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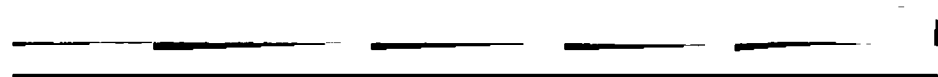
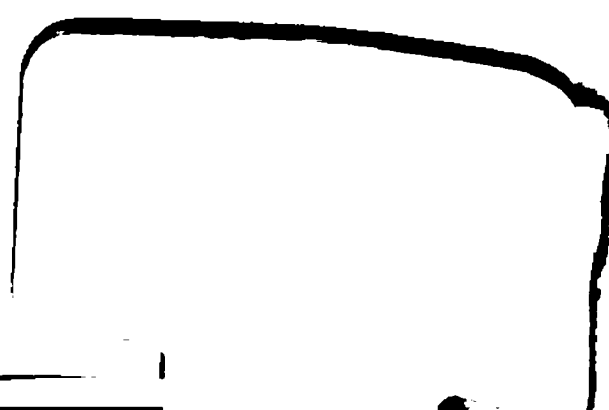
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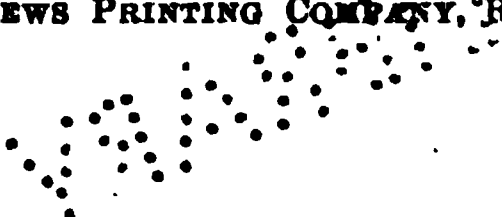
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MASSACHUSETTS SUPREME JUDICIAL COURT.

FRANCES C. WELCH et al.

v.

HAROLD BLANCHARD et al.

(— Mass. —, 94 N. E. 811.)

Will — devise to heirs after life estate —rule for determining.

Under a bequest in trust to pay the income to testator's children for life, and after the decease of the survivor of them, to distribute the fund to those persons "who may then take the same as my heirs," the persons to take are those who were his heirs at testator's death, and not those who

would have been such had he lived until the time of the death of the surviving child; at least, where other clauses of the will creating similar estates indicate that he referred to his real, and not hypothetical, heirs.

(April 7, 1911.)

REPORT by the Supreme Judicial Court for Suffolk County for the determination of the Full Bench of a bill for instructions by the trustees under the will of John Dove, deceased, after a decision that, under the eighth clause of the will of testator, the latter's heirs were to be ascertained as of the date of his death. Affirmed.

The facts are stated in the opinion.

Note. — Time for ascertaining member of class described as testator's "heirs," "next of kin," "relations," etc., to whom an estate in real or personal property is limited by way of remainder or executory gift.

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Mr. Henry Wheeler, for plaintiffs Lee et al.:

The fund should be distributed among those persons who would have been entitled to take the same as the testator's heirs had he died at the time of the death of the last surviving life tenant.

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Mass. 225, 5 L.R.A. 690, 22 N. E. 1003; Wood v. Bullard, 151 Mass. 324, 7 L.R.A. 304, 25 N. E. 67; Peck v. Carlton, 154 Mass. 231, 28 N. E. 166; Eager v. Whitney, 163 Mass. 463, 40 N. E. 1046; Welch v. Brimmer, 169 Mass. 204, 47 N. E. 699; Heard v. Read, 169 Mass. 216, 47 N. E. 778; Leonard v. Haworth, 171 Mass. 496, 51 N. E. 7; Delaney v. McCormick, 25 Hun, 574, s. c. 88 N. Y. 174; Bisson v. West Shore R. Co. 66 Hun, 604, 22 N. Y. Supp. 31, s. c. 143 N. Y. 125, 38 N. E. 104; Pinkham v. Blair, 57 N. H. 226; Hardy v. Gage, 66 N. H. 552, 22 Atl. 557; De Wolf v. Middleton, 18 R. I. 810, 31 L.R.A. 146, 26 Atl. 44, 31 Atl. 271; Wood v. Schoen, 216 Pa. 425, 66 Atl. 79.

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I. Scope.

In further elucidation of the scope of this note as outlined by its title, it may be stated that it includes cases where a testamentary gift the enjoyment of which is postponed to some period subsequent to the death of the testator, as at the death of a life tenant, the termination of a trust, or the happening of a contingency, is limited to a class described as the testator's "heirs," "right heirs," "heirs according to law," "lawful heirs," "such persons as would take an estate in fee simple in lands by descent from him," "such persons as would be legally entitled to succeed to and inherit the same in case I died intestate," "next of kin," "nearest of kin," "next of kin in due course of administration," "nearest relations," "such person or persons who shall appear to be related to me," "nearest relatives," "blood relations of the degree which the law permits," "my personal representative or representatives," "legal representatives," etc.

Cases in which the word "heirs" is used to designate certain individuals, such as testator's children, and in which the question is whether the interest taken is subject to be divested by death before the period of enjoyment, are obviously not in point, since in such cases there can be no question that the class is to be ascertained at the time of testator's death.

Nor does this note include cases in which the limitation over is to a class described as "heirs" or "next of kin" of some individual other than the testator himself, as such cases, though analogous, are governed by distinct considerations.

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Although the primary inquiry to which the note is addressed is as to the time as to which the membership of the class is to be ascertained, attention has also been given to the question as to when the first taker may be excluded from participation in a gift to a class of which he is a member, and to the cases in which the membership of the class has been held subject to diminution by death prior to the time of actual enjoyment.

II. General principles.

a. The rule of construction.

1. In general.

It is a general rule of testamentary construction, so universally recognized as to render superfluous a full citation of the cases which support it, that, in the absence of clear and unambiguous indications of a different intention to be derived from the context of the will, read in the light of the surrounding circumstances, the class described as testator's heirs, or next of kin, or relations, or such persons as would take his estate by the rules of law if he had died intestate, to whom a remainder or executory interest is given by the will, is to be ascertained at the death of the testator.

This is not only a rule of construction, but the natural meaning of the words. *Re Winn* [1910] 1 Ch. 278, 79 L. J. Ch. N. S. 165, 101 L. T. N. S. 737; *Whall v. Converse*, 146 Mass. 345, 15 N. E. 660; *Tuttle v. Woolworth*, 62 N. J. Eq. 532, 50 Atl. 445.

It may, however, be useful to notice some of the decisions in which the rule is comprehensively stated or particularly discussed.

Thus, in the leading case of *Bullock v. Downes*, 9 H. L. Cas. 1, Lord Campbell said: "Generally speaking, where there is a bequest to one for life, and after his decease to the testator's next of kin, the next of kin who are to take are the persons who answer that description at the death of the testator, and not those who answer that description at the death of the first taker. Gifts to a class, following a bequest of the same property for life, vest

Mr. J. L. Thorndike, for defendants J. A. Blanchard et al.:

The word "heirs" referred to those who were such at the time of the testator's death.

Dove v. Torr, 128 Mass. 38; Bullock v. Downes, 9 H. L. Cas. 1; Mortimer v. Slater, L. R. 7 Ch. Div. 323, 47 L. J. Ch. N. S. 134, 37 L. T. N. S. 520, 26 Week. Rep. 134, L. R. 4 App. Cas. 448, 48 L. J. Ch. N. S. 470, 27 Week. Rep. 575; Re Wilson, [1907] 1 Ch. 450, 76 L. J. Ch. N. S. 228, 96 L. T. N. S. 392, [1907] 2 Ch. 574; Holmes v. Holmes, 194 Mass. 558, 80 N. E. 614; Minot v. Harris, 132 Mass. 528; Jewett v. Jewett, 200 Mass. 310, 86 N. E. 308; McArthur v. Scott, 113 U. S. 380, 28 L. ed. 1027, 5 Sup. Ct. Rep. 652; Abbott v. Brad-

street, 3 Allen, 587; Whall v. Converse, 146 Mass. 345, 15 N. E. 660; Rotch v. Rotch, 173 Mass. 125, 53 N. E. 268.

Loring, J., delivered the opinion of the court:

By the eighth article of his will, John Dove gave one sixth of the residue of his estate to his son outright, and five sixths thereof to trustees to pay the income thereof to all his daughters, in equal shares, and to the issue of any deceased daughter (such issue taking their mother's share), and "after the decease of the survivor of my daughters the trust fund created by this item shall be distributed to those persons who may then take the same as my heirs." John Dove died in 1876, and the last sur-

mediately upon the death of the testator. Nor does it make any difference that the person to whom such previous life interest was given is also a member of the class to take on his death."

And in Lee v. Lee, 1 Drew. & S. 85, it is said: "It is a general rule that a bequest in trust for A for life, and from and after his death in trust for other persons *nominatim*, is an immediate bequest to the persons in whose favor the ulterior gift is made, subject to the life interest given to A; and those persons take immediate vested interests, transmissible to their representatives, although they may die before A. And the same general rule prevails in the case of a bequest in trust for A for life, and from and after his death in trust for a class of persons, as, for example, the testator's next of kin; this is an immediate gift to the persons answering the description of the testator's next of kin at his death, subject to the life interest given to A. The gift of the previous life interest to A does not postpone the period at which the persons answering the description next of kin are to be ascertained. The persons answering the description of next of kin at the death of the testator take an immediate vested interest, subject only to the life interest of A. And whether the testator, in giving the fund to the next of kin, uses the language 'from and after the death of A,' or 'subject to the life interest of A,' the result is the same."

In Michell v. Bridges, 13 Week. Rep. 200, 11 L. T. N. S. 727, it is said that the general rule is clear and undisputed that if a testator, after giving an estate for life in personal estate, and whether there is or is not a limitation to the children of any person which may fail if he die, after these limitations directs that the personal estate shall be distributed amongst his next of kin, according to the statute, the persons to take are the testator's next of kin under the statute at the time of his death, unless a clear and unambiguous intention to the contrary can be collected from the will.

Other English cases which particularly state the rule are Doe ex dem. Pilkington 33 L.R.A. (N.S.)

v. Spratt, 5 Barn. & Ad. 731, 2 Nev. & M. 524, 3 L. J. K. B. N. S. 53; Murphy v. Donegan, 3 Jones & L. 534; Say v. Creed, 5 Hare, 580, 16 L. J. Ch. N. S. 361, 11 Jur. 603.

In Kellett v. Shepard, 139 Ill. 442, 28 N. E. 751, it is said: "Ordinarily, the words 'heirs,' or 'heirs at law,' are used to designate those persons who answer this description at the death of the testator. The word 'heir,' in its strict and technical import, applies to the person or persons appointed by law to succeed to the estate in case of intestacy. 2 Bl. Com. 201; Rawson v. Rawson, 52 Ill. 62. Hence, where the word occurs in a will, it will be held to apply to those who are heirs of the testator at his death, unless the intention of the testator to refer to those who shall be his heirs at a period subsequent to his death is plainly manifested in the will. This construction or definition is not changed by the fact that a life estate may precede the bequest to the heirs at law, nor by the circumstance, that the bequest to the heirs is contingent on an event that may or may not happen."

A testamentary gift to testator's heirs will be construed as a gift to those who are his heirs at the time of his death, in the absence of words indicating a clear intention that it shall go to those who may be in that relation at the time of the happening of the contingency upon which the estate is to be distributed. Merrill v. Wooster, 99 Me. 460, 59 Atl. 596.

The rule is the same when the devise or bequest is to the next of kin of the testator as when it is to his heirs. Fargo v. Miller, 150 Mass. 225, 5 L.R.A. 690, 22 N. E. 1003.

When a bequest is made to one or more for life and remainder to the testator's heirs, or next of kin, or relations, or such persons as would take his estate by the rules of law if he had died intestate, the bequest is to those who are such heirs or next of kin at the time of his decease, unless there are words indicating a clear intention that it shall go to those who may be his relations or next of kin at the time

viving daughter died in 1910. The question we have to decide is whether, by the true construction of these words, this fund is to be distributed to and among those persons who are entitled thereto in 1910 as the heirs of John Dove who died in 1876 (including persons who have succeeded to the rights of his heirs as next of kin or by bequest or assignment), on the one hand, or, on the other hand, to and among those persons who would have been the heirs of John Dove if he had died in 1910 in place of 1876.

A man's heirs are not ascertained until he dies, and, using words with accuracy, a man's heirs cannot be ascertained at any other time or as of any other time. But a testator may make a gift to persons who

would have been his heirs had he died at some time other than the time when he did die. See, for example, *Peck v. Carlton*, 154 Mass. 231, 28 N. E. 166. This is not (using words with accuracy) a gift to heirs, but to a body of artificial or hypothetical heirs (see *Re Wilson* [1907] 2 Ch. 572, 575); i. e., to persons who would have been his heirs had he died under circumstances different from those under which he did die.

The rule of construction in cases like that now before us was settled as early as *Abbott v. Bradstreet*, 3 Allen, 587, and it is this: "A bequest or devise to 'heirs' or 'heirs at law' of a testator will be construed as referring to those who are such at the time of the testator's decease, unless

of the happening of the contingency upon which the estate is to be distributed. *Childs v. Russell*, 11 Met. 16; *Brown v. Lawrence*, 3 Cush. 390.

In *Jones v. Oliver*, 38 N. C. (3 Ired. Eq.) 369, it is said that when a devise or bequest is simply to a testator's next of kin, it unquestionably vests in those who sustain the character at his death; and it is equally clear that when a testator devises or bequeaths for life or for any other limited interest, and afterwards to his own next of kin, those who stand in that relation at the death of the testator will be entitled, without regard to the fact of their existence at the period of distribution. To take a case out of the general rule there must be some special circumstances tending to show that the testator did not intend that the next of kin who were to take should be looked for at his death, but at some other period.

And in *Buzby's Appeal*, 61 Pa. 111, it is said that it is well settled as a general rule of construction that a devise or bequest to heirs or heirs at law of a testator, or to his next of kin, will be construed as referring to those who are such at the time of testator's decease, unless a different intent is plainly manifested by the will. Other Pennsylvania decisions to the same effect are *Stewart's Estate*, 147 Pa. 383, 23 Atl. 599; and *Wood v. Schoen*, 216 Pa. 425, 66 Atl. 79.

B. Reasons supporting rule.

One of the reasons adduced in support of this rule of construction is that it gives the words of description their natural and prima facie meaning.

Thus, in *Tuttle v. Woolworth*, 62 N. J. Eq. 532, 50 Atl. 445, it is said: "The words 'heirs or next of kin' are technical legal words, and in their legal sense bear within themselves an indication as to the time intended for fixing the class, which cannot be overlooked. The legal relation or status of 'heir' or 'next of kin' arises only upon the death of the ancestor, and it arises immediately. In a legal sense, 33 L.R.A. (N.S.)

therefore, 'heirs' implies a reference to the time of the ancestor's death; and if a testator makes a devise or gift to his 'heirs' or 'next of kin,' those standing in that relation at the time of his death would seem to be the persons intended, unless there is something in the will itself to show that the testator had another period in his mind, and that the legal sense of the words is to be restricted by indications that some other time is fixed."

And in *Whall v. Converse*, 146 Mass. 345, 15 N. E. 660, it is said that the reasons for the rule that persons to take under an ultimate limitation to testator's heirs at law are those who answer the description at the time of testator's death, are that the words cannot be used properly to designate anybody else, that such a mode of ascertaining the beneficiary implies that the testator has exhausted his specific wishes upon the previous limitations, and is content thereafter to let the law take its course; and perhaps that the law leans toward a construction which vests the interest at the earliest moment.

See also *Re Winn* [1910] 1 Ch. 278, 79 L. J. Ch. N. S. 165, 101 L. T. N. S. 737.

A reason more frequently brought forward is the preference of the law to construe a remainder as vested rather than as contingent.

Thus, in *Wood v. Bullard*, 151 Mass. 324, 7 L.R.A. 304, 25 N. E. 67, it is said: "Where there is a limitation over to a class designated as the testator's heirs at law, or his next of kin, it is usual to hold that this class should be ascertained at the time of the testator's death, unless there is something to be found in the will showing a contrary intention; and this for two principal reasons; namely, that the law leans rather to vested remainders, and that ordinarily in such cases it appears that, after making the special and earlier provisions for the disposition of his property, the testator does not care to follow the property further, but is content to let the law take its course, and the final devise to his heirs at law means that at that stage he will let it go as intestate property."

a different intent is plainly manifested by the will." See page 589. This rule has since been adhered to. The last case is *Jewett v. Jewett*, 200 Mass. 310, 86 N. E. 308. It was said in *Whall v. Converse*, 146 Mass. 345, 348, 15 N. E. 660, 662, that "the reasons for this rule are that the words [heirs of the testator] cannot be used properly to designate anybody else"

than those who take his real estate at his death); that the testator wishes the law to take its course; and perhaps that the law leans toward a construction which vests the interest at the earliest moment.

We do not spend time on a discussion of what the construction of these words in the eighth article of this will would have been if they had stood alone. For they do not

stand alone, and the general scheme of the will shows that the intention of the testator was that on the death of the last surviving daughter this fund should be distributed to and among those entitled to it then as the real heirs of the testator, including those who had succeeded to the rights of his heirs as next of kin or by bequest or assignment.

The testator was a widower with one son and five daughters, possessed of a very considerable property, about \$90,000 of which was in real estate, including his homestead. It does not directly appear that he had any land, in addition to the homestead, except that within the fence around his son's house which he devised to his son.

He first gave legacies amounting to \$3,000

The question "is to be decided in the light of the rule that the law favors vesting very strongly, and will not regard a remainder as contingent, in the absence of very decisive terms of contingency, unless the provisions or implications of the will clearly require it, and that words expressive of future time are to be preferred to the vesting in possession if they reasonably can be, rather than to the vesting in right." *Kenyon's Petition*, 17 R. I. 149, 20 Atl. 294.

Since the law favors the vesting of estates, and it is an established rule of construction not to read a limitation in a will as being a contingent remainder unless such clearly appears to have been the testator's intention, it follows that where land is given to one for life, or any other estate upon which a remainder may be limited, and after the determination of that estate to a person sustaining a given character, as heir at law, heir male, or next of kin, of testator, the remainder will vest in the person or persons who fill that character at the death of the testator, unless it can be plainly and distinctly made out from the will that the testator intended otherwise. *Doe ex dem. Pilkington v. Spratt*, 5 Barn. & Ad. 731, 2 Nev. & M. 524, 3 L. J. K. B. N. S. 53.

And see also, to the same effect as the preceding cases. *Abbott v. Bradstreet*, 3 Allen, 587; *Dove v. Torr*, 128 Mass. 38; *Minot v. Harris*, 132 Mass. 528; *Whall v. Converse*, 146 Mass. 345, 15 N. E. 660; *Jewett v. Jewett*, 200 Mass. 310, 86 N. E. 308; *Boston Safe Deposit & T. Co. v. Parker*, 197 Mass. 70, 83 N. E. 307; *Wood v. Schoen*, 216 Pa. 425, 66 Atl. 79.

But in *Heard v. Read*, 169 Mass. 216, 47 N. E. 778, it is said that since contingent remainders in property are now protected to a considerable degree by modern legislation, the tendency of the modern cases is to put the reason of the rule, not on any fondness which the law has for vested over contingent interests, but upon the fact that heirs at law, by the very meaning of the words, are usually those persons who take inheritable real property immediately on

the death of the owner if he dies intestate.

A third reason assigned is the bias of the courts in favor of the heir or next of kin, as against third persons.

Thus, in *Stewart's Estate*, 147 Pa. 383, 23 Atl. 599, it is said that as, in construing a will under which title is asserted by a stranger or person not claiming by immediate descent, all doubts will be resolved in favor of the heir or next of kin, hence, where a testator directs that, in a certain event, after the expiration of a particular interest, the estate shall go to his heirs or next of kin, or to the persons who would take under the intestate laws, he is to be understood as meaning the persons who would have so taken at the time of his death, and not at the time appointed for their taking, unless the will affords clear and unequivocal evidence to the contrary.

3. Yields to contrary intention.

The rule above stated, as is said in *Heard v. Read*, 169 Mass. 216, 47 N. E. 778, "is not a rule of substantive law, but a rule of interpretation, which has been adopted by the courts as one means of ascertaining the intention of the testator as expressed in his will; and it never should be used to defeat what, from the whole will, appears with reasonable certainty to have been his intention."

It is a rule of mere construction, which the court cannot apply if the context excludes it. *Valentine v. Fitzsimons* [1894] 1 I. R. 93.

"The rules of construction that the word 'heirs' in a will is usually construed to mean those who are such at the time of the testator's decease, and that estates created by devise are to be held to be vested rather than contingent, must give way to the controlling rule of interpretation that the intent of the testator is to govern if it does not conflict with the rules of law.

. . . And if it be found to conflict, it does not change the rule of construction. The will must fail of effect so far as it violates the rules of law, not because the intent of the testator does not control its con-

to several persons who may be assumed to have been servants, a bequest of \$10,000 for a library, and to his two unmarried daughters bequests equal in amount to the sums given by him on their marriage to his other daughters. These sums amounted to some \$28,000. Then, by the fourth article of the will, he gave to trustees \$2,000 to pay the income thereof to one Mary McLagan during her life, \$5,000 to pay the income thereof to one Coulie during his life, and \$50,000 to pay the income thereof to his unmarried daughters and the survivor of them so long as they or she remained unmarried and occupied the homestead, "for the purpose of enabling them to keep said homestead in good order and condition." This (the fourth article) ends with these words:

struction, but because the law will not permit his intent to be accomplished." *Sears v. Russell*, 8 Gray, 86.

"The truth is," says Vice Chancellor Stuart, in *Re Barber*, 1 Smale & G. 118, "that in all this class of cases the question must be determined upon the particular passage, taken in connection with the context."

"Upon the question whether the customary meaning of these words when used in a will is to be regarded as modified by the other provisions of the will, not only particular clauses, but the whole scope of the will must be considered." *Heard v. Read*, 169 Mass. 216, 47 N. E. 778.

The expression of a contrary intention which will preclude the application of the rule must be clear and unambiguous (*Cusack v. Rood*, 24 Week. Rep. 391); and is not sufficient that there is in the will that which raises a doubt, ever so serious, as to whether the testator intended that the next of kin should be ascertained at some future time. (*Michell v. Bridges*, 13 Week. Rep. 200, 11 L. T. N. S. 727; *Wharton v. Barker*, 4 Kay & J. 483, 4 Jur. N. S. 553, 6 Week. Rep. 534).

As remarked in *Wood v. Bullard*, 151 Mass. 324, 7 L.R.A. 304, 25 N. E. 67, the reasoning of the cases is often very refined and subtle, and involves a consideration of minute differences of language; and the final determination of each case must, after all, depend upon the intention to be gathered from all of the language used by the particular testator whose will is before the court.

b. Matters relating to applicability of rule.

1. In general.

In such a situation, it is obviously impossible to indulge in generalizations as to when the rule may or may not be applicable. There are, however, certain points of discussion the frequency of the recurrence of which renders proper their separate consideration, which immediately follows.

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"The principal sums or funds shall, as the trusts cease, be distributed to my heirs." By the fifth article he gave to his son the land within the fence of his homestead, and by the sixth article he devised to his unmarried daughters the residue of his real estate for their lives and the life of the survivor so long as they or she should continue unmarried. He then provided that "after the marriage or death of my surviving daughter taking under this item, the estate herein devised shall descend to those persons who may then be entitled to take the same as my heirs." By the seventh article he gave the personal property pertaining to the homestead to his daughters, to be held by them upon the same terms as the real estate covered by the sixth article,

It is no argument to say that the testator has done what the law would have done for him. *Re Lang*, 9 Week. Rep. 589, 4 L. T. N. S. 577.

Or that the application of the rule may lead to peculiarities and inconsistencies which, if pointed out to the testator, would have been avoided, will not prevent its being applied. *Starr v. Newberry*, 23 Beav. 436.

Or that the effect of the construction is to take property out of the testator's family and give it to a stranger to his blood. *Bird v. Luckie*, 8 Hare, 301, 14 Jur. 1015.

The rule is equally applicable whether the limitation over is regarded as an executory devise or a contingent remainder. *Buzby's Appeal*, 61 Pa. 111.

It is immaterial whether the subject of the gift be realty or personalty (*Kellett v. Shepard*, 139 Ill. 443, 28 N. E. 751, 34 N. E. 254); nor is the rule affected by the circumstance that the gift includes the proceeds of the sale of realty as well as of personalty. (*Cusack v. Rood*, 24 Week. Rep. 391).

Or by the fact that the testator has made ample provision for those who were his heirs at the time of his death. *Boston Safe Deposit & T. Co. v. Parker*, 197 Mass. 70, 80 N. E. 307.

The words "legal personal representatives" are more flexible than the words "next of kin," and as "legal personal representatives," in the strict signification of the term, do not take, the prima facie meaning will the more readily yield to indications of a contrary intention to be found in the context of the will. *Holloway v. Radcliffe*, 23 Beav. 163, 26 L. J. Ch. N. S. 401, 3 Jur. N. S. 198, 5 Week. Rep. 271.

See also, as illustrating the greater flexibility of the phrase "my relations," the case of *Lees v. Massey*, 3 DeG. F. & J. 113, 7 Jur. N. S. 534, 4 L. T. N. S. 36, 9 Week. Rep. 425, where it was held that the limitation over to a class thus designated, who were to take share and share alike, was inconsistent with an intention that the

and by the eighth article (the article here in question) he bequeathed to his son (in the event which happened) one-sixth of the residue of his personal estate, and to trustees the other five-sixths thereof in trust (as we have said) to pay the income thereof to all his daughters in equal shares and to the issue of any deceased daughter (such issue taking their mother's share), and after the decease of the survivor of my daughters, the trust fund created by this item shall be distributed to those persons who may then take the same as my heirs."

Apart from the provisions for servants, for the library, and his son, the scheme of the will was to create life estates in five different funds and as the life estate or the last life estate in each fund came to an end,

the principal of that fund was to pass to or be distributed among his heirs. These several life estates of necessity would terminate at three different times, and might terminate at four or possibly five different times; consequently the five different funds would pass under the gifts over at three, four, or possibly five different dates. It is hardly conceivable that the testator should have intended that these several gifts over to heirs should be to three, four, or possibly five sets of different hypothetical heirs. On the contrary, it is plain that all that the testator wished to do was to provide for certain persons by creating life estates in the five different funds, and having done that, to let the law take its course in each instance.

class should be ascertained at testator's death, where he must have known that his daughter, who was given the property absolutely in the event of her surviving the termination of the particular estate, would be his sole heir and sole next of kin at that time.

2. Membership of first taker in class.

The courts, both in England and the United States, agree in holding that the circumstance that the first taker will be one of the class to whom the limitation over is made is not so incongruous as to preclude the ascertainment of the membership of the class as of the time of testator's death, whether the first taker is given an estate for life, as in *Doe ex dem. Garner v. Lawson*, 3 East, 278; *Wharton v. Barker*, 4 Kay & J. 483, 4 Jur. N. S. 553, 6 Week. Rep. 534; *Bullock v. Downes*, 9 H. L. Cas. 1; *Kellett v. Shepard*, 139 Ill. 443, 28 N. E. 751, 34 N. E. 254; *Minot v. Tappan*, 122 Mass. 535; *Keniston v. Mayhew*, 169 Mass. 166, 47 N. E. 612; *Leonard v. Haworth*, 171 Mass. 496, 51 N. E. 7, and other cases subsequently cited; or an absolute interest, subject to be defeated by condition subsequent, as in *Southgate v. Clinch*, 27 L. J. Ch. N. S. 651, 4 Jur. N. S. 428, 6 Week. Rep. 489; or a defeasible fee, as in *Brabant v. Lalonde*, 26 Ont. Rep. 379.

Thus in *Holloway v. Holloway*, 5 Ves. Jr. 399, 25 Eng. Rul. Cas. 687, it is said that the circumstance that the first taker is an heir at law of testator at the time of his death is not alone sufficient to control the legal meaning of a limitation over to his heirs, the court saying: "If an estate for life was devised to one, and after his death to the right heirs of the testator, it never would be held that though the tenant for life was one of the heirs, that would reduce him to an estate for life, but he would take a fee."

Little weight can be given to the argument that a testator, having given particular interests to those who were his next of kin at the time of his death, could not have intended them to take under the

limitation to next of kin in default of issue, as at the time when a will is made it is necessarily uncertain who will be the testator's next of kin at the time of his death, and in view of the various contingencies which may operate to change the membership of the class between the making of the will and the testator's death, it is quite probable that the testator in such case means only to provide for those whom he does mean to benefit in the way he thinks best, and then to add, that if events defeat that particular intention, the law may take its course. *Seifferth v. Badham*, 9 Beav. 370, 15 L. J. Ch. N. S. 345, 10 Jur. 892.

It is no decisive or valid objection to the construction which vests a bequest of a remainder interest to testator's heirs or next of kin in those who are such heirs or next of kin at the time of his decease, that some of the persons thus designated to take in remainder are the same persons to whom an interest for life is thus given, so that the personal representative of such deceased tenant for life may take a share in the remainder under a residuary clause; though this circumstance, in connection with other words or special circumstances, may be resorted to to show that such was not the intention of the testator. *Childs v. Russell*, 11 Met. 16; *Abbott v. Bradstreet*, 3 Allen, 587; *Minot v. Tappan*, 122 Mass. 535.

In *Tuttle v. Woolworth*, 62 N. J. Eq. 532, 50 Atl. 445, it is said: "The objection from incongruity supposed to arise against holding that the previous tenant is entitled to any interest in an estate as next of kin after the estate specially given to him by the will has terminated is, as it seems to me, met and answered by the consideration that when the testator limits an estate to one of his next of kin and his children or issue, and then directs that, on failure of this limitation, his heirs or next of kin shall take according to law, he discloses clearly that if the special and immediate limitation fail, as it may, then he had no intentions or wishes to change the disposition which the law itself would

Again, it is hard to believe that the testator intended the gift over made by the eighth article to be a gift to artificial or hypothetical heirs, while the gifts over made in the fourth and sixth articles were to his real heirs. It was decided in *Dove v. Torr*, 128 Mass. 38, that the gift over in the sixth article was a gift to the testator's real heirs. And it is plain that the gift over made in the fourth article is the same; i. e., to his real heirs. That gift plainly comes within the rule established in *Abbott v. Bradstreet*, supra, and since acted upon, the last case being *Jewett v. Jewett*, supra. The fact that a gift over is made only by a direction to distribute does not prevent the application of the usual rule. The gift over in the following cases was only by way of a direction to pay or distribute: *Minot v. Tappan*, 122 Mass. 535; *Dove v. Torr*, 128 Mass. 38; *Whall v. Converse*, 146 Mass. 345, 15 N. E. 660; *Rotch v. Rotch*, 173 Mass. 125, 53 N. E. 268; *Jewett v. Jewett*, 200 Mass. 310, 86 N. E. 308. See also 2 Wms. Exrs. 9th ed. 1108; 1 Wms. Exrs. 10th ed. 990, 991; 2 Jarman, Wills, 8th ed. 1104.

It has been urged with great insistence by the learned counsel for the appellant that it could not have been the testator's

intention that when the time for distribution came anyone should take who was not a blood relation or a statutory heir, and that, under the construction adopted by the single justice, the assignees of an heir would and in this case do take. But it is evident that it was no part of the intention of the testator in making this will to guard his heirs against their own improvidence. He did not provide, as he might have done, that what they took under his will should not be alienated by them or taken by their creditors. He was content to create certain life estates and then to let the law take its course, which included the right of his children to assign or bequeath their respective shares of his property, subject to the several life estates created by him.

We are therefore of opinion that by the true construction of the eighth article of the will here in question, the principal of the trust fund there created should be distributed to and among those persons now entitled to it as the heirs of the testator, including persons who have succeeded to the rights of his heirs as next of kin or by bequest or assignment.

Decree accordingly.

have made for him in regard to this part of his estate, and that, on the failure of the special purpose, he desires that he should be considered as making no provisions of his own about the disposition of his estate, but as expressly leaving that disposition to be made by the laws as if he had died intestate."

The fact that the person to whom the prior estate is given, though his death is to precede the ultimate limitation, is himself an heir, does not change the result, or show such unequivocal intention that he was not also to take as heir upon the happening of the contingency. *Stewart's Estate*, 147 Pa. 383, 23 Atl. 599.

And see also in this connection, *Cushman v. Arnold*, 185 Mass. 165, 70 N. E. 43, where the residuary estate was directed to be divided among the legatees named in the will in proportion to the amount of their several legacies, and it was held that the fact that one of such legatees had been given an estate for life did not take the case out of the ordinary rule that a remainder after a life estate must be held to have vested at the death of testator; also *Smith v. Smith*, 186 Mass. 138, 71 N. E. 314, where a remainder was limited over to the brothers and sisters of the testator, and it was held that the fact that the construction which adopts the death of the testator as the period for ascertaining the members of the class brings the life tenant within the class among which the remainder is to be divided does not show a contrary meaning.

It was at one time made a question in 33 L.R.A. (N.S.)

the English courts whether, where the person taking the particular estate was at testator's death the sole member of the class to whom the limitation over was made, an intention was not *ipso facto* shown that the gift should vest in the person answering the description at the termination of the particular estate. Among the cases which appear to recognize this contention are *Marsh v. Marsh*, 1 Bro. Ch. 293; *Jones v. Colbeck*, 8 Ves. Jr. 38, 6 Revised Rep. 207; *Miller v. Eaton*, G. Cooper, 272, 14 Revised Rep. 259; *Briden v. Hewlett*, 2 Myl. & K. 90, 1 L. J. Ch. N. S. 114; and *Butler v. Bushnell*, 3 Myl. & K. 232, 3 L. J. Ch. N. S. 139,—in all of which, however, with the exception of *Miller v. Eaton*, there were other indications which were relied upon as supporting the construction adopted. In 2 Jarman on Wills, *987, in commenting upon decisions of this type, it is said: "But the effect given to those additional grounds of argument is scarcely to be reconciled with the principle which may be considered to be now established, that, as infinite variations may take place in the expectant next of kin, either by deaths or births, or both, in the interval between the making of the will and the death of the testator, it is not to be assumed, in the absence of a clear context, that the testator lost sight of the probability of such variation; and without that assumption, the testator's supposed intention in favor of or against particular persons as his next of kin can possess little or no weight. The argument drawn from the inapplicability of the description used to the person even-

NEW YORK COURT OF APPEALS.

MARGARETTA WETHERILL WALLACE
et al., Exrs., etc., of Margaretta M. Diehl,
Deceased, Appts.,

v.

CHARLES W. DIEHL et al., Respts.,
and
SUSAN D. EDSON, Appt.

(— N. Y. —, 95 N. E. 646.)

Will — life estates — appointment of remainder among heirs — time of ascertainment.

1. A devise of a life estate, with power to bequeath the property upon death of the life tenant to such of testator's heirs as the life tenant may prefer, confines the selection to testator's legal or actual heirs, so that the property may not be given to a descendant of testator, whose parent is living, but the heirs among whom the appointment may be made will be determined as of the time of the death of the life tenant.

Same — conditional bequest — lapse.

2. A provision in a will giving money to a testator's granddaughter "if she survives me" is not relieved of the condition by a succeeding clause, "I hereby give and bequeath such sum to her," and therefore

usually answering to it thus falls to the ground; since the testator may have chosen to give to that person by a description which, if he died in his lifetime, would carry his bounty to other objects. Again, words which are expressive of futurity without pointing to any definite period are satisfied when referred to the time of the testator's death; and, being themselves ambiguous, ought not to be allowed to control the known legal meaning of such words as 'next of kin.' At the present day it is not probable that such decisions would be made as those in *Briden v. Hewlett* and *Butler v. Bushnell*."

Indications of a disposition to follow the earlier English cases in holding that the fact that a person taking a particular estate was, at the time of making the will and at testator's death, the sole member of a class to which the limitation over was made, sufficiently indicates an intention that the gift over should not vest until the termination of the particular estate, are manifest in the cases of *Johnson v. Askey*, 190 Ill. 58, 60 N. E. 76; and *Bond v. Moore*, 236 Ill. 576, 19 L.R.A. (N.S.) 540, 86 N. E. 386, as well as in the Massachusetts cases which follow.

In *Welch v. Brimmer*, 169 Mass. 204, 47 N. E. 699, it is said: "When a life estate is given to one, and the remainder on his death to the heirs at law of the testator, and the life tenant is one of these heirs, this fact alone has been held not sufficient to take the case out of the general rule that the heirs at law of the testator are to be determined as of the time of his

the bequest will lapse in case of her death before that of testator.

(Collin and Gray, JJ., dissent in part.)

(May 9, 1911.)

APPEAL by plaintiffs and defendant Susan D. Edson from an order of the Appellate Division of the Supreme Court, Second Department, affirming certain parts of an interlocutory judgment of a Special Term for Richmond County, in an action brought to construe the will of Margaretta M. Diehl, deceased, and for an accounting. Modified and affirmed.

The facts are stated in the opinion.

Messrs. W. B. Chamberlin and G. F. Chamberlin, for appellants Wallace et al.:

The word "heirs" was used in the sense of "issue" or "descendants."

Re *Cramer*, 59 App. Div. 553, 69 N. Y. Supp. 299; *Johnson v. Brasington*, 156 N. Y. 181, 50 N. E. 859; *New York L. Ins. & T. Co. v. Viele*, 161 N. Y. 11, 76 Am. St. Rep. 238, 55 N. E. 311; *Lawton v. Corlies*, 127 N. Y. 108, 27 N. E. 847; *Bundy v. Bundy*, 38 N. Y. 419.

The legacy bequeathed to testator's

death, unless it plainly appears from other provisions of the will that the testator's intention was that they should be determined as of some other time. But when the person to whom the property is given for life is sole heir presumptive of the testator at the time when the will is made, and will continue to be such if he lives until the death of the testator, unless there are some changes in the testator's family relations or in the laws, which the will apparently does not contemplate, whether that person will take a remainder given on the death of the life tenant to the heirs at law of the testator, if there is nothing else in the will to determine as of what time the heirs of the testator are to be ascertained, has occasioned a good deal of doubt. The present tendency of the law in England seems to be that this fact alone would be held not enough to take the case out of the general rule. In this commonwealth the intimations are perhaps doubtfully the other way."

But in *Heard v. Read*, 169 Mass. 216, 47 N. E. 778, it is said: "It has been intimated by this court, but with some doubt, that where property is given by will to a person for life, and on his death without issue surviving him, to the testator's heirs at law, and it is known to the testator at the time when the will is made that that person is his sole heir presumptive, and probably will be his sole heir when he dies, if such person survive him, it is to be inferred that that person is not intended by the designation of the testator's heirs at law. But in the cases actually decided in

granddaughter lapses and falls into the residuary estate.

Pimel v. Betjemann, 183 N. Y. 194, 2 L.R.A.(N.S.) 580, 76 N. E. 157, 5 A. & E. Ann. Cas. 239; *Lytle v. Beveridge*, 58 N. Y. 598; *Phillips v. Davies*, 92 N. Y. 204.

The statute of wills does not operate to prevent a lapse.

Pimel v. Betjemann, 183 N. Y. 194, 2 L.R.A.(N.S.) 580, 76 N. E. 157, 5 A. & E. Ann. Cas. 239; *Howland v. Slade*, 155 Mass. 415, 29 N. E. 631; *Wildberger v. Cheek*, 94 Va. 517, 27 S. E. 441.

Mr. John Ewen, for appellant Edson:

The word "heirs," when used in a will or other instrument, is to be understood in its primary or legal sense, unless it appears from other parts of the instrument

that it was used in the more restricted sense of "children," "heirs of the body," or "descendants."

Johnson v. Brasington, 156 N. Y. 181, 50 N. E. 859; *Cushman v. Horton*, 59 N. Y. 149; *Bodife v. Brown*, 12 App. Div. 335, 42 N. Y. Supp. 202; affirmed in 154 N. Y. 778, 49 N. E. 1093; *Re Russell*, 168 N. Y. 169, 61 N. E. 166; *Newcomb v. Lush*, 84 Hun, 254, affirmed in 155 N. Y. 687, 50 N. E. 1120.

The bequest to the testatrix's granddaughter lapsed upon her death by the express terms of the will and codicils, and did not vest in her daughter.

Pimel v. Betjemann, 183 N. Y. 194, 2 L.R.A.(N.S.) 580, 76 N. E. 157, 5 A. & E.

this commonwealth there were other provisions in the will which supported this construction. The cases generally on this subject have been often considered by this court. The present tendency in this country is against absolute rules of construction, and in favor of a careful consideration of the particular language of each will, as well as of its general scope and purpose, in order to determine, in view of the circumstances known to the testator when the will was made, his intention, as expressed to it."

The decided weight of authority may be said to be to the effect that the fact that, at the time of the making of the will, the person to whom a particular estate is given will presumably be at testator's death the sole member of the class to whom the same property is limited is not of itself sufficient to overcome the prima facie meaning of the words of limitation. See, in addition to the other cases which follow, *Urquhart v. Urquhart*, 13 Sim. 613; *Jenkins v. Gower*, 2 Colly. Ch. Cas. 537, 10 Jur. 702; *Murphy v. Donegan*, 3 Jones & L. 534; *Bird v. Luckie*, 8 Hare, 301, 14 Jur. 1015; *Re Barber*, 1 Smale & G. 118; *Gorbell v. Davison*, 8 Jur. 161, 18 Beav. 556; *Lee v. Lee*, 1 Drew. & S. 85, 29 L. J. Ch. N. S. 788, 6 Jur. N. S. 621, 8 Week. Rep. 443; *Re Ford*, 72 L. T. N. S. 5; *Thompson v. Smith*, 27 Can. S. C. 628; *Re Ferguson*, 28 Can. S. C. 38; *Doe ex dem. Wright v. Gooden*, 6 Houst. (Del.) 397; *Abbott v. Bradstreet*, 3 Allen, 587; *Kenyon's Petition*, 17 R. I. 149, 20 Atl. 294; *Stokes v. Van Wyck*, 83 Va. 724, 3 S. E. 387,—in all of which a life estate was given to persons constituting the class at the time of testator's death; also *Seifferth v. Badham*, 9 Beav. 370, 15 L. J. Ch. N. S. 345, 10 Jur. 892; *Wilkinson v. Garrett*, 2 Colly. Ch. Cas. 643, 15 L. J. Ch. N. S. 416, 10 Jur. 560; *Holloway v. Radcliffe*, 23 Beav. 163, 26 L. J. Ch. N. S. 401, 3 Jur. N. S. 198, 5 Week. Rep. 271; *Harrison v. Harrison*, 28 Beav. 21; *Brabant v. Lalonde*, 26 Ont. Rep. 379,—in all of which a gift subject to be defeated by the happening of a certain contingency was given in the first 33 L.R.A.(N.S.)

instance to those who were at testator's death the sole members of the class to which the limitation over was made. The cases cited are more fully set out under subdivision III., *infra*.

In *Lee v. Lee*, 1 Drew. & S. 85, 29 L. J. Ch. N. S. 788, 6 Jur. N. S. 621, 8 Week. Rep. 443, the opinion that where the tenant for life happens to be the next of kin of the testator, the persons who in that case are to take under the ulterior gift to next of kin are those who shall answer the description, not at testator's death, but at the death of the tenant for life, and which is said to be founded upon the reasoning that it is impossible to suppose that the testator intended the life tenant to have any further interest in the property, that therefore he must be excluded from taking under the limitation over, and that, in order to effect that exclusion, the gift to the next of kin shall be held to mean a gift to those persons who shall answer the description at the death of the life tenant,—is criticized at length, as based upon two insufficient conclusions: the first being the assumed impossibility of supposing that the testator intended the first taker to have anything more than the life interest, and the second being that the exclusion of the first taker ought to be effected by postponing till his death the period at which the person answering the description of the testator's next of kin shall be ascertained. As to the first conclusion, it is said that if a testator bequeaths property to a class by a particular description, and the question arises whether a certain individual who comes within the description ought or ought not to be excluded, it is not sufficient, in order to exclude him, to show the absence of a special intention to include him, but that a clear and unambiguous indication of an intention to exclude him must be shown; that there is no such absurdity or unreasonableness in a person taking a life interest by virtue of a particular gift to him *nominatim* and a further interest, either alone or jointly with others, as the case may be, under a gift in the same will to a class which, as described by the testator, clearly

Ann. Cas. 239; *Re Depeirris*, 110 App. Div. 421, 97 N. Y. Supp. 321.

The attempted gift to defendant Purcell was ineffectual, since it was not to take effect at all events, or until the death of the testatrix, and until that time the testatrix retained control of the property. It was, at most, an imperfect attempted testamentary disposition.

Thornton, Gifts, § 76; *Young v. Young*, 90 N. Y. 422, 36 Am. Rep. 634; *Trow v. Shannon*, 78 N. Y. 446; *Robb v. Washington & J. College*, 185 N. Y. 492, 78 N. E. 359; *Priester v. Hohloch*, 70 App. Div. 256, 75 N. Y. Supp. 405; *Sullivan v. Sullivan*, 161 N. Y. 554, 56 N. E. 116.

Mr. George M. Pinney, Jr., for respondent Lillian Purcell:

It was the intention of the testatrix to

part with her dominion over the bond and mortgage and the stock, and to place the same with her daughter, Mrs. Wallace.

Hill, Tr. 130; *Martin v. Funk*, 75 N. Y. 143, 31 Am. Rep. 446; *Re Totten*, 179 N. Y. 112, 70 L.R.A. 711, 71 N. E. 748, 1 A. & E. Ann. Cas. 900; *Brown v. Spohr*, 180 N. Y. 201, 73 N. E. 14; *Re King*, 115 App. Div. 751, 100 N. Y. Supp. 1089; *Beakes Dairy Co. v. Berns*, 128 App. Div. 137, 112 N. Y. Supp. 529; *Gegan v. Union Trust Co.* 129 App. Div. 184, 113 N. Y. Supp. 595, affirmed in 198 N. Y. 541, 92 N. E. 1085; *Beaver v. Beaver*, 117 N. Y. 421, 6 L.R.A. 403, 15 Am. St. Rep. 531, 22 N. E. 940.

Mr. Frederick A. Drake, for infant respondents:

The legacy bequeathed to Marguerite Wetherill Buckwell did not lapse, but de-

includes him; especially since it is probable that the testator did not concern himself with the consideration of the question who would be his next of kin, but simply intended that, at all events, the first taker should have a life estate, and then that the property should go to his next of kin, whoever he, she, or they might happen to be. As to the second conclusion, that, in order to accomplish the exclusion of the life tenant, the period for ascertaining the persons answering the description of testator's next of kin must be postponed till the death of the life tenant, it is said that if the first taker must be excluded, the proper way to effect that object would be simply to exclude him, and to hold that the persons to take under the gift to the next of kin should be those who would answer the description at the testator's death if the life tenant were altogether left out of consideration; that because the first taker is to be excluded, it does not follow that others who would be testator's next of kin at the time of his death, but who might die in the meantime, also are to be excluded, as might be the case if the time for ascertaining the class were thus postponed.

In *Cusack v. Rood*, 24 Week. Rep. 391, it is said to be settled by authority that a gift to a person who may even be the testator's sole next of kin, and after his decease to the testator's next of kin, or to the persons who shall be then his next of kin, is a gift to the person or persons who, at the death of testator, filled the character of next of kin.

It is not enough to preclude the application of the rule that the heir has an express estate in the same property limited to him in a previous part of the will. *Re Frith*, 85 L. T. N. S. 455.

An intention to indicate by the term "heirs" persons other than those answering the description at the time of testator's death does not sufficiently appear merely from the fact that, by the will, a prior particular estate is limited to a particular person, who presumably would, and in fact

did turn out to, be the person filling the character of right heir. *Thompson v. Smith*, 27 Can. S. C. 628; *Re Ferguson*, 28 Can. S. C. 38; *Jost v. McNutt*, 40 N. S. 41.

The case of *Rand v. Butler*, 48 Conn. 293, sometimes cited as authority for the proposition that the testator's death is the time for ascertaining the heirs to whom a remainder interest is given, notwithstanding the fact that the life tenant is testator's only heir, does not in fact decide the question, as it was there held that the invalidity of the limitation over, if the heirs intended were those who were such at the death of the life tenant, would lead to the same practical result. The same is true of the case of *Thomas v. Castle*, 76 Conn. 447, 56 Atl. 854.

The facts that the heirs of a testatrix at her death are her children, that an absolute bequest was made to one and life estates given to the others, do not indicate an intention that the same children should not finally take as heirs under a limitation over to heirs in default of descendants of any of her daughters. *Jewett v. Jewett*, 200 Mass. 310, 86 N. E. 308.

Although not of itself sufficient to overcome the prima facie meaning of the words of limitation, the fact that the first taker is among the members of the class, or the sole member thereof, at the time of testator's decease, may be taken into consideration in ascertaining testator's real intention, and was so taken into account in *Minter v. Wraith*, 13 Sim. 52; *Wharton v. Barker*, 4 Kay & J. 483, 4 Jur. N. S. 553, 6 Week. Rep. 553; *Re Greenwood*, 31 L. J. Ch. N. S. 119, 3 Giff. 300, 8 Jur. N. S. 907, 10 Week. Rep. 1117; and *Sears v. Russell*, 8 Gray, 86,—in all of which the first taker was one of the members of the class; and in *Clapton v. Bulmer*, 15 Nyl. & C. 108; *Say v. Creed*, 5 Hare, 580, 16 L. J. Ch. N. S. 361, 11 Jur. 603; *Lees v. Massey*, 3 DeG. F. & J. 113, 7 Jur. N. S. 534, 4 L. T. N. S. 38, 9 Week. Rep. 425; *Johnson v. Askey*, 190 Ill. 58, 60 N. E. 76; *Bond v. Moore*, 236 Ill. 576, 19 L.R.A.(N.S.) 540,

scended under the statute to the infant defendant Isabel Bingham Buckwell.

Trask v. Sturges, 170 N. Y. 492, 63 N. E. 534; Roe v. Vingut, 117 N. Y. 212, 22 N. E. 933; Van Nostrand v. Moore, 52 N. Y. 20; Parks v. Parks, 9 Paige, 124; 30 Am. & Eng. Enc. Law, 2d ed. p. 687; Roberts v. Bosworth, 107 App. Div. 511, 95 N. Y. Supp. 239; Re Hafner, 45 App. Div. 549, 61 N. Y. Supp. 565; Barnes v. Huson, 60 Barb. 598; Moses v. Allen, 81 Me. 268, 17 Atl. 66; Bishop v. Bishop, 4 Hill, 138; Re Disney, 190 N. Y. 128, 82 N. E. 1093; Pimel v. Betjemann, 183 N. Y. 199, 2 L.R.A.(N.S.) 580, 76 N. E. 157, 5 A. & E. Ann. Cas. 239; Re Depeirris, 110 App. Div. 422, 97 N. Y. Supp. 321; Re Wells, 113 N. Y. 400, 10 Am. St. Rep. 457, 21 N. E. 137; Red-

86 N. E. 386; Welch v. Brimmer, 169 Mass. 204, 47 N. E. 699; Heard v. Read, 169 Mass. 216, 47 N. E. 778; Brown v. Wright, 194 Mass. 540, 80 N. E. 612; Boston Safe Deposit & T. Co. v. Blanchard, 196 Mass. 35, 81 N. E. 654; Pinkham v. Blair, 57 N. H. 226; Delaney v. McCormack, 88 N. Y. 174; Salter v. Drowne, 141 App. Div. 352, 126 N. Y. Supp. 686; Everitt's Estate, 195 Pa. 450, 46 Atl. 1; McKee's Estate, 198 Pa. 255, 47 Atl. 993; Merrefield's Estate, 5 Pa. Dist. R. 463,—in all of which the first taker was the sole member of the class at the time of testator's decease. The cases cited will be found set forth in detail under subdivision IV. *infra*.

3. Imbecility of person for whose benefit particular estate created, who is member of class at testator's death

The imbecility of the person who will be the sole member of the class if ascertained at testator's death, and for whose benefit the particular estate has been created, may be considered in determining the time at which the class is to be ascertained. See Johnson v. Askey, 190 Ill. 58, 60 N. E. 76.

A direction that the daughter's share shall be held in trust for her "so long as she should continue to labor under her present affliction," which is unaccompanied by any direction as to what should be done with respect to the whole of the property in case she should become entitled to have the whole conveyed to her, is indicative of an intention to postpone the ascertainment of the class entitled under a limitation in default of issue of any of his children. Minter v. Wraith, 13 Sim. 52.

But in Rand v. Butler, 48 Conn. 298, the fact that property was put into the hands of trustees for the benefit of one who was testator's sole heir, during his life, from which it may be inferred that testator regarded him as incapable of managing his own affairs, as was the fact, was held insufficient, of itself, to give to the word "heirs" a different meaning from that 33 L.R.A.(N.S.)

field, Law & Pr. Surrogates Ct. 6th ed. § 763.

The word "heirs," in the eleventh paragraph of the will, was intended to include the issue of any child or descendant of the testatrix who might be living at the time the power of appointment was exercised.

Re Smith, 131 N. Y. 239, 27 Am. St. Rep. 586, 30 N. E. 130; Re Russell, 168 N. Y. 169, 61 N. E. 166; Fuller v. Martin, 96 Ky. 500, 29 S. W. 315; Teed v. Morton, 60 N. Y. 503; Goebel v. Wolf, 113 N. Y. 405, 10 Am. St. Rep. 464, 21 N. E. 388.

Cullen, Ch. J., delivered the opinion of the court:

I concur in the opinion of my Brother Collin, save in one respect. The courts

which the word ordinarily imports; *i. e.*, those answering the description at testator's death. The force of this decision is, however, considerably impaired by the fact that it was further held that any other construction would cause the will to offend the rule against perpetuities, in which case the same person would, of course, take by inheritance.

4. Nonexistence of subject-matter of gift at testator's death.

An intention that the class shall not be immediately ascertained is manifested by the fact that the property is to be converted into personalty and distributed as such at the death of the first taker, so that the subject of the gift does not come into existence until then. Delaney v. McCormack, 88 N. Y. 174.

Where a gift is of a fund which is to be created at the termination of the particular estate, and there is no gift *in præsentia*, either by remainder or executory devise, the class among whom the fund is to be distributed is to be ascertained at the termination of the life estate. Barr v. Denney, 79 Ohio St. 358, 87 N. E. 267.

5. Provision for accumulation.

The ordinary meaning of the words is not overcome by a provision for the accumulation of the income of a moiety of the property during the life of the life tenant of the other moiety. Urquhart v. Urquhart, 13 Sim. 613, 8 Jur. 161.

But in Re Southworth, 52 Misc. 86, 102 N. Y. Supp. 447, it is held that a contrary intention might be found in a direction that principal and accrued interest shall be divided at the death of the life tenant, since testator could not have intended that unexpended interest remaining at the death of the life tenant should vest before it was in existence.

A conclusion that the time for ascertaining the class should be postponed is strengthened by a direction to accumulate income. Brown v. Wright, 194 Mass. 540, 80 N. E. 612.

below have held that the power of appointment given in the eleventh clause of the testatrix's will to Mrs. Wallace, "to give, devise, and bequeath upon her death, by last will and testament, duly executed, to such of my heirs as she may prefer," may be exercised in favor of any issue or descendant of the testator. I can find no authority in the decided cases for the extension of the term "heir" to include issue or descendants who are not heirs. Not one of the propositions cited in support of that contention in my opinion sustains it.

Before entering on a review of the cases, the distinction must be borne in mind between two radically different propositions: First, that in the case of a devise to "heirs" upon the death of a life tenant, and espe-

cially in the case of a gift over upon death without heirs, the term "heirs" may be confined to such heirs as are issue or descendants; in other words, to heirs of the body; second, the proposition which it is necessary to maintain to support the decisions below, that the term "heirs" may include all descendants, however remote, though not heirs because their parents or ancestors are still living. This second proposition, as I have said, I can find no authority to sustain. Now, to refer to the cases cited by my Brother, *Re Cramer*, 170 N. Y. 271, 63 N. E. 279, is authority for the first proposition, not the second. In that case the word "heirs" was limited to heirs of the body, and death without heirs construed as a gift over without heirs who were de-

6. Contingency of gift.

The mere circumstance that a gift to the next of kin is not immediate, but is contingent upon a future event which may or may not happen, is insufficient of itself to render the description applicable only to such person or persons as should form the class at the time of the occurrence of the event. *Bird v. Luckie*, 8 Hare, 301, 14 Jur. 1015.

In *Tuttle v. Woolworth*, 62 N. J. Eq. 532, 50 Atl. 445, it is said that the contingency as to a limitation over to testator's heirs taking effect does not affect the question of who compose the class to take, and does not of itself afford a reason for restricting its application so as to exclude any person who was an heir of testator at the time of his death.

7. Gift to class by direction to distribute.

In *WELCH v. BLANCHARD*, it is said that the fact that a gift over is made only by a direction to distribute does not prevent the application of the usual rule.

And see also the following cases, in which a direction to divide at the termination of a life estate, as in *Masters v. Hooper*, 4 Bro. Ch. 207; *Gorbell v. Davison*, 18 Beav. 556; *Weil v. King*, 31 Ky. L. Rep. 1010, 104 S. W. 380; *Childs v. Russell*, 11 Met. 16; *Cummings v. Cummings*, 146 Mass. 501, 16 N. E. 401; and *McDaniel v. Allen*, 64 Miss. 417, 1 So. 356; or at the termination of a trust, as in *Rayner v. Mowbray*, 3 Bro. Ch. 234; *Collisam v. Sams*, Tamlyn, 346; *Urquhart v. Urquhart*, 13 Sim. 613, 8 Jur. 161; *Lee v. Lee*, 1 Drew. & S. 85, 29 L. J. Ch. N. S. 788, 6 Jur. N. S. 621, 8 Week. Rep. 443; *Merrill v. Wooster*, 99 Me. 460, 59 Atl. 596; *Boston Safe Deposit & T. Co. v. Parker*, 197 Mass. 70, 83 N. E. 307; *Jewett v. Jewett*, 200 Mass. 310, 86 N. E. 308; and *Allison v. Allison*, 101 Va. 537, 63 L.R.A. 920, 44 S. E. 904,—seems not to have been regarded as precluding the application of the general rule.

But in some instances the fact that there are no words specifically giving the remain-

der to a class has been considered, together with other indications, as indicative of an intention that the remainder should not vest before the time of distribution. See *Leonard v. Haworth*, 171 Mass. 496, 51 N. E. 7; *Brown v. Wright*, 194 Mass. 540, 80 N. E. 612; *Boston Safe Deposit & T. Co. v. Blanchard*, 196 Mass. 35, 81 N. E. 654; *Re Bowers*, 109 App. Div. 566, 96 N. Y. Supp. 562; *Salter v. Drowne*, 141 App. Div. 352, 126 N. Y. Supp. 686.

And see also *Forrest v. Porch*, 100 Tenn. 391, 45 S. W. 676, where a direction that at the death of the life tenant the property should be divided was held not to vest the remainder until the time for distribution.

8. Words of futurity.

The use of words of description in the future is immaterial, since words to postpone the vesting in possession of an interest are naturally prospective. *Doe ex dem. Garner v. Lawson*, 3 East, 278; *Wharton v. Barker*, 4 Kay & J. 483, 4 Jur. N. S. 553, 6 Week. Rep. 534; *Valentine v. Fitzsimons* [1894] 1 I. R. 93.

Mere words of futurity without the adverb of time are insufficient to preclude the application of the general rule. Per *Baggallay and Thesiger, Lds. JJ.*, in *Mortimer v. Slater*, L. R. 7 Ch. Div. 322.

Words expressive of future time are to be referred to the vesting in possession if they reasonably can be, rather than to the vesting in right. *Kenyon's Petition*, 17 R. I. 149, 20 Atl. 294.

But in *Butler v. Bushnell*, 3 Myl. & K. 232, 3 L. J. Ch. N. S. 139, it was said that the words "such persons as shall happen to be my next of kin," or "such persons as shall or should be my next of kin," which import a future period, indicate an intention to confine the gift to such persons as shall answer the description at the death of the life tenant. But see criticism of this decision in *Jarman on Wills*, hereinbefore quoted.

9. Use of word "then."

Where the word "then," which is fre-

scendants or heirs of the body. *Snider v. Snider*, 160 N. Y. 151, 54 N. E. 676, decides exactly the same proposition. *Johnson v. Brasington*, 156 N. Y. 181, 50 N. E. 859, the same. So with *Kiah v. Grenier*, 56 N. Y. 220. In *Heath v. Hewitt*, 127 N. Y. 166, 13 L. R. A. 46, 24 Am. St. Rep. 438, 27 N. E. 959, which was the case of a gift to the heirs of a living person, Judge Parker, writing for the court, said the devise was to the children, but this was not because the word "heirs" could be construed as meaning children, but because it was the children which happened in that case to be the persons who would have been the heirs of the living person had he died at that time. This plainly appears, because the case was decided on the authority of *Heard*

v. Horton, 1 Denio, 165, 43 Am. Dec. 659, where the general rule is stated that "a devise to the heirs of one who is stated in the will to be living is a valid disposition in favor of those who would be his heirs if he should then die." *Livingston v. Greene*, 52 N. Y. 118, seems to have no application to the case before us. In *Thurber v. Chambers*, 66 N. Y. 42, 47, the term "heirs" was construed in its legal meaning so as to include all persons entitled to succeed in case of intestacy. So the decision has no bearing on the question before us. But Judge Church does remark in his opinion: "The word 'heirs' will, however, be construed to mean 'children' when, from the whole will, such appears to have been the intention of the testator. *Taggart v. Murray*, 53 N.

quently employed in limitations of the sort under discussion, is clearly used as an adverb of time, and not as referring to the event, it will have the effect to postpone the ascertainment of the class until the period to which it has reference.

Thus, in *Long v. Blackall*, 3 Ves. Jr. 486, 4 Revised Rep. 73, where the limitation was to such persons "as should then be" the legal representatives of the testator, the word "then" seems to have been regarded as showing that the personal representatives at the time of testator's death were not intended.

And where the word "then" is used twice in the limiting clause so closely together that it is clearly not employed in both places for the same purpose nor with the same meaning, it may be sufficient to indicate an intention that the class should be determined as of the time of distribution. See *Wharton v. Barker*, 4 Kay & J. 483, 4 Jur. N. S. 553, 6 Week. Rep. 534; *Travis v. Taylor*, 14 Week. Rep. 909, 12 Jur. N. S. 791; *Valentine v. Fitzsimons* [1894] 1 I. R. 93; *Re Karn*, 2 Ont. Week. Rep. 841; *Wood v. Schoen*, 216 Pa. 425, 66 Atl. 79.

But the tendency of the courts seems to be to construe the word "then" ordinarily as having reference to the event, rather than to the time; and such effect as it might have had as a temporal word if used alone is generally held to be controlled or overcome by a reference to the statute of distributions.

Thus, in *Doe ex dem. Garner v. Lawson*, 3 East, 278, it was said by Le Blanc, J., that even though a distribution upon a contingency is directed to be made amongst such persons as should "then" appear to be testator's next of kin, the word "then" would be satisfied by reference to the time when the inquiry was to be made, and that the time for ascertaining the class would be controlled by the further provision that the next of kin should take in such parts and proportions as they would, by virtue of the statute of distributions, have been entitled to his personal estate if he had died intestate, which must refer to the time of his death.

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In *Wharton v. Barker*, 4 Kay & J. 483, it is said that the application of the rule is excluded where, after a previous bequest for life or other limited interest, there is a bequest "to those who then shall be" the next of kin of the testator, although it would seem that in such case, if the ulterior bequest were "to those who then shall appear to be his next of kin, in such parts and proportions as they would, by virtue of the statutes of distribution, have been entitled to his personal estate if he had died intestate," the rule would again become applicable, and the death of the testator would be the period for designating the persons to take under that designation.

In *Bullock v. Downes*, 9 H. L. Cas. 1, where property was limited over upon certain contingencies to such person or persons of testator's blood "as would, by virtue of the statutes of distributions of intestates' effects have become and been then entitled thereto in case I had died intestate," it was held that, even assuming that the word "then" is to be read as an adverb of time, the time indicated is not the time of the death of testator, but the time when the persons would come into the enjoyment of that which is bequeathed to them.

So also in *Mortimore v. Mortimore*, L. R. 4 App. Cas. 448, 48 L. J. Ch. N. S. 470, 27 Week. Rep. 575, it is said that even though the word "then" be used as an adverb of time, it may be satisfied by taking it as referring to the time at which the persons entitled under a limitation are to be found out, and not the time as of which the membership of the class is to be determined, where there is in the limitation a reference to the statute of distributions, such reference being taken as descriptive of a class which must be ascertained at the death of the testator.

In *Re Winn* [1910] 1 Ch. 278, 79 L. J. Ch. N. S. 165, 101 L. T. N. S. 737, it was said that although where there is a gift to the next of kin or nearest of blood, or any similar gift, the time at which a class is to be ascertained is the death of the testator, it is always possible for a tes-

Y. 233, 238; *Bundy v. Bundy*, 38 N. Y. 410." A reference to the two cases Judge Church cites plainly indicates his meaning that the term "heirs" will be limited to children or other issue, and not extended to heirs generally. *Scott v. Guernsey*, 48 N. Y. 106, is precisely to the same effect, and in the opinion it is said: "The testator has used the word 'heirs' in the sense of 'children.'" Now, such a statement was correct, though possibly misleading, because in that case children were the heirs.

Without discussing the provisions of the will at length, I can simply say I cannot find any indication of a desire of the testatrix to pass over the nearest in line of her descendants or heirs in favor of more remote issue who might not be born till a

generation after she was in her grave. Certainly there is no such clear indication as would warrant us in departing from the proper meaning of the word "heirs."

But I am of opinion that the heirs of the testatrix were to be ascertained, not at her death, but at the death of the life tenant, to whom she gave the power of appointment.

It should be conceded that the general rule is that a gift to a testator's heirs, though after the death of a life tenant, is a gift to those who were the testator's heirs at law at the time of his decease. But the will may disclose an intention that they are to be ascertained at a different period. In some of the cases cited as requiring a class to be ascertained at the death of the

tator to say that the class is to be ascertained at a later time; and if the testator makes a gift to a tenant for life, and after the death of the tenant for life "to the persons who shall then be my relatives or my next of kin," then, apart from any reference to the statute of distributions, the class is clearly to be ascertained at the death of the tenant for life, in accordance with the express language of the testator; but that where a testator, referring to his statutory next of kin, uses expressions such as "the persons who shall then be entitled by virtue of the statute of distributions," the ordinary rule which would have ascertained the class at the time to which the word "then" points is or may be rebutted because of the necessity for every person who claims under the gift to prove his title by virtue of the statute of distributions.

The word "then" is not decisive of testator's intention that a gift in remainder, after a life estate, to heirs or next of kin, is to those answering such description at the time of distribution, as it may be satisfied by the consideration that it refers to those who shall be entitled to share in that capacity at the time of the testator's decease. *Childs v. Russell*, 11 Met. 16.

The use of the word "then," as introductory to a limitation to testator's right heirs, is not sufficient to show that the testator intended to limit the estate to those who should be such at the time of the happening of the contingency. *Buzby's Appeal*, 61 Pa. 111.

The word "then," as introductory of a limitation to testator's heirs, is not to be understood as an adverb of time, or as indicating anything else than the event in which the heirs, etc., are to take. *Stewart's Estate*, 147 Pa. 383, 23 Atl. 599.

For other instances in which it has been held that the class was to be determined as of the time of testator's death, and not as of the time of distribution, notwithstanding testator's use of the word "then," see *Harrington v. Harte*, 1 Cox, Ch. Cas. 131; *Nicholson v. Wilson*, 14 Sim. 549, 14 L. J. Ch. N. S. 351, 9 Jur. 389; *Ware v. Row*, 33 L.R.A. (N.S.)

land, 2 Phill. Ch. 635, 17 L. J. Ch. N. S. 147, 12 Jur. 165; *Cable v. Cable*, 16 Beav. 507; *Mays v. Carroll*, 14 Ont. Rep. 699; *Brabant v. Lalonde*, 26 Ont. Rep. 379; *Jost v. McNutt*, 40 N. S. 41; *Bunting v. Speck*, 41 Kan. 424, 3 L.R.A. 690, 21 Pac. 288; *Dove v. Torr*, 128 Mass. 38; *Boston Safe Deposit & T. Co. v. Parker*, 197 Mass. 70, 83 N. E. 307; *Stokes v. VanWyck*, 83 Va. 724, 3 S. E. 387; *Allison v. Allison*, 101 Va. 537, 63 L.R.A. 920, 44 S. E. 904,—set forth in full in subdivision III., infra.

10. Reference to statute of distributions.

As those who are testator's next of kin at the time of his death are alone entitled to take by the statute of distributions in case of his intestacy, a reference to such statute in the limitation over has been held to show that the persons intended by such limitation are those who answer the description at that time. *Doe ex dem. Garner v. Lawson*, 3 East, 278.

A reference to the statute to point out the persons who are to take tends to show that those who are to take are those living at the death of the person whose estate is to be distributed. *Holloway v. Radcliffe*, 23 Beav. 163, 26 L. J. Ch. N. S. 401, 3 Jur. N. S. 198, 5 Week. Rep. 271; and see also *Wharton v. Barker*, 4 Kay & J. 483, 4 Jur. N. S. 553, 6 Week. Rep. 534, and *Re Winn* [1910] 1 Ch. 278, 79 L. J. Ch. N. S. 165, 101 L. T. N. S. 737, set out more fully under heading immediately preceding.

So also, in *Cable v. Cable*, 16 Beav. 507, a limitation over to persons entitled under the provision of the statute of distributions, and in the proportion pointed out by such statute, was regarded as militating against a construction by which the next of kin would be determined at the time of the first taker's death, as in such case the fund could not be divided in the same proportions as directed by statute.

The fact that the gift is to such persons as may be legally entitled to the same under the statute of distribution clearly shows testator's intention that the property is

testator, the language is too plain to admit of discussion. In *Delaney v. McCormack*, 88 N. Y. 174, the provision was "to distribute the proceeds thereof amongst my next of kin as personal estate, according to the laws of the state of New York for the distribution of intestate personal estate." There also the language of the will was imperative. There appears to have been no claim that the next of kin would have been ascertained at a later period. In *Wadsworth v. Murray*, 161 N. Y. 274, 282, 76 Am. St. Rep. 265, 55 N. E. 910, 911, the provision was that the property should "descend to and vest in my heirs at law in the same manner that it would have descended to and vested in them if this will had not been made." Of course, if the

will had not been made, the property would have passed as in case of intestacy. The general rule is stated in 2 *Jarman on Wills*, 6th ed. p. 981: "Prima facie the next of kin at the death of the testator are meant; and the indication should be clear to overcome the presumption." But in several cases indications have been held sufficiently clear to show that the testator meant the class to be ascertained at the death of a life tenant or of a primary devisee. Such cases are *Wood v. Bullard*, 151 Mass. 324, 7 L.R.A. 304, 25 N. E. 67; *Welch v. Brimmer*, 169 Mass. 204, 47 N. E. 699; and *Re Bowers*, 109 App. Div. 566, 96 N. Y. Supp. 562, affirmed on op. below in 184 N. Y. 574, 77 N. E. 1182.

It must be borne in mind that in the case

to go as if he had died intestate, and therefore that the class is to be ascertained at the time of his death. *Starr v. Newberry*, 23 Beav. 436.

Where the limitation is "according to the statute of distribution" of intestates' effects, it has been held that the next of kin at the time of testator's death are clearly entitled. See *Royds v. Royds*, 1 New Reports, 516, 8 L. T. N. S. 199.

The phrase, "my next of kin under the statute for the distribution of intestates' estates," describes a class which, according to the statute, must be ascertained at the death of the testator. *Mortimore v. Mortimore*, L. R. 4 App. Cas. 448, 48 L. J. Ch. N. S. 470, 27 Week. Rep. 575.

In *Re Wilson* [1907] 2 Ch. 572, the effect of a gift to those entitled as next of kin under the statute of distributions as a gift to those who, according to the express language of that statute, must be ascertained at the testator's death, was held not to be varied by the introduction of the phrase, "on the death of my said nephew" (the tenant for life), in a limitation to "such person or persons as, on the death of my said nephew, will be entitled as my next of kin under the statute for the distribution of intestates' estates," as, even if the latter phrase refers to the time, and not the event, it may be satisfied by taking it as referring to the time of coming into possession, and not the time of vesting.

In *Fargo v. Miller*, 150 Mass. 225, 5 L.R.A. 690, 22 N. E. 1003, it is said that a reference to the statutes of distribution has sometimes been regarded as a circumstance indicating that the testator intended that his next of kin should take as of his death, because the persons who are distributees under the statute take from that time.

A clear intention that the heirs shall be determined as of the time of testator's death is manifested by a provision that, upon certain contingencies, the trust estate and its accumulations shall descend to and vest in testator's heirs at law in the same manner that it would have descended to and vested in them if the will had not been made. *Wadsworth v. Murray*, 161 33 L.R.A. (N.S.)

N. Y. 274, 76 Am. St. Rep. 265, 55 N. E. 910.

An intention that the class shall be ascertained at testator's death is disclosed by a limitation to such person or persons who would be legally entitled to succeed to and inherit the same in case of intestacy, as the persons who take under such circumstances are those in being at the time of their decedent's demise. *Smith v. Allen*, 161 N. Y. 478, 55 N. E. 1056.

Although the presumption arising from the prima facie meaning of the words is strengthened by a direct reference to the statute of distribution (*Valentine v. Fitzsimons* [1894] 1 I. R. 93; *Tuttle v. Woolworth*, 62 N. J. Eq. 532, 50 Atl. 445), the absence of a reference to the statute is not a sufficient reason for departing from the general rule (*Re Ford*, 72 L. T. N. S. 5).

A reference to the "shares, proportions, and manner prescribed by the statute" must however, give way to other indications of an intent to postpone the ascertainment of the class. *Sturge v. Great Western R. Co.* L. R. 19 Ch. Div. 444, 51 L. J. Ch. N. S. 185, 45 L. T. N. S. 787, 30 Week. Rep. 456.

And in *De Wolf v. Middleton*, 18 R. I. 810, 31 L.R.A. 146, 26 Atl. 44, 31 Atl. 271, it is held that the words, "according to the statute of descents," in an executory devise to testator's heirs at law according to such statute, do not necessarily import a class to be ascertained and traced from testator's death.

A distinction between cases in which the reference is to a title conferred by the statute of distribution, e. g., "to those who would be entitled thereto as my next of kin under the statute of distribution," and cases in which the reference is not to the title conferred, e. g., "to those who would be my next of kin according to the statutes," is taken in *Valentine v. Fitzsimons* [1894] 1 I. R. 93, where the latter expression was held insufficient to limit the meaning of the word "then," used in an adverbial sense, on the ground that in such case it was susceptible of meaning "in the way in which kinship is reckoned under these statutes."

before us there is no present gift of the property, the subject of the eleventh clause, to the heirs of the testatrix. They take solely by the exercise of the power of appointment, dependent entirely on the favor of the life tenant, who might give all to one and exclude the rest. It was not a gift to a class, but the designation of a class among which the life tenant was to exercise her favor. It is in this respect that I think the case before us is to be distinguished from an ordinary gift by the testatrix herself. There the class to be benefited would be known to the testator, and take under the will as a recipient of the testator's bounty. Here, though it was not the life tenant's bounty, it was the life tenant's favor to which any appointee

would be indebted for what he might get. That favor was to be exercised by the life tenant at her decease; and it seems to me that the class was to be ascertained at the same time. But there is one further consideration which is to my mind controlling. It is true that the life tenant has no children, but she might have had children after the testatrix's death, and, for aught we know, even after the present time. A construction of the will which would require the heirs of the testatrix to be ascertained at her death would preclude the life tenant from exercising the power of appointment over what may be not improperly termed her own share of her mother's estate in favor of her own children. Certainly this testatrix never intended this.

11. Terms importing plurality in membership of class.

The description of the class in terms which import that testator contemplated a plurality of persons under that description, although, at the time of the making of the will, such class presumptively consisted of but one person, is not conclusive of an intent to postpone the ascertainment of the membership of the class; although it may be indicative of such an intention. *Say v. Creed*, 5 Hare, 580, 16 L. J. Ch. N. S. 301, 11 Jur. 603; *Urquhart v. Urquhart*, 13 Sim. 613, 8 Jur. 161; *Ware v. Rowland*, 2 Phill. Ch. 635, 17 L. J. Ch. N. S. 147, 12 Jur. 165; *Bird v. Luckie*, 8 Hare 301, 14 Jur. 1015; *Re Barber*, 1 Smale & G. 118; *Re Lang*, 9 Week. Rep. 589, 4 L. T. N. S. 577; *Rand v. Butler*, 48 Conn. 293; *Stokes v. Van Wyck*, 83 Va. 724, 3 S. E. 387.

The solution of such apparent inconsistency is found in the fact that the testator would naturally use such terms with respect to an event which might not take place until some distant period, when it would be uncertain who would compose the class, or in the fact that he may have contemplated the possibility of the death of his heir presumptive in his own lifetime. *Ware v. Rowland*, 2 Phill. Ch. 635, 17 L. J. Ch. N. S. 147, 12 Jur. 165.

The reference to a plurality or possible plurality of persons as the testator's next of kin, while at the time the will was made and at his death there was only one person answering such description, is of little force to show that testator intended the class to be ascertained at a time subsequent to his death, as he may have supposed some change or circumstances might take place in his lifetime so as to render the plural properly descriptive. *Bird v. Luckie*, 8 Hare. 301, 14 Jur. 1015, *Re Barber*, 1 Smale & G. 118.

The use of the words "between and amongst," which seem to import a plurality of members of the class, will not preclude a construction which has the effect to vest the gift in a single person. *Lee v. Lee*, 1 33 L.R.A. (N.S.)

Drew. & S. 85, 29 L. J. Ch. N. S. 788, 6 Jur. N. S. 621, 8 Week. Rep. 443.

But see *Johnson v. Askey*, 190 Ill. 58, 60 N. E. 76, in which the use of the plural was taken into consideration in ascertaining whether it was testator's intention that the time as of which the class should be ascertained should be postponed.

See also *Nicoll v. Irby*, — Conn. —, 77 Atl. 957, in which the use of the plural "heirs," and the provision that they should share alike, was held to indicate an intention on the part of the testator to exclude the life tenant who was the sole member of the class at the time of testator's death.

12. Limitation to those of class making claim or proving relationship.

A limitation over in case no claimant shall appear after a certain time will not preclude the application of the rule, notwithstanding the fact that the life tenants were members of the class at the time of testator's death, the claim being no part of the qualification necessary to constitute the members of the class legatees. *Gorbell v. Davison*, 18 Beav. 556.

And in *Re Ferguson*, 28 Can. S. C. 38, it was held that no contrary intention could be found in the fact that the limitation was to the testator's heirs who might prove their relationship within six months from the termination of the particular estate.

But in *Tiffin v. Longman*, 15 Beav. 275, where the limitation was to such of testator's relations as should make their claim within a certain period after advertisement upon the termination of the life estate, it was held indicative of an intention that the class should be ascertained at the termination of the life estate.

13. Limitation to heirs, etc., both of testator and of another.

In *Jones v. Oliver*, 38 N. C. (3 Ired. Eq.) 369, it is said that it makes no difference in the application of the general rule that the gift over is to the next of kin both of testator and of another person.

I think the judgment of the Appellate Division and of the Special Term should be further modified so as to hold that the power of appointment given in the eleventh clause of the will must be exercised in favor of the heirs of the testator, such heirs, however, to be ascertained at the death of the life tenant and donee of the power.

Collin, J. (dissenting in part):

The action is to procure a judgment establishing the meaning of certain provisions of the will of Margaretta M. Diehl and settling the accounts of the plaintiffs. Upon the trial at special term, by an interlocutory judgment unanimously affirmed, the disputed parts of the will were given con-

struction and the plaintiffs directed to account. The action thereupon proceeded to the final judgment appealed from.

The testatrix died in January, 1908, leaving surviving as her sole heirs at law and next of kin three sons, Charles W., Thomas, and William, and three daughters, Margaretta Wetherill Wallace, Mary E. Smith, and Susan D. Edson. The original will and the three codicils were probated April 13, 1908. They are without unusual or involved features, and a brief general statement of their contents will suffice. The original will by its second paragraph gave to Charles, in case he survived the testatrix, certain shares of corporate stock, and to the executors the sum of \$10,000 in trust to purchase him an annuity. By its third

And see also *Holloway v. Radcliffe*, 23 Beav. 163, 26 L. J. Ch. N. S. 401, 3 Jur. N. S. 198, 5 Week. Rep. 271; *Walker v. Dunshee*, 38 Pa. 430; and *Jones v. Knappen*, 63 Vt. 391, 14 L.R.A. 293, 22 Atl. 630, in which the general rule was applied in the case of a similar limitation. But see also *Wharton v. Barker*, 4 Kay & J. 483, 4 Jur. N. S. 553, 6 Week. Rep. 534; *Howell v. Ackerman*, 89 Ky. 22, 11 S. W. 819; and *Bisson v. West Shore R. Co.* 143 N. Y. 125, 38 N. E. 104, in which the fact that the remainder was limited to the heirs of the testator and of the life tenant seems to have been regarded as indicative of an intention to postpone ascertainment of the class until the termination of the life estate.

14. *Exclusion of certain persons.*

The express exclusion of persons who would be members of a class if such class is determined at a certain time is an indication of intention that the class should then be ascertained, where it may be assumed that testator, in making his will, regarded it as certain that the state of his family would remain precisely the same at his death as at the date of his will. *Lee v. Lee*, 1 Drew. & S. 85, 29 L. J. Ch. N. S. 788, 6 Jur. N. S. 621, 8 Week. Rep. 443; *Clark v. Shawen*, 190 Ill. 47, 60 N. E. 116.

Thus, the rule of construction under which the class is ascertained at testator's death is fortified by the circumstance of the exclusion of the tenant for life, which would be superfluous if the vesting was postponed until the termination of the life estate. *Cable v. Cable*, 16 Beav. 507; *Fletcher v. Fletcher*, 3 De G. F. & J. 775; *Minot v. Harris*, 132 Mass. 528.

But the exclusion of a person who would be the sole member of a class at the time of testator's death is indicative of an intention to postpone the ascertainment of the membership of the class. *Say v. Creed*, 5 Hare, 580, 16 L. J. Ch. N. S. 361, 11 Jur. 603.

An instance in which the exception of 33 L.R.A. (N.S.)

persons who presumptively would not, at the time of testator's death, be members of the class, was held insufficient to show an intention that the ascertainment of the members of a class should be postponed, may be found in *Re Winn* [1910] 1 Ch. 278, 79 L. J. Ch. N. S. 165, 101 L. T. N. S. 737, where testator made the same exception in another provision of his will, where it was clear that the class must be ascertained at his death, as in such case the probability is that he may have contemplated the possibility of changes during his own lifetime in the membership of the class who were presumptively his next of kin.

So, in *Lee v. Lee*, *supra*, it was held that the exclusion of certain nephews and nieces did not afford any sufficient indication of testator's intention that the class of which they were members should take under the limitation, where it appeared that the nephews and nieces whom testator wished to exclude were the children of a brother who was living when the will was made, showing that he had in his mind the possibility of changes taking place in the state of his family by death.

15. *Other phraseology.*

The construction reached by the application of the general rule is fortified by the use of the word "descend," which ordinarily denotes the vesting of the estate by operation of law in the heirs immediately upon the death of the ancestor. *Dove v. Torr*, 128 Mass. 38.

Such construction is strengthened by the use of the words "go and descend." *Abbott v. Bradstreet*, 3 Allen, 587.

It is strengthened by the absence of words of contingency, such as "if they shall be living at his death," or "to such of my heirs as shall then be living." *Minot v. Tappan*, 122 Mass. 535.

No contrary intention may be derived from the employment of the phrase "convey and transfer." *Ibid*.

The fact that the limitation is to next of kin "for the time being" will not preclude such construction, although its effect

paragraph it gave to Thomas, in case he survived her, all promissory notes belonging to the estate of her deceased husband under process of collection by him; also his indebtedness to her, and to the executors \$10,000 in trust to purchase an annuity for him. Each paragraph provided that, if the son named therein did not survive the testatrix, the bequests should form a part of the residue of the estate. The fourth paragraph devised to William certain lands in St. Paul, Minnesota. It was, however, revoked by a codicil which devised to him all properties in the state of Minnesota owned by the testatrix. By the fifth paragraph testatrix gave to her daughter Mary E. Smith all of her diamonds and the sum of \$500; and to her

grandson, Edward I. Smith, certain paintings and engravings. The sixth and seventh paragraphs were revoked by the codicils. The eighth paragraph gave to the daughter Margaretta Wetherill Wallace a real-estate mortgage of \$5,000, and to the daughter Susan Douglas Edson real property known as No. 12 Clinton avenue, in the borough of Richmond, New York city. The ninth paragraph directed the executors to divide the rest and residue into two equal parts, with power to convert it into cash, one of which parts the tenth paragraph gave to her daughter, the appellant Susan D. Edson, and the other was disposed of in the following language: "Eleventh. I give, devise, and bequeath unto my daughter Margaretta Wetherill Wallace, if liv-

is to reduce the words quoted to a nullity, since it is a matter of constant occurrence to find in an instrument more words than are necessary. *Moss v. Dunlop*, Johns. V. C. (Eng.) 490.

No contrary inference may be drawn from the expression "whoever they may be," following a gift to the next of kin living at the time of the termination of the precedent estates, since such expression may be explained either as indicating a doubt in testator's mind as to who will be his next of kin, or as meaning that he is in doubt as to which of the next of kin may survive the period. *Re Winn* [1910] 1 Ch. 278, 79 L. J. Ch. N. S. 165, 101 L. T. N. S. 737.

No contrary intention is manifested by the circumstances that a bequest was given to a member of the class "in full of any share of the estate" to which such person might be entitled. *Abbott v. Bradstreet*, *supra*.

Such construction is not affected by the use of the phrase "if I were to die," in a limitation to those who, under the statute of distributions, would then be entitled thereto if I were to die possessed thereof and intestate," as they express an hypothesis not as to death only, but as to death under particular circumstances. *Michell v. Bridges*, 13 Week. Rep. 200, 11 L. T. N. S. 727.

The clear words of a gift to a class which must be ascertained at testator's death cannot be cut down by the phrase "on the death of" the life tenant, which, even if it refers to the time, and not to the event, must be taken as referring only to the time when the persons entitled will come into possession. *Re Wilson* [1907] 2 Ch. 572.

In *Hersee v. Simpson*, 154 N. Y. 496, 18 N. E. 890, where a testator gave his residuary estate to his wife for life, adding, "and from and after her decease my will is that all of my said property be disposed of according to the statutes of the state of New York governing the descent of real property and the distribution of personal estates," it was held that the words "from and after" the wife's death were insufficient to limit to a contingent remainder the

estate devised to testator's heirs, but were to be construed to relate merely to the time of the enjoyment of the estate, and not to the time of its vesting.

But a contrary intention which will preclude the application of the rule is manifested by a limitation to testator's "heirs then living." *Cushman v. Goodwin*, 95 Me. 353, 50 Atl. 50.

Or by a limitation to such persons "as shall then be my next of kin." *Travis v. Taylor*, 14 Week. Rep. 909, 12 Jur. N. S. 791.

Or by a limitation to such persons as would have been entitled under the statute of distribution "in case I had then died intestate." *Clowes v. Hilliard*, L. R. 4 Ch. Div. 413, 46 L. J. Ch. N. S. 271, 25 Week. Rep. 224.

Or by a limitation to such persons "who, at the time of such respective decease of my children," should be testator's next of kin. *Sturge v. Great Western R. Co.* L. R. 19 Ch. Div. 444, 51 L. J. Ch. N. S. 185, 45 L. T. N. S. 787, 30 Week. Rep. 456.

Or where the testator directs that the property, after the decease of the life tenant, be equally divided among his surviving heirs. *Evans v. Godbold*, 6 Rich. Eq. 26.

Or by a limitation to testator's "heirs at law then surviving, they taking by right of representation." *Wood v. Bullard*, 151 Mass. 324, 7 L.R.A. 304, 25 N. E. 67.

Or by a limitation to such persons "as shall, upon the death of [the life tenant], be my then next of kin." *Re McFee* [1910] W. N. 186, 79 L. J. Ch. N. S. 676, 103 L. T. N. S. 210.

Or by a limitation to such persons "as shall, at the time of the decease of" the life tenant, be entitled thereto, etc. *Horn v. Coleman*, 1 Smale & G. 169, 22 L. J. Ch. N. S. 779, 17 Jur. 408, 1 Week. Rep. 94; *Re Morley*, 25 Week. Rep. 825.

16. Provision against alienation of particular estate.

A provision against alienation or encumbrance of the respective life estates taken by

ing, the other part of my residuary estate during the term of her natural life, with power to collect and apply the income therefrom for her own use, to invest and reinvest the principal according to her judgment, in real estate or in any other investment except railroad securities, and with further power to give, devise, and bequeath upon her death by last will and testament duly executed, to such of my heirs as she may prefer." A question presented to us is, Does the word "heirs" therein mean those who were the testatrix's legal or actual heirs, or those who are her descendants at the time the legatee exercises the power of appointment. The courts below have held that the legatee may effectually exercise the power of appointment for the

benefit of any descendants of the testatrix.

The sixth paragraph of the will, revoked by a codicil, gave to the executors \$5,000 in trust to establish a comfortable home for Marguerite Wetherill Buckwell, a granddaughter of testatrix. The first codicil revoked the sixth paragraph and gave the \$5,000 to the executors in trust, to purchase an annuity for the said granddaughter. The second codicil contained the provision: "Whereas circumstances may arise which may make the purchase of an annuity undesirable, it is my will that said sum of five thousand dollars be paid to my said granddaughter Marguerite Wetherill Buckwell if she survive me, and I hereby give and bequeath such sum of five thousand dollars to her, giving, however, my

persons who would be members of the class if ascertained at testator's death is not a sufficient reason for departing from the general rule. *Re Ford*, 72 L. T. N. S. 5.

Nor is the fact that testator manifests an intention to prevent the capital from coming into the hands of the life tenant. *Jost v. McNutt*, 40 N. S. 41.

A contrary intention which will preclude the application of the rule cannot be found in a provision that the beneficiaries of a trust created by a testator are not to have or exercise any right or power of disposing of their respective interests, title, or property in their respective trust estates by will or testamentary appointment, nor to sell, pledge, assign, or transfer the same, since, if testator had desired to make it impossible for any of them to have the disposition of any part of what he himself should leave in trust, a construction that he meant by the words "to my heirs at law," heirs to be determined as of some other time than as of that of his death, would not have made that intent effectual. *Rotch v. Rotch*, 173 Mass. 125, 53 N. E. 268.

17. Power of appointment.

An intention which will preclude the application of the rule may be inferred from a limited power to appoint by will, given to the donee of a defeasible fee. *Doe ex dem. King v. Frost*, 3 Barn. & Ald. 546, 22 Revised Rep. 478.

Such an intention is manifested by the fact that the life tenant, who was testator's sole next of kin at the time of his death, is given a power of appointment, in default of which the property is limited over to such person or persons as would be entitled to the same by virtue of the statute of distributions. *Briden v. Hewlett*, 2 Myl. & K. 90, 1 L. J. Ch. N. S. 114.

But see *Pearce v. Vincent*, 2 Keen, 230, 7 L. J. Ch. N. S. 285, where it was held that the gift of a power of appointment to a life tenant who was testator's sole next of kin at his death was not inconsistent with an intention that the class to whom the limitation over was made in default of appointment should be ascertained at testator's death.

tor's death, the court saying that the argument derived from intention did not apply in such case, because testator could not have had in his view and knowledge that the ultimate gift should go to any particular individual.

18. Other similar limitations.

The construction under which the class is ascertained at testator's decision is supported by the fact that a similar limitation over is made after other provisions of the will,—especially where the language used gives rise to the inference that the whole is to be treated as a single fund, to go all together in one direction. *Moss v. Dunlop, John*, V. C. (Eng.) 490.

It is strengthened by the circumstance that other provisions are similarly limited, as it is hardly conceivable that the testator contemplated several sets of different hypothetical heirs. *WELCH v. BLANCHARD*; *Kellett v. Shepard*, 139 Ill. 443, 28 N. E. 571, 34 N. E. 254.

Such construction is assisted by the circumstance of there being an immediate gift to the same class. See *Crisp v. Crisp*, 61 Md. 149.

But an indication of an intention to postpone the ascertainment of the members of a class to whom a moiety in a trust estate is given upon the termination of the trust has been found in the fact that the gift of the other moiety to a named person or his issue is made contingent upon one or the other being alive at the time of distribution. See *Boston Safe Deposit & T. Co. v. Blanchard*, 196 Mass. 35, 81 N. E. 654.

19. Miscellaneous.

An additional reason for giving the words of the limitation their prima facie meaning may be found in the fact that a construction which would postpone the time for ascertaining the membership of the class would render the provision obnoxious to the statute of perpetuities. See *Nicoll v. Irby*, — Conn. —, 77 Atl. 957.

The fact that the limitation over is only

said executors power to apply said sum of five thousand dollars to the purchase of an annuity in their discretion, for the benefit of my said granddaughter Marguerite, in the manner as declared with respect to the proceeds of my property in Manhattan, Kansas, given my granddaughter Lillian." The granddaughter died April, 1907, leaving her surviving her daughter, Isabel Bingham Buckwell, her only heir at law and next of kin. The testatrix died, as stated, January 20, 1908. A question presented to us is, Did this legacy lapse because of the death of the legatee prior to that of the testatrix. The courts below have held that it did not lapse and become a part of the residuary estate, but vested in Isabel Bingham Buckwell.

of such property as shall then remain is not sufficient to show an intention that the heirs shall be ascertained as of the time of distribution. *Childs v. Russell*, 11 Met. 16; *Kenyon's Petition*, 17 R. I. 149, 20 Atl. 24. See also *Clark v. Shawen*, 190 Ill. 47, 60 N. E. 116; *Smith v. Winsor*, 239 Ill. 567, 88 N. E. 482; *Keniston v. Mayhew*, 169 Mass. 166, 47 N. E. 612; *Clark v. Mack*, 161 Mich. 545, 28 L.R.A.(N.S.) 479, 126 N. W. 632.

In *Smith v. Winsor*, 239 Ill. 567, 88 N. E. 482, the fact that a power of disposition given to a life tenant was limited to the right to use the property for her own support, comfort, and enjoyment, or for such charitable purposes as she should deem worthy, was taken into consideration, together with other indications of intention, as showing an intention to exclude the life tenant from the class to whom the remainder was limited.

A direction to devote the income and such of the principal of a testamentary trust as may be necessary for the comfort of a daughter, who was the sole next of kin and heir at law at the time of the death of the testatrix, makes it unreasonable to suppose that such daughter was intended to take under limitation over in the event of the death of any of such daughter's children before becoming twenty-three years old. *Hardy v. Gage*, 66 N. H. 552, 22 Atl. 557.

Where the termination of the life estate is the time fixed for the gift to take effect, then is the time when the members of the class are to be ascertained. *Bisson v. West Shore R. Co.* 143 N. Y. 125, 38 N. E. 104.

Where a power of appointment is given in trust to a life tenant for the benefit of a class, it seems that, in default of such appointment, the persons entitled to an execution of the power are those answering the description at the time of the death of the donee of the power, rather than at testator's death. See *Harding v. Glyn*, 1 Atk. 469, note; *Re Saville*, 14 Week. Rep. 603; *Hoey v. Kenny*, 25 Barb. 396.

But where such a power was given in the event of failure of a prior limitation of the remainder, it has been held that the prop-

erty vested in those who were members of the class at testator's decease. See *Pope v. Whitcombe*, 3 Meriv. 689, 17 Revised Rep. 171, 686.

III. Instances of application of rule.

a. Preliminary statement.

Although, as above stated, the construction of a limitation to heirs, next of kin, etc., is not affected by the circumstance that the gift is contingent (*Bird v. Luckie*, 8 Hare, 301, 14 Jur. 1015; *Tuttle v. Woolworth*, 62 N. J. Eq. 532, 50 Atl. 445), and although it is immaterial whether such a limitation be regarded as an executory devise or a contingent remainder (*Buzby's Appeal*, 61 Pa. 111), the decisions which follow are arranged, for the purpose of facilitating the finding of parallel cases, with regard to the nature of the gift.

b. Where gift is immediate.

In *Rayner v. Mowbray*, 3 Bro. Ch. 234, where testator devised property in trust to permit his wife to receive the rents for her life, and after her decease to sell the same, and then as follows: "To divide and pay the monies arising by virtue of the sale of his said estate to and among all and every such person and persons who shall appear to be related to me only, share and share alike; and that such person or persons shall prove himself, herself, or themselves entitled to the same in six months after my said estates shall be so sold as aforesaid; save and except" a nephew,— it was said that though the distribution was deferred to the death of the wife, that did not prevent the interests from vesting at the death of testator.

In *Masters v. Hooper*, 4 Bro. Ch. 207, testator gave his residuary estate to A for life, then to B for life, "and after his decease, then the rest and residue of my said estate to be divided amongst all by relations, share and share alike." It was held that the relations referred to were not those living at the death of the last taker for life, but that the residue vested, sub-

intention must spring from the will itself. When the doubt exists, the intention must be sought through a scrutiny and study of the provisions of the will and a consideration of the relevant and competent facts and circumstances; and, while judicial rules of construction may be called in aid, they may not frustrate the intention. Neither rules of construction nor the technical sense of words can prevail against the superior force of intention, the ascertainment and declaration of which is the whole province and duty of the court.

At the outset, therefore, the inquiry arises as to whether there arises from the language within the entire will a legitimate doubt as to the intention of the testatrix when she used the word

"heirs." The word has various meanings. It has the primary and correct meaning of designating those on whom the law, immediately on the death of an owner of real estate, casts the estate therein. Under that meaning it relates only to real estate, and describes the persons appointed by law to succeed to it in cases of intestacy. That meaning the courts will give it without question, unless there is in the will itself language or disposition which suggests that the purpose in the mind of the testator is not thereby fulfilled. It has, however, popular or colloquial meanings and with sensitive flexibility yields easily and quickly from its primary, legal meaning in favor of an inconsistent or opposing intention. Applied to the succession of personal es-

ject to the life interests therein, in such of the testator's next of kin as were living at the time of his death.

In *Doe ex dem. Garner v. Lawson*, 3 East. 278, where testator devised property upon trust for his son for life, with remainder to his issue, and in case of his marriage with certain persons or his dying without issue, then to his nephew for life, and after his decease then "for and amongst such person and persons, and to his and their several and respective heirs as tenants in common, and not as joint tenants, as shall appear and can be proved to be my next of kin, in such parts and proportions as they would by virtue of the statute of distributions have been entitled to my personal estate if I had died intestate," it was held that as the persons who would have been entitled to his personal estate if he had died intestate would have been so entitled at the time of his death, the limitation over is to those who were his next of kin at the time of his death, and not at the time when it took effect, notwithstanding the words of description used being in the future, since words to postpone the vesting in possession of an interest are naturally prospective. And it was further held that there was no such inconsistency in the circumstance that an estate for life was given to one who was also entitled to a share of the remainder over in fee, as would get rid of the plain meaning of the words.

In *Collisam v. Sams*, Tamlyn, 346, a bequest upon trust for one during her natural life, "and after her decease upon trust to divide the same unto and amongst the next of kin in due course of administration," was construed as referring to the next of kin at the time of testator's death.

In *Doe ex dem. Pilkington v. Spratt*, 5 Barn. & Ad. 731, 2 Nev. & M. 524, 3 L. J. K. B. N. S. 53, testator devised lands to certain persons or the survivor of them during their natural lives, "and after the decease of all of them, to the male heir at law of me, the said William Spratt, his heirs and assigns forever." It was held that there was nothing to show that the

testator did not mean by the words "male heir at law" what the law would strictly speaking intend, heir male at law at the time of his death, it being only conjectural that testator looked to the period of the actual possession, and not the vesting of the estate in remainder.

In *Boydell v. Golightly*, 14 Sim. 327, 9 Jur. 2, where testator devised his entire estate to trustees, directing them, *inter alia*, to apply such part of the income as they should think sufficient to the maintenance and support during his life of testator's son and heir apparent, with remainder to the first and other sons of such son in tail, with remainder to another person for life, with remainder to the first and other sons of such person in tail, etc., the ultimate limitation being to the testator's own right heirs, it was held that the ultimate trust vested on the testator's death in his son as his heir at law at his death.

In *Jenkins v. Gower*, 2 Colly. Ch. Cas. 537, 10 Jur. 702, where testator directed his trustees to pay the dividends of certain stock to his wife for life, and after her decease to pay over the trust estate as testator might by codicil appoint, and in default of such direction or appointment, then to transfer and make over the same unto such person or persons as would, under and by virtue of the statutes of distribution of intestates' estates, have been entitled to his personal estate in case he had died intestate, it was held that there was nothing in the context, or the circumstance that the widow took for life, to show that the persons entitled to take under the limitation over were to be ascertained at other than the time of testator's own decease.

In *Rawlinson v. Wass*, 9 Hare, 673, 16 Jur. 282, where testator devised his estate in trust for his daughter, who was his sole heir, for life, and from and after her decease to such persons as she should by will appoint, and, in default of such appointment, to testator's heirs and assigns *ex parte materna* as if he had died intestate, and by codicil empowered the trustees to sink any part of the personal estate or

tate, it means next of kin. *Tillman v. Davis*, 95 N. Y. 17, 47 Am. Rep. 1. It not infrequently designates children. *Heath v. Hewitt*, 127 N. Y. 166, 13 L.R.A. 46, 24 Am. St. Rep. 438, 27 N. E. 959; *Livingston v. Greene*, 52 N. Y. 118; *Scott v. Guernsey*, 49 N. Y. 106; *Thurber v. Chambers*, 66 N. Y. 42. Legatees and devisees have been designated by it. *Roland v. Miller*, 100 Pa. 47; *Re Hull*, 30 Misc. 281, 63 N. Y. Supp. 725; *Plummer v. Shepherd*, 94 Md. 466, 51 Atl. 173; *Clark v. Scott*, 67 Pa. 446; *Shapleigh v. Shapleigh*, 69 N. H. 577, 44 Atl. 107; *Greenwood v. Murray*, 28 Minn. 120, 9 N. W. 629. We have, as the intention expressed by the instruments required, given the meaning of issue or descendants. *Re Cramer*, 170 N. Y. 271, 63 N. E. 279; *Snider v. Snider*, 160 N. Y. 151, 54 N. E. 676; *Johnson v. Brasington*, 156 N. Y. 181, 50 N. E. 859; *Taggart v. Murray*, 53 N. Y. 233; *Kiah v. Grenier*, 56 N. Y. 220.

Whenever it reasonably appears that words within a will were not used in their technical sense, but according to a vocabulary of the testator, they are to have the signification he designed for them if the nature of the estate which he meant to create is not prohibited by law. The provisions of the will under consideration indicate that the testatrix did not intend that the operative exercise of the power of appointment given Mrs. Wallace depended upon the survival beyond her life of one or more of her brothers or sisters. The disposition by the testatrix of the estate is

proceeds of the sale of real estate in the purchase of an annuity for the daughter, it was held that the ultimate limitation must be construed as referring to the heir of the testator at the time of his death, so that the daughter was entitled to a conveyance of the estate by the trustees.

In *Gorbell v. Davison*, 18 Beav. 556, where a testator, after creating successive life estates, provided that at the decease of the last tenant for life the principal sum should be equally divided amongst his next of kin, but should no claimant appear after twelve months, that the principal sum should be equally divided amongst certain charitable societies, it was held that the claim being no part of the qualification necessary to constitute the next of kin legatees, the remainder vested in those who were his next of kin at the time of his decease; notwithstanding the fact that the life tenants were such next of kin.

In *Moss v. Dunlop*, Johns. V. C. (Eng.) where a testator devised his estate in trust to convert into money and invest, and out of the dividends and interest to pay a number of annuities, and upon further trust to dispose of any residue of income remaining after paying the annuities and also such sum or sums of money as might become available by reason of the determination of any of the annuities in such manner as testator might appoint, "and failing such appointment, to pay the same to my own next of kin for the time being, equally among them, share and share alike," it was held that there was no such clear, express, and positive necessity for construing the words used as referring to a future time as to overcome the general rule that the words "next of kin" mean next of kin at testator's death, although the effect of such construction was in effect to reduce the words "for the time being" to a nullity, since it is a matter of constant occurrence to find in an instrument more words than are necessary; but that, on the other hand, such construction is supported by the consideration that it would be extremely inconvenient to constitute a fresh class of next of kin, to be ascertained as each of

the annuities fell in, by the absence of such words as "from time to time," in the direction to pay, and the inference from the words "to pay the same" as the whole was to be treated as a single fund, to go all together in one direction.

In *Lee v. Lee*, 1 Drew. & S. 85, 29 L. J. Ch. N. S. 788, 6 Jur. N. S. 621, 8 Week. Rep. 443, where a testator, after giving to his daughter, who was his sole next of kin at the time of his decease, a life estate, gave it after her death upon trust "to divide such residue unto and equally among my next of kin, but exclusive of my said nephew Leonard Lee, and my said nieces Mary Jane Lee and Emma Lee, according to the statute for the distribution of personal estates in case of a party dying intestate," it was held that, aside from the passage excluding the nephew and nieces, it was clear, both upon principle and authority, that the daughter, being the only child and next of kin of the testator at the time of his death, would have been entitled to take under the gift to the next of kin, notwithstanding the previous life estate given to her; neither the words "pay and divide," nor the words "between and amongst," which seem to import a plurality of next of kin, being sufficient to affect that conclusion. And it was further held that while the argument that the express exclusion of persons who would be members of the class if the daughter were excluded is a clear indication of intention that such class should take, would have considerable force if it might be assumed that the testator, when making his will, regarded it as certain that the state of his family would remain precisely the same at his death as at the date of his will, the assumption upon which such argument was based failed in the present case, it appearing that the nephew and nieces whom testator wished to exclude were the children of a brother who was living when the will was made, showing that he had in his mind the possibility of changes taking place in the state of his family by death; and therefore that the exclusion of the nephews and nieces did not afford any sufficient indication of testator's

inconsistent with that intention. She gave sparingly and cautiously to her children. While the value of the estate is not made known by the findings, a very substantial part of it at least passed into the rest, residue, and remainder, of which only one half is given to a child, Mrs. Edson, who had a son, to whom she could give that which she had received. We may with reason and just cause believe that the testatrix did not intend to compel Mrs. Wallace to hand over or distribute her estate to those from whom she herself had withheld it. A careful reading of the provisions in favor of all the sons and daughters, except Mrs. Edson, is persuasive to the conclusion that she anxiously intended that an important part of her estate should not

pass under the ownership, with its power to lose, spend, and squander, of her children, but should be preserved for the next generation at least. This conclusion is aided by the fact that she gave by the will to three of her grandchildren, *viz.*, the son of Mrs. Smith and two married daughters of Charles. The findings of the referee establish the fact that Mrs. Wallace had no children, and that there are three other grandchildren, one of whom is the son of Mrs. Edson, and two, Madelaine Diehl and Theodore Diehl, are the children of Charles. The will shows the testatrix desired that her property should be deemed a general provision for the family, and that as such the one-half should be dispensed within the family by Mrs. Wallace. Another fact

intention to exclude his daughter from taking under the gift to the next of kin.

In *Thompson v. Smith*, 27 Can. S. C. 628, a will by which testator, after giving his wife and daughter, who was his only child, an estate during their joint lives and the life of the survivor, provided: "I do further will and desire that at the decease of both the said Lissy Thompson and Mary Anna Thompson, the said residue of my real and personal property shall be enjoyed and go to the benefit of my lawful heirs," was construed, in accordance with the rule established in *Bullock v. Downes*, 9 H. L. Cas. 1, as ultimately limiting the property to those who were testator's heirs at the time of his death.

In *Rees v. Fraser*, 25 Grant, Ch. (U. C.) 253, a gift of testator's residuary estate to his wife, "and, on her decease, the same to go [*sic.*] my heirs and next of kin," was construed as limiting the property to persons answering the description at the death of the testator.

In *Johnson v. Webber*, 65 Conn. 501, 33 Atl. 506, where a testatrix, after creating a trust for the benefit of her granddaughters for life, and certain other trusts, provided, "and should there, upon the ending of all the trusts herein, remain anything not by preceding provisions finally and fully disposed of, I give, bequeath, and devise the same to my heirs at law," it was held that persons taking thereunder were the heirs at law of the testatrix upon her decease, since, had she desired such property to go to such persons as might be her heirs at law at the final termination of the trusts, she would naturally have used in describing them, language somewhat similar in character to that used by her in another provision in which property was limited at the expiration of a trust estate therein to her "then lineal descendants."

In *Doe ex dem. Wright v. Gooden*, 6 Houst. (Del.) 397, where testator, after devising various parcels of real estate to each of his sons for life, and at their decease to his daughters for life, added, "and at the death of my said daughters, I give

my beforementioned lands to my heirs forever," it was held, in view of the disinclination of the law toward a construction which postpones vesting, and the fact that the result would be in the end to equalize the division of the estate among his children, that the remainder vested in such persons as were testator's heirs at law at the time of his own death, not such as should become his heirs at law on the death of the last surviving life tenant.

In *Clark v. Shawen*, 190 Ill. 47, 60 N. E. 116, testator, after giving his wife the use of his entire estate for life, directed that after her death it be divided "as hereinafter mentioned;" and, after making certain bequests to his various relatives, directed: "I will that the residue of my estate, if there be any left, be divided according to the statute of the state of Illinois amongst all of my heirs except those above named that I have excluded." It was held that futurity not being annexed to the substance of the gift, and there being nothing in the will to indicate that testator intended to refer to those who should be his heirs at any period subsequent to his death, but, on the other hand (as manifested by the excluding clause), that he evidently had in mind those who should be his heirs at the time of his death, and not those who should be his heirs at some future time, when his wife should die, the property devised by the residuary clause vested in those who were heirs of the testator at the time of his death, except such as were excluded by the express terms of the will.

In *Mosier v. Bowser*, 226 Ill. 46, 80 N. E. 730, where a testator limited a remainder after a life estate to relations of himself and his wife "according to their heirship," it was held that the heirs of the testator were determined as of the time of his death.

In *Smith v. Winsor*, 239 Ill. 567, 88 N. E. 482, testator gave to his wife, in case she should survive him, his entire estate for life, with full power to sell and convey and to use the proceeds or any part thereof in any way she should desire for her com-

points to the conclusion that the testatrix did not in the eleventh paragraph use the word "heirs" in its technical significance. Paragraph twelfth is: "Twelfth: Any real or personal property remaining undisposed of by this my will, or to which my sons Thomas and Charles or either of them for any reason might otherwise, as heir at law or next of kin, become entitled, whether under the laws of the state of New York or any other state, shall vest in my said executors in place of my said sons, and shall be converted by my said executors into cash, and my executors are instructed to use the same for the purchase of annuities for each of my said sons Thomas and Charles." The third and only additional use in the will of the word is in the thirteenth paragraph,

for or advantage, or for such charitable purposes as she should deem worthy, adding, "at and upon her death, the remainder of the said estate, if any, to descend to my heirs at law in proportion as designated and provided by statutes of the state of Illinois." He further provided that his wife should not be held accountable for the use or disposition of such estate or any part thereof, or the proceeds arising from any sale thereof. In case his wife should not survive him, he directed that his estate should descend to his heirs at law. It was held that the will evinced a clear intention that the persons whom the testator designated by the words "my heirs at law" should take a vested remainder in all his property, subject, however, to be defeated by the exercise of the power of disposition possessed by the widow.

In *Bunting v. Speck*, 41 Kan. 424, 3 L.R.A. 690, 21 Pac. 288, where a will provided, "I give to my wife . . . all my estate, real and personal, to have and to hold during her lifetime, and then they are to descend to my legal heirs," it was held that although the language used was not free from ambiguity, the word "then" did not fix the time when the remainder should vest at the death of the life tenant, but that it vested at the death of the testator.

In *Weil v. King*, 31 Ky. L. Rep. 1010, 104 S. W. 380, where testator, after giving his wife certain property for life, provided that at her death it should "be equally divided between my heirs *per stirpes*," it was held that the remainder vested in those who were testator's heirs at the time of his death.

In *Merrill v. Wooster*, 99 Me. 460, 59 Atl. 596, it is said that even if the legal title to a fund set apart by executors for the purpose of paying an annuity had been held by trustees expressly appointed, in trust for the life of the annuitant, a gift of the residuary estate to be divided equally between testator's heirs would be construed as a gift to those who were the heirs of the testator at the time of his death.

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which forfeits the benefit or share of any of her "heirs" who shall legally dispute or contest any of the provisions of the will. The manifest purpose of the testatrix in the twelfth paragraph required that the status of Thomas and Charles against which she was providing should be accurately expressed. If she were in the eleventh or thirteenth paragraph designating only those of that identical status of heir at law or next of kin, she would have used the identical expressions. *Bundy v. Bundy*, 38 N. Y. 410, 422. It is probable rather than improbable from the thirteenth paragraph, considered by itself, that the testatrix intended the forfeiture therein prescribed to apply to all persons benefited by the will who might legally contest it. Inasmuch as the

In *Crisp v. Crisp*, 61 Md. 149, a devise in trust for the benefit of testator's wife during her natural life, which at her death was to "go to and become the property and estate of such person or persons as would, by the now-existing laws of the state of Maryland, be entitled to take an estate in fee simple in lands by descent from me, and the heirs, executors, and administrators of such person or persons, *per stirpes*, and not *per capita*," was, in view of the general rule that the law favors the vesting of estates, and the fact that there was nothing in the language of the will or the surrounding circumstances to indicate that the testator intended to fix on any future period for the vesting of the gift, construed as having reference to those who were testator's heirs at the time of his death,—especially as, by the residuary clause of his will, testator gave the residue "to be divided among my legal heirs, under the laws of the state of Maryland, in the same way that it would without a will."

In *Childs v. Russell*, 11 Met. 16, a provision by which the testator directed his executor to invest his residuary estate to raise a fund out of which an annuity given to his wife should be paid during her natural life, "and after her decease, should she survive me, I will and order that all the rest, residue, and remainder of my estate, real, personal, or mixed, and of whatsoever name or nature, shall be divided among my heirs according to law, excepting the share which will by law descend to my daughter," which share was directed to be held in trust for her during her lifetime, and at her decease to be equally divided among her children,—was construed as vesting a right to the distributive shares in those who were testator's heirs at the time of his death; the court emphasizing the fact that while the estate was to remain in the hands of the executor, *qua* executor, for distribution, charged with the payment of the annuity, it was the subject of the bequest, so that it was to be regarded as an immediate gift, the time for payment of which only being postponed. The court further rejected the argument that inas-

will raises a doubt as to the intention of the testatrix, and, for the reasons stated, fair grounds for holding that she intended that Mrs. Wallace should be free to select from the family the beneficiaries under her will, aid in reaching the correct conclusion may be sought in the established rules of construction. Such a rule is, the courts will with alacrity and satisfaction lay hold of slight expressions as a ground for avoiding a construction or decision which excludes the issue of a deceased child from participation in a general family provision. *Re Paton*, 111 N. Y. 480, 18 N. E. 625. It is apparent from the will that the general purpose of the testatrix was to include her grandchildren in the distributees of her estate, and, the will permitting, we reach the

conclusion, in accord with that purpose, that Mrs. Wallace may, in fulfilment of the intention of the testatrix, exercise the power of appointment for the benefit of any descendants of the testatrix.

Second. Did the legacy to Marguerite Wetherill Buckwell lapse by reason of her death prior to that of the testatrix? It is argued in the negative that the words "and I hereby give and bequeath such sum of five thousand dollars to her" effect a gift or legacy, absolute, and unaffected by the preceding words of the paragraph, upon the principle that when two clauses in a will are irreconcilable, so that they cannot possibly stand together, the one which is posterior in position shall be considered as indicating a subsequent intention, and pre-

much as the annuity was to be paid from the fund, and not from the income, so that it might happen that the whole fund would be exhausted, such provision rendered the gift of the residue contingent, so as to postpone the vesting to the happening of the event.

In *Brown v. Lawrence*, 3 Cush. 390, where a testator revoked by codicil a devise to a son and his heirs, and gave him in lieu thereof a life interest in the real and personal property theretofore devised to him, "so that no more than the income, interest, or rent of any portion of my real or personal estate, and not the principal of said personal or fee of said real estate, may come to the said Samuel, my son, which, at his decease, it is my will that the said real and personal estate shall then go to the legal heirs," it was held that the heirs referred to were those of testator himself, and were ascertained at the moment and by the event of the testator's decease.

In *Abbott v. Bradstreet*, 3 Allen, 587, it was held that no contrary intention can be found in the fact that those to whom a life estate is given are among testator's heirs at law, or that a bequest is given to another heir at law in full of any share to which such person may be entitled out of the estate, which will preclude a bequest of a fund at the decease of testator's last surviving child, "to go and descend to my heirs at law," from being construed as referring to those who are heirs at the time of the testator's decease; but that, on the other hand, the testator's use of the words "go and descend" strengthens such construction.

There is nothing in a testamentary provision by which, after devising the residue of his real estate to his daughters and the survivor of them until death or marriage, testator continued: "After the marriage or death of my surviving daughter taking under this item, the estate herein devised shall descend to those persons who may then be entitled to take the same as my heirs," to preclude the application of the rule that a devise to heirs is ordinarily understood to refer to those who are

such at the time of testator's death, as the word "then" is not inserted by way of description of the persons who are to take, the word "surviving" not being superadded, but by way of defining the time when they shall come into the enjoyment of that which is devised to them; and the application of such rule is fortified by the use of the word "descend," which ordinarily denotes the vesting of the estate by operation of law in the heirs immediately upon the death of the ancestor. *Dove v. Torr*, 128 Mass. 38.

The construction of a testamentary provision by which testator, after creating an estate for life in his residuary estate, gave and bequeathed such residue after the death of the life tenant "to my legal heirs as the law provides, other than those hereinbefore mentioned," resulting from the application of the rule which considers the persons referred to as heirs as those who were such at the time of the testator's decease, is fortified by the circumstance that the latter part of the clause quoted excludes the tenant for life, which would be superfluous if the vesting of the remainder were postponed until her death. *Minot v. Harris*, 132 Mass. 528.

There is nothing to preclude the operation of the established principle that when a bequest is made to one or more for life, and remainder to the testator's heirs, the bequest is to those who are the heirs at the time of his decease, unless there are words indicating a clear intention that it shall go to those who may be in that relation at the happening of the contingency upon which the estate is to be distributed, in a testamentary provision by which a testator in a will not drawn by a lawyer directed his executors to pay the income from his residuary estate to his wife during her life, "and at her decease to divide the principal thereof equally between my blood relations of the degree which the law permits." *Cummings v. Cummings*, 146 Mass. 501, 16 N. E. 401.

In *Keniston v. Mayhew*, 169 Mass. 166, 47 N. E. 612, it was held, construing a bequest by which a sister was given the re-

will, unless the general scope of the will leads to a contrary conclusion; and, as a second step in the argument, the statute (2 Rev. Stat. 2d ed. pt. 2, chap. 6, title 1, § 52) providing that whenever a testator gives a legacy to a child who dies during the lifetime of the testator, leaving a child who survives the testator, the legacy shall not lapse, but shall vest in the surviving child is invoked. This position cannot be maintained. The language of the codicil clearly and plainly expresses the intention that the bequest should become effective only in case the legatee survived the testator. The words above quoted are not a clause or a bequest independent of the words immediately preceding them.

There are not, within the principle in-

voluntary estate during her lifetime, with power of disposition, "at her decease to go to my nearest of kin," that the nearest of kin should be determined as of the death of the testatrix, and not as of the death of the life tenant, although such life tenant was one of the next of kin.

In *Pierce v. Knight*, 182 Mass. 72, 64 N. E. 692, where testator directed whenever the income of the estate should exceed the annuities directed to be paid, such surplus should be divided by his executors and trustees "among my heirs at law in such way and in such proportion as may seem to them most in accordance with my wishes, devoting the sum or sums in preference to the purchase of land and homestead for the young married persons among my heirs," it was held that although there were among the persons who were the testator's presumptive heirs when he used this language, and who became his heirs at his death, none who could be called young married persons, this did not make it reasonably certain that the testator did not use the phrase "my heirs at law" and "my heirs" in their usual sense, where, when the provision was written, he had a nephew of twenty-nine who had been married but a few months, a niece of twenty-nine who had been married but a few days, and another niece who had been married five years, and his brothers and sisters had other marriageable children, so that a death of a brother or sister before that of testator would place among his heirs persons who would answer to the description.

In *WELCH v. BLANCHARD*, the general rule was held to apply to a provision whereby testator gave one sixth of the residue of his estate to his son outright, and five sixths thereof to trustees to pay the income thereof to all his daughters in equal shares, and to the issue of any deceased daughter (such issue taking their mother's share), adding, "after the decease of the survivor of my daughters, the trust fund created by this item shall be distributed to those persons who may then take the same as my heirs;" notwithstanding the fact that the gift over was made only by

invoked, two disposing clauses. The paragraph is free from contradictory or inconsistent parts and constitutes one disposition. So clear is this that it is enunciation rather than construction to say that the testatrix, fearing that the direction to the executors to pay, in case Mrs. Buckwell survived, was not a complete testamentary giving, added the words quoted, which were inoperative unless the payment, depending upon the survivorship, was made. The five thousand dollars was not bequeathed to Mrs. Buckwell within the meaning of the statute (2 Rev. Stat. § 52), which, therefore, has no application. The courts below erred in holding that the legacy did not lapse.

As to the other questions presented, we

a direction to distribute, where the scheme of the will was to create life estates in five different funds, and as the life estate or last life estate in each fund came to an end, the principal of that fund was to pass to or be distributed among testator's heirs, as it is hardly conceivable that the testator should have intended that these several gifts over to heirs should be to three or four or possibly five sets of different hypothetical heirs.

There is nothing in the testamentary provision by which a testatrix gave all her estate to her sisters, to be used and controlled by them until the death of the survivor, "when, if anything remains, it shall then be divided among the nearest of kin," to take the case out of the general rule that the death of the person whose next of kin is mentioned determined the membership of the class, in the absence of provision to the contrary. *Clark v. Mack*, 161 Mich. 545, 28 L.R.A.(N.S.) 479, 126 N. W. 632.

In *McDaniel v. Allen*, 64 Miss. 417, 1 So. 356, where a testator gave his residuary estate to his wife "during the term of her natural life, and upon her death to be divided equally among the heirs of my body," it was held, in accordance with the principle that no remainder will be construed to be contingent which may, consistently with intention, be deemed vested, that the remainder, limited by the testator to his heirs at law was vested, and not contingent; and therefore that those who were alive at his death took the estate, and not those only who survived the tenant for life.

In *Smith v. Allen*, 32 App. Div. 374, 53 N. Y. Supp. 114, where a testator gave his residuary estate to his wife during widowhood, and upon her death or marriage to "such person or persons as would be legally entitled to succeed to and inherit the same in case I died intestate," it was held that the gift being direct and immediate, and not merely by a direction to distribute and divide at the termination of a precedent estate, the intention of the testator was to create a vested remainder, to take effect

concur in the conclusions of the Appellate Division.

That part of the interlocutory and final judgments adjudging that the legacy of \$5,000 bequeathed to Marguerite Wetherill Buckwell does not lapse and form a part of the residuary estate of Margaretta M. Diehl, but that said legacy vested in the surviving child of Marguerite Wetherill Buckwell, the defendant Isabel Bingham Buckwell, and that additional part of the final judgment adjudging that the plaintiffs pay to the guardian of the person and property of the defendant Isabel Bingham Buckwell, after security given, the sum of \$4,-

500, together with the interest or income on the sum of \$5,000 from the 13th day of April, 1909, and that the plaintiffs pay to Frederick A. Drake, Esq., guardian *ad litem* for the infant defendant Isabel Bingham Buckwell, the sum of \$500 heretofore allowed to him as guardian *ad litem* out of the said Isabel Bingham Buckwell's share or portion of the estate, should be reversed. In all other respects said judgments should be affirmed, with costs to the plaintiffs and to the respondent Lillian Purcell, to be paid out of the estate.

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at the time of his death, although the enjoyment by the legatees was to be postponed until the widow should remarry or die.

In affirming this decision in 161 N. Y. 478, 55 N. E. 1056, the court of appeals said: "There can be no doubt as to the intention of the testator. Were there persons in being at his death who were entitled to the estate on the termination of the life estate of the widow? Under the will he gave, devised, and bequeathed 'to such person or persons who would be legally entitled to succeed to and inherit the same in case he died intestate, and to their heirs, executors, administrators, and assigns forever.' Who would inherit in case he had died intestate? Surely his heirs at law and next of kin then in being. He not only gave the remainder to them, but he gave it to their heirs, executors, administrators, and assigns. This clearly constituted a vested remainder under the statute."

In *Rives v. Frizzle*, 43 N. C. (8 Ired. Eq.) 237, where testator gave certain personal property to his wife for life, and provided that after her death it should "be equally divided between by lawful heirs," except a share given in trust for a daughter, who was excluded from taking any other share, it was held that the limitation not being to such persons "as may be my heirs at the death of my wife," but to "my lawful heirs" *simpliciter*, it imports those who were the heirs at the testator's death, who took in right then, though they were not to take in possession until the termination of the life estate.

In *Walker v. Dunshee*, 38 Pa. 430, a devise to testator's three children in tail, with cross remainders in tail, remainder to his right heirs and to the right heirs of his wife as tenants in common, forever, was construed as vesting the remainder on testator's death in the next of kin of himself and his wife, after excluding their children.

In *McCrea's Estate*, 5 Pa. Dist. R. 448, a bequest of a sum of money in trust to pay the income to testator's wife for life, and then to his sisters or the survivor of them, "and at the death of my said wife and sisters to pay over the same to my right heirs." was construed as referring to

the heirs of the testator living at the date of his death.

In *Kenyon's Petition*, 17 R. I. 149, 20 Atl. 294, it was held that no contrary intention which would preclude the application of the rule was manifest in a will by which a testator gave the residue of his estate to a trustee, to have and to hold for and during the natural life of testator's son, in trust for such son, with power to sell, mortgage, or lease the same with the son's written consent for the purpose of paying off encumbrances, making repairs, improving the investment, or, should the income prove insufficient, for the purpose of raising money for the necessary support or the advancement of the son; and further provided: "After the decease of said [son] I give and bequeath all the property affected by the above trust which should then remain to my own right heirs;" notwithstanding the circumstance of the giving of the power of disposal to the trustee, the fact that the son was testator's sole heir at the time of his death, and the fact that the limitation over was of such property as should remain.

In *Tucker v. Tucker*, 63 Vt. 104, 25 Am. St. Rep. 743, 21 Atl. 272, where a testator, after giving his sister the use and occupancy of the residue of his estate during her natural life, directed that it should be distributed at her decease among his lawful heirs, it was held that, as no estate will be held contingent unless very decided terms are used in the will, or it is necessary to so hold it in order to carry out the other provisions or implications of the will, the words "amongst my lawful heirs" had reference to those persons who were the lawful heirs of testator at the time of his death, and not those who might be such at the time of the death of the life tenant.

In *Jones v. Knappen*, 63 Vt. 391, 14 L.R.A. 293, 22 Atl. 630, where a testator, after giving his wife the use and income of his estate during her natural life, continued: "At her decease I give, devise, and bequeath all my estate that may be remaining, as follows," giving certain sums to individual legatees, and the residue to the next of kin of himself and his wife, one half to the next of kin of each, to be distributed according to the law of intestate

concur with Cullen, Ch. J., Gray, J., concurs with Collin, J.

Judgment of Appellate Division and that Special Term modified, first, so that, instead of declaring that the power of appointment given by the eleventh paragraph of the testator's will may be effectually exercised for the benefit of any issue or descendants of Margaretta M. Diehl, it be adjudged and declared that it may be exercised for the benefit of any of the heirs of said Margaretta M. Diehl, such heirs to be ascertained at the death of the donee of the power, Margaretta Wetherill Wal-

lace; second, that, instead of adjudging that the legacy of \$5,000 bequeathed to Marguerite Wetherill Buckwell did not lapse, it be adjudged and declared that said legacy did lapse and fall into and become part of the residuary estate of Margaretta M. Diehl; and the direction that the legacy be paid to the guardian of the person and property of defendant Isabel Bingham Buckwell, and Frederick A. Drake, guardian *ad litem*, is reversed; and, as modified, the said judgments are affirmed, with costs to all parties who have appeared and filed briefs in this court, payable out of the estate.

states, it was held that the language used being as consistent with an intention to postpone the enjoyment only as to postpone the vesting of the remainder, his next of kin took a vested interest at the time of his death.

c. Where gift is contingent on future event.

1. Remainders.

In *Harrington v. Harte*, 1 Cox, Ch. Cas. 131, where testatrix gave a fund after the death of her daughter to such persons as the daughter should appoint, and in default of such appointment, to such persons as should then, by virtue of the statute of distributions of intestates' estates, be entitled to testatrix's personal estate in case she had died intestate, the question was raised whether the funds should go to such persons as were next of kin to the testatrix at the time of her death, or such as were so at the death of the first taker; but counsel gave up the point, and admitted that the word "then" was to be taken as an adverb of relation, and not of time, and that the fund must therefore go to such persons as were next of kin at the time of testatrix's death.

In *Holloway v. Holloway*, 5 Ves. Jr. 399, where a testator gave property upon trust for a daughter for life, and after her decease to pay the principal unto such child or children as she should leave at the time of her decease, in such shares and proportions as she should think proper to give the same, further providing, "and in case she shall die leaving no child, then as to £1,000 out of the said £5,000 in trust for the executors, administrators, or assigns of my said daughter Hindes, and as to the £4,000 remainder of the said £5,000 in trust for such person or persons as shall be my heir or heirs at law,"—it was held that neither the language of the will nor the circumstances that the daughter would take as an heir was sufficient to give the words any other than their *prima facie* construction; heirs at law at testator's own death.

In *Pope v. Whitcombe*, 3 Meriv. 689, 17 Revised Rep. 171, 686, where testator gave the residue of his estate to his wife for life, with remainder to his son if he should

attain twenty-one, but in case of his son's death before twenty-one and without issue, directed his wife to dispose thereof among his, the testator's, relations in such manner as she should think fit, it was held that the property vested in those who were the testator's next of kin at the time of his death, though in uncertain proportions.

In *Lasbury v. Newport*, 9 Beav. 376, where testator, after giving each of his two daughters life estates, with remainder to their children, directed that, in default of children, the trustees should stand seised and possessed in trust for his next of kin under and according to the statute of distribution of estates and effects of persons dying intestate, the whole thereof to be considered as personal, and not as real estate, it was held that there being no reference to anything future, the daughters, who were his only children, and sole next of kin at his death, took under the ultimate limitation.

In *Urquhart v. Urquhart*, 13 Sim. 613, 8 Jur. 161, where testator directed one half of the income from his residuary estate to be paid to his daughter, who was his nearest of kin at his death, and the other half to his wife, during their joint lives; and that if his daughter survived her mother, or married and left issue, then that the whole of the capital should be paid to her after his wife's death; but if she died first, without marrying or leaving issue, then that the trustees should accumulate the interest of the residue, so far as it was not directed to be paid to his wife; and that on her death one half of the principal should be divided amongst his nearest of kin; it was held the words "nearest of kin" must be given their ordinary meaning, as referring to those who were such at testator's death, unless it should appear on the face of the will that he meant to use them in a different sense; that neither the previous provision for the daughter, who was his nearest of kin at his death, nor the direction for the accumulation of her moiety during the life of his wife, nor the fact that the phraseology used was applicable to a plurality of persons, and not to a single individual, was enough to show that testator did not mean those who should be his nearest of kin at the time of his death.

In *Wrightson v. Macaulay*, 14 Mees. & W. 214, 15 L. J. Exch. N. S. 121, where a testator devised property to his son and heir at law for life, remainder to his first and other sons in tail, remainder to his daughters in fee, and upon default of issue, then upon certain other limitation, the ultimate limitation being to the use of the testator's own right heirs being of the name of Heber, and his heir, and their heirs and assigns forever, it was held that the estate vested at the death of the testator in his son and heir at law, and not at a subsequent period, in accordance with the rule of law that estates should be construed to vest at the earliest possible period.

In *Nicholson v. Wilson*, 14 Sim. 549, where a testator bequeathed a sum of money in trust for a daughter for life, and from and immediately after her decease to such of his children as should be living at that time, "and if all my said children shall be then dead, then I give and bequeath the same unto my personal representative or representatives, and do direct my said trustees and the survivor of them, his executors and administrators, to transfer the same accordingly," it was held that, notwithstanding the use of the word "then," the ultimate beneficiaries were to be determined as of the time of his death, and not as of the time of the death of the life tenant.

In *Ware v. Rowland*, 2 Phill. Ch. 635, 17 L. J. Ch. N. S. 147, 12 Jur. 165, a testator, after creating a trust, subject to an annuity to his wife, for his daughter, who was his only surviving child at the date of his will, and his sole heiress at law and next of kin at the time of his death, during her life, and after her death to distribute the principal among his daughter's children, further directed that, in the event of failure of the preceding limitations, the trustee should sell the principal fund and pay certain legacies, if the legatees should severally be alive at that time, adding: "And all the rest and residue of the said principal fund, with interest and dividends, I give and bequeath to and amongst my heirs at law, share and share alike." It was held that the word "then" referred to the event, and not to the time; and that the ultimate limitation was to be determined as of the time of testator's death, notwithstanding the use of the plural in the phrase "my heirs at law, share and share alike;" the solution of the apparent inconsistency being found in the fact that the testator would naturally use such terms with respect to an event which might not take place until some distant period, when it would be uncertain who would stand in the place of such heirs, or the fact that he might have contemplated the possibility of his daughter's death in his own lifetime.

In *Baker v. Gibson*, 12 Beav. 101, it was held, construing the provisions of a will by which a testatrix, having three daughters, gave one third to each for life, with remainder to their children respectively, with

cross remainders between them, and ultimate limitation to her own "next of kin and legal personal representatives," that it was firmly settled that the class was to be ascertained at the death of testator, and not at the death of the tenant for life.

In *Bird v. Luckie*, 8 Hare, 301, 14 Jur. 1015, a testator devised his estate upon trust for the benefit of his grandson for life, with remainder to his issue upon attaining twenty-one or marrying, and in case the grandson should die under the age of twenty-one without lawful issue, then upon trust to pay and apply the surplus rents and profits, after the payment of certain annuities, unto and amongst testator's next of kin in such proportions and manner as provided by the statute of distributions until the death of the last of the annuitants, and, upon failure of the preceding limitations over, to divide the estate upon the death of the last of the annuitants unto and among testator's said next of kin in the proportions and manner aforesaid. The grandson was the next of kin of the testator at the time of making his will, and at his death. It was held that the context of the will contained nothing varying the construction by which the next of kin meant is the person or persons answering the description at the time of testator's death, the mere circumstance that the gift was not immediate, but was contingent upon a future event, not being sufficient to render the description applicable only to such person or persons as should happen to form the class at the time of the occurrence of the event; and it was further held that there was nothing in the extrinsic circumstance that the grandson was the only living descendant of testator, who was a widower, and had collateral kinsmen who were well known to him, to warrant a different construction, although the effect was to take the bulk of the property out of testator's family, and give it to the father of the grandson; that the argument that such construction was to allow in effect no operation to the gift to the next of kin, as the testator was when he made his will, and remained, a widower, while of weight in some cases, was of no force as applied to the will under consideration; and that the reference in the will to a plurality or possible plurality of persons as the testator's next of kin made no difference, as the testator might have contemplated the possibility of the grandson's death in his own lifetime.

In *Re Barber*, 1 Smale & G. 118, where testator, after bequeathing his personal estate upon trust to pay the income therefrom to three several persons, one of whom was his sole next of kin at the time of his death, during their lives and the life of the survivor, and after the decease of the survivor to pay the principal to the children of one of them upon their attaining the age of twenty-one, further provided that, in default of such children, "then the said trust moneys shall go to and be divided among all and every of my next of kin-

dred who shall be in equal degree, and those who shall legally represent them, according to the statute of distribution of intestates' effects in case I had died possessed thereof and intestate," it was held that there was nothing on the face of the will to induce the court to give the words "next of kindred" any other than their natural construction, as meaning those who were such at the death of testator, notwithstanding the fact that his sole next of kin at such time was the object of a distinct provision, or the fact that testator used the plural number, as it is possible that, though he knew that at the date of his will he had but one next of kin, he might have supposed that, at the time of his decease, he might have several.

In *Cable v. Cable*, 16 Beav. 507, testator gave his residuary estate in trust for his wife for life, remainder to his children, living at his decease, but in case he should have no child at his death, then and in such case he directed that the trust fund should, from and immediately after his wife's decease, become the property of the person or persons who should then become entitled to take out administration on his effects as his personal representative or representatives, according to the provision of the statute of distribution of intestates' effects, and in the proportion pointed out by the said statute, in case he had died intestate and unmarried. It was held that the word "then" must be construed as relating to the event, and not the time of distribution; and that the ultimate limitation was to those who were next of kin at the death of testator, and not at the death of the life tenant; since there is always the difficulty in fixing the death of the tenant for life as the period at which the next of kin of a testator are to be determined, that the words "if the testator had died then" must be introduced; and since the latter construction would produce a contradiction between the members of the sentence, as in that case the fund could not be divided in the same proportions as directed by the statute; that the word "unmarried" strengthens the construction, as it seems introduced to exclude the widow, who was otherwise provided for, and would, but for this, be entitled under the statute at the death of the testator, but not at her own death.

In *Markham v. Ivatt*, 20 Beav. 579, a testamentary provision by which a leasehold was bequeathed upon trust for testatrix's daughter, who was her sole next of kin, and to convey it as she should by deed or will appoint, and, in default of such appointment, then upon further trust to dispose thereof to and amongst the nearest kindred of testatrix precisely in the manner directed by statute made for distribution of intestate's effects, was construed as a gift to those who were next of kin at the time of the testatrix's death.

In *Starr v. Newberry*, 23 Beav. 436, where testator gave the residue of his personal estate in trust for his wife, and on

her death or marriage in trust for his children during minority, and to them absolutely upon attaining the age of twenty-one, and upon failure of such limitations, to pay such trust moneys "to such person and persons as might be legally entitled to the same under the statute of distributions," it was held that there was a clear and distinct expression that, in the event stated, testator intended the property to go as if he had died intestate; and therefore that the class was to be ascertained at the time of his death, and not the death of his only child.

In *Bullock v. Downes*, 9 H. L. Cas. 1, testator left his residuary estate in trust to pay the dividends to his son for life, and after the son's decease to pay any widow of the son an annuity, and the residue to his son's children, and in case there should not be any child of the son, "then to stand possessed of the same in trust for such person or persons of the blood of me as would, by virtue of the statutes of distributions of intestate's effects, have become and been then entitled thereto in case I had died intestate." It was held that neither the consideration that the son was himself one of the next of kin, nor the use of the words "then entitled," as describing the person to take in the event of the son dying without issue, was sufficient to affect the general rule of construction that the next of kin referred to are prima facie those at testator's death, and not those who may happen to answer that description at the termination of the preceding particular interests.

In *Re Lang*, 9 Week. Rep. 589, 4 L. T. N. S. 577, a testator gave property to his daughter for life, with remainder to her issue, and if there should be no child of the daughter who should attain twenty-one or leave issue, then "unto my own personal representatives and next of kin forever, to be assigned, distributed, and paid according to the statute of distributions." At the date of the will and of the testator's death the daughter was his sole next of kin. It was held there was no indication of a gift to a class living at the death of the daughter, rather than an intention that the property was to go as in case of intestacy, and that although it was not to be supposed that the testator intended to designate his daughter by such a periphrasis, such fact was not inconsistent with an intent to leave the law to take its effect.

In *Royds v. Royds*, 1 New Reports, 516, 8 L. T. N. S. 199, where the bequest was to testator's daughter for life, remainder to her children, and in default of such children or their issue, "then to pay the same according to the statutes of distribution of intestates' effects," it was held that the next of kin at the time of testator's death were clearly entitled; and that it was not an inconsistency that the testator might have meant that his next of kin should participate in a particular portion of his estate, although he had left a residu-

ary legatee who might probably have taken a large share of that estate.

In *Michell v. Bridges*, 13 Week. Rep. 200, testator gave his real and personal estate upon trust for his wife for life and after her decease for his daughter for life, and for her husband and children, and in case the daughter should die without lawful issue attaining the age of twenty-one, directed that the personal estate should be in trust "for the person or persons who, under the statutes made for the distribution of the estates of intestates, would then be entitled thereto if I were to die possessed thereof and intestate, and to be divided between or among them, if more than one, in the shares in which the same would be divisible under the same statute." It was held that, with respect to the words "if I were to die," they were an hypothesis not as to death only, but as to death under particular circumstances; that the case was governed by *Bullock v. Downes*, *supra*, and the persons entitled to take were the next of kin at the death of testator.

In *Mortimore v. Mortimore*, L. R. 4 App. Cas. 448 (which affirms L. R. 7 Ch. Div. 322, 47 L. J. Ch. N. S. 134, 37 L. T. N. S. 520, 26 Week. Rep. 134), testator created trusts for each of his daughters for life, remainder to the children of each after her decease, and in case any should die without leaving issue her surviving, then to the survivor or survivors for life, and from and immediately after the decease of the last surviving daughter, to pay and divide the principal among her children, "and if there shall be no such children, that the sum be paid to such person or persons as will then be entitled to receive the same as my next of kin under the statute for the distribution of intestates' estates." The testator's daughters were his sole next of kin at the time of his death. It was held that the case was governed by the decision in *Bullock v. Downes*, *supra*; that even though the word "then" be regarded as meaning at the expiration of the preceding limitation, it simply has reference to the time of ascertaining the members of the class, and not the time as of which such membership is to be determined; and that the phrase "my next of kin under the statute for the distribution of intestates' estates" describes the class which, according to the statute, must be ascertained at the death of the testator.

In *Re Ford*, 72 L. T. N. S. 5, testator devised various parcels of his real estate upon trust for divers of his children for life, remainder to the children or child of each, who, being a son or sons, should attain twenty-one, or, being a daughter or daughters, should attain that age or marry, and in default of issue, to the others of testator's children successively for their lives, and for their respective children, and if all the testator's children should die without leaving issue who should acquire a vested interest, then in trust for testator's own right heirs according to the na-

ture of the said property. The will contained a declaration that it should not be lawful for any son or daughter to sell or encumber his or her life interest, and that if any of them should so sell or encumber the interest should thereupon cease and be held in trust for his or her brother and sisters and his or her issue as if he or she had died. It was held that neither the absence of a reference to the statute concerning distributions, nor the provision against alienation or encumbrance of the respective life estates, was a sufficient reason for departing from the general rule that membership in a class is to be ascertained at the time of testator's death, and not at the period of distribution, even though the persons who thus become entitled under the ultimate limitation take particular interests under the will.

In *Re Frith*, 85 L. T. N. S. 455, it was held that there was nothing to make the case an exception to the general rule that the heir means the heir of testator at the time of his death, in a will by which a testator, after giving his eldest son (who was his heir at law) a life estate in certain property, directed that when his son's children should have all departed this life, then that such property should be sold and the proceeds equally divided "among my then surviving grandchildren, share and share alike, and in case no grandchildren of mine be then living, it shall become the property of the heir at law."

The time for ascertaining the persons to whom a trust fund is ultimately limited by a will which gives a life interest to testator's nephew and certain contingent interests to the children or issue of the nephew on their attaining twenty-one, or, in the case of daughters, marrying, and declares that if no child or other issue of the nephew shall ever attain a vested interest, the fund is to be held "in trust for such person or persons as, on the death of my said nephew Samuel Eyres Wilson, will be entitled to (*sic*) as my next of kin under the statute for the distribution of intestates' estates,"—is at the death of testator, and not that of the nephew, though the effect of such construction is to vest the absolute title in the nephew, subject to be divested in the event of any child attaining a vested interest; since the only persons who can be entitled as "next of kin under the statute" must, according to the express language of that statute, be ascertained at testator's death; and the clear words of the gift to such persons cannot be cut down by the phrase, "on the death of my said nephew," which, if it refers to the time, and not to the event, must be taken as referring only to the time when the persons entitled will come into possession. *Re Wilson* [1907], 2 Ch. 572.

In *Re Ferguson*, 28 Can. S. C. 38, a testator devised the bulk of his estate to executors, to be held for the use of his wife and daughter jointly so long as both survive and his widow remain unmarried,

and in the event of the widow remaining unmarried and surviving the daughter, for her use for life, and in case the daughter survived her mother, then for the use of the daughter as her separate estate, with power to dispose of the same by will in case she should marry, and further directed: "In case my daughter shall have died without leaving issue her surviving, and without having made a will as aforesaid, my trustees shall, after the death of my wife, if she survive my said daughter, sell all my estate, real and personal, and divide the same equally amongst my own right heirs who may prove to the satisfaction of my said trustees their relationship within six months from the death of my wife or daughter, whichever may last take place." It was held that although the clause in question was not free from doubt, that upon the whole there did not appear, either in the will or from the fact the daughter was testator's right heir, any sufficient indication that the expression was used in other than its natural sense, as referring to those entitled to take at testator's death.

In *Mays v. Carroll*, 14 Ont. Rep. 699, testator, after devising his property in trust for his daughter for life, with remainder to her children, provided: "And if she have no children, then the said property to fall to my next of kin who may be living on this continent." In another clause of the will he provided that should his daughter become the mother of an illegitimate child, "then, notwithstanding anything heretofore provided, I will and direct that neither she . . . nor any of her children shall receive any portion of my property; and in such case my whole property shall be given to my said wife absolutely, or if my said wife at that time be dead, then the property to go to my nearest of kin, as above provided." The daughter was testator's sole next of kin at the time of his death. The word "then" being plainly not used in either of the clauses above quoted as an adverb of time, and the clause last quoted being regarded simply as excluding the daughter in the contingency specified, it was held that there was nothing in the will sufficient to take the case out of the general rule that next of kin are to be ascertained as of the time of testator's death.

In *Jost v. McNutt*, 40 N. S. 41, testator created a trust to pay the income to his wife during her life, and after her death to his son, and after his death to divide the principal equally among the son's children as they should respectively attain the age of twenty-one. The trustees were further authorized to advance not to exceed a certain sum from the principal to set up the son in business. Testator further provided: "But if he shall die childless, then it is my will that said principal sum . . . be divided as follows: one third thereof to my heirs at law and the remaining two thirds thereof" for certain charitable purposes. It was held that notwithstanding the use of the word "then," which

was construed as referring to the event, and not the time, and the fact that the son was testator's sole heir at law at the time of his death, and the fact that testator manifested an intention to prevent the capital from coming into the hands of the son, the limitation over must be construed as to those who were testator's heirs at the time of his death.

In *Nicoll v. Irby*, — Conn. —, 77 Atl. 957, where a testator gave his entire estate to trustees in trust for the support and maintenance of a brother, and after his death to his children, and in the event of the death of the brother without children, then to testator's own heirs, it was held that the language used being entirely consistent with an intent that the heirs should be determined as of the date of testator's death, the provision would not be construed as giving the remainder to those persons who, at the brother's death, were testator's next of kin and heirs at law, where the latter construction would render the provision obnoxious to the statute of perpetuities.

In *Harrison v. Jones*, 52 Ga. 599, 9 S. E. 527, it was held, in construing an antenuptial settlement in trust for the separate use of the wife during her life; then for the use of the husband during his life; then for the use of the children, if any, in fee; and if no children, then and in that case upon his death for the use of the wife's right heirs by blood forever,—that there was nothing in the settlement to indicate that the heirs were to be looked for at the death of the husband, rather than at the death of the wife.

In *Kellett v. Shepard*, 139 Ill. 433, 28 N. E. 751, where a testator, after giving his daughter a life interest in a share of his estate, provided that "after her death it shall descend and go in reversion to her child or children, should she have any, but in case she die having no issue, in such case to go to and descend in reversion to my heirs at law," it was held not only was there nothing to show an intention upon the testator's part to designate those who should be his heirs at law at the date of his daughter's death as the persons who were to take the interest set apart for her use during her life, but that it was testator's actual intention to use the word "heirs" as referring to those who were his heirs at his death. Such intention was deduced from the fact that the specific provisions of his will were in the interest of his son and daughter and such other children as he might have at his death; and the fact that a fund the income of which was set apart for the support of his widow during her life was to go after her death in reversion to "my heirs at law," since it could not be supposed that he intended the expression to have one meaning when applied to those who should take at the termination of the daughter's life estate, and another meaning when applied to those who should take at the termination of the widow's life estate; and in the further cir-

cumstances that, in a recapitulation of the provisions of his will, testator made no provision whatever in the event of his daughter's death without issue, so that, had such recapitulation been the only provision in the will in regard to her share, it would have passed as intestate property at the death of the daughter without children to those who were the testator's heirs at law at his decease.

In *Minot v. Tappan*, 122 Mass. 535, where a testator devised property upon trust for his son for life, and if he should die leaving a widow, to such widow for life, and if such son should die leaving no widow, but leaving children, then to such children, and "in default of any such child, children, or issue, then living, then in trust to convey and transfer the same to my heirs at law to hold same, to them, their heirs and assigns, forever," it was held that there being no words of contingency, such as "if they should be living at his death," or "to such of my heirs as should then be living," which would naturally be used if the intention was to limit the devise or bequest to such class as should be then living, that neither the fact that the life tenant was one of testator's heirs at law at the time of his decease, nor the employment of the phrase "convey and transfer," afforded any decisive indication that testator intended the limitation to his heirs at law to import those who should be such at the death of the life tenant without issue, rather than those who should be such at the time of testator's own death.

There is nothing to take the case out of the general rule that, under a limitation over to testator's heirs at law, the persons to take are those who answer the description at the time of his death, in a testamentary provision by which testator gave the income of a trust fund to his wife until her death or remarriage, and in either event to his son and daughter, with remainder to their issue, or, in default of issue, to testator's heirs at law, and further provided that in case his wife should survive their children and their issue, the trust fund might be disposed of by her by will, and in default of such disposition, then to testator's heirs at law. *Whall v. Converse*, 146 Mass. 345, 15 N. E. 660.

In *Rotch v. Loring*, 169 Mass. 190, 47 N. E. 660, testator, after giving his wife the right to occupy certain real estate for her life, or as long as she might desire, in the third article of his will created a trust for the benefit of each of his daughters, and further provided, "upon the decease of each of my said daughters, the deposit made as aforesaid for her benefit shall be transferred, conveyed, assigned, and paid over to her children then living, and the issue of any deceased child by right of representation; to have and to hold the same to them and their respective heirs, executors, administrators, and assigns forever. And in default of any lawful issue then living of such daughter, then the same

shall be conveyed, assigned, transferred, and paid over to my heirs at law, as part of the residue of my estate, in the manner hereinafter directed concerning the same." In the fourth article of his will, testator created trusts for the benefit of his two sons, the income to be paid to them during their lives, and the principal upon the death of each to be paid over to the children of such deceased son then living and to the issue of any deceased child by right of representation, "and in default of any issue or children of any sons then living, then in trust to convey, assign, transfer, and pay over . . . to my heirs at law as hereinafter provided." By the residuary clause of his will, in which he enumerated as part of his residuary estate "all such estate, property, funds, and moneys as shall, from time to time, become part of the residue of my estate under the provisions of this my will," the testator directed that the residue should be "divided into so many equal shares or parts, that there may be one share set apart and appropriated for the benefit of each of my children then living, and one share or part for the benefit of the lawful issue then living of every deceased child of mine," such issue to take the share which his parent if living would have taken; "and I hereby give, devise, and bequeath one of the said shares or parts of the said residue of my estate to be set apart as aforesaid to each of my sons living at the time of my decease." And he further proceeded to give the share of each of his daughters living at his decease, and the share of each and every of the female issue living at his decease of any of his children who should die before himself, to trustees. One of the sons having died without issue, the question arose as to the construction of the limitation over to testator's heirs in such event, as described in the third article of the will. It was held that the phrase "then living," used in the residuary clause, must be taken as intended to refer to the only period of time mentioned,—“the time of my decease;” and that it was the testator's intention that the limitation over in question should be to those who should be his heirs at law at the time of his death, and not at the time of the death of the son.

The same will was again before the court in *Rotch v. Rotch*, 173 Mass. 125, 53 N. E. 268, in which the question was as to the meaning of the limitation over in the event of the death of a daughter without issue, and it was held that there was nothing in the language of the whole will nor in the circumstances of the testator to show that the phrase "to my heirs at law" was used with different meanings in the various provisions of the will; and a clause providing, "it is my will that the *cestuis que trust* to whom income is payable under this will for their respective lives, or for any less period, are not to have or exercise any right or power of disposing of their respective interests, title, or property in their respective trust estates by will or testamentary ap-

pointment, nor to sell, pledge, assign, or transfer the same; it being my intention that said annuitants or *cestuis que trust* shall take an interest for life or term of years as the case may be, with remainder to their or my heirs respectively, as the case may be," was held not to vary the construction by which the heirs were to be determined as of the time of the testator's decease: since, if testator had desired to make it impossible for any of them to have the disposition of any part of what he himself should leave in trust, the construction that he meant by the words "to my heirs at law," heirs to be determined as of some other time than as of that of his own death, would not have made that intent effectual; and since the direction that when a fund which he had put in trust had fulfilled all the possible purposes of the trust, and was not then otherwise limited, it should go to those who, when he died, were his heirs at law, tended to carry out to the end the scheme of equality among his children manifested by other provisions of the will, which giving the ultimate remainders to those who should be his heirs when the several trusts should terminate would defeat.

In *Boston Safe Deposit & T. Co. v. Parker*, 197 Mass. 70, 83 N. E. 307, where a testator gave a share of his estate upon trust to pay the net income to a daughter for life, and at her decease to distribute and divide the principal among her children or the descendants of any deceased children, and in default of children living at the time of her death, "then to divide and distribute said estate among my heirs at law," it was held that the word "then" was used conjunctively, and not as an adverb of time; that the fact that the testator had made ample provision for those who were his heirs at the time of his death was not sufficient to show that the phrase "heirs at law" was used in other than its usual meaning; and that the case was one where the testator, having exhausted his specific wishes by previous limitations, was content thereafter to let the law take its course.

In *Jewett v. Jewett*, 200 Mass. 310, 86 N. E. 803, it was held that no contrary intent which would take the case out of the general rule was manifested by the language of a will in which a testatrix, after creating a trust, and directing that the income should be paid primarily to her daughters, but in certain events in part to her sons and in part to descendants of any of her daughters until the decease of the last survivor of her daughters, further provided that the trustees should, "on the decease of the last survivor of my said daughters" . . . 'convey, assign, deliver, and distribute the whole remaining trust property to the then surviving descendants of my said children respectively . . . and in case of there then being no surviving descendants of any of my said children, then the trust property is to go to my heirs, and in either case the trust is to

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cease;" notwithstanding a provision that the share of the income which was to be paid to her daughters or to their female descendants should be paid to them or for their benefit, independently of their husbands; and notwithstanding that her heirs at her death were her children, that an absolute bequest was made to her son, and that life estates were given to her daughters.

In *Harris v. McLaran*, 30 Miss. 533, where a father executed a deed of trust of certain slaves for the benefit of his daughter during her lifetime, and after her death to belong to her child or children, adding, "but should she die without living issue, then and in that case the slaves before named and their increase shall return to my lawful heirs," it was held that the fact that the daughter would take under the limitation over to grantor's heirs was not of itself sufficient to warrant the supposition that the grantor meant such limitation over to be to an artificial class.

In *Tuttle v. Woolworth*, 62 N. J. Eq. 532, 50 Atl. 445, a testator, after creating a trust first for the use of his wife during widowhood, and thereafter to his daughter for life, and at her death to convey to her children, further provided that if the daughter should die "without issue her surviving, then I direct my executors to sell the said house and lot, and distribute the proceeds thereof among my heirs according to the laws of the state of New Jersey." He further bequeathed to his executors certain bonds and stocks in trust for his wife during her natural life, and after her death to set off the said bonds and stocks to his daughter or her heirs, and if the said daughter should die without issue, "then said bonds and stocks shall revert to my estate, and be distributed among my heirs in the manner provided by the laws of New Jersey respecting intestate estates." It was held that the fact that the daughter was one of testator's heirs and next of kin was not sufficient to restrict the class of heirs who are to take under such limitation over, to those living at the time of distribution, the court saying: "The objection from incongruity supposed to arise against holding that the previous tenant is entitled to any interest in an estate as next of kin, after the estate specially given to him by the will has terminated, is, as it seems to me, met and answered by the consideration that when the testator limits an estate to one of his next of kin and his children or issue, and then directs that, on failure of this limitation, his heirs or next of kin shall take according to law, he discloses clearly that, if the special and immediate limitation fail, as it may, then he had no intentions or wishes to change the disposition which the law itself would have made for him in regard to this part of his estate, and that, on the failure of his special purpose, he desires that he should be considered as making no provisions of his own about the disposition of his estate, but as expressly leaving that disposition to

be made by the laws as if he had died intestate. When there is the further express direction in the will, as there is in this case, that the estate shall be distributed among testator's heirs (or next of kin), in the manner provided by law respecting intestates' estates, the conclusion seems unavoidable that the testator, as to the estate limited over, intended the same persons to receive the estate as would have received it at his death, by law, had he died intestate as to its future disposition after the failure of the particular estate. If this be the correct view, the previous gift to one of the next of kin cannot, of itself, be sufficient to exclude him from the portion which, as next of kin, would have come to him by law, or show that the testator intended to restrict the operation of the laws relating to distribution of intestates' estates, by referring them to a time subsequent to his death."

In *Wadsworth v. Murray*, 161 N. Y. 274, 76 Am. St. Rep. 265, 55 N. E. 610, where a testator, after creating a trust for the benefit of his grandson during his natural life, disposed of the real estate and its proceeds in the trust after the death of the grandson as follows: "And in case the said [grandson] . . . shall die leaving lawful issue him surviving, such issue shall take an estate in fee in the real estate hereby devised in trust for him, and the entire and absolute estate and interest in such accumulations as are hereinbefore provided for. And in case the said [grandson] . . . shall die leaving no lawful issue him surviving, then, and in that case, the estate in said lands, and the entire and absolute estate and interest in such accumulations, shall descend to and vest in my heirs at law in the same manner that it would have descended to and vested in them if this will had not been made,"—it was held that, without resorting to the rule of construction that where, on the termination of a life estate, a remainder is limited to the heirs of testator, the will is deemed to speak as of the time of his death, and his heirs at that time take a vested remainder, the language of the will manifested an intention that the heirs should be determined as of the time of testator's death.

In *Jones v. Oliver*, 38 N. C. (3 Ired. Eq.) 369, where a testator devised certain property to his wife for life, and at her death to the heirs of her body, adding: "But in case there should be no such heirs lawfully begotten as aforesaid, then and in that case I give and bequeath the whole of my estate as aforesaid to be equally divided among the next of kin of myself and of my said wife," it was held that there was nothing in the language of the will to induce the supposition that the testator meant to exclude any of the persons who were next of kin of himself or of his wife at his death in favor of persons who might happen to answer the description at the death of his wife without having issue; although it was said that if the wife had

been one of the next of kin herself, the argument would be strong that the next of kin at her death were in the testator's contemplation.

In *Riehle's Appeal*, 54 Pa. 97, a devise in trust for testator's daughters for life, with remainder to their children, "but in case both or either of them, my said two daughters, depart this life without leaving any child or lawful issue surviving her or them, then the part or share of such of them so dying to go and be inherited by my right heirs forever, agreeably to the intestate laws of Pennsylvania," was construed to give each of the daughters an estate for life with remainder to her children and issue, if any, in fee, with an executory devise on her death without issue to testator's right heirs under the intestate laws at the time of his death. The gift thus incidentally characterized by the court as an executory devise would seem however, more properly to be regarded as creating a contingent remainder.

There is nothing in the language of a testamentary provision by which certain property was devised in trust for the benefit of a son for life, and from and immediately after his decease, then in trust for the use and behoof of all and every child and children of the said son that should then be living, and the lawful issue of them as should then be deceased, their respective heirs and assigns forever, "and for want of such a child or children or lawful issue, then in trust for the use and behoof of my right heirs forever," which qualifies the natural meaning of the word "heirs" as referring to those who were such at the time of testator's death, the word "then" obviously being used not as an adverb of time, but as a conjunction signifying "in that event or contingency." *Buzby's Appeal*, 61 Pa. 111.

In *Stewart's Estate*, 147 Pa. 383, 23 Atl. 599, where testatrix after giving successive life estates in a moiety of her property to a sister and niece, with remainder to the issue of the niece, or, in event of the niece dying without issue in the lifetime of another sister, to such persons as such other sister should by will appoint, further provided that if, at the death of the niece having no issue, such other sister should be herself then dead, "I then give, devise, and bequeath the said moiety of the residuary estate to my right heirs according to the intestate laws of the state of Pennsylvania," it was held that there was nothing to take the case out of the general rule.

In *Stokes v. Van Wyck*, 83 Va. 724, 3 S. E. 387, where a testator, after devising lands to his daughter and her husband during their joint lives and during the life of the survivor, with remainder to their issue, if any, further provided: "But if my said daughter should die without leaving such issue, then my will and desire is that after the death of my son-in-law [naming him] . . . that the said land and plantation should pass and descend to my heirs according to the laws of descent in Virginia, and their heirs forever," it was held that

the heirs taking under the limitation over were those who were such at the time of testator's death, upon the ground that such is the ordinary signification of the term "heirs," and that any ambiguity should be determined in favor of vesting, notwithstanding the use of the word "then," which evidently means "in that event," or the fact that the daughter was testator's sole heir at the time of his death, or the fact that he employed the plural word "heirs."

In *Allison v. Allison*, 101 Va. 537, 63 L.R.A. 920, 44 S. E. 904, it was held that there was nothing contrary to the rule of construction that heirs are to be determined at the time of testator's death, in the language of a will by which the residuary estate was given in trust for a daughter during her natural life, "and at her death to be equally divided among her children, should any survive her; if she should die without issue, or if her surviving child or children should die before becoming of age, then the property bequeathed for the benefit of my daughter is to be divided among my heirs at law according to the laws of the state of Virginia."

2. Executory limitations.

In *Wilkinson v. Garrett*, 2 Colly. Ch. Cas. 43, 15 L. J. Ch. N. S. 416, 10 Jur. 560, a testator devised property upon trust to pay an annuity to his widow, and subject to such annuity, upon trust for his only son when he should attain the age of twenty-five years, and in case he should die after the age of twenty-one, but before the age of twenty-five, then upon trust for such persons as the son should appoint, and in default of such appointment, or in the event of the son's death before attaining the age of twenty-five without lawful issue, "then upon trust as to my said real and personal estate for my own heirs, executors, administrators, and assigns according to the notice thereof respectively." The testator's son and widow were at his death his next of kin according to the statute of distribution. It was held that there was no sufficient indication in favor of any other persons than those who would be entitled to the property under the ultimate limitation at the time of testator's death to justify the court in supposing that he intended to benefit any other class of persons; but that, on the other hand, it might conjecture that the testator contemplated the possibility of the son dying in his lifetime, leaving children, or of testator having other children living at his death, or that he might have had an intention in favor of his widow which would be disappointed by construing the words to refer to the death of the son.

In *Seifferth v. Badham*, 9 Beav. 370, 15 L. J. Ch. N. S. 345, 10 Jur. 892, where a testator gave his residuary estate in trust, first for his wife during widowhood, and after her decease or marriage to apply the income for the maintenance and education of his children until they should

attain the age of twenty-one, when the share of each should be transferred to him or his issue, and if all testator's children should die without issue, then upon trust to release testator's real estate unto and to the use of his heir at law, and to assign his personal estate unto and equally between his next of kin according to the statute of distributions, it was held that there was nothing on the face of the will, or in the fact that testator's children were his heirs at law and next of kin at the time of his death, to alter the plain construction of the language under which the words mean the next of kin at the time of testator's death.

In *Murphy v. Donegan*, 3 Jones & L. 354, where a testatrix bequeathed all her personal estate upon trust for her granddaughter (not, however, naming her as such) until she should become of age or be married, when the trust fund was to be handed over to her, further providing, "in case said Elizabeth shall die under age, unmarried, I leave, devise, and bequeath the said principal money and interest to my next of kin, share and share alike, as tenants in common, and not as joint tenants and if but one, the whole to such one," it was held, that, as testatrix had made no mention of the relationship which subsisted between herself and the beneficiary, but described her as the child of certain parents and as the niece of other persons, it could not be assumed that she had a knowledge that the granddaughter was her next of kin; and that, as the gift itself provides for the two events of the next of kin consisting of several persons or of one person only, there is nothing to show an intention to use the words "next of kin" in any other than their natural import as designating those living at the death of the testatrix.

In *Holloway v. Radcliffe*, 23 Beav. 163, testator gave his estate to his wife for life, and from and after her decease to his son, if then living, upon his attaining the age of twenty-one, but in case of the son's death in the lifetime of the wife, or before attaining the age, of twenty-one, the estate was directed to be sold, "and as to the money to arise from such sale or sales, after payment of all expenses attending the same, I give and bequeath one moiety or equal half part thereof unto and equally amongst my legal personal representatives, in such and the like manner as if the same had been to be paid under the statute of distribution; and as to the other moiety or equal half part thereof, I give and bequeath the same unto and equally amongst the legal personal representatives of my said wife, to be paid in manner aforesaid." The son was testator's sole next of kin at the time of his death. It was held that the persons entitled to take were to be ascertained at the death of testator, the master of the rolls saying: "By referring to the statute, to point out the persons who are to take, the testator has expressed that those are to take whom the statute

of disitribution designates, that is, certain persons who are living at the death of the person whose estate is to be distributed. *Prima facie*, therefore, this is the meaning of the testator. There certainly might be words introduced which would specify some other time as the period at which the class was to be ascertained, but there are none here. The case would have been much varied if the words had run 'in such and the like manner as if the same had been then, or at that time, to be paid under the statute of distribution,' or even if the words 'were then' had been substituted for the words 'had been;' but it is simply 'in such and the like manner as if the same had been to be paid under the statute of distribution,' importing, as far as any time is thereby expressed, a past, rather than a present, ascertainment of the class. The words, therefore, designate the next of kin of the testator who survive him, according as the class is ascertained by the statute or distribution."

In *Southgate v. Clinch*, 27 L. J. Ch. N. S. 651, 4 Jur. N. S. 428, 6 Week Rep. 489, where a testator left a sum of money to be divided among his three children or the survivors of them upon attaining twenty-one, "but should neither of them attain the age of twenty-one years, I then request the said £2,000 3£ per cent consols to go to my wife for her natural life, and afterwards to my next heir at law," it was held that the person ultimately entitled was one who, at the death of the testator, was his heir at law, notwithstanding that person was one of the children provided for originally out of the fund, since such provision is not inconsistent with his also taking a benefit out of that fund larger or other than the previous one in different exents.

In *Harrison v. Harrison*, 28 Beav. 21, where a testator, after giving his residuary estate to his widow during widowhood, with remainder to testator's child or children attaining the age of twenty-one, or their issue, provided that, in default thereof, "then and in such case my said trustees and trustee shall stand seised and possessed of my said real and personal estate and effects, from and immediately after the decease or marriage again of my said wife, in trust for such person or persons as shall be my next of kin, according to the statute for the distribution of intestates' effects, his, her, or their heirs, executors, administrators, or assigns, absolutely and forever,"—it was held that there was nothing to take the words "next of kin" out of their ordinary significance as applying to persons who were such at the time of testator's death, there being no absurdity in the bequest of the remainder to children who were testator's next of kin and the ultimate gift to them in event of death under twenty-one, as practically the estate would go through any child so

dying to the same person as if testator had not inserted the provision.

In *Fletcher v. Fletcher*, 3 De G. F. & J. 775, testator gave his residuary estate upon trust to pay an annuity to his widow during her life, and after her death to divide the trust fund among such of his children as should attain the age of twenty-one years, or their issue, "and in case there shall be no child or the issue of any child of my body living at the time of my decease, then upon trust for such person or persons who, at the determination or failure of the preceding trusts of this my will, would be entitled under the statute of distributions to the said trust estate and premises as my next of kin in case I had then died possessed thereof intestate and without leaving any wife me surviving, in the same shares and proportions as such persons, if more than one, would be entitled thereto by virtue of the same statute. It was held that there being a provision for the maintenance of the children, which, as there was no trust for accumulation, must have been intended to take effect during her life, the words "after the decease of my wife" cannot receive a strict construction; that as the testator must be taken to have contemplated his wife's surviving him in accordance with the rule that the death of a legatee in testator's lifetime is not considered to be contemplated unless no other construction will satisfy the words, the words carefully excluding the wife from the ultimate gift point to a distribution in her lifetime, and show that testator meant the whole fund to go to those who were his next of kin at the time of his own death.

In *Brabant v. Lalonde*, 26 Ont. Rep. 379, testator, after giving his only child, a daughter, all his estate, subject to the use thereof by his wife until the daughter should become of age, or should marry, further provided: "In the event of my said daughter Rebecca Lalonde dying without leaving issue, then in that case all of my said property shall be equally divided between my nearest of kin, but with the condition that my said wife shall have and hold the same during her lifetime." It was held that the word "then," introducing the ultimate devise to the nearest of kin, was clearly not intended to be used as an adverb of time, and that the fact that the daughter to whom the fee was given in the first instance would take one third as one of the next of kin not show that testator intended that the persons to take under the limitation should be other than those answering the description of nearest of kin at the time of his death.

In *Clifton v. Holton*, 27 Ga. 321, where a testator provided that in case his son should die before arriving at twenty-one years of age, without issue, the property given him should go to testator's "blood relations of nearest kin, to be equally di-

vided among them," it was held that such relations are to be ascertained and fixed at the time of testator's death, and not the death of his son; although it was stated to be a rather disputable point.

IV. Instances where application precluded by context of will or accompanying circumstances.

a. Preliminary statement.

The introductory observation which heads the division entitled "Instances of application of rule" may here be repeated, that although the construction of testamentary provisions of the sort under consideration is not dependent upon the character of the estate limited, they are herein arranged with regard thereto for the sake of convenience in reference.

It has been held, however that the fact that a defeasible fee is given to one who is the sole heir presumptive of the testator furnishes a somewhat stronger reason for holding that the heirs to whom the property is limited over upon certain conditions are to be determined as of the time of the death of the first taker, than when the first taker has only a life estate and the devise is of the remainder. *Welch v. Brimmer*, 169 Mass. 204, 47 N. E. 699.

b. Where gift is immediate.

In *Harding v. Glyn*, 1 Atk. 469, note, where testator gave his wife certain property, but desired her to give such property at or before her death unto and amongst such of his own relations as she should think most deserving, it was held that, in default of her performance of the power, the court would decree the property to be divided among such of the relations of testator as were his next of kin at her death.

In *Say v. Creed*, 5 Hare, 580, 16 L. J. Ch. N. S. 361, 11 Jur. 603, testatrix directed her trustees to convert her personal estate into money and invest it, and to pay the income therefrom to her mother for life, and from and after her mother's death to her sister for life, and to pay over the principal as testatrix should appoint, and in default of appointment, to pay it unto and amongst testatrix's next of kin in due course of administration, as the law directs in respect of intestates' personal estates. By codicil she directed that it should be paid to her next of kin on the part of her mother only, and not to any of her next of kin on the part of her deceased father. The sister of testatrix, who was the sole next of kin living at the time of her death, was also at the same time the only next of kin of the testatrix on her mother's side. The court, although recognizing the fact that, at the date of the codicil, the father and mother of testatrix were dead, and she had no nephew or nieces, or brother or sister, except the sister to whom the life interest was given, so that of necessity

such sister, if surviving her, would be her only next of kin living at her death, while she described her next of kin in terms which import that she contemplated a plurality of persons under that description, as being indicative, though not conclusive, of an intent to exclude the sister,—expressly put its decision that the ultimate limitation was to the next of kin on the part of the mother living at the death of the sister upon the ground that testatrix, knowing at the date of the codicil that her sister, if she survived her, would be her next of kin *ex parte paterna* as well as *ex parte materna*, yet described the objects of her bounty as next of kin on the part of her mother, and not next of kin on the part of her father.

In *Horn v. Coleman*, 1 Smale & G. 169, 22 L. J. Ch. N. S. 779, 17 Jur. 408, 1 Week. Rep. 194, where testator created a trust for his sister and her husband for their lives, and after the death of the survivor of them directed the trustees to transfer the trust fund "unto such person or persons as shall, at the time of the decease of my said sister, . . . be entitled thereto as my next of kin under the statute made for the distribution of the effects of intestates," it was held that those entitled to take under the limitation were clearly those answering the description of next of kin at the time of the decease of the sister.

In *Re Saville*, 14 Week. Rep. 603, where the testator bequeathed a sum of money in certain events to his "relatives" and those of his wife, in such proportions as she would appoint, nevertheless two thirds thereof amongst his own relatives, and the remaining one-third amongst those of his wife, it was held that as the wife had a power of apportionment, but not of exclusive appointment, the class was to be ascertained at her death, and not that of testator.

In *Re Morley*, 25 Week. Rep. 825, construing a will by which a childless testator gave personalty upon trust to pay the income to his wife for life, and after her decease, subject to the payment of certain legacies, to pay and divide three-fifths parts or shares of the residue among such person or persons as, under the statute of distribution of the effects of intestates, would have become entitled on his late father's side to his personal estate at the death of his wife if he had died intestate, and to pay and divide the other two-fifths parts among such person or persons as, under the same statute, would have become entitled on his mother's side to his personal estate at the death of his said wife if he had died intestate, it was held that the words "at the death of my wife" clearly pointed to the time of ascertaining the class to take.

In *Re McFee* [1910] W. N. 186, 79 L. J. Ch. N. S. 676, 103 L. T. N. S. 210, testator gave his entire estate to trustees to pay certain legacies and an annuity to his brother during his life, and to accumulate the re-

mainder of the income during the life of such brother, and upon his death to hold the estate and the accumulations of income thereof "in trust for such person or persons as shall, upon the death of my said brother, be my then next of kin according to the statutes for the distribution of the estates of intestates." The brother was his heir at law and sole next of kin at the time of his death. It was held to be the plain meaning of the will that persons entitled to participate under the ultimate gift would be the testator's next of kin under the statute of distribution if he had lived up to, and died immediately after, the death of his brother.

In *Howell v. Ackerman*, 89 Ky. 22, 11 S. W. 819, construing a gift to testator's wife for life, and after her death, "then one half of said property to go to my lawful heirs, and the other half of said property to the lawful heirs of my said wife," it was held that one who was the lawful heir of the testator at the time when the widow elected to take present cash value for her life estate in the proceeds of the property devised was properly entitled to a one-half of the residue of said proceeds.

In *Cushman v. Goodwin*, 95 Me. 353, 50 Atl. 50, a devise upon the decease of the survivor of testator's sisters, to whom he had given estates for life, of all his estate to his heirs then living, to descend and be distributed according to the statutes of the state, was construed apparently without controversy as a devise to testator's heirs living at the time of the death of the survivor.

In *Leonard v. Haworth*, 171 Mass. 496, 51 N. E. 7, an aged testator whose wife was seventy-two years of age and whose only next of kin was a sister of seventy-four, without living issue, and a brother having two unmarried daughters, after making certain specific bequests which practically exhausted his small personal estate, gave his widow the use of part of his real estate for life, and to his sister the use of the remaining portion thereof for life, and finally directed that "when my wife has deceased and her funeral expenses have been paid, and all the provisions named in this will had been carried out, I will what is left of my estate be divided among my nearest of kin." It was held that, in view of the circumstances that his wife and sister were both old and childless, and that he would naturally expect that they would live about the same length of time, and that when both should be dead there would be no living kin of his blood except his brother and his children; the fact that his sister's husband was alive, and had she taken a vested interest, the effect might be that a portion of testator's estate would not go to his kin, but to a stranger in blood; and the fact that there were no words specifically giving a remainder to next of kin, or explicitly giving the legal title to trustee during the life estates,—the intention of the testator was that those who

should be his nearest blood relations at the death of the survivor of his wife and sister should then take what should be left of his property.

In *Fargo v. Miller*, 150 Mass. 225, 5 L.R.A. 690, 22 N. E. 1003, it was held that the time of ascertaining the next of kin of a testatrix who were to take under a clause by which the residuary estate was given, subject to legacies and trusts specified in the will, to the next of kin of testatrix's husband and to those of herself, in the proportion of one third to the former, and two thirds to the latter, was at the death of her father, who was her sole next of kin while he lived, and not at her own death, where she, in preference to all other legacies, provided in the will for his comfortable support for life, even to the extent of using the whole estate, if necessary, but in case of his marriage or death, directed distribution at once; whether or not the time would be thus fixed by the mere fact that he was sole next of kin.

In *Wood v. Bullard*, 151 Mass. 324, 7 L.R.A. 304, 25 N. E. 67, the language of a testamentary provision by which testator's widow, for whose benefit a trust had been created for life, was given power to dispose of the trust fund by will, and in case of her failure to make a will, one half of said trust fund was to be paid at her decease to his heirs at law then surviving, they taking by right of representation, and the other half to the heirs at law of the widow then surviving, they taking by right of representation,—was deemed to manifest an intention that the heirs referred to should be determined as of the time of the death of the widow, and not that of the testator, it being impossible to consider the remainder as vested, and it being apparent that testator was not willing that, in default of his wife's leaving a will, the fund should go as intestate property.

In *Peck v. Carlton*, 154 Mass. 231, 28 N. E. 166, it was held that the natural interpretation of a provision by which a testator, by the residuary clause of his will, left property upon trust to pay the income to his wife and other persons during her life, and as soon after the decease of his wife as should be expedient, to convert the estate into money, "and to pay over the proceeds of such sale and disposition to my legal heirs in the same proportion as they would have inherited the same in case I had died the survivor of my said wife, and intestate," was that the same persons are to receive the property, and to receive it in the same proportions, as if testator had died immediately after the decease of his wife; and that it was not to be construed simply as meaning that the widow should be excluded.

In *Bisson v. West Shore R. Co.* 143 N. Y. 125, 38 N. E. 104, it was held, construing a provision by which testator gave his wife an estate during widowhood, "and from and after her decease or marriage (which shall first happen) I give, devise, and bequeath all my said real estate unto

my heirs and my said wife Maria Bernardino's heirs, their heirs and assigns forever, share and share alike," that the termination of the life estate given to the widow being the time fixed for the gift to take effect, then was the time when the persons would be ascertained who, coming under the description of heirs of testator, would be entitled to share with the heirs of his widow in distribution of the estate.

In *Hoey v. Kenny*, 25 Barb. 396, where a testator devised property to his widow for life, and by her to be divided and distributed by will among testator's relatives in such shares as she might see fit, it was held that since the wife's selection of the relatives might be among those who might be living at her decease, and would not be limited to those living at the testator's death, the law would, upon her failure to exercise such power, distribute the property among the relatives living at her decease.

In *Re Southworth*, 52 Misc. 86, 102 N. Y. Supp. 447, a direction that, upon the termination of a trust, the principal and any accrued interest remaining unexpended should be paid over to the testator's heirs, was held to manifest an intention that it should be paid to those who should be heirs at the time of distribution, since he could not have intended unexpended interest remaining at the death of the life tenant should vest before it was in existence.

In *Re Bowers*, 109 App. Div. 566, 96 N. Y. Supp. 562, where a testator created a trust in his residuary estate for the benefit of a certain person for and during her natural life, and further provided that, after the death of such person, the trustees should "transfer, set over, and convey my entire residuary estate, with all accumulations of income then on hand, to my heirs at law and next of kin, whomsoever they may be," it was held that the gift over being after the death of the life tenant, and being found only in the direction to convey, and in view of the employment of the phrase "whomsoever they may be," it was plainly testator's intention that the persons entitled under the limitation over could not be ascertained until after the death of the life beneficiary.

In *Hostetter v. State*, 26 Ohio C. C. 702, where a testator devised everything excepting household goods and furniture to his executors for the benefit of his widow during her life, and at her decease to convey certain of the realty as therein directed, and to convert the rest into money, and out of the estate to pay certain specific legacies, and directed: "On final settlement of my estate, all the rest and residue thereof to be divided and distributed and paid to my heirs at law in the same proportion that the same would have been paid to them if I had died without a will. All of the former legacies and specific and statutory devises to be paid after the death of my wife,"—it was held that in view of the testator's manifest intention to keep the estate intact until his

widow's death, the several interests of the legatees could not be said to have vested prior to that time, the heirs at law were those who were such at the time of the authorized distribution.

In *Barr v. Denney*, 79 Ohio St. 358, 87 N. E. 267, where testator, after giving his wife his whole estate for life, except certain payments to be made to certain of his children in order to make them equal with others who had received advancements, provided: "After the death of my wife I desire that the whole of my property, both real and personal, be sold by my executor, and after expenses are paid, to distribute equally to my legal heirs," it was held that since there is no gift *in presenti* to testator's heirs, either by remainder or executory devise, and since the fund to be divided could not be created, nor the extent of the interest in it determined, until the termination of the life estate, the conversion of the property and payment of expenses, the most natural interpretation of the will was that the testator bequeathed nothing after the expiration of the life estate, and contented himself with the expression of his desire that the property should all be converted into personalty, and then distributed equally among those who might then be his legal heirs.

In *Donohue v. McNichol*, 61 Pa. 73, where a testatrix, after creating a trust for the benefit of her son during his life, and for the benefit of his issue during their lives directed: "And my said executor, after the death of such lawful issue of my said son John, is to give up and convey over unto my said lawful heirs all my real and personal estate, and in the event of the death of my said son John without lawful issue, that my said executor is to hold my said real and personal estate (if any) for the use, benefit, and behoof of my lawful heirs, their heirs and assigns forever. And upon the death of my said son John, as aforesaid, without lawful issue, my said executor is to give up and convey all my real and personal estate unto my said lawful heirs,"—the question was raised, but it was found unnecessary to decide whether the limitation was to the heirs of the testatrix at the time of her own death, or at that of the death of her son's unborn issue, as in either case the son, being the sole heir of his mother, would take, in the one case under the will, and in the other, on account of the remoteness of the limitation, as heir at law by descent.

In *McKee's Estate*, 198 Pa. 255, 47 Atl. 993, where testator, whose sole heirs at the time of his death were a son and daughter, after giving annuities to his sister and brother and to his son and daughter, directed: "On the death of my heirs herein named all property and bank stocks to be sold and divided among all the heirs,"—it was held that had testator intended that his son and daughter should take under such provision as his heirs, he would have provided for distribution immediately up-

on the death of the other beneficiaries, and limited to their lifetime the annuities given to his children; and therefore that it was reasonably clear that he intended that they or their representatives should not receive anything more from his estate than the annuities, and that his heirs were to be ascertained as of the period of distribution.

In *Evans v. Godbold*, 6 Rich, Eq. 26, a provision by which testator, after giving his wife the use of certain property for life, continued: "It is my will and desire that all the property I have loaned to my wife for her natural life after her decease be equally divided among my surviving heirs, share and share alike," was construed as a limitation to such persons as, at the termination of the life estate, should be his heirs.

In *Forrest v. Porch*, 100 Tenn. 391, 45 S. W. 676, where a testator devised certain land to his wife "to have and to hold as long as she lives; at her death the said land is to be divided between my heirs at law," it was held to be the obvious intention of testator that the land should be divided at the death of his widow among such persons as should then sustain to him the relation of heirs at law.

c. Where gift is contingent on future event.

1. Remainders.

In *Doyley v. Atty. Gen.* 4 Vin. Abr. 485, where testator gave his estate in trust for his niece for life, with successive remainders to her sons or daughters, and for want of such issue, to such of his relations on his mother's side who were most deserving, and in such manner as his trustees should think fit, it was held that, as to the personal estate, there should be no representation of those relations who died in the lifetime of the life tenant, for before her death no part thereof vested in any of the relations, and it was contingent whether they would be entitled thereto or not.

In *Marsh v. Marsh*, 1 Bro. Ch. 293, where testator gave his residuary estate to trustees to pay the interest to his son, who was his nearest of kin, and from and after the decease of the son to such son's eldest son and his heirs forever, and in case of their death without issue, unto testator's nearest relation, and to the nearest relation of such nearest relation, forever, it was said that the testator certainly meant that the nearest relation at the time of the decease of the son should take the property, and not the nearest at his own decease, it being impossible to suppose that he meant a reversion to his son.

In *Long v. Blackall*, 3 Ves. Jr. 486, 4 Revised Rep. 73, testator gave certain leasehold premises in trust for a son during his life, and after his decease for such of his male issue as should be his heirs at law at his death, in default whereof the property was similarly limited to a second and third son successively, and finally di-

rected that, upon the failure of all these successive limitations, the trustees should be possessed of the said premises in trust for such persons as should then be the legal representatives of the testator; and he appointed his wife sole executrix. It was held that, in view of the fact that the testator had altered his will, which, as originally prepared, contained an ultimate limitation to the executors and administrators of the first son, it was quite impossible he meant it to vest in his wife, transmissible to those who should become her legal representatives; that, the property being personal in character, it would be too much conjecture to apply the words to an heir at law; and therefore that the ultimate limitation was to those who were the next of kin at the time of distribution. In commenting upon this case in *Holloway v. Holloway*, 5 Ves. Jr. 399, 5 Revised Rep. 81, 25 Eng. Rul. Cas. 687, it was said that the language of the will under construction put it out of the power of the court to put upon it any other interpretation; that the word "then" plainly proved that the personal representatives at the time of the death were not intended; and that if that word had not occurred, there was a great deal to show it could not be the intention, for there the wife was his executrix, and it would have been a strange and circuitous way of giving it to her.

In *Jones v. Colbeck*, 8 Ves. Jr. 38, 6 Revised Rep. 207, testator bequeathed his residuary estate upon trust, to convert it into money, invest the proceeds, and to pay the interest, after deducting an annuity, for the use of a daughter during her life, or until she should have a child or children, when it was to be applied toward their maintenance until they should respectively attain the age of twenty-one, when the principal was to be divided among them, and further provided that after the decease of said daughter and her children, in case they should all die under the age of twenty-one, that the residuum should go and be distributed among his relations in due course of administration. It was held that the ultimate limitation was to those who should answer the description, not at the time of his own death, but at that of his daughter or her issue under the age of twenty-one, upon the ground that it was hardly possible that the testator could mean to describe an only daughter by the terms "my relations," directing also the residue to be distributed among those relations; that it was impossible that he could take this strange, circuitous method of giving her the whole residue on the event of her dying without children, instead of directly saying so; and that if he had meant the limitation to be those who should answer the description at the time of his death, excluding his daughter, he would not have used an expression necessarily including her, but would have given expressly to those bearing certain definite relationships. This case is frequently cited as authority for the proposition that where

the first taker is, at the time of testator's death, the sole member of the class to which the limitation over is made, the testator must be deemed to have intended the membership of the class to be determined as of the time of the happening of the event upon which the limitation was made; and as such is said by Stuart, V. C., in 1 Smale & G. 122, to have "the singular property of being often cited as an authority, always considered as open to observation, and never followed."

In *Miller v. Eaton*, G. Cooper, 272, 14 Revised Rep. 259, testator gave the interest of the residue of his personal estate to his widow for life, and after her decease a moiety thereof to each of his sons; and in case the elder should die in the lifetime of the widow, and the younger should be then living, then to such younger son; but in case it should happen that both sons should die in the lifetime of testator's wife, he directed that after her decease the trust fund should go to and be divided between his own next of kin. It was held that, as the testator had given the trust fund by express bequests to his sons who were his next of kin living at his death, he must therefore, when he used the term "next of kin," have meant his next of kin living at some other time than at his decease.

In *Butler v. Bushnell*, 3 Myl. & K. 232, where a testator bequeathed his residuary personal estate upon trust, subject to the life interest of his widow for her life for his daughters during their lives, and after their respective deceases in trust for the benefit of their children, and in case there should be no child or children of his daughters respectively, or if such children should die under age, then in trust for such person or persons as should happen to be testator's next of kin, according to the statute of distributions, it was held that it was the intention of the testator to limit the property over to those who should be his next of kin living at the death of each of the daughters without children, the court saying: "Where a testator gives property to a person for life, with remainder to his children, and if he should die without children, then over to his next of kin, it is not a probable intention that he should mean to include, as one of his next of kin, the person upon whose death without issue he has expressly directed that the property should go over. In looking to the cases, it appears to me that the court always considers whether the words of limitation are words of present intention, so that they are intended to take effect as soon as the testator's next of kin, living at his death, are ascertained; or whether they import a future period, and are referable to the event upon which the gift over is to take effect. The words 'such persons as shall happen to be my next of kin,' or 'such persons as shall or should be my next of kin,' indicate an intention to confine the gift to such persons as shall answer the description of the testator's next of kin at the death of the tenant for life."

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In *Clapton v. Bulmer*, 5 Myl. & C. 108, the testator having one child, a daughter, gave his residuary estate in trust for the daughter for life, and after her death to her children, but should she die without issue, then in trust to pay a certain sum to such person or persons as the daughter should by will appoint, and in case testator's wife should happen to survive the daughter dying without issue, to pay a sum of money to the wife, adding: "And I will and direct that my said trustees . . . do and shall assign and transfer the residue of such trust moneys of my personal estate unto the nearest of kin of my own family forever." It was held that, in view of the language of the will, the testator could not possibly intend his own daughter to take under the ultimate limitation, and therefore that the gift was to those answering the description at her death.

In *Minter v. Wraith*, 13 Sim. 52, a testator directed his entire estate to be held upon trust for his wife during her life, and from and immediately after her decease in trust as to a moiety thereof for his daughter Sarah, for and during her natural life, and from and after her decease to pay and divide the same among her children upon their attaining the age of twenty-one, and in default of the preceding limitation, then in trust to convey and assign such moiety to testator's "personal representatives." The other moiety was similarly limited to his daughter Jane, with remainder to her children upon attaining twenty-one, and in default of such, then to transfer and convey "the said last-mentioned moiety or one-half part of and in the said moneys, stocks, and funds, and of and in the said part or parts of my said real and personal estates remaining unsold, if any, unto my personal representatives, his, her, or their heirs, executors, administrators, and assigns." He further directed that his trustees should keep the share of his daughter Sarah in their hands "so long as she should continue to labor under her present affliction." It was held that, in view of the language showing testator considered it doubtful whether any of his property would remain unsold or not; the fact that he was looking to an event which would be posterior to his own death; the fact that the original devise had vested everything, real and personal, in the trustees, so that the subsequent direction was one by means of which the trustees should denude themselves of the trust; and in view of the description of the persons to whom the property was to be conveyed, which shows that the testator contemplated that the person or persons to take might either be one male, one female, several males, several females, or several males and females, and which therefore is inconsistent with any notion on testator's part that his two daughters would be those persons; and in view of the direction as to holding Sarah's share "so long as she should continue to labor under her present affliction"

which is unaccompanied by any direction as to what should be done with respect to the whole of the property in case Sarah should become entitled to have the whole conveyed to her, in which case the trustees would denude themselves of the trust property altogether,—the ultimate limitation was not to testator's next of kin at the time of his own death, but to those persons who were his next of kin at the death of a daughter.

In *Cooper v. Denison*, 13 Sim. 290, 12 L. J. Ch. N. S. 404, a provision by which a testator bequeathed his residuary estate to his wife for life, remainder to his daughter absolutely, but if his wife survived his daughter, then at his wife's death one third part was to go according to her will and the other two thirds were to go and be paid "to my other the next of kin of my paternal line," was held to show that all the persons to take at the death of the widow were to be simultaneously ascertained, and therefore that the next of kin were to be ascertained at the time of the widow's death.

In *Tiffin v. Longman*, 15 Beav. 275, a testator, after giving his residuary estate in trust for his daughter, proceeded: "At the death of my daughter I will the whole property vested in the funds and otherwise to her issue, provided she should have any; and, if more than one child, in equal proportions between them. But provided my daughter should die without issue, I then direct that advertisements shall be inserted in the daily papers for the space of one week for the information of my relations, to whom, that is to say, to such and to such only as shall make their claim within two months after such advertisements, I leave the before-mentioned property, to be divided between them according to the discretion of my executors . . . Should I survive my daughter, I will my property to my relations above mentioned." It was held that although "next of kin" are to be ascertained at the death of the ancestor, the case of a gift "to relations" claiming at a particular period is not the same; and that the obvious intention was that on the death of the daughter without issue, the property should go to the relations of the testator then living, provided they claim within two months.

In *Bessant v. Noble*, 2 Jur. N. S. 461, testator created a trust for his daughter for life with remainder to her children, and in case she should leave no children, then in trust for testator's next of kin "in manner aforesaid." In the previous part of his will, testator had given property to his son Daniel, with the provision that in case Daniel should die under the age of twenty-five years without issue surviving "the property given to him shall be in trust for such person as, at the time of such failure of issue, shall be my next of kin according to the statute for the distribution of intestates' estates, and as if I had survived my son Daniel, in the like shares as they would be entitled to the same under 33 L.R.A. (N.S.)

the statute." He similarly provided with respect to property given to his son Thomas, that if he should die under twenty-five without issue surviving, it should be held in trust "for such persons as, at the time of failure of such issue, shall be my next of kin as if I had survived my said son Thomas John, and in the like shares as they would be entitled to the same under the statute for the distribution of intestates' estates." He further provided that in the event of the death of either of his sons in the lifetime of his wife, without child or children, the property given to him should "belong to such person as shall then be my next of kin, in manner aforesaid." It was held that the limitation over of the bequest to the daughter must be construed in the light of all the previous passages in the will which contain a limitation to next of kin, and accordingly that the phrase "in manner aforesaid" did not refer only to the manner of taking, as described by statute, but was of the essence of the description of the persons who were to be next of kin; and therefore that the time fixed for ascertaining the members of that class was at the death of the daughter, and not that of the testator.

In *Wharton v. Barker*, 4 Kay & J. 483, testator, after devising his estate upon trust as to one moiety for his daughter Mary for life, with remainder to her children, and as to the other moiety for his daughter Sarah for life, with remainder to her children, with cross remainders between them, proceeded: "And in case my said daughters Mary and Sarah shall both happen to die without lawful issue, or leaving such, all of them shall die under the age of twenty-one years without leaving any lawful issue, then I direct my said trustees, their executors, etc., to pay one equal half part of all the said trust moneys unto the person or persons that shall then be considered as my next of kin and personal representative or representatives, agreeable to the order of the statutes of distribution, and the whole of the other equal part or share unto the person or persons that shall then be considered the next of kin and personal representative or representatives of my late wife . . . agreeable to the order of the statutes of distribution." It was held, after an extensive review of the decisions bearing upon the question, that while it is the general rule, based upon the broad principle of construction by which all gifts to a class following after a bequest for life in the same property vest immediately upon the death of the testator, that where there is a limitation by will to one for life, and after his decease, then to the next of kin of testator, those who are to take under the designation "next of kin" are the persons who answer that description at the death of testator, and not those who answer that description at the death of the tenant for life, and while the operation of such rule of construction is not excluded by the mere circumstance that words of futurity are

ed, or by the circumstance that the first class would be one of the class to take if the persons it comprised were to be ascertained at the death of the testator, yet that there was in the case before the court sufficient to show that testator intended the persons entitled under the ultimate limitation to be ascertained at the time of distribution. This conclusion is based upon the ground that it was extremely unlikely that the testator would take so circuitous a method of giving his daughter a residue in event of her dying without children, instead of directly saying so (although that reason, taken alone, would not be of sufficient weight to prevent the application of the general rule); upon the fact that the word "then," being twice used, and first as marking the conjunction of circumstances, and in the second instance be read as an adverb of time, the force of which cannot be justified by construing it as denoting the time when the inquiry was to be made; and upon the further ground that if the persons entitled to take under the bequest to the next of kin of his deceased wife were to be determined at the time of his death, it would have been more natural for the testator to limit the estate directly to his daughters, who, of course, were the sole next of kin of the deceased wife, instead of adopting a circuitous mode of expression.

In *Lees v. Massey*, 3 DeG. F. & J. 113, testator, by a will executed very shortly before his death, devised his real estate upon trust to pay a moiety of the rents to his wife for life, and to apply the other moiety toward the maintenance of his daughter, who was his only child; and after the decease of his wife, gave all the real estate to his daughter, her heirs and assigns forever; adding: "Provided, nevertheless, that in case of the decease of my said daughter . . . without lawful issue, and my said wife . . . her surviving, then and in such case I bequeath such last-mentioned estates to her, my said wife, for life, and after her decease to my relations, share and share alike." It was held that the limitations in the will were inconsistent with an intention that the class designated as "my relations," who were to take "share and share alike," should be ascertained at his own death; as he must have known that his daughter would be his sole heir and sole next of kin at that time.

In *Re Greenwood*, 31 L. J. Ch. N. S. 119, where testator gave a sum of money in trust for his daughter for life, and after her decease for the use of her husband and children, and in case she should not have any child or children, or that none of them should attain a vested interest in the trust fund, "then to assign and transfer the said stocks, funds, and securities, and all accumulations, if any, of the interest and dividends thereof, unto such person or persons as shall happen to be my next of kin according to the statute for the distribution of intestates' estates." Testator's next of kin at the time of his death were his four children. It was held, following

Briden v. Hewlett, 2 Myl. & K. 90, 1 L. J. Ch. N. S. 114, and *Butler v. Bushnell*, 3 Myl. & K. 232, 3 L. J. Ch. N. S. 139, that it was not probable that testator should mean to include as one of his next of kin the person upon whose death without issue he had expressly directed that the property should go over; and therefore that the class entitled under the ultimate limitation was to be ascertained as of the date of the daughter's death.

A clear expression of intention of testatrix that the next of kin should be ascertained at the death of the tenant for life, and not at her own death, was held, in *Travis v. Taylor*, 14 Week. Rep. 909, to be manifested by a will by which testatrix, after giving a life estate to a niece, with remainder to her children, provided, "If my said niece shall happen to die without leaving lawful issue as aforesaid, that then the whole of my said estate and effects . . . shall go and belong to such person or persons as shall then be my next of kin in a course of administration according to the statute of distribution of intestates' personal effects."

In *Clowes v. Hilliard*, L. R. 4 Ch. Div. 413, 46 L. J. Ch. N. S. 271, 25 Week. Rep. 224, testator created a trust for each of his daughters for life, remainder to their respective issue, with cross remainders between them, the issue to take vested interests at twenty-one or marriage, and further declared that if all his daughters should die without having any child or issue who should acquire a vested interest in the premises, then that the trustees should stand possessed in trust "for such person or persons as would have been entitled to the residue of my trust estate under and according to the statutes of distribution in case I had then died intestate." The court, in holding that those who, as some of testator's next of kin, would be entitled under the limitation over if his four daughters, who were all living and unmarried, were dead without issue, had no such interest as entitled them to institute an action for administration, said that the gift was to those persons who might answer the description of the testator's next of kin at the period when all his four daughters should have died; and, as to three of them, without issue who should have acquired vested interests.

An artificial class was held, in *Sturge v. Great Western R. Co.* L. R. 19 Ch. Div. 444, to have been created by the provisions of a will by which testator directed property to be held in trust for the benefit of each of his children for life, with remainder to their issue, etc., and in default of the previous limitations "upon trust for the person or persons who, at the time of such respective decease of my children, shall, by virtue of the statutes for the distribution of the estates of persons dying intestate, be my next of kin; and if more than one, then in the shares, proportions, and manner prescribed by the said statutes," the court saying: "It appears to me that the

corresponding words here, 'who, at the time of such respective decease of my children, shall,' etc., import that the class was to be ascertained at that time. It seems to me to follow as a matter of course that we have got an artificial class, artificial in the sense that you must suppose that the testator was looking to a class who would be ascertained at the time he designated and at no other time; and that although we find in this case a reference to the 'shares, proportions, and maner prescribed by the statutes,' yet those words must give way for the purpose of ascertaining the class at another point of time than that of the death of the testator, at which the statute would ascertain them."

In *Valentine v. Fitzsimons* [1894] 1 I. R. 93, where a testator directed that the residue of his property should, at the death of his wife, or at the expiration of ten years from his death, which ever should last happen, be held by his trustees on trust as to a moiety thereof for each of his sons absolutely, and in the event of either of the sons being dead or having encumbered the provision theretofore made for him by the will, then in trust for all or any of his relations by blood, then living, excluding such son, as the then trustees of his will should appoint, and in default of appointment, "in trust for the persons who would then be my next of kin according to the statutes of distribution of the personal estates of intestates if my son . . . were then dead, such persons, if more than one, to take as tenants in common in the share prescribed by the said statutes." It was held that as the word "then" was used, if not in the first instance, at least in the second, as an adverb of time, the next of kin were to be ascertained as of the date of ten years after the death of testator; and that the reference to the statute of distribution, not being to such statute as conferring title, was insufficient to limit the meaning of such word.

In *Re Karn*, 2 Ont. Week. Rep. 841, where testator devised certain real estate to his daughter for life, with remainder to his granddaughters, "but if my said granddaughter Louisa be not then alive, the same I give and bequeath to her children lawfully begotten, in fee, but failing such children then alive, to my own right heirs absolutely forever," it was held that the word "then," twice used, referred to the death of the daughter, and therefore that the right heirs intended were those existing at the date of her death.

In *Haddock v. Perham*, 70 Ga. 572, where a testator gave property in trust for a daughter for life, and at her death to go to her children, and if she should die without children, then to his heirs at law, it was said in passing that, in default of children, the estate would revert and pass in fee to such persons as might at that time be the heirs of testator; but this may hardly be regarded as an adjudication, the question before the court being whether the daughter took an estate tail.

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In *Johnson v. Askey*, 190 Ill. 58, 60 N. E. 76, where a testator, after giving his daughter, who was his sole heir, his entire estate, to be held in trust for her, provided: "Should my daughter die without issue, it is my wish that said estates, of every kind and nature soever, shall revert back to the heirs of myself and my wife, Elizabeth Johnson, deceased, as the law provides. Should my daughter die with issue, said heir or heirs shall inherit the estate herein given to my daughter,"—it was held that, in view of the circumstances that the testator's daughter was not possessed of average mental capacity, was wholly unfit to care for, preserve, and manage the estate, and the use of the word "heirs," which evidently refers to a class consisting of more than one person, it was clearly testator's intention that the remainder should not vest at the time of his death, but at the time of the death of his daughter.

In *Bond v. Moore*, 236 Ill. 576, 19 L.R.A. (N.S.) 540, 86 N. E. 386, where testatrix devised her entire estate to her son for life, and provided that "should he die without children, then the estate, or so much of it as may remain after his reasonable expenses for living, etc., shall go to my nearest relatives in such proportions as the law in such cases does provide," it was held that, as the son was himself the nearest relative of testatrix at the time of her death, the remainder would be considered as given to the persons answering the description at the termination of the estate for life.

In *Sears v. Russell*, 8 Gray, 86, an intention to refer to those who should be testator's heirs when the contingency should arise, and not to those who were his heirs at the time of his decease, in a testamentary provision by which testator, after creating trusts for the benefit of his children for life, and directing that, at the death of each, the trust property should be conveyed and transferred to his or her child or children then living, or to the issue of any then deceased, further directed that, in case of the decease of any one or more of the grandchildren "during the lifetime of such surviving son-in-law or daughter-in-law, the distributive share or shares of said grandchildren or either of them so deceasing without issue shall not pass to or vest in such surviving sons-in-law or daughters-in-law, but, on the contrary, I do hereby give and devise the same to my heirs at law," and further providing that nothing contained in the will should prevent or deprive any grandchild arriving at the age of thirty years, or at the time fixed for distribution, from making a will disposing of such property,—was held to be manifested by a clause by which a legacy was given to any son-in-law or daughter-in-law who should survive their respective wives or husbands, out of the devise in trust for the benefit of such deceased husband or wife, and in which testator stated, "and having thus provided for my sons-in-law and daughters-in-law as shall or may out-

to my children, their husbands and wives, I deem it fit and proper that in case of the decease afterwards and without issue of any of my said grandchildren, they, the surviving sons-in-law or daughters-in-law, should not become seised or possessed, by tenancy or otherwise, of any right, property, interest, or estate in said distributive share or shares of said trust property belonging to such grandchildren, any law or usage to the contrary notwithstanding." And this view of the testator's intent was further held to be greatly strengthened by the use of the same words with a similar meaning in a preceding clause by which testator directed the trustees, in the event of the death of his daughter without issue, to convey the trust estate to his heirs at law, since, if the heirs referred to were those who were his heirs at the time of his death, it would follow that his daughter would have an equitable estate for life and also a vested right to a conveyance in fee of the same estate upon her own decease.

In *Heard v. Read*, 169 Mass. 216, 47 N. E. 778, construing a will by which a widower, about seventy-five years of age, gave a residuary estate in trust for his daughter, a childless widow, then over forty-two years of age, who was his sole heir presumptive, remainder to her issue, and if she should leave no issue surviving her, "the trust premises shall at her decease be divided into two equal parts or portions, one of which parts shall go to and be held by a certain person] . . . and the other part shall be divided among my heirs at law as though I died intestate," it was held that not only the particular phrases of the will, but its general purport in the event which had happened, of the daughter's death without issue, and which the testator must have contemplated, was inconsistent with any intention that the daughter, if she should leave no issue surviving her, should take as sole heir one half of the trust property, but that the testator had in mind his heirs at law living at the time of the decease of his daughter.

In *Brown v. Wright*, 194 Mass. 540, 80 N. E. 612, where the effect of a will and codicil was to give testator's son a life estate in \$2,000, being a part of a trust estate, which life estate was subject to a life estate in the whole trust estate in testator's widow, with remainder to the son's issue, or, failing such issue, to testator's right heirs at law: and it was plain from the provisions of the will, as read in the light of the circumstances, that it was made in the expectation that the son would be testator's only child and sole heir presumptive, it was held that, there being no words of present gift to the heirs, but the gift to the heirs being made by way of a direction to pay over and distribute only, and the gift over being made after a life estate in the sole heir presumptive, the heirs were to be ascertained as of the date of the termination of the life estate; and that this conclusion was strengthened by the

fact that there was in effect a direction to accumulate all income after the wife's death above the income on the sum given for life to the son.

In *Boston Safe Deposit & T. Co. v. Blanchard*, 196 Mass. 35, 81 N. E. 654, testator seventy-six years of age left as his only descendant a daughter who was a widow and childless and *non compos mentis* at the time the will was executed, and thereafter until her death. After creating a trust to pay over one half the net income to his wife and the other half to, or for the benefit of, his daughter, and making certain provisions in the event of the death of his wife or daughter, leaving issue, and directing that, in the event of either of them dying without leaving issue, the whole of the net income should be paid to the survivor, testator continued: "And upon the decease of such survivor leaving issue, to distribute the principal of the trust fund among my issue; and if, on the decease of such survivor, there should be no living descendant of mine, then to distribute said principal among my own right heirs, unless my adopted son, Thomas Blanchard, Jr., or some issue of his body, should then be living, and in that case pay over to him, if living, or to his issue if he be not then living, one half of said principal fund." It was held that, taking into account the situation of testator with reference to his wife, daughter, and other kindred at the time of the execution of his will, the fact that the will contains no words of present gift to the "right heirs" of testator, and the fact that the vesting of any interest in Thomas Blanchard, Jr., or his issue, is, by the clear terms of the will, made contingent upon one or the other being alive at the time of distribution, an intent was indicated that only upon the death of the surviving life tenant should the ultimate beneficiaries be ascertained.

In *Hardy v. Gage*, 66 N. H. 552, 22 Atl. 557, a testatrix, after creating a trust the income of one half of which was to be paid to her daughter during her life, and the income of the other half to the daughter's son up to the age of twenty-three years, and providing that if such son and any other child that might be born to her daughter should die before becoming twenty-three years old, then the income of the whole estate should be paid over to the daughter, and so much of the principal as the executors might judge necessary for her personal comfort, further provided that, in case the daughter's son and any other child which she might have should die before attaining the age of twenty-three that, upon the decease of the daughter, "all the said residue of my estate shall go and descend to my heirs at law." It was held that the daughter being the sole next of kin and heir at law at the time of the death of testatrix, it was unreasonable to suppose, in view of the direction to devote the income and so much of the principal as might be necessary for the comfort of the daughter in the event of the decease

of the daughter's children in her lifetime, that testatrix meant to give the daughter the whole estate in such event, and therefore that the gift over must be construed as intending to refer to the persons answering the description of next of kin at the death of the daughter.

In *Beers v. Grant*, 110 App. Div. 152, 97 N. Y. Supp. 117, affirmed without opinion in 185 N. Y. 533, 77 N. E. 1181, it was held that, under the provisions of a will by which testator gave to trustees a portion of his residuary estate in trust for a daughter during her natural life, and after her death to her children, and in case of failure of children, to testator's heirs at law in such shares and proportions as, by the laws of the state of New York, they would take and inherit real estate of which he should die possessed and intestate, the daughter took no interest in the property as an heir at law of the testator, but that, upon her death without children, it became the duty of the trustee to pay over the trust fund, in the shares which they would have taken, to and among those who would have been testator's heirs at law had he died a moment after his daughter's death.

In *Salter v. Drowne*, 141 App. Div. 352, 126 N. Y. Supp. 686, testatrix devised a sum of money upon trust for her sister for life, and on the death of the sister, for her daughter for life, "and if my daughter be not living, or on her death, then to pay and divide such principal sum or the investment thereof to the issue of my daughter absolutely, and if none, then to my next of kin." She then devised certain real estate in trust for her daughter for life, and if her daughter should not be then living, or on her death, to convey such realty in fee to the daughter's daughter upon her attaining the age of twenty-one, and if she should not be then living, then to convey to her issue, and if none, "then to my heirs at law." Testatrix further created a trust in her residuary estate for her daughter for life, adding, "and if my daughter should not then be living, or on her death, to pay such principal sum, or the investments thereof, to the issue of my daughter and if my daughter shall leave no issue, then to my next of kin." The granddaughter died without issue in the lifetime of testatrix. The daughter was the sole heir and next of kin of testatrix at the time of her death. It was held that as there was no immediate gift of the remainder interests, but only a direction to the trustees to pay and divide in the future with respect to the trusts of the personal property, and to convey in the future with respect to the trust of the real estate; and as testatrix could not have intended to give her daughter a remainder limited upon her own life, but in all probability, the daughter having issue living at the time the will was made, the ulterior bequest to the next of kin of testatrix was considered by her, if at all, only as a remote possibility, as to which she did not have

the particular individuals in mind; it was plain that testatrix did not intend that the remainder should vest upon her death, but that the persons entitled under the ultimate limitation should be those who would answer to that description after the death of the daughter.

In *Peirce v. Hubbard*, 152 Pa. 18, 25 Atl. 231, where a testator directed property to be held in trust for his daughter, "and in case of her death without issue or issues of her children, then reversible to my right consanguinary heirs," it was held that the devise over was to the persons who, at the daughter's death, were then the right heirs of testator.

In *Everitt's Estate*, 195 Pa. 450, 46 Atl. 1, construing a devise of testator's entire estate in trust for the benefit of his son, an only child, for life, with remainder to his children, "and in case he shall die leaving no children, . . . then all my estate shall go to and immediately become vested in my next of kin then living, share and share alike, including issue born to my brother George B. and his second wife, Rosanna," it was held to be clear that the testator intended only his next of kin who should be living at the death of his son to be the residuary legatees of his estate.

In *Wood v. Schoen*, 216 Pa. 425, 66 Atl. 79, a testator devised all his real estate to a trustee for the purposes named in his will. If he died without children, he directed his trustee to pay one half the proceeds to his wife for life and the other half to his three sisters and the survivor of them for life. Upon the death of his wife and sisters he devised one third of his estate to a nephew and niece, and the other two thirds to such child or children as he might leave, or their issue, adding: "And in default of such child or children or issue, then to those who would then be entitled thereto under the intestate laws of this state. And I authorize my said trustees aforesaid to convey and assure the same by proper assurances in law to said persons respectively." It was held that as the word "then" is used twice in the provision in question, it must have been employed the second time for a different purpose and with a different meaning than where first used, and so must be given its adverbial significance; and therefore that it was the intention of the testator, as disclosed by the will, to devise the two thirds of the remainder of his real estate to those who should be his heirs at the expiration of the particular estate, and not to those who were his heirs at the time of his death.

In *Merrefield's Estate*, 5 Pa. Dist. R. 463, where a testatrix, after giving a life estate in the income to her son, who was her sole heir at law at the date of her death, with remainder to his child or children upon reaching majority, provided that should her son die without issue surviving, then after his decease "all of my said residue to be equally divided amongst my heirs then living, absolutely, agreeable with the intestate laws of Pennsylvania," the

fact that the son was given only the income for life was held to show that those who were to take the residue were to be ascertained at the time of his death, and not that of the testatrix. No allusion is made to the circumstance that the limitation was expressly to "heirs then living," although this would appear to furnish a better basis for the conclusion reached than the reason assigned by the court.

2. Executory limitations.

In *Doe ex dem. King v. Frost*, 3 Barn. & Ald. 546, where a testator having a son and married daughter who had five children devised to his son in fee, adding: "And if the said W. Frost [his son] should have no children, child, or issue, the said estate is, on the decease of the said W. Frost, to become the property of the heir at law, subject to such legacies as the said W. Frost may leave by will to any of the younger branches of the family," the will, in the light of surrounding circumstances, was held sufficiently to manifest an intention that the expression, "the heir at law," should mean the person who, at the time of the son's decease without issue, should then be the heir at law of the testator, it being clear that the son himself could not be meant as the heir at law, as then the devise over would be nugatory, and the power of leaving legacies unnecessary.

In *White v. Springett*, L. R. 4 Ch. 300, where testator gave his estate to such of his three grandchildren as should survive their father and attain twenty-five, but directed that in case two only of them should die in the lifetime of their father, or under twenty-five, and the amount to which the surviving grandchild would then become entitled should exceed a certain sum, then the excess should go to the person or persons exclusive of the surviving grandchild who, under the said statute for the distribution of personal estates of intestates, would, immediately after the decease of the survivor of my other two grandchildren, be entitled to my personal estate in case I had at such time died intestate," it was contended that it having turned out that the surviving grandchild was testator's sole next of kin at the time of the decease of the survivor of the other two grandchildren, and as such grandchildren were excepted from the class, the gift failed for want of a member of the class; but it was held that the testator, in the clause under discussion, did not say that the surviving grandchild was to be excluded from the class entitled, but that he had created for himself an arbitrary class, to be ascertained by applying the statute to a particular time in order to arrive at the particular class of persons, without any reference to any division of the estate, or any exclusion of the particular person from taking a share; and therefore that the persons entitled under the limitation were those who would have been next of kin had the surviving

grandchild also been dead at the time when the class was to be ascertained.

In *Welch v. Brimmer*, 169 Mass. 204, 47 N. E. 669, testator gave his son, who was his only heir, a moiety of his estate, to be held in trust for him until he should attain the age of twenty-three, and added: "Provided, however, that in case my said son shall die having no issue him surviving, or such issue shall de cease during minority, then and in either of such cases my will is that my sister, Eliza Oliver, shall have and take the said moiety of my estate and its accumulations hereinbefore given to my said son, and if the said Eliza O. shall not then be living, I give said estate with its accumulations to the person or persons who shall be my heir or heirs at law." The other moiety of the estate was given to the sister for life, with remainder to the son or his issue, with a similar limitation over to testator's heir or heirs at law. It was held that the fact that the son, who was the sole heir presumptive of the testator when the will was made, was given a fee, furnished a somewhat stronger reason for holding that the heirs were to be determined as of the time of the death of the first taker than when the first taker has only a life estate and the devise is of a remainder; and that the repeated use by the testator of the word "shall" in the clause quoted, and the concluding portion of such clause, in which the word "then" relates to the time of the death of the son, tended to confirm the conclusion that the testator must have intended his heir or heirs living at the time of the death of his son.

In *Pinkham v. Blair*, 57 N. H. 226, it was held that where the only next of kin of testator at the time of his own decease were three children, to whom he devised his estate in fee, a provision that, in the event of the death of all his children without issue, "then my will is that said estate shall go to my next of kin, and their heirs and assigns forever," had reference to those who should be his next of kin at the time of the death of the last survivor of his children without issue.

In *Delaney v. McCormack*, 88 N. Y. 174, a testator gave his son the whole of his real estate for life, and absolutely and in fee in case the son married and had issue, but if he should die without having had lawful issue, the testator directed his executors who should then be surviving, or the last survivor of them, to sell his real estate and distribute the proceeds among the testator's "next of kin as personal estate according to the laws of the state of New York for distribution of intestate personal estate." It was held that the gift not being immediate, conditioned upon the death of the son without having had lawful issue, and the fact that as, at the death of the son, the land was to be converted into personalty, and distributed as such, the subject of the gift did not come into existence until after the son's death; as well as the incongruity of a construction which

would give the property to the son, who was testator's sole next of kin at the time of his death, upon the death of such son without issue,—all went to show that the next of kin to whom the proceeds were to be distributed were those who were such at the date of the son's death.

In *De Wolf v. Middleton*, 18 R. I. 810, 31 L.R.A. 146, 26 Atl. 44, 31 Atl. 271, a will by which testator gave his daughters a defeasible fee, providing that if they should leave no surviving heir, his estate "on their decease" should "be divided among my heirs at law according to the statute of descents," was held to manifest an intent that testator's heirs should be ascertained as of the time of the death of the daughters, notwithstanding the use of the words "according to the statute of descents."

In *Green v. Edwards*, 31 R. I. 1, 77 Atl. 188, where testator, after giving equitable estates in fee tail to his three children, with contingent cross remainders to the survivors or their descendants if either child died without issue, provided that "in case of the death of all my said children without issue, they [the trustees] shall transfer and convey the estate held by them in trust to my heirs at law according to the statutes of descent and distribution then in force in the state of Rhode Island." It was held that a vested remainder was given to heirs at law to be then designated.

V. Exclusion of first taker from participation.

It should be pointed out that the question as to when a first taker who is also a member of the class to which the limitation over is made is to be excluded from participation is not peculiar to cases of the type under discussion, but is governed by much the same considerations as where the class is described by other words than those with the construction of which this note is concerned.

In *Lee v. Lee*, 1 Drew. & S. 85, 29 L. J. Ch. N. S. 788, 6 Jur. N. S. 621, 8 Week. Rep. 443, it is said that if a testator bequeaths property to a class by a particular description, and the question arises whether a certain individual who comes within the description ought or ought not to be excluded, it is not sufficient, in order to exclude him, to show the absence of a special intention to include him, but that a clear and unambiguous indication of an intention to exclude him must be shown; that there is no such absurdity or unreasonableness in a person taking a life interest by virtue of a particular gift to him *nominatim* and a further interest, either alone or jointly with others, as the case may be, under a gift of the same will to a class which, as described by the testator, merely includes him; especially since it is probable that the testator did not concern himself with the consideration of the question who would be his next of kin, but simply intended that, at all events, the first taker should

have a life estate, then that the property should go to his next of kin, whoever he, she, or they might happen to be.

The fact that some of the persons who would fall within the class described, if ascertained at the testator's death, are tenants for life, will not prevent them from taking under the limitation. *Mitchell v. Bridges*, 13 Week. Rep. 200, 11 L. T. N. S. 727; *Smith v. Winsor*, 239 Ill. 567, 88 N. E. 482; *Rotch v. Loring*, 169 Mass. 190, 47 N. E. 660; *Buzby's Appeal*, 61 Pa. 111.

The fact that the first taker is sole member of a class to which a limitation over is made is no sufficient ground for excluding such person from participation, since the effect of a positive bequest is not to be controlled by inference and argument from the other part of the will. *Jones v. Colbeck*, 8 Ves. Jr. 38, 6 Revised Rep. 207; *Murphy v. Donegan*, 3 Jones & L. 534; *Thomas v. Castle*, 76 Conn. 447, 56 Atl. 854; *Buzby's Appeal*, 61 Pa. 111; *Kenyon's Petition*, 17 R. I. 149, 20 Atl. 294.

In *Elmsley v. Young*, 2 Myl. & K. 780, 4 L. J. Ch. N. S. 200, construing a settlement upon trust to pay the interest to one for life, remainder to his children, and if no child, to such person or persons as the settlor should appoint, and, in default of appointment, to such person or persons as should, at the time of the settlor's decease, be the settlor's next of kin, it was held to be too clear for argument that the life tenant should be included in the class of next of kin to whom the fund was ultimately limited.

The case of *Pearce v. Vincent* involved a will by which testator devised his real estate to a cousin, Thomas Pearce, for life, remainder to such of his relations of the name of Pearce, being a male, as the cousin should by deed or will appoint, and in default of such appointment, to such of his relations of the name of Pearce, being a male, as the cousin should approve of or adopt if he should be living at the death of the cousin; and in default of appointment or adoption, then testator devised the said estates and premises unto the next or nearest relation or next of kin of him, the testator, of the name of Pearce, being a male, or the elder of such male relations in case there should be more than one of equal degree who should be living at his, the testator's decease. The cousin was the nearest male relation of the testator living at his death. The question having arisen as to whether the cousin took under the ultimate limitation, before Sir John Leach, then master of the rolls, he directed the case to be sent to a court of law, inasmuch as the question affected real estate. The case was accordingly submitted to the court of exchequer, which (see 1 Crompt. & M. 598) expressed the opinion that the cousin took an estate in fee simple under the ultimate limitation. This conclusion, however, seemed to the master of the rolls (2 M. & K. 800) inconsistent with the limited

power of appointment given to the first taker, inasmuch as it would give him the power of defeating the object of the appointment. He therefore directed a second case to be sent to the court of common pleas, which (see 2 Scott, 347, 2 Bing. N. C. 328) arrived at the same conclusion as the court of exchequer. The case was ultimately disposed of by Lord Langdale, M. R. in 2 Allen, 230, who said: "It is argued that [to be excluded from taking under the ultimate limitation] because the gift to Thomas Pearce for life, and the restrictions put upon him, in his character of tenant for life, are wholly inconsistent with an intention on the part of the testator to give him the absolute power over the estate. But the testator could not have had in his view and knowledge that the ultimate gift, which is limited to a person unascertained at the date of his will, would go to Thomas Pearce. The argument derived from intention does not apply in this case; and I am of opinion that, upon the true construction of the will, Thomas Pearce took under the ultimate limitation, not because he was the individual person intended by the testator to take, but because he answers the description of the person to whom the estates are ultimately given."

In *Gorbell v. Davison*, 18 Beav. 556, the testator, after limiting a remainder to next of kin, provided that, should no claimant appear after twelve months from the decease of the life tenants, the principal sum should be equally divided amongst certain charities, was not regarded as sufficient to exclude the life tenants, who were testator's sole next of kin at the time of his death, from taking a vested interest in the remainder, which might be claimed after their death by their representatives.

In *Thompson v. Smith*, 27 Can. S. C. 33, a will by which testator, after giving to his wife and daughter, who was his only child, an estate during their joint lives and the life of the survivor, provided: "I do further will and desire that at the decease of both the said Lissy Thompson and Maria Anna Thompson the said residue of my real and personal property shall be enjoyed and go to the benefit of my lawful heirs," was held to contain no indication of any intention, express or implied, to exclude the daughter from the class entitled to the fee.

In *Rand v. Butler*, 48 Conn. 293, where a testator devised property in trust for a grandson who was, at the date of the will and at the death of the testator, his only living issue and heir, and who was an imbecile, the income thereof to be expended for his support during his natural life, and on the decease of said grandson, then to deliver and transfer the property to testator's heirs at law, it was held that neither the fact that the property was put in the hands of trustees for the benefit of the grandson during his life, nor the fact that the testator speaks of his heirs in the plural number, while the grandson was his sole L.R.A. (N.S.)

heir, was sufficient evidence of an intention to use the word "heir" in other than its usual and legal acceptation, to warrant the exclusion of the grandson from consideration, if the will should be so construed that the heirs must be ascertained at the death of testator.

In *Fargo v. Miller*, 150 Mass. 225, 5 L.R.A. 690, 22 N. E. 1003, it is said that whether, if the life tenant was the sole next of kin or heir of the testator when the will was made, and would continue to be such if he survived the testator, and this was known to testator, this fact alone would be sufficient to show that the testator did not include him in a bequest or a devise of a remainder to the heirs or next of kin of testator, cannot be considered as free from doubt.

In *Harris v. McLaran*, 30 Miss. 533, it is held that no inference of an intention to exclude the life tenant from the benefits of the limitation over could be drawn from a provision in a deed by which slaves were settled upon grantor's daughter for life, with remainder to her issue, and, in default of issue, then to grantor's lawful heirs.

In *Wadsworth v. Murray*, 161 N. Y. 274, 76 Am. St. Rep. 265, 55 N. E. 610, a provision that, upon the death of a grandson without issue, a trust fund of which he was the life beneficiary should descend to and vest in testator's heirs at law in the same manner that it would have descended to and vested in them if the will had not been made, and the said grandson had died without issue before testator's decease, was held not to exclude by implication the grandson from any share in testator's estate under a limitation over to testator's heirs at law in event of the death of another beneficiary without issue.

The fact that a limitation over to the heirs of a testator can take effect only after the death of certain persons who would be heirs at the time of testator's death is not enough to demonstrate an intention to exclude them from participation. *Stewart's Estate*, 147 Pa. 383, 23 Atl. 599.

See also, in this connection, *Peck v. Carlton*, 154 Mass. 231, 28 N. E. 166, set out under subdivision IV. b, supra.

On the other hand, an intention to exclude the first taker in ascertaining the membership of the class entitled under the limitation over was held to have been manifested in the following cases:

In *Bird v. Wood*, 2 Sim. & Stu. 400, 4 L. J. Ch. 86, 25 Revised Rep. 238, testatrix bequeathed property upon trust for her daughter for life, and after the death of her daughter, to transfer to such persons as her daughter should appoint, and, in default of appointment, then upon trust to assign and transfer the property unto testatrix's own next of kin according to the statute of distribution, to be considered as a vested interest from the time of testatrix's death, except only as to any child that might be afterward born of her daughter, and it was held that the daughter

could not be such next of kin, for the persons intended were to take at her death; and the persons intended must have been living at the death of the testatrix, for their interests were then to be vested; and therefore that the persons who, at the testatrix's death, would have been her next of kin if her daughter had been then dead without children, were plainly intended. This case has been distinguished in subsequent decisions as having been decided on a ground which, though it appears in the statement of facts, is not touched upon in the judgment. This ground is that the exception showed what was the class of persons out of whom the exception was made, and the exception being of "any child that might be afterward born" of the daughter, it was plain that the next of kin at the death of the daughter were the persons entitled.

In *Briden v. Hewlett*, 2 Myl. & K. 90, a testator gave his personal estate to trustees to invest and to pay the interest to his mother, who was his sole next of kin, for her life; and after the decease of his mother, he gave the principal to such person or persons as she should by her will direct and appoint; "and in case my said mother shall die without a will, then to such person or persons as would be entitled to the same by virtue of the statute of distributions." The court said: "It is impossible to contend that this testator meant to give the property in question absolutely and entirely to his mother, because he gives it to her for life, with a power of appointment. In case of her death without a will, the testator gives his property to such person or persons as would be entitled to it by virtue of the statute of distributions. Entitled at what time? The word 'would' imports that the testator intended his next of kin at the death of his mother. It is clear that he meant to exclude his mother from the class who were to take in the event of her intestacy; and no question can, in this case, be raised between the next of kin, exclusive of the mother, at the time of the death of the testator, and the next of kin at the time of the death of the mother; for these are here the same persons."

In *Say v. Creed*, 5 Hare, 580, 16 L. J. Ch. N. S. 361, 11 Jur. 603, the fact that testatrix, knowing that the life tenant, if she survived her, would be her sole next of kin *ex parte paterna* as well as *ex parte materna*, limited the remainder to her next of kin *ex parte materna*, was held to show an intention to exclude the tenant for life; such exclusion being accomplished by holding that the members of the class were to be ascertained at the time of the death of the life tenant.

The express exclusion of persons who would be members of a class to whom a limitation over is made at the termination of a life estate if the life tenant were excluded may be taken as indicative of an intention to exclude the life tenant, where the context of the will or the circumstances

under which it is executed show that the testator, when making it, regarded it as certain that the state of his family would remain precisely the same at his death as at the date of his will; but where such a provision is susceptible of explanation as having been intended to meet the possibility of changes in the class before testator's death, it may well be questioned whether such provision affords a clear and unambiguous indication of an intention to exclude the life tenant from taking. *Lee v. Lee*, 1 Drew. & S. 85, 29 L. J. Ch. N. S. 788, 6 Jur. N. S. 621, 8 Week. Rep. 443.

In *Nicoll v. Irby*, — Conn. —, 77 Atl. 957, where testator created a trust for the benefit of his brother so long as he should live, and after his death for the support and maintenance of any children, heirs of his own body, who should survive him, till the youngest of them should attain the age of thirty years, when the trust property was to be divided among them, and in the event of the brother dying without children, heirs of his own body, then to testator's own heirs, adding, "it is my will that no adopted child shall receive aught under this will," it was held that the testator's manifest unwillingness that the remainder estate should go to the life tenant's natural heirs, or to those whom he might make his heirs by will, and the fact that the language used assumes that the heirs designated will, or may, be in existence at the time the payment was to be made after the brother's death, together with the use of the plural "heirs," and the provision that they are to share alike, indicated an intention on the part of the testator to exclude the life tenant from the heirs who were to take.

In *Smith v. Winsor*, 239 Ill. 567, 88 N. E. 482, testator gave to his wife, in case she should survive him, his entire estate for life, with full power to sell and convey and to use the proceeds or any part thereof in any way she should desire for her comfort or advantage, or for such charitable purposes as she should deem worthy, adding: "At and upon her death the remainder of the said estate, if any, to descend to my heirs at law in proportion as designated and provided by statutes of the state of Illinois." He further provided that his wife should not be held accountable for the use or disposition of such estate or any part thereof, or the proceeds arising from any sale thereof. In case his wife should not survive him, he directed that his estate should descend to his heirs at law. It was held that while the fact that the life tenant was to have the use of all the property during life was not alone sufficient to indicate an intention to exclude the life tenant from the class to whom the remainder is limited, but that, taken in connection with the provision giving the estate to testator's heirs at law in the contingency of his surviving his wife, and the fact that the power of disposition given her was limited to the right to use it for her own support, comfort, and enjoyment, or for

such charitable purposes as she should deem worthy, showing that testator did not contemplate that she would have power over the property for any other purpose, the intention of the testator was manifest that the widow should not take under the ultimate limitation, but that, subject to her use and disposition, it should pass to his heirs at law who were of his blood.

In *Walker v. Dunshee*, 38 Pa. 430, it was held that testator's children were to be excluded from participation in the ultimate limitation of a devise to them in tail, with cross-remainders in tail, remainder to testator's right heirs and to the right heirs of his wife, as tenants in common, forever.

VI. Instances in which members of class are ascertained at testator's death, but take only in event of surviving distribution.

This subdivision may be prefaced with much the same statement as the one preceding, that the decisions which follow should be regarded only as instancing the application to cases of the type falling within the scope of this note of general principles common to all testamentary gifts to a class.

In *Spink v. Lewis*, 3 Bro. Ch. 355, where testator directed his residuary estate to remain invested for the space of ten years, when the fund thus accumulated should be divided into six parts, one sixth thereof to be paid to a nephew or to his legal representatives, and the other five parts thereof to be divided among such next of kin and legal representatives as should then be living, under the usual and due course of representation, it was said to be plain that the testator meant by "next of kin" some class of persons of whom it was doubtful whether they would live ten years, and that the only next of kin of the testator living at his death having died before the end of the ten years, the disposition of the five sixths lapsed.

In *Bishop v. Cappel*, 1 De. G. & S. 411, where the testator provided that a moiety of his personal estate given to a brother should "not be left to him and his heirs forever, but for the term of his natural life; and after his decease to go to . . . his wife; and at her decease to go to such of my relations as shall survive them, share and share alike," it was held that, although the construction of the provision was doubtful, it would be construed as a limitation over to such of the persons entitled at testator's death to his personal estate under the statute of distributions as should be living at the expiration of the life estates.

In *Eagles v. Le Breton*, L. R. 15 Eq. 148, 42 L. J. Ch. N. S. 362, where testatrix, after devising all her real estate to her sisters as tenants in common, directed: "At the death of my sisters . . . the residue of my property is to pass to my relatives in America," it was held that the class was to be determined at the death of the testatrix, but that they took as

joint tenants; which therefore limits the donees to those members of the class who should survive the termination of the life estate.

In *Re Nash*, 71 L. T. N. S. 5, where testator gave his residuary estate to his wife for life, directing that after her decease a certain legacy be paid, "and that the nearest relatives then living (to be hereafter named in a codicil) shall receive the benefit equally among them after the aforesaid sum has been paid," it was held that, testator having left no codicil to his will, the class was to be ascertained at his death, but that only such of them were to take as survived the tenant for life.

In *Re Winn* [1910] 1 Ch. 278, a testator seventy-three years old when he made his will, and whose next of kin at the time the will was made and at the time of his death were his nephews and nieces, directed a certain sum to be held in trust for each of his nieces for life, and for the husband of each for life in the event of her leaving no issue, remainder to any child or issue, and in the event of the death of any niece without issue, or of the death of such issue before becoming entitled to the principal, "upon trust for my next of kin, whoever they may be, living at the time of the trusts failing as aforesaid, except the children or other descendants of my late nephew Thomas Winn, deceased, whose children are hereinbefore, as well as by other means, amply provided for." Sums equal to those thus given in trust were then given upon similar trusts in favor of each of his nephews and their issue, "and with the like gift over in favor of my next of kin, except as aforesaid, for want of issue respectively, as hereinbefore mentioned." He also directed his trustees to hold a further sum upon trust in favor of T. T. and his children and issue, and in case of the death of the said T. T. without issue living to acquire a vested interest, then such sum to go as T. T. should appoint, "and in default thereof, to my next of kin except as aforesaid." The six nephews and nieces were made residuary legatees. It was held that, looking at the will alone, it was rather to be supposed that the testator contemplated that, in respect of the final limitation of the various trust funds, the same class would take, subject, however, in each case, to their surviving the failure of the preceding trusts, rather than he meant that in case of each of the trust funds there would be a different class to take under the ultimate limitation in favor of the next of kin; such conclusion being supported by the similarity of the ultimate limitation of the gift to T. T.; and therefore that the natural construction was, in the case of all the legacies, that the limitation was to those of the testator's next of kin at the time of his death who should survive the failure of the preceding trusts. And it was further held that no inference to the contrary could be drawn from the expression "whoever they may be," since such expression may be explained either as

meaning a doubt in testator's mind as to who will be his next of kin, or as meaning that he is in doubt as to which of the next of kin may survive the period; and since to hold that the class is to be ascertained at the failure of the prior trust in respect of each trust fund would be in effect to strike out the word "living." And further, that no such inference could be drawn from the exception of the descendants of his deceased nephew, as the same exception is made in the limitation over of the sum bequeathed in trust for T. T., where the class must be ascertained at testator's death; or from the fact that the residuary legatees would have been the testator's next of kin if he had died immediately after making his will.

In *Re Wilson*, 53 Misc. 238, 104 N. Y. Supp. 480, where testator, after creating a trust for the use of a certain person for life, directed that, on her decease, the trust fund "be paid to the heirs of my body then surviving, they to share alike," it was held that the heirs of the testator were determinable at his death, but that it was clearly his intention that the title should not vest until the death of the life tenant.

In *Gourdin v. Shrewsbury*, 11 S. C. 1, testator gave his residuary estate to his executors to sell and reinvest the proceeds in stock, which stock was given to testator's two daughters during their natural lives, share and share alike, the share of the one first dying to go to her surviving children, and in default thereof, and subject to a provision for any husband, to her sister. He further provided that at the death of the survivor of the two daughters, the stock and property immediately bequeathed to her, or which she might take at the death of her sister, should go to her surviving child or children, and in default thereof, and subject to a provision for any husband, to the child or children of her deceased sister, if living at the death of the daughter so surviving, "and if there be no child of her deceased sister, then the said remainder shall go to my legal representatives in fee simple." It was held that, as the will manifested the intention that after the direct line of descent should be exhausted during the lifetime of the two daughters, the estate should go to the collateral line, the words "my legal representatives" had reference to those answering such description who should be living at the death of the daughter last dying.

In *Barber v. Crawford*, 85 S. C. 54, 67 S. E. 7, the following provision: "If any of my children named in my said will or codicils to whom I have given my property should die without bodily heirs, it is my will that all of said property be equally divided among my surviving heirs, share and share alike," was construed in accordance with the rule that survivorship relates to the time of the testator's death only where there is no other period to which it may be referred, as an executory devise to those answering the description of surviving heirs at the time of the death 33 L.R.A. (N.S.)

of the first taker, and not that of the testator.

E. S. O.

PENNSYLVANIA SUPREME COURT.

W. H. DENTZEL, Admr., etc., of G. A. Dentzel, Deceased,
v.

ISLAND PARK ASSOCIATION et al.,
Appts.

(229 Pa. 403, 78 Atl. 935.)

Sale — delivery f. o. b. — passing of title.

Title passes upon delivery by the seller of machinery to the carrier f. o. b. at the place of manufacture, if it is not expressly reserved, although the purchase price has not been paid and the seller is to assist in setting it up.

(January 3, 1911.)

Note. — Passing of title by delivery f. o. b.

The earlier cases on this subject are gathered in a note in 62 L.R.A. 798 et seq. Only cases subsequent to this note are included herein.

Where the term f. o. b. is used in an executory agreement for the sale of an article, if there is no express provision as to the retention of title, such term will be construed to require the seller to deliver the subject-matter of the sale without expense to the buyer at the place mentioned, and at the time of such delivery the title passes from the seller to the buyer, providing payment is made or waived where the sale is for cash. *Hoffman v. Gosline*, 96 C. C. A. 318, 172 Fed. 113; *St. Louis Hay & Grain Co. v. American Cast Iron Pipe Co.* 167 Ala. 442, 52 So. 904; *Kilmer v. Money-weight Scale Co.* 36 Ind. App. 568, 76 N. E. 271; *Samuel M. Lawder & Sons Co. v. Albert Mackie Grocery Co.* 97 Md. 1, 62 L.R.A. 795, 54 Atl. 634; *Vogt v. Schienebeck*, 122 Wis. 491, 67 L.R.A. 756, 106 Am. St. Rep. 989, 100 N. W. 820, 2 A. & E. Ann. Cas. 814 (overruling *Boyington v. Sweeney*, 77 Wis. 55, 45 N. W. 938); *Fromme v. O'Donnell*, 124 Wis. 529, 103 N. W. 3; *Murphy v. Sagola Lumber Co.* 125 Wis. 363, 103 N. W. 1113; *State ex rel. Pittsburgh Coal Co. v. Patterson*, 138 Wis. 475, 120 N. W. 227; *Badger State Lumber Co. v. G. W. Jones Lumber Co.* 140 Wis. 73, 121 N. W. 933.

But a delivery f. o. b. on cars as agreed, where the sale is for cash, will not vest the title in the purchaser when payment is not made; in such case the seller may repossess himself of the goods sold. *Berlowsky v. Rosenthal*, 104 Me. 62, 71 Atl. 69.

In this connection, see note to *McIver v. Williamson-Halsell-Frazier Co.* 13 L.R.A.

APPEAL by defendants from a judgment of the Court of Common Pleas for Somerset County in plaintiff's favor in an action of replevin to secure the return of certain machine sold by plaintiff to defendant Island Park Association. Reversed.

The facts are stated in the opinion.

Messrs. W. H. Ruppel and C. F. Uhl, Jr., for appellants:

The title to the carrousel vested absolutely in the Island Park Association at the time of shipment.

Eare, Contr. 399; Emery v. Scarlett, 8 Pa. Ct. 123; Andrews v. Weaver, 4 Montg. Co. Rep. 110; Leedom v. Philips, 1 Yeates, 27; Bowen v. Burk, 13 Pa. 148; Backen-
v. Speicher, 31 Pa. 324; Welsh v. Pa. 32 Pa. 12; Mackaness v. Long, 85 Pa. 38; Frech v. Lewis, 218 Pa. 141, 11 L.R.A. (N.S.) 948, 120 Am. St. Rep. 864, 67 Atl. 5, 11 A. & E. Ann. Cas. 545.

The fact that the plaintiff made no offer to return the hand money paid at the time the contract was signed, or to return the notes given as part payment for the machine, precluded the plaintiff from asserting title by an action of replevin.

Sloane v. Shiffer, 156 Pa. 59, 27 Atl. 67; Schofield v. Shiffer, 156 Pa. 65, 27 Atl. 69.

Messrs. Charles H. Edmunds, Ernest G. Kooser, and Edmund E. Kiernan for appellee.

Stewart, J., delivered the opinion of the court:

This case called for binding instructions. The contract between buyer and seller was in writing, and so definite and explicit in its terms that it gave rise to no controversy whatever. It was not attempted to be shown that it had ever been rescinded or modified. G. A. Dentzel, whose legal

(N.S.) 696, as to right of purchasers of, or debtors levying on, goods sold for cash, delivered without payment; and notes in Frech v. Lewis, 11 L.R.A. (N.S.) 948, and People's State Bank v. Brown, 23 L.R.A. (N.S.) 824, as to delay in attempting to obtain the property under such circumstances.

On the general doctrine, in State ex rel. Pittsburgh Coal Co. v. Patterson, the court said that "the general rule is, nothing appearing to the contrary, that in case of an executory contract for the sale and delivery of chattels f. o. b. cars at a particular point, the intention of the parties is presumed to be that the title shall pass upon such delivery occurring."

And in Fromme v. O'Donnell, as to the meaning of the term "f. o. b. cars at Milwaukee," the court said: "The quoted term unmistakably shows that the parties intended a change of title upon delivery. . . . It does not follow necessarily, however, that the amount to be paid for the material becomes then fixed. The general rule is that, as between vendor and vendee, the title to the subject of the transaction passes from the one to the other when the terms of sale are agreed upon, and everything the vendee has to do with the matter has been done.

Nothing appearing to the contrary, it is presumed that the price to be paid for the property is to be fixed theretofore, but it is perfectly competent for parties to so contract that the title shall pass to the vendee, and the property may be taken and appropriated by him, and the amount he shall pay be subsequently determined. . . . Whenever it is apparent that the parties intended at the inception of their contract of sale that the title to the subject thereof should pass to the vendee, and the measurement thereof be thereafter made, and the amount to be paid therefor determined according thereto, that will govern."

So, in Vogt v. Schienebeck, the court said: "A sale f. o. b. cars means that the sub-

ject of the sale is to be placed on cars for shipment without any expense or act on the part of the buyer, and that as soon as so placed the title is to pass absolutely to the buyer, and the property be wholly at his risk, in the absence of any circumstances indicating a retention of such control by the seller as security for purchase money, by preserving the right of stoppage *in transitu*."

Where a contract provides that delivery is to be made "f. o. b. New York city," a delivery to an express company at New York city, with directions to deliver the articles to the purchaser at his place of business at Baltimore, Maryland, charges of carriage to be there collected, is not sufficient to pass the title, in the absence of any evidence that such delivery was with the knowledge or request of the purchaser. International Money Box Co. v. Southern Trust & D. Co. 93 App. Div. 309, 87 N. Y. Supp. 881.

In Fruit Dispatch Co. v. Sturges, 7 Ohio C. C. N. S. 445, affirmed without opinion in 73 Ohio St. 351, 78 N. E. 1125, the foregoing general doctrine is qualified by holding that, in order for the title to pass, an article corresponding in quality and quantity with the description in the contract must be actually delivered. On this subject the court said: "Delivering perishable goods in carload lots f. o. b. shipping point means that the seller is charged with the responsibility of properly loading the car, and delivering it to the railroad company in proper condition. There the responsibility of the shipper ends, but if the shipper should fail in any particular in properly loading said car, and delivering it to the railroad company in right condition, and by reason of which failure, the goods are injured and destroyed in transit, the buyer is not bound to receive the same, nor does the property in the goods pass to him until the obligation of the shipper is discharged with reasonable care and diligence."

representative is the plaintiff in the action, was the seller, and the Island Park Association, one of the defendants, was the buyer. The contract provided that the former, for the sum of \$5,500, was to manufacture for the latter a carrousel, with organ, motor, and attachments. The price was to be paid in instalments \$250 on the signing of the agreement, \$2,500 on the erection of the machine in the park, \$900 in sixty days thereafter, and \$950 in ninety days thereafter, notes to be given for the last three payments. The contract provided, among other things, that the seller was to "deliver the complete carrousel f. o. b. cars, Philadelphia, and send one man to erect and place in order;" the party of the second part agreeing "to pay freight charges." It is a general rule, not to be questioned, that when the contract in a sale of personal property calls for delivery f. o. b. at some particular place, and the seller there delivers the article in accordance with the stipulations, the title to the property at once passes to the buyer, unless otherwise provided. *Schmertz v. Dwyer*, 53 Pa. 335; *Bacharach v. Chester Freight Line*, 133 Pa. 414, 19 Atl. 409; *Dannemiller v. Kirkpatrick*, 201 Pa. 218, 50 Atl. 928. The rule yields where the contract reserves to the seller the right of

property, notwithstanding the delivery to the carrier. Since delivery is after all a matter of intention on the part of the seller, even though the contract calls for delivery f. o. b. cars at a designated place of shipment, the seller may, before the delivery on board the cars, stipulate with the carrier that the latter is to carry it for him, thereby making the carrier the seller's agent in receiving the property. This follows when the seller takes from the carrier a bill of lading which secures the shipper against delivery, at the point of destination, to anyone except upon his order. When the contract, however, as here, shows an agreement to deliver f. o. b., with nothing to qualify it, the law will presume a delivery to have been in accordance with the stipulations, and cast the burden on the seller if he assert the contrary. There is not a particle of evidence in the case that this burden was discharged. No assertion of dominion over the property, so far as the evidence discloses, was made until after it reached its destination. The plaintiff does not pretend to say that he stipulated either with the defendant or the carrier that his right of property was not to be affected by the delivery to the latter. We find no copy of the bill of lading in the record; but it is distinctly stated in

And generally the title to articles purchased f. o. b. place of shipment, to be delivered at another place, does not pass until delivery at the latter place; and the right of inspection is also at the latter place. *American Bridge Co. v. Duquesne Steel Foundry Co.* 28 Pa. Super. Ct. 479.

So, where the purchaser reserves the right of inspection at another point than the place of shipment, of articles to be delivered f. o. b. at the latter place, title to the articles sold passes only conditionally upon delivery to the carrier, and is subject to the right of the purchaser to reject the articles upon inspection if they do not conform to the contract. *Weil v. Stone*, 33 Ind. App. 112, 104 Am. St. Rep. 243, 69 N. E. 698.

And where a contract for the sale of goods of a specified quality, to be delivered f. o. b. place of shipment, contains no provisions as to time or place of payment, inspection, or acceptance, title passes conditionally upon delivery to the carrier; but the purchaser has the right of inspection, to be exercised within a reasonable time after the articles arrive at their destination, and the right to reject same if they do not correspond with the description. *Eaton v. Blackburn*, 52 Or. 300, 20 L.R.A. (N.S.) 53, 132 Am. St. Rep. 705, 96 Pac. 870, 97 Pac. 539, 16 A. & E. Ann. Cas. 1198.

Where articles are sold f. o. b. place of destination, title does not pass until delivery at such place, and the loss of the articles during transportation falls upon the

seller. *Hunter Bros. Mill. Co. v. Kramer Bros.* 71 Kan. 468, 80 Pac. 963.

But where the meaning of the term f. o. b. at place of destination as used in a contract of sale is doubtful, the construction placed upon it by the parties, if they have construed it, will be adopted. Thus, where lumber was sold f. o. b. place of destination, with a provision that in transportation it should be stopped at the works of a creosoting company and turned over to the company for treatment, to be paid for according to the measurements and inspection of this company, the title passes upon delivery to the creosoting company. *Barnett & Record Co. v. Fall*, — Tex. Civ. App. —, 131 S. W. 644.

The presumption that title passed upon delivery to a carrier designated by the government, under a contract by it for the purchase of goods, and the acceptance by the government of the bills of lading made to the consignee or his order, is not rebutted by the fact that in the contract, composed of different instruments, there was a provision that the goods were to be delivered f. o. b. place of destination, the meaning of the term, as construed with other portions of the contract, indicating that it referred to the payment of freight by the seller, which was to be included in the purchase price, rather than the place at which delivery and the passing of title was to be consummated. *United States v. Andrews*, 207 U. S. 229, 52 L. ed. 185, 28 Sup. Ct. Rep. 100.

A. G. S.

the charge of the court, as though it were an uncontroverted fact in the case, that the carrousel "on the 19th June was put on board cars of the Pennsylvania Railroad and shipped to defendant the Island Park Association." The learned trial judge adds: "That did not make it, because of this contract, the property of the Island Park Association, at that time, because it was yet subject to the payment of the \$2,500 cash upon the erection of the machine upon the premises of the defendant, and a number of days' work, as has been detailed to you, was left to be done on the machine in its erection before it was ready for complete delivery to the Island Park Association." This was error. If delivery on board of cars was delivery to the Park Association, as it presumably was, and as it certainly was if the direction was to ship to the defendant association, it is wholly immaterial that the price had not been paid, or that, under the contract, the seller was yet to put the machine in place. The delivery was a parting with the dominion, and that fact of itself passed the title to the property. In *Scott v. Wells*, 6 Watts & S. 357, 40 Am. Dec. 568, it was held to be a general rule that wherever there has been an absolute delivery pursuant to a bargain perfect in its members, the ownership of the property is vested by it, and, although the terms of sale be cash, a subsequent delivery without payment passes the property. The right of reclamation after delivery exists only in case of fraud or deceit in the purchase, or in procuring the possession. *Smith v. Smith*, 21 Pa. 367, 60 Am. Dec. 51. "Where a delivery to a carrier is equivalent to a delivery to the buyer, the condition as to payment or security may be waived by an unconditional delivery to the carrier; but such condition is not waived if the delivery to the carrier is merely conditional, as where the carrier is instructed not to deliver the goods unless payment is made. The seller may also reserve the right of property in the goods notwithstanding delivery, by taking a bill of lading in such form as to indicate an intention to so reserve the right." 35 Cyc. Law & Proc. p. 330, and the authorities there cited. Here the seller did nothing of this kind. Not a single circumstance was shown from which an inference of conditional delivery could be derived. The machine when put on board was complete. Nothing remained to be done to perfect it. It was deliverable; and its price was fully ascertained and fixed. That the seller was to contribute the labor of an expert to put it in place and running order did not make it any the less deliverable as a piece of property. The law governing

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cases of this character was so recently and fully discussed in *Dannemiller v. Kirkpatrick*, 201 Pa. 218, 50 Atl. 928, by our Brother Mestrezat, that further discussion here is not required. This may be a hard case; but, if so, the responsibility rests not with the law, but upon the losing party, who failed to adopt the easy precautions it afforded for his protection. The court's refusal to give binding instructions for the defendant is the subject of the first assignment, and that assignment is sustained.

We now reverse the judgment on the verdict, and enter judgment for the defendant.

WASHINGTON SUPREME COURT.

GEORGE M. McDONALD & COMPANY,
Appt.,
v.

GEORGE R. JOHNS et al., Respta.

(— Wash. —, 114 Pac. 175.)

Mortgage — priority — pre-existing debt.

A mortgage to secure a pre-existing debt is not within the protection of a statute giving mortgages priority as against bona fide purchasers from the date they are filed for record, so as to entitle it to priority from the time of its record over an existing unrecorded mortgage.

(March 23, 1911.)

Note. — Protection under recording acts of mortgage given as security for pre-existing debt.

This note is limited to mortgages on real estate, mortgages on chattels being excluded. Cases like *Vandoren v. Todd*, 3 N. J. Eq. 397, and *Martin v. Bowen*, 51 N. J. Eq. 452, 26 Atl. 823, dealing with priority as between general assignments for the benefit of creditors and other unrecorded equities, are omitted.

Concerning discharge of antecedent debt as consideration sustaining one's character as a bona fide purchaser for value, entitled to protection of recording acts, see note to *Western Grocer Co. v. Alleman*, 27 L.R.A. (N.S.) 620.

As to holder of bill or note as collateral security, as a bona fide holder within the law as to negotiable paper, see note to *Exchange Nat. Bank v. Coe*, 31 L.R.A. (N.S.) 287.

A mortgage given to secure a pre-existing debt is usually considered as supported by sufficient consideration as between the parties, and as against subsequent purchasers and encumbrancers with notice, by record or otherwise. See, for example, *Crooks v. Jenkins*, 124 Iowa, 320, 104 Am. St. Rep. 326, 100 N. W. 82.

APPEAL by plaintiff from a judgment of the Superior Court for Douglas County in defendant's favor in an action on certain promissory notes, and for the foreclosure of a mortgage to secure the payment of said notes. Affirmed.

The facts are stated in the opinion.

Mr. C. C. Bryant for appellant.

Messrs. Sam B. Hill and John W. Hanna, for respondents:

A pre-existing indebtedness is a valuable consideration for the execution of a mortgage as between the parties and all others who had no equitable interest in the property at the time of its execution.

Rea v. Wilson, 112 Iowa, 517, 84 N. W. 539; Chadwick v. Devore, 69 Iowa, 637, 29 N. W. 757; Meyer v. Evans, 66 Iowa, 179,

But a different question arises when it is sought to give such a mortgage precedence under the recording acts over prior unrecorded deeds, mortgages, and equities of various kinds, given bona fide for value.

By the weight of authority a mortgagee of real estate is not a bona fide purchaser for value within the meaning of recording acts, so as to cut off prior equities, where the mortgage was given merely to secure a pre-existing debt. Bybee v. Hawsett, 8 Sawy. 176, 12 Fed. 649, 11 Mor. Min. Rep. 594; Hill v. Hilt, 79 Fed. 826, affirmed in 29 C. C. A. 549, 56 U. S. App. 403, 85 Fed. 268; Wells v. Morrow, 38 Ala. 125; Saffold v. Wade, 51 Ala. 214; Coleman v. Smith, 55 Ala. 368; Alexander v. Caldwell, 55 Ala. 517; Bartlett v. Varner, 56 Ala. 580; Thurman v. Stoddard, 63 Ala. 336; Cook v. Parham, 63 Ala. 456; Thames v. Rembert, 63 Ala. 561; Craft v. Russell, 67 Ala. 9; Jones v. Robinson, 77 Ala. 499; Banks v. Long, 79 Ala. 319; Anthe v. Heide, 85 Ala. 236, 4 So. 380; Alston v. Marshall, 112 Ala. 638, 20 So. 850; Randolph v. Webb, 116 Ala. 135, 22 So. 550; Gewin v. Shields, 167 Ala. 593, 52 So. 887; Salisbury Sav. Soc. v. Cutting, 50 Conn. 115; Collins v. Moore, 115 Ga. 327, 41 S. E. 609; Harris v. Evans, 134 Ga. 161, 67 S. E. 880; Busenbarke v. Ramey, 53 Ind. 499; Davis v. Newcomb, 72 Ind. 413 (*dictum*); Durham v. Craig, 79 Ind. 117; Wert v. Naylor, 93 Ind. 431; First Nat. Bank v. Connecticut Mut. L. Ins. Co. 129 Ind. 241, 28 N. E. 695; Citizens' Nat. Bank v. Judy, 146 Ind. 322, 43 N. E. 259; Adams v. Vanderbeck, 148 Ind. 92, 62 Am. St. Rep. 497, 45 N. E. 645, 47 N. E. 24; Warford v. Hankins, 150 Ind. 489, 50 N. E. 468; Phelps v. Fockler, 61 Iowa, 340, 14 N. W. 729, 16 N. W. 210; Smith v. Moore, 112 Iowa, 60, 83 N. W. 813; Stone v. Welling, 14 Mich. 514; Boxheimer v. Gunn, 24 Mich. 372; McGraw v. Solomon, 83 Mich. 443, 47 N. W. 345 (case of chattel mortgage, but *dictum* as to real estate); De Mey v. Defer, 103 Mich. 239, 61 N. W. 524; Maynard v. Davis, 127 Mich. 571, 81 N. W. 1051; Whittacre v. Fuller, 5 Minn. 508, Gil. 401; Harney v. Pack, 4 Smedes & M. 33 L.R.A.(N.S.)

23 N. W. 386; Johnston v. Robuck, 104 Iowa, 523, 73 N. W. 1062; Duncan v. Miller, 64 Iowa, 223, 20 N. W. 161.

A pre-existing indebtedness is not such a valuable consideration as will constitute the mortgagee a bona fide purchaser, in the sense to cut off prior equities.

Citizens' Nat. Bank v. Judy, 146 Ind. 322, 43 N. E. 261; Rea v. Wilson, 112 Iowa, 517, 84 N. W. 539; Port v. Embree, 54 Iowa, 14, 6 N. W. 83; Phelps v. Fockler, 61 Iowa, 340, 14 N. W. 729, 16 N. W. 210; Koon v. Tramel, 71 Iowa, 132, 32 N. W. 243; Edwards v. McKernan, 55 Mich. 520, 22 N. W. 20; Maynard v. Davis, 127 Mich. 571, 86 N. W. 1051; Meyer v. Evans, 66 Iowa, 179, 23 N. W. 386; DeMey v. Defer, 103 Mich. 239, 61 N. W. 524; Henriques v. Ypsi-

257; Pope v. Pope, 40 Miss. 516; Perkins v. Swank, 43 Miss. 360; Hinds v. Pugh, 48 Miss. 268; Schumpert v. Dillard, 55 Miss. 348; Wheeler v. Kirtland, 24 N. J. Eq. 552; Mingus v. Condit, 23 N. J. Eq. 313; Pancoast v. Duval, 26 N. J. Eq. 445 (deed given as security); Reeves v. Evans, — N. J. Eq. —, 34 Atl. 477; Martin v. Bowen, 51 N. J. Eq. 452, 26 Atl. 823; Dickerson v. Tillinghast, 4 Paige, 215, 25 Am. Dec. 528; Manhattan Co. v. Evertson, 6 Paige, 457; Westervelt v. Haff, 2 Sandf. Ch. 98; Hiscock v. Phelps, 49 N. Y. 97; De Lancey v. Stearns, 66 N. Y. 157; Cary v. White, 52 N. Y. 138; Young v. Guy, 87 N. Y. 457; Re Rochester, 136 N. Y. 83, 19 L.R.A. 161, 32 N. E. 702; Breed v. National Bank, 57 App. Div. 468, 68 N. Y. Supp. 68 (*semble*), affirmed in 171 N. Y. 648, 63 N. E. 1115; O'Brien v. Fleckenstein, 180 N. Y. 350, 105 Am. St. Rep. 768, 73 N. E. 30; Wilcox v. Drought, 36 Misc. 351, 73 N. Y. Supp. 587 affirmed in 71 App. Div. 402, 75 N. Y. Supp. 960; Donaldson v. State Bank, 16 N. C. (1 Dev. Eq.) 103, 18 Am. Dec. 577; Southerland v. Fremont, 107 N. C. 565, 22 Am. St. Rep. 900, 12 S. E. 237; Lewis v. Anderson, 20 Ohio St. 281; Ashton's Appeal, 73 Pa. 153; Adamson v. Souder, 205 Pa. 498, 55 Atl. 182 (deed absolute on its face, intended as a mortgage); Marsh v. Ramsay, 57 S. C. 121, 35 S. E. 433; Brown v. Vanlier, 7 Humph. 239; Spurlock v. Sullivan, 36 Tex. 511; Steffian v. Milmo Nat. Bank, 69 Tex. 513, 6 S. W. 823; Watts v. Corner, 8 Tex. Civ. App. 588, 27 S. W. 1087; Stacey v. Henke, 32 Tex. Civ. App. 462, 74 S. W. 925; Moody v. Martin, — Tex. Civ. App. —, 117 S. W. 1015.

Contra: Partridge v. Smith, 2 Biss. 183, Fed. Cas. No. 10,787; Frey v. Clifford, 44 Cal. 335; Work v. Brayton, 5 Ind. 396; Wright v. Bundy, 11 Ind. 398; Babcock v. Jordan, 24 Ind. 14 (these early Indiana cases have been overruled by later cases in the same jurisdiction); Dorr v. Meyer, 51 Neb. 94, 70 N. W. 543; Evans v. Greenhow, 15 Gratt. 153; Gilbert Bros. v. Lawrence Bros. 56 W. Va. 281, 49 S. E. 155.

And therefore the lien of his mortgage

Anti Sav. Bank, 84 Mich. 168, 47 N. W. 704; Burrough v. Ploof, 73 Mich. 607, 41 N. W. 704; Martin v. Bowen, 51 N. J. Eq. 432, 26 Atl. 823; Van Heusen v. Radcliff, 7 N. Y. 580, 72 Am. Dec. 480; Reeves v. Evans, — N. J. Eq. —, 34 Atl. 477; Shirk v. Thomas, 121 Ind. 147, 16 Am. St. Rep. 331, 22 N. E. 976; Anniston Carriage Works v. Ward, 101 Ala. 670, 14 So. 417; Warford v. Hankins, 150 Ind. 489, 50 N. E. 468; Adams v. Vanderbeck, 148 Ind. 92, 2 Am. St. Rep. 497, 45 N. E. 645, 47 N. E. 24; Summers v. Brice, 36 S. C. 204, 15 S. E. 374; Steffian v. Milmo Nat. Bank, 69 Tex. 513, 6 S. W. 823; Funk v. Paul, 64 Wis. 35, 54 Am. Rep. 576, 24 N. W. 419; 1 Jones, Mortg. § 460; Re Rochester, 136 N. Y.

83, 19 L.R.A. 161, 32 N. E. 702; Goetzinger v. Rosenfeld, 16 Wash. 392, 38 L.R.A. 257, 47 Pac. 882; Hicks v. National Surety Co. 50 Wash. 16, 126 Am. St. Rep. 883, 90 Pac. 515.

Dunbar, Ch. J., delivered the opinion of the court:

Incorporated in the record in this case is a very lucid and forceful opinion rendered by the trial judge, and a very succinct statement of the facts, which we will adopt, there being no question raised as to the facts found by the court. Johns and wife, whom we will hereafter refer to as Johns, were indebted to appellant in the principal sum of \$2,210, evidenced by three

will be postponed to that of a prior, but unrecorded, mortgage. Bybee v. Hawckett, 3 Sawy. 176, 12 Fed. 649, 11 Mor. Min. Rep. 594; First Nat. Bank v. Connecticut Mut. L. Ins. Co. 129 Ind. 241, 28 N. E. 635; Phelps v. Fockler, 61 Iowa, 340, 14 N. W. 729, 16 N. W. 210; Koon v. Tramel, 71 Iowa, 132, 32 N. W. 243; Smith v. Moore, 112 Iowa, 60, 83 N. W. 813; Boxheimer v. Gunn, 24 Mich. 372; Westerwelt v. Haff, 2 Sandf. Ch. 98; Dickerson v. Tillinghast, 4 Paige, 215, 25 Am. Dec. 528; Cary v. White, 52 N. Y. 138; De Lancey v. Stearns, 66 N. Y. 157; Re Rochester, 136 N. Y. 83, 19 L.R.A. 161, 32 N. E. 702; Wilcox v. Drought, 36 Misc. 351, 73 N. Y. Supp. 587; affirmed in 71 App. Div. 402, 75 N. Y. Supp. 960.

And to the right of a prior mortgagee to have the description of real estate intended to be mortgaged corrected. Busenbarke v. Ramey, 53 Ind. 499.

But it was held in Hayner v. Eberhardt, 37 Kan. 308, 15 Pac. 168, that a recorded mortgage given as security for a pre-existing debt would take priority over an earlier unrecorded mortgage, under a statute providing that every instrument in writing affecting real estate, "certified and recorded in the manner hereinbefore prescribed, shall, from the time of filing the same with the register of deeds for record, impart notice to all persons of the contents thereof; and all subsequent purchasers and mortgagees shall be deemed to purchase with notice."

It will also be postponed to a vendors' lien. Wells v. Morrow, 38 Ala. 125; Craft v. Russell, 67 Ala. 9; Jones v. Robinson, 77 Ala. 499.

But a deed of trust given to secure a pre-existing debt of the grantee in a recorded deed will take precedence over a vendors' lien, where the trustee, vested with full power to close the trust, has started proceedings to do so, whether in a legal forum or not, before the vendor has filed a bill to foreclose his lien; at least, where the trust deed stipulated for delay on the part of the creditor. Sharp v. Fly, 90 Baxt. 4.

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It will also be postponed to the right of the equitable owner of land, though the legal title and apparent ownership was in the mortgagor. Banks v. Long, 79 Ala. 319; Anthe v. Heide, 85 Ala. 236, 4 So. 380; Reeves v. Evans, — N. J. Eq. —, 34 Atl. 477; Lewis v. Anderson, 20 Ohio St. 281 (where mortgagor, a partner, had legal title to land belonging to the partnership); Adamson v. Souder, 205 Pa. 498, 55 Atl. 182; Spurlock v. Sullivan, 36 Tex. 511.

And to a wife's prior equity in the land arising because of its having been purchased by the mortgagor, her husband, with money belonging to her separate estate. Banks v. Long, 79 Ala. 319.

And to the equity of one whose money the mortgagor used, in whole or in part, in purchasing the land, under an agreement, not carried out, to have the title conveyed to such person furnishing the money in proportion to his interest. Anthe v. Heide, 85 Ala. 236, 4 So. 380.

A mortgagee who purchases at a foreclosure sale under his own mortgage, received as security for pre-existing debt, is not a purchaser for value as against the real owner of the land, who had been induced by fraud to deed it to the mortgagor, even though such mortgagee was ignorant of the fraud. Gewin v. Shields, 167 Ala. 593, 52 So. 887.

So, also, the lien of a mortgage given to secure a pre-existing debt will be postponed to the rights of one in possession of land under a prior parol sale of the land by the mortgagor. Collins v. Moore, 115 Ga. 327, 41 S. E. 609.

And to the right of a prior grantee of the land holding under an unrecorded deed. Cary v. White, 52 N. Y. 138.

A mortgagee in good faith, for a pre-existing debt from a fraudulent grantee of land conveyed to such grantee without consideration, will not be protected against a judgment creditor of the grantor, whose judgment was rendered after the giving of the fraudulent deed, but before the giving of the mortgage. Mingus v. Condit, 23 N. J. Eq. 313.

Where a creditor of a fraudulent grantee

promissory notes, all executed and delivered at times prior to May 5, 1908. On May 5, 1908, Johns executed and delivered to appellant a mortgage on certain lands specified. Johns was also at the same time indebted to Bechtol, one of the respondents, in the sum of \$662.16, evidenced by a promissory note executed and delivered at a time prior to May 4, 1908. On May 4, 1908, Johns executed and delivered to Bechtol a mortgage on the same lands which have been mortgaged to appellant, and above described. Both mortgages were given to secure the payment of a pre-existing indebtedness, and no new or additional consideration or extension of time of payment was

given as an inducement to the execution of either of said mortgages. The Bechtol mortgage was executed and delivered first. The McDonald mortgage was recorded first. Quoting from the opinion of the court: "Upon these facts the ultimate question is: Which of these mortgages has the prior lien on the land in said sections 25 and 30? McDonald claims to be a bona fide purchaser (encumbrancer) without notice of the Bechtol mortgage prior to the execution and delivery of his own. I will assume (without finding or deciding at this time) that he had no notice. The law upon which his claim to priority must rest is found at § 4441, Pierce's Code, and reads:

of real estate takes from him a mortgage on such estate as a further security of the previous debt, but without notice of the fraud, such creditor is not protected against the prior equity and legal lien of judgment creditors of the fraudulent grantor, whose judgments were recovered subsequent to the fraudulent conveyance, but prior to the mortgage. *Manhattan Co. v. Evertson*, 6 Paige, 457.

It was stated by the court in *Wheeler v. Kirtland*, 24 N. J. Eq. 552, that "an equitable mortgage for a precedent debt has no equity superior to that of a valid subsequent judgment at law. Between such contestants, the first perfected legal lien should prevail. The rule is otherwise with regard to bona fide purchasers or equitable mortgagees, where the consideration of the mortgage is paid at the time it is given. Equity, in the latter case, regards the equitable mortgagee as a bona fide purchaser."

Under a statute providing that where, on appeal from a judgment, an undertaking is given to stay execution, the court may, by an order directing the entry, "secured on appeal," to be made in the docket, cause the real property on which the judgment is a lien to be exempted therefrom, and that "thereupon such judgment shall cease, during the pendency of such appeal, to be a lien upon the property so exempted, as against purchasers and mortgagees in good faith," a mortgage, though given for a pre-existing debt, which was executed after the judgment, but while the land was exempted from the lien of such judgment by the entry indicated above, will be superior to such lien. *Union Dime Sav. Inst. v. Duryea*, 67 N. Y. 84.

A mortgage to secure an antecedent debt, which is filed before the actual entry of a judgment which was filed soon afterward on the same afternoon, will not have priority over the judgment, but their liens will be equal. *Goetzinger v. Rosenfeld*, 16 Wash. 392, 38 L.R.A. 257, 47 Pac. 882.

But had the mortgage been given for a present valuable consideration, equity would give it priority over the later filed judgment, though both were filed on the same day. *Ibid.*

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Under a mechanics' lien statute providing that liens for repairs and alterations shall not be valid against a bona fide purchaser or mortgagee before such lien is filed in the office of the clerk of the proper county, a mortgage given for a precedent debt on property on which alterations were being made, which was executed and recorded without notice of such alterations, is a mortgage in good faith, within the meaning of said act, so as to entitle it to priority over a mechanics' lien subsequently filed, since the statute protects the mortgage if given bona fide before the filing, whether for value or not. *Reed v. Rochford*, 62 N. J. Eq. 187, 50 Atl. 70.

A deed absolute on its face, but intended as a mortgage, will be considered as a mortgage, and when given to secure a pre-existing debt, is not protected by the recording acts in jurisdictions where a mortgage would not be. *Wells v. Morrow*, 38 Ala. 125.

In *Young v. Guy*, 87 N. Y. 457, the owner of land and another entered into a contract in writing for a sale of the former's land to the latter, whereby a certain sum was to be paid down at the date of the agreement, and at a later named date the vendor was to give the vendee a warranty deed, a further sum was to be paid to the vendor, an existing mortgage on the premises assumed by the vendee, and a purchase-money mortgage given for the balance. This arrangement was carried out. But between the date of the making of the agreement (which was not recorded) and the date of the giving of the deed, etc., the vendor gave a mortgage, as security for a pre-existing debt, to a third person, who took in ignorance of the contract of sale; which mortgage duly recorded on the day after its execution. The vendee also took his deed, and made the further cash payment on the purchase price without actual notice of the mortgage, but paid the amount of the purchase-money mortgage to an assignee of the vendor after actual notice. In an action to foreclose the mortgage given for the pre-existing indebtedness, it was held that it would be postponed to the purchase-money paid at the date of the giving of the deed, as the

All deeds, mortgages, and assignments of mortgages shall be recorded in the office of the county auditor of the county where the land is situated and shall be valid as against bona fide purchasers from the date of their filing for record in said office; and when so filed shall be notice to all the world.' Of course, the term 'bona fide purchaser' means bona fide mortgage or encumbrancer as well; else the statute would have no application to mortgages at all. Hence the statutory phrase will be used in that sense herein. This statute is for the protection of those who become bona fide purchasers subsequent to a given conveyance or mortgage, and has nothing to do

with those who becomes such prior thereto. In other words, the recording act reaches forward with its benefits, and not backward. It imposes upon any given mortgagee the duty of making a public record of his mortgage, for the information, guidance, and protection of those who at a subsequent time may have occasion to deal concerning the land, failing in the discharge of which duty he shall lose the priority otherwise to be accorded to him. But a mortgagee owes no such duty to those who precede him, and as against them he neither gains nor loses anything by recording his mortgage, except in those states where the statutes expressly provide otherwise."

vendee had no actual notice of its existence when such payment was made; but that the vendee was liable to such mortgagee to the amount of the purchase-money mortgage paid after actual notice of the prior mortgage given for the pre-existing indebtedness.

Effect of additional consideration—extension of time.

A mortgagee in a mortgage given as security for a pre-existing debt is a holder for value when there is some additional consideration, such as an extension of time of payment. *Thurman v. Stoddard*, 63 Ala. 336; *Cook v. Parham*, 63 Ala. 456; *Thames v. Rembert*, 63 Ala. 561; *Craft v. Russell*, 67 Ala. 9; *Downing v. Blair*, 75 Ala. 216, overruling *Pepper v. George*, 51 Ala. 190; *Jones v. Robinson*, 77 Ala. 499; *Whitfield v. Riddle*, 78 Ala. 99; *Alston v. Marshall*, 112 Ala. 638, 20 So. 850; *Randolph v. Webb*, 116 Ala. 135, 22 So. 550; *Gilchrist v. Gough*, 63 Ind. 576, 30 Am. Rep. 250; *Port v. Embree*, 54 Iowa, 14, 6 N. W. 83; *Koon v. Tramel*, 71 Iowa, 132, 32 N. W. 243; *Hinds v. Pugh*, 48 Miss. 268; *Schumpert v. Dillard*, 55 Miss. 348; *Cary v. White*, 52 N. Y. 138; *O'Brien v. Fleckenstein*, 180 N. Y. 350, 105 Am. St. Rep. 768, 73 N. E. 30; *Farmers' & M. Nat. Bank v. Wallace*, 45 Ohio St. 152, 12 N. E. 439 (where there was also a reduction in the rate of interest); *Farmers' & M. Bank v. Citizens' Nat. Bank*, — S. D. —, 125 N. W. 642; *Steffian v. Milmo Nat. Bank*, 69 Tex. 513, 6 S. W. 823; *Watts v. Corner*, 8 Tex. Civ. App. 588, 27 S. W. 1087; *Farmers' Nat. Bank v. James*, 13 Tex. Civ. App. 550, 36 S. W. 288; *Ingenhuett v. Hunt*, 15 Tex. Civ. App. 248, 39 S. W. 310.

But see, *contra*, *Southerland v. Fremont*, 107 N. C. 565, 22 Am. St. Rep. 900, 12 S. E. 237, where the extension of time did not result in any real loss to the mortgagee.

But the mere fact that, at the time of the giving of the mortgage, an extension of time of payment is allowed, does not make the mortgagee a purchaser for value, where the extension of time was not contracted for and did not form one of the 33 L.R.A. (N.S.)

considerations of the mortgage. *Ingenhuett v. Hunt*, 15 Tex. Civ. App. 248, 39 S. W. 310.

And the mere taking of collateral security on time does not of itself amount to an extension of time of payment of the principal debt, so as to suspend the right of action for the original debt or upon the original security until the collateral security shall become due. *Cary v. White*, 52 N. Y. 138.

—release of security.

A release of security for the old debt constitutes a valuable consideration. *Alston v. Marshall*, 112 Ala. 638, 20 So. 850; *McCleery v. Wakefield*, 76 Iowa, 529, 2 L.R.A. 529, 41 N. W. 210; *Constant v. University of Rochester*, 111 N. Y. 604, 2 L.R.A. 734, 7 Am. St. Rep. 769, 19 N. E. 631 (release of prior mortgage with accrued interest thereon); *Lane v. Logue*, 12 Lea, 681.

—compromise of debt.

So, a compromise of the debt by the acceptance of a smaller sum. *Hinds v. Pugh*, 48 Miss. 268.

—releasing personal liability.

And the acceptance of the mortgage as satisfaction of the debt, so that the mortgagee gives up all personal claim against the mortgagor. *Ibid*.

—new debt contracted.

Where a mortgage is given partly in consideration of a pre-existing indebtedness and partly to secure a new debt contemporaneously contracted, the mortgagee is protected by the recording acts to the extent of the new debt only. *Wells v. Morrow*, 38 Ala. 125; *De Mey v. Defer*, 103 Mich. 239, 61 N. W. 524.

Contra: *Branch v. Griffin*, 99 N. C. 173, 5 S. E. 393, 398, holding that the new advance is sufficient consideration to support the mortgage for the entire amount.

R. A. E.

In the opinion of the learned judge, there are collated and distinguished the principal cases on this subject, and the court concluded, as indicated, that the priority should be accorded to the party having received the first mortgage, and judgment was entered accordingly.

A review of the authorities convinces us that the judgment in this case should be affirmed. The doctrine of mortgages was originally, of course, purely equitable, and is yet as between the mortgagor and the mortgagee; and as between them it makes no difference whether the mortgage is recorded or not. The recording statutes were for the purpose, as is universally understood now, of giving constructive notice to innocent purchasers and encumbrancers; and the practical question in all these cases is: Who are innocent purchasers and encumbrancers? Pomeroy, in the second volume of his *Equity Jurisprudence*, 3d ed. § 749, says: "A conveyance of real or personal property as security for an antecedent debt does not, upon principle, render the transferee a bona fide purchaser, since the creditor parts with no value, surrenders no right, and places himself in no worse legal position than before. The rule has been settled, therefore, in very many of the states, that such a transfer is not made upon a valuable consideration, within the meaning of the doctrine of bona fide purchase,"—citing cases from Alabama, Arkansas, New York, Vermont, Massachusetts, New Jersey, Pennsylvania, Kentucky, Illinois, Mississippi, Tennessee, Texas, and Indiana, to sustain the text. It is also stated by the author that the doctrine is not universal, but that the weight of authority is in accordance with the text announced. It is also said, in discussing the question, at § 747: "What constitutes a valuable consideration within the meaning of the doctrine which gives protection to a bona fide purchaser? No person who has acquired title as a mere volunteer, whether by gift devise, inheritance, postnuptial settlement on wife or child, or otherwise, can thereby be a bona fide purchaser. Valuable consideration means, and necessarily requires, under every form and kind of purchase, something of actual value, capable, in estimation of the law, of pecuniary measurement,—parting with money or money's worth, or an actual change of the purchaser's legal position for the worse." And ordinary examples are given, as a contemporaneous advance or loan of money, or a sale, transfer, or exchange of property, made at the time of the purchase or execution of the instrument; the surrender or relinquishment of an existing legal right, or the as-

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sumption of a new legal obligation which is in its nature irrevocable. Jones on Mortgages 6th ed. vol. 1, p. 433, also states that the weight of authority is to the effect that the equitable mortgage, the mortgage first given, will prevail over the subsequent mortgage, recorded prior to it. In *People's Sav. Bank v. Bates*, 120 U. S. 556, 30 L. ed. 754, 7 Sup. Ct. Rep. 679, a case which cannot be distinguished in principle from the case at bar, it was held that the doctrine that the bona fide holder for value of negotiable paper, transferred as security for an antecedent debt merely, and without other circumstances, is unaffected by equities or defenses between prior parties, of which he had no notice, does not apply to instruments conveying real or personal property as security, in consideration only of pre-existing indebtedness; the court quoting from 2 *Leading Cases in Equity*, 3 Am. ed. 104, where it is said: "Whatever the rule may be in the case of negotiable instruments, it is well settled that the conveyance of lands or chattels as security for an antecedent debt will not operate as a purchase for value, or defeat existing equities." "A creditor who takes a mortgage on realty merely as security for the payment of a debt or demand already due to him, and without giving any new consideration or being induced to change his condition in any manner, is not entitled to the protection accorded to a bona fide purchaser for value, as against prior liens or equities." 27 Cyc. Law & Proc. p. 1191; 24 Am. & Eng. Enc. Law, 2d ed. p. 139.

Outside of general authority, this view of the law has been distinctly sustained by this court in *Hicks v. National Surety Co.* 50 Wash. 16, 126 Am. St. Rep. 883, 96 Pac. 515. That was where a surety company took a bill of sale as security for a pre-existing debt upon a breached contractor's bond, where a prior unrecorded bill of sale had been given, and it was held that the surety company was not an encumbrancer for value in good faith, and that its lien was inferior to that of a prior bill of sale valid as between the parties, although not executed so as to be valid as to creditors of the vendor or subsequent encumbrancers in good faith. The court concluded its announcement in that case by saying: "The instrument under which the appellant claims was taken as security for a pre-existing debt or a pre-existing contingent liability. Under such circumstances, does it come within the definition of an encumbrancer for value and in good faith, as that term is defined in law? Under the great weight of authority it does not." And the

first case cited was *People's Sav. Bank v. Bates, supra*.

The judgment is affirmed.

Crow, Chadwick, and Morris, JJ. con-
cur.

WASHINGTON SUPREME COURT.

L. B. WINSOR, Appt.,

v.

COMMONWEALTH COAL COMPANY et
al., Respts.,

and

R. L. McCORMICK et al., Appts.

(— Wash. —, 114 Pac. 908.)

**Usury — loan to corporation — attack
by stockholder.**

1. One seeking to set aside for fraud a contract by which he transferred corporate stock to his attorney, in consideration of the latter's securing money to relieve the business from financial difficulties, cannot set up usury in a transaction by which the attorney transferred a portion of the stock to persons who lent the money which he undertook to secure.

**Corporation — agreement to pool stock
— validity.**

2. A contract by which the owner of the majority of the stock of a corporation agrees with one to whom he transfers a portion of his stock in consideration of a loan of money to finance the corporation, that the stock might be pooled for a term of years in order to control the management, is not against public policy.

**Contract — partial invalidity — effect
on remainder.**

3. The invalidity in a contract for the transfer and pooling of corporate stock in consideration of a loan of money to finance the institution, of a provision which retains the owner in the board of directors and gives him employment as the sales agent of the corporation, does not necessarily invalidate the pooling agreement.

(April 10, 1911.)

CROSS APPEALS from a judgment of the Superior Court for Pierce County in an action for the annulment of a contract between plaintiff and defendant Peer for the transfer and pooling of corporate stock, and for the annulment of all contracts made by certain of the defendants pursuant to the original contract; plaintiff appealing from so much of the decree as denied the relief prayed for, and defendants McCor-

Note. — As to validity of agreements to control the voting power of corporate stock, see notes to *Morel v. Hoge*, 16 L.R.A. (N.S.) 1136, and *Carnegie Trust Co. v. Security L. Ins. Co.* 31 L.R.A. (N.S.) 1186.
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mick et al. from so much as rescinded the pooling agreement. Modified and affirmed.

The facts are stated in the opinion.

Messrs. Sullivan & Christian, Gordon & Askern, and Higgins, Hall, & Hal-verstadt, for appellants Winsor:

Purchases by an attorney from his client of property involved in litigation, and concerning which he was consulted, are prima facie invalid.

Snow v. Hazlewood, 85 C. C. A. 226, 157 Fed. 898; *Re Egan*, 22 S. D. 355, 117 N. W. 874; *Sanford v. Flint*, 108 Minn. 399, 122 N. W. 315; *Morrison v. Smith*, 130 Ill. 304, 23 N. E. 241; *Palms v. Howard*, 129 Ky. 668, 112 S. W. 1110; *Phipps v. Willis*, 58 Or. 190, 96 Pac. 866, 99 Pac. 935, 18 A. & E. Ann. Cas. 119; *Moore v. Miers*, 78 N. J. L. 201, 73 Atl. 33; *Payne v. Avery*, 21 Mich. 524; *Ross v. Payson*, 160 Ill. 349, 43 N. E. 399; *Jennings v. McConnel*, 17 Ill. 148; *Alwood v. Mansfield*, 59 Ill. 496; *Laclede Bank v. Keeler*, 109 Ill. 385; *Elmore v. Johnson*, 143 Ill. 513, 21 L.R.A. 366, 36 Am. St. Rep. 401, 32 N. E. 413; *Roby v. Colehour*, 135 Ill. 300, 25 N. E. 777; *Rogers v. R. E. Lee Min. Co.* 9 Fed. 721 and note, 2 Mor. Min. Rep. 71; *Stubinger v. Frey*, 116 Ga. 396, 42 S. E. 713; *Crocheron v. Savage*, 75 N. J. Eq. 589, 23 L.R.A. (N.S.) 679, 73 Atl. 33, reversing 74 N. J. Eq. 629, 70 Atl. 353; *Barrett v. Ball*, 101 Mo. App. 288, 73 S. W. 865; *Young v. Murphy*, 120 Wis. 49, 97 N. W. 496; *Klein v. Borchert*, 89 Minn. 377, 95 N. W. 215; *Merryman v. Euler*, 59 Md. 588, 43 Am. Rep. 564; *Carter v. West*, 93 Ky. 211, 19 S. W. 592; *Thweatt v. Freeman*, 73 Ark. 575, 84 S. W. 721; *Cline v. Charles*, — Ky. —, 124 S. W. 347; *Keenan v. Scott*, 64 W. Va. 137, 61 S. E. 806; *Sanguinett v. Rossen*, 12 Cal. App. 623, 107 Pac. 560; *Dunn v. Dunn*, 42 N. J. Eq. 431, 7 Atl. 842; *Landis v. Wintermute*, 40 Wash. 673, 82 Pac. 1000.

The contract contains illegal provisions.

Hampton v. Buchanan, 51 Wash. 155, 98 Pac. 374; *Guernsey v. Cook*, 120 Mass. 501; *Woodruff v. Wentworth*, 133 Mass. 309; *Forbes v. McDonald*, 54 Cal. 98; *Noel v. Drake*, 28 Kan. 265, 42 Am. Rep. 162; *Gage v. Fisher*, 5 N. D. 297, 31 L.R.A. 557, 65 N. W. 809.

The contract is not divisible.

Trist v. Child (*Burke v. Child*) 21 Wall. 441, 22 L. ed. 623; *Hazelton v. Sheckells*, 202 U. S. 71, 50 L. ed. 939, 26 Sup. Ct. Rep. 567, 6 A. & E. Ann. Cas. 217; *Crichfield v. Bermudez Asphalt Paving Co.* 174 Ill. 466, 42 L.R.A. 347, 51 N. E. 552; *Bishop v. Palmer*, 146 Mass. 469, 4 Am. St. Rep. 339, 16 N. E. 299; *Pueblo & A. Valley R. Co. v. Taylor*, 6 Colo. 1, 45 Am. Rep. 513; *Folmar v. Siler*, 132 Ala. 297,

31 So. 719; Santa Clara Valley Mill & Lumber Co. v. Hayes, 76 Cal. 387, 9 Am. St. Rep. 211, 18 Pac. 391; Snyder v. Willey, 33 Mich. 483; McNamara v. Gargett, 68 Mich. 454, 13 Am. St. Rep. 555, 36 N. W. 218; Foley v. Speir, 100 N. Y. 552, 3 N. E. 477; Widoe v. Webb, 20 Ohio St. 431, 5 Am. Rep. 664; Sullivan v. Horgan, 17 R. I. 109, 9 L.R.A. 110, 20 Atl. 232; Potts v. Gray, 3 Coldw. 468, 91 Am. Dec. 294; Reed v. Brewer, 90 Tex. 144, 37 S. W. 418; Edwards County v. Jennings, 89 Tex. 618, 35 S. W. 1053; Giles v. De Cow, 30 Colo. 412, 70 Pac. 681; Hill v. Hill, 74 N. H. 288, 12 L.R.A. (N.S.) 848, 124 Am. St. Rep. 966, 67 Atl. 406; Stanard v. Sampson, 23 Okla. 13, 99 Pac. 796.

The taking of the stock bonus is admitted. The sharing in the profits of the contract with Bates, Peer, & Peterson is admitted. This makes the loan usurious.

Pottle v. Lowe, 99 Ga. 576, 59 Am. St. Rep. 246, 27 S. E. 145; Harrison v. Stiles, 95 Ga. 264, 22 S. E. 536; Sherwood v. Roundtree, 32 Fed. 113; Ridgway v. Davenport, 37 Wash. 134, 79 Pac. 606.

A pooling agreement is prima facie unlawful and may be upheld, according to one line of authority, only by showing that the object of the "pool" is free from any fraud or self-interest detrimental to the minority stockholders. By the other line of authority such agreement can never be upheld.

Harvey v. Linville Improv. Co. 118 N. C. 693, 32 L.R.A. 265, 54 Am. St. Rep. 749, 24 S. E. 489; Morel v. Hoge, 130 Ga. 625, 16 L.R.A. (N.S.) 1136, 61 S. E. 487, 14 A. & E. Ann. Cas. 935; Cone v. Russell, 48 N. J. Eq. 208, 21 Atl. 847; Shepang Voting Trust Cases, 60 Conn. 553, 24 Atl. 32; Warren v. Pim, 65 N. J. Eq. 36, 55 Atl. 66, affirmed in 66 N. J. Eq. 353, 59 Atl. 773; Kreissl v. Distilling Co. 61 N. J. Eq. 5, 47 Atl. 471; Bridgers v. Staton, 150 N. C. 216, 63 S. E. 892; Sheppard v. Rockingham Power Co. 150 N. C. 776, 64 S. E. 894; Bridgers v. First Nat. Bank, 152 N. C. 293, 31 L.R.A. (N.S.) 1199, 67 S. E. 770; White v. Thomas Inflatable Tire Co. 52 N. J. Eq. 178, 28 Atl. 75; Clarke v. Central R. & Bkg. Co. 15 L.R.A. 683, 50 Fed. 338; Smith v. San Francisco & N. P. R. Co. 115 Cal. 584, 35 L.R.A. 309, 56 Am. St. Rep. 119, 47 Pac. 582; Theis v. Spokane Falls Gaslight Co. 34 Wash. 23, 74 Pac. 1004; 1 Thomp. Corp. §§ 889-901; 29 Am. & Eng. Enc. Law, 2d ed. pp. 1077, *et seq.*; 3 Clark & M. Priv. Corp. § 657.

Messrs. James F. McElroy, Hayden & Langhorne, and Bates, Peer, & Peterson, for respondents Bates et al. and appellants McMurray et al.:

An attorney may acquire the property 33 L.R.A. (N.S.)

of his client where the transaction is fair and honest, and is not tainted with fraud, undue influence, or corruption.

Laclede Bank v. Keeler, 109 Ill. 385; Miles v. Ervin, 1 M'Cord, Eq. 524, 16 Am. Dec. 623; Mitchell v. Colby, 95 Iowa, 202, 63 N. W. 769.

The pooling agreement is valid, and not against public policy.

Faulds v. Yates, 57 Ill. 416, 11 Am. Rep. 24, 3 Mor. Min. Rep. 551; Smith v. San Francisco & N. P. R. Co. 115 Cal. 584, 35 L.R.A. 309, 56 Am. St. Rep. 119, 47 Pac. 582; Weber v. Della Mountain Min. Co. 14 Idaho, 404, 94 Pac. 441; Chapman v. Bates, 61 N. J. Eq. 658, 88 Am. St. Rep. 459, 47 Atl. 638; Cone v. Russell, 48 N. J. Eq. 208, 21 Atl. 847; Mobile & O. R. Co. v. Nicholas, 98 Ala. 92, 12 So. 723; Barnes v. Brown, 80 N. Y. 527.

The provisions are binding upon Winsor, who had delivered his stock to his agents, Bates, Peer, & Peterson, to accomplish the purpose intended.

Jones v. Brown, 171 Mass. 318, 50 N. E. 648; Rigg v. Reading & S. W. Street R. Co. 191 Pa. 298, 43 Atl. 212; Fitzsimmons v. Lindsay, 205 Pa. 79, 54 Atl. 488; Williams v. Montgomery, 148 N. Y. 519, 43 N. E. 57.

To set aside a contract with strangers, because of dealings between attorney and client, would throw open the door of fraud upon the rights of these appellants.

Bronson v. Chappell (Townsend v. Chappell) 12 Wall. 681, 20 L. ed. 436; McBlair v. Gibbes, 17 How. 233, 15 L. ed. 133; McNeil v. Tenth Nat. Bank, 46 N. Y. 325, 7 Am. Rep. 341; Anderson v. Armstead, 69 Ill. 452; Tootle v. First Nat. Bank, 6 Wash. 181, 33 Pac. 345; Bigelow, Estoppel, 5th ed. 560.

Mount, J., delivered the opinion of the court:

The plaintiff brought this action to annul a contract entered into by himself and Newton H. Peer, and to annul all contracts made by Bates, Peer, & Peterson pursuant to the original contract, upon the ground that Bates, Peer, & Peterson were attorneys for the plaintiff at the time the original contract was made, and that they overreached the plaintiff, and that, after they and their associates had obtained possession of the property described in the contract, they mismanaged the same, so that it was in imminent danger of being wholly lost. The defendants admitted the contract, but denied all the allegations upon which an annulment was based. Upon a trial of the case, the court concluded that Bates, Peer, & Peterson at the time of the

contract was made were attorneys and confidential advisers of the plaintiff, and, the contract being in effect between attorneys and their clients, the burden rests upon the attorneys to show the fairness of the agreement, and "the evidence shows that the amount of compensation provided for in the agreement was just, fair, and proper, and it was the purpose of the attorneys in making the contract to deal fairly with their client." The court also found that the attorneys had fully executed the agreement, and that the provisions in the contract relating to the retention of the plaintiff as a trustee of the corporation, and in regard to the employment of the plaintiff as a sales agent, were against public policy and void, and for that reason concluded that the plaintiff had a right to rescind the provisions of the contract relating to the pooling of plaintiff's stock. A decree was thereupon entered to the effect that defendant Bates, Peer, & Peterson and their associates retain 355,000 shares of the stock of the Commonwealth Coal Company, and that new certificates for 336,589 shares be made out in the name of the plaintiff, and deposited with the defendant Scandinavian American Bank, to be held by it under an agreement for collateral security for a debt owing to the bank, and secondarily to secure a claim of defendant Richard Winsor; also that out of the stock adjudged to defendants Bates, Peer, & Peterson and their associates, 18,411 shares be held subject to the claim of said Richard Winsor, and that the pooling agreement be adjudged void in so far as it affected the stock awarded to plaintiff, as above stated. The plaintiff has appealed from that part of the decree denying the relief prayed for, and the defendants McCormick, McMurray, and Stevenson have appealed from that part of the decree rescinding the pooling agreement.

The record of the case is very voluminous, but the salient facts are briefly stated as follows: It appears that prior to December, 1909, the plaintiff owned the majority of the capital stock of the commonwealth coal company, a corporation organized under the laws of this state. This corporation was engaged in operating coal mines. The defendants C. O. Bates, N. H. Peer, and C. T. Peterson had been retained as attorneys for the Commonwealth Coal Company, and had frequently advised the plaintiff in regard to the business of this and other corporations in which the plaintiff was interested. In the summer of 1909, the Commonwealth Coal Company became embarrassed financially, and was unable to meet its maturing obligations. The plaintiff had unsuccessfully endeavored to dispose

of his personal stock in order to raise funds with which to carry on the business of the corporation. The plaintiff owned 710,000 shares of the capital stock of the Commonwealth Coal Company, capitalized for 1,000,000 shares. This company on December 8, 1909, was in the hands of a receiver, because of its inability to meet its monthly pay roll. On that date the plaintiff entered into an option contract by which he agreed to sell 510,000 shares of his stock in the Commonwealth Coal Company to one A. C. Marconnier, in consideration that the latter would pay \$43,000 indebtedness of said company. This contract was to be accepted by 10 o'clock the next morning. It was not so accepted. Whether Marconnier changed his mind, or whether plaintiff changed his mind, is not clear. At any rate, the contract was not carried out. Thereupon the plaintiff solicited his attorneys, Bates, Peer, & Peterson to assist him to finance the company in order to get the same out of the hands of the receiver. After some negotiations the contract in question was entered into as follows:

Memorandum of agreement made and entered into this 11th day of December, A. D. 1909, by and between I. B. Winsor, party of the first part and Newton H. Peer as trustee, party of the second part, witnesseth: That whereas the party of the first part is the owner of seven hundred ten thousand (710,000) shares of the capital stock of the Commonwealth Coal Company, a corporation duly organized and existing under and by virtue of the laws of the state of Washington, of the par value of one dollar (\$1) a share; and whereas the said I. B. Winsor is president of said Commonwealth Coal Company; and whereas the said Commonwealth Coal Company is indebted to divers and sundry persons in the sum of approximately forty-five thousand dollars (\$45,000), of which sum about five thousand dollars (\$5,000) is for the October pay roll of said corporation, which is now part due and for which a lien has been filed; and whereas there will be due to the laborers in the mines of said corporation the November pay roll, amounting to about eight thousand dollars (\$8,000) on the 20th day of December, A. D. 1909; and whereas the said Commonwealth Coal Company and the party of the first part are without funds with which to liquidate said amounts due on said pay rolls and the other indebtedness; and whereas they are desirous of obtaining the necessary funds to liquidate said indebtedness; and whereas the said party of the first part is the owner of more than a majority of the capital stock in said Commonwealth Coal Company; and

whereas most of the capital stock of said Commonwealth Coal Company owned by the party of the first part is now hypothecated with the creditors of said company as security for the payment of said indebtedness: Now, therefore, it is mutually understood and agreed between the parties hereto, as follows: The party of the first part, in consideration of the covenants and agreement hereinafter set forth to be performed on the part of the party of the second part, agrees as follows: That he will and does hereby transfer and set over unto the party of the second part three hundred fifty-five thousand (355,000) shares of the capital stock of the Commonwealth Coal Company, to be held and owned by the said party of the second part; and that he will deposit the balance of said capital stock owned by him, to wit, three hundred fifty-five thousand (355,000) shares with the party of the second part, to be pooled by the party of the second part with the stock owned by him, under a pooling agreement that the party of the second part shall vote at all stockholders' meetings all of said stock, to wit, three hundred fifty-five thousand (355,000) shares, owned by the said I. B. Winsor, either in the election of a board of trustees or officers or for any other purpose for which said stock shall be voted, it being distinctly understood and agreed, however, that the title to the said three hundred fifty-five thousand (355,000) shares so deposited with the party of the second part by the party of the first part under said pooling agreement shall be and remain in the party of the first part, subject only to the terms of said pooling agreement. It is further understood and agreed that all of said stock be transferred to the party of the second part under the terms of this agreement, subject only to the rights of the party with whom said stock is now hypothecated. And the said party of the second part, for and in consideration of the covenants and agreements to be performed by said party of the first part, as herein set forth, agrees to at once advance to the Commonwealth Coal Company, sufficient money to pay the October pay roll of the Commonwealth Coal Company and also, on or about the 20th day of December, A. D. 1909 advance to said Commonwealth Coal Company sufficient money to pay the November pay roll of said Commonwealth Coal Company, or so much thereof as may be necessary to take care of said November pay roll. The said party of the second part further agrees to advance at once any further sum necessary, not exceeding the sum of thirty-five hundred dollars (\$3,500), to pay and take care of any floating in-

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debtedness or liability of said Commonwealth Coal Company that it is necessary to pay at this time. It is further understood and agreed that the said I. B. Winsor shall resign his office as president of said Commonwealth Coal Company, and the vacancy caused by said resignation shall be filled by some party that is elected by the party of the second part or his associates, provided, however, that the said I. B. Winsor shall be retained on said board of trustees, and shall be retained on said board of trustees during the continuance of this agreement. It is further understood and agreed that as soon as practicable the mines of the Commonwealth Coal Company shall be opened and put in active operation, and the profits derived from the sale of the product of said mine, after paying all running expenses and fixed charges and such betterments as the board of trustees of said Commonwealth Coal Company shall direct, shall be applied to the payment of the said indebtedness owing by the Commonwealth Coal Company, in such manner and in such a way as the board of trustees may designate. It is further understood and agreed that the said I. B. Winsor shall be appointed salesman of the produce of said mine. It is further understood and agreed that the party of the first part shall obtain the resignation of the following named trustees of said Commonwealth Coal Company: George H. Tarbell, John W. Phillips, W. H. Pringle, and Corwin S. Shank, or any three of the same, and the vacancies caused thereby shall be filled by the said party of the second part or his associates.

I. B. Winsor.

Newton H. Peer, as Trustee.

This contract was, in fact, the contract of Winsor and Bates, Peer, & Peterson. It was dictated in the presence of the plaintiff, and contained the offers made by the plaintiff to his attorneys at the time it was made. It was not signed until the 13th or 14th of December. At the time this contract was entered into, the corporation was in the hands of a receiver, and all of the stock mentioned was held by the Scandinavian American Bank as collateral security for debts owing to the bank by the coal company and by the plaintiff. The plaintiff thereupon gave to Peer an order on the bank for the stock mentioned in the contract. It was estimated by the parties to the contract that \$30,000 would be sufficient to pay off the pressing debts and take the company out of the hands of the receiver. Bates, Peer, & Peterson thereupon solicited certain of their friends to loan money to the Commonwealth Company,

promising them that the money would be repaid within a few months, and, as an inducement to them to make the loan, promised that all the stock should be placed in a pool for ten years in order that they might control the company, and that persons loaning money should share in the stock given to Bates, Peer, & Peterson by the contract. Under these promises, the defendants loaned money to the coal company, and advanced the same to Mr. Peterson as follows: R. L. McCormick, \$8,000; J. L. McMurray, \$15,000; N. H. Peer, \$2,250; C. T. Peterson, \$2,250; George Stevenson, \$2,250,—making a total of \$29,750. Mr. Peterson took his money, and, in company with the plaintiff, went to the mine, where \$17,068.79 was used in paying labor claims for the mining company. The balance was turned over to the treasurer of the company. At the time these labor claims were paid, Mr. Peterson had no security from the company for this money. He thereupon had the claimants assign their claims to him, the plaintiff being present and assisting in making the payments and in taking these assignments. The receiver was subsequently discharged, and the new stockholders proceeded to reorganize the company by electing themselves and the plaintiff directors thereof. Upon this being done, application was made to the Scandinavian American Bank to release the capital stock held as collateral security, as above stated. A new contract was then entered into by the bank and the coal company, acting through its new officers, by which contract a part of the debt owing to the bank was paid and time was given upon the remainder. The bank, however, upon being informed that the plaintiff, I. B. Winsor, was retained upon the board of directors, refused to execute the new contract or release any of the stock held by it, until the plaintiff was without authority in the management of the company. The plaintiff thereupon agreed to retire from the board of directors temporarily, until the debt owing to the bank was paid, but that such retirement should not alter the other terms of the contract with Mr. Peer, —the contract in question. Thereupon the bank released 475,589 shares of stock, the greater part of which it was agreed by the contract should belong to Bates, Peer, & Peterson. Two hundred thousand of these shares were then divided between all the parties who had advanced money, according to the amount each one had advanced, and upon a basis of 16 cents per share. It was soon necessary for the company to have more money, and \$15,000 more was loaned

to the company by the same parties who had advanced the \$29,750, as above stated. These parties thereupon insisted that Bates, Peer, & Peterson should, on account of this new loan, divide the 155,000 shares held by them. They thereupon consented, and, taking one half thereof to themselves, divided the other half among the parties who had advanced the last loan, according to the amount advanced by each. Thereafter the plaintiff, who had been employed as sales agent for the company, was discharged for inefficiency. Subsequently, interest on the bonded indebtedness of the mine became due, and was not paid, but so far as disclosed by the record, no foreclosure proceedings were instituted.

It is conceded that the defendant Richard Winsor has a secondary lien for about \$40,000 on the stock held by the bank. There is no evidence that the coal company had been improperly managed by the new board of directors. The whole record shows that the plaintiff was fully advised and knew of all the conditions of the contract which he seeks to have declared void; that he was fully informed and knew what Bates, Peer, & Peterson were doing with the stock. We find nothing worthy of notice to the effect that Bates, Peer, & Peterson overreached the plaintiff, or, of any bad faith on their part. On the other hand, the great weight of the evidence shows that they did what the plaintiff desired them to do, and at all times kept faith with the plaintiff. It was specifically agreed that they should have 355,000 shares, to be held and owned by them for their work. It is extremely doubtful if this stock at that time had any real value. It is true that Bates, Peer, & Peterson divided this stock among the persons loaning money at the rate of 16 cents per share, but there was no market for it at that time at such price or at any other price, and there is no evidence in the record as to the value after that time. It is true there is a statement of assets and liabilities of the Commonwealth Coal Company which shows assets largely in excess of the liabilities, but there is nothing to show that this statement is correct, or even approximately so, in regard to the assets. But if the stock was valuable, the plaintiff knew that fact much better than anyone else, and it was his proposition to give that stock to his attorneys as compensation for their work. There was some effort made to show that the plaintiff was worried, and thereby unfit to attend to business transactions. He was no doubt worried, but he was fully competent to attend to his business, and

knew his business at all times, and particularly when he entered into the contract in question.

It is argued by the plaintiff that the contract contained illegal provisions and was therefore void, as follows: "(1) That Peer, as part consideration for the transfer, should vote the plaintiff's stock; (2) that plaintiff should be retained on the board of trustees during the life of the agreement; (3) that the plaintiff should be appointed salesman of the produce of the mine; (4) that plaintiff should secure the resignation of three of the trustees, and the vacancies be filled by Peer and his associates." The first and fourth provisions named above were for the benefit of the persons whom Bates, Peer, & Peterson should interest in the company, and the second and third provisions were for the benefit of the plaintiff. We know of no rule of law which prevents one person from authorizing another to vote his stock. The Code provides that this may be done. Rem. & Bal. Code, § 3686. The plaintiff himself, after the contract had been executed and before the action was brought, expressly waived his right to be retained on the board of trustees. The plaintiff was appointed as sales agent, and served in that capacity for several months, and until he became inefficient; and he certainly was liable to be discharged for such cause. The vacancies were made on the board of directors. Even if the contract was illegal, and therefore might not have been enforced in the particulars named, the provisions for the benefit of the plaintiff were actually performed or waived. The plaintiff therefore has no cause for complaint upon that account.

The plaintiff also argues that the giving of the stock by Bates, Peer, & Peterson, to the parties who advanced the money for the loans, constituted usury. We think there was no usury in this. The stock given out actually belonged to Bates, Peer, & Peterson at the time. They certainly could dispose of it as they saw fit. But if the giving out of this stock by Bates, Peer, & Peterson did constitute usury, the plaintiff may not urge that question in this case, for he is not interested. We think the record shows that the contract sought to be avoided was fairly entered into, and was executed by the defendants Bates, Peer, & Peterson in good faith. This contract, in regard to pooling the stock, is as follows: "That he [plaintiff] will deposit the balance of said capital stock owned by him, to wit, three hundred fifty-five thousand (355,000) shares, with the party of the second part, to be pooled by the party of the second part with the stock owned by him, under a pooling agreement that the party of the second

part shall vote at all stockholders' meetings all of said stock, to wit, three hundred fifty-five thousand (355,000) shares, owned by the said I. B. Winsor, either in the election of a board of trustees or officers or for any other purpose for which said stock shall be voted." The trial court rescinded this provision of the contract, upon the ground that the two provisions relating to the retention of the plaintiff as a member of the board of trustees and his employment as sales agent were against public policy. If these provisions were against public policy, it does not necessarily follow that the pooling agreement was also void or against public policy. This pooling agreement was made by the plaintiff, who, at that time, owned a majority of all the stock of the corporation. He made it for his own protection, and also for the protection of those who might thereafter acquire stock. Under this provision of the contract, the defendants Bates, Peer, & Peterson, with the knowledge and acquiescence of the plaintiff entered into a ten-year pooling agreement with minority stockholders, who acquired stock upon the assurance that the stock should remain in the pool, and not be offered for sale except to each other for that length of time, and that the plaintiff's stock should be voted by Mr. Peer. There appears to be nothing unfair or fraudulent in this agreement. Bates, Peer, & Peterson acquired their stock under this agreement and the defendants McCormick, McMurray and Stevenson acquired stock from Bates, Peer, & Peterson relying upon this provision of the contract. In fact, their testimony shows that, without such agreement, they would neither have loaned their money nor accepted the stock. It is therefore apparent that this provision of the contract should not now be rescinded, unless it is contrary to public policy or in some way tainted with fraud. The agreement to pool the stock was not against public policy, because there was nothing unlawful about it, and nothing which necessarily affected the rights of minority stockholders. Persons owning stock have the unqualified right to combine their interests to secure the management of the corporation, when such management is fair to all stockholders alike. *Faulds v. Yates*, 57 Ill. 416, 11 Am. Rep. 24, 3 Mor. Min. Rep. 551; *Smith v. San Francisco & N. P. R. Co.* 115 Cal. 584, 35 L.R.A. 309, 56 Am. St. Rep. 119, 4 Pac. 582; *Weber v. Della Mountain Min. Co.* 14 Idaho, 404, 94 Pac. 441; *Chapman v. Bates*, 61 N. J. Eq. 658, 88 Am. St. Rep. 459, 47 Atl. 638. If this agreement had been made for the purpose of depriving some stockholder of his rights in the company or of doing some other illegal act, a dil

that rule would apply. But this contract seems to have been entered into for legal purpose and in good faith, and has been acted upon. The plaintiff is not now in a position to seek its rescission. The judgment of the lower court is therefore modified in so far as it rescinds the provision relating to the pooling agreement, but in all other respects it is affirmed; defendants to recover costs.

Dunbar, Ch. J., and Parker, Fullerton, and Gose, JJ., concur.

WEST VIRGINIA SUPREME COURT OF APPEALS.

O. G. AUGIR

v.

REBECCA R. WARDER et al., Appts.

(— W. Va. —, 70 S. E. 719.)

Pleading — lack of parties — demurrer.

1. A bill which on its face shows want of necessary parties is demurrable.

Mechanics' lien — foreclosure — contractor as party.

2. The principal contractor is a necessary party to a suit to enforce a mechanics' lien against the building of the owner, for material furnished by plaintiff to such contractor, to be used in the construction of the building.

Same — judgment against owner.

3. It is error to render a personal decree in such suit in favor of plaintiff against the owner, if there is no privity of contract between them.

Pleading — time for answer.

4. A defendant has a right to file his answer at any time before final hearing, but he cannot delay the hearing, unless, by affidavit filed, good cause be shown therefor.

(February 28, 1911.)

Headnotes by WILLIAMS, P.

Note. — Contractor as a necessary party to a bill to enforce a mechanics' lien.

The decided weight of authority supports AUGIR v. WARDER in holding that the principal contractor is a necessary party to a suit by a subcontractor or materialman to enforce a mechanics' lien. In general, the decisions to that effect are based upon equitable grounds, although, of course, much depends upon the particular statutes involved. This latter ground not only accounts to a great extent for the contrariety of decisions on the question, but prevents the formulation of general rules.

In Vreeland v. Ellsworth, 71 Iowa, 347, 32 N. W. 374, the court, in holding that 33 L.R.A.(N.S.)

APPEAL by defendants from a decree of the Circuit Court for Taylor County overruling a demurrer to a bill filed to enforce a mechanics' lien against certain property owned by defendant Mrs. Warder. Reversed.

The facts are stated in the opinion.

Mr. A. W. Burdett, for appellants:

The contractor, Thomas, is a necessary party, and it was error of the court to decree as it did in his absence.

Central City Brick Co. v. Norfolk & W. R. Co. 44 W. Va. 286, 28 S. E. 930; Boisot, Mechanics' Liens, § 533; Davis v. John Mouat Lumber Co. 2 Colo. App. 381, 31 Pac. 187; Estey v. Hallack & H. Lumber Co. 4 Colo. App. 165, 34 Pac. 1113; Sayre-Newton Lumber Co. v. Park, 4 Colo. App. 482, 36 Pac. 445; Union P. R. Co. v. Davidson, 21 Colo. 93, 39 Pac. 1095; Lombard v. Young Men's Library Asso. Fund, 73 Ga. 322; Castleberry v. Johnston, 92 Ga. 499, 17 S. E. 772; Vreeland v. Ellsworth, 71 Iowa, 347, 32 N. W. 374; Tracy v. Kerr, 47 Kan. 656, 28 Pac. 707; Kerns v. Flynn, 51 Mich. 573, 17 N. W. 62; Northwestern Cement & Concrete Pav. Co. v. Norwegian-Danish E. L. A. Seminary, 43 Minn. 449, 45 N. W. 868; Ashburn v. Ayres, 28 Mo. 75; Wibbing v. Powers, 25 Mo. 599; Bombeck v. Devorss, 19 Mo. App. 38; Johnson-Frazier Lumber Co. v. Schuler, 49 Mo. App. 90; Sinnickson v. Lunch, 25 N. J. L. 317; Look-out Lumber Co. v. Mansion Hotel & Belt R. Co. 109 N. C. 659, 14 S. E. 35; Barnes v. Wright, 2 Whart. 193; Thomas v. Ownby, 1 Tex. App. Civ. Cas. (White & W.) 694; Austin & N. W. R. Co. v. Rucker, 59 Tex. 587.

Mr. John L. Hechmer for appellee.

Williams, P., delivered the opinion of the court:

O. G. Augir brought his suit in equity in the circuit court of Taylor county against Rebecca R. Warder, J. H. Warder, her husband, and others, to enforce a mechanics'

where the account of the subcontractor against the principal contractor was "open, unliquidated, and unsettled," the principal contractor was a necessary party, said: "If the claim were liquidated, it may be that the principal contractor would not be a necessary party. But that question we need not determine. This is an open, unliquidated account,—a mere charge against the contractor. The burden of ascertaining whether there is any defense to the action ought not to be put upon the owner of the property. He is not presumed to have any knowledge upon the subject. Further than this, if the subcontractor establishes his lien against the property, and the owner is compelled to pay it, he has recourse on the principal contractor. He ought to be fur-

lien against a certain house and lot owned by Mrs. Warder, situate in the city of Grafton; and on the 19th of January, 1905, the court decreed a sale of said house and lot, and also rendered a personal decree against Mrs. Warder for the amount of the lien. From this decree, she and her husband have appealed.

The bill alleges that the lien is on account of material furnished to one Henry Thomas, the builder of the house, under contract with J. H. Warder, the husband and agent of the owner; but Thomas is not made a party, and the bill is demurred to. The court overruled the demurrer, and this is assigned as error. The allegations in the bill show Thomas's relation to the transaction; and, if he is a necessary party, the

failure to make him such may be raised by demurrer. *Pappenheimer v. Roberts*, W. Va. 702; *Clayton v. Henley*, 32 Gra 65.

Was he a necessary party? Mrs. Warder is not personally liable to the plaintiff for the material furnished to Thomas, because there is no privity of contract between them; but her property is liable. Consequently, she is interested in having the amount due from Thomas to plaintiff judicially determined in a manner binding both him and Thomas. This cannot be done if Thomas is not a party to the suit. She is also interested to know that the material on account of which the lien is claimed actually went into the construction of the house. Material might be furnished to

finished with an adjudicated claim, and not with a mere open account." *Wheelock v. Hull*, 124 Iowa, 752, 100 N. W. 863, is to the same effect.

And in some jurisdictions the original contractor is held a necessary party to an action to foreclose a lien by a materialman or subcontractor, on the ground that the inquiry necessarily involves the contract relations and state of accounts existing between the contractor and the one seeking to enforce the lien, and that, without the establishment of that debt, there can be no right of recovery by a materialman, which renders his right to a lien dependent upon the establishment of his claim or debt against the contractor, for which purpose the contractor is an indispensable party. The following cases are to this effect: *Davis v. John Mouat Lumber Co.* 2 Colo. App. 381, 31 Pac. 187; *Estey v. Hallack & H. Lumber Co.* 4 Colo. App. 165, 34 Pac. 1113; *Sayre-Newton Lumber Co. v. Park*, 4 Colo. App. 482, 36 Pac. 445; *Charles v. E. F. Hallack Lumber & Mfg. Co.* 22 Colo. 283, 43 Pac. 548; *Kerns v. Flynn*, 51 Mich. 573, 17 N. W. 62; *Godfrey Lumber Co. v. Kline*, 160 Mich. 565, 125 N. W. 682; *Northwestern Cement & Concrete Pav. Co. v. Norwegian-Danish E. L. A. Seminary*, 43 Minn. 449, 45 N. W. 868; *Emmet v. Rotary Mill Co.* 2 Minn. 286; *Gil*, 248; *Lookout Lumber Co. v. Mansion Hotel & Belt R. Co.* 109 S. C. 658, 14 S. E. 35.

In Georgia, it is held that a materialman, in order to enforce his lien, must concurrently sue and obtain judgment against the original contractor, unless he has obtained a previous judgment against such contractor. This is upon the ground that a special judgment fixing a lien on the property of an owner, in favor of one as to whom no privity of contract exists, cannot be obtained until there is first a general judgment for the claim against the contractor. *Mauck v. Rosser*, 126 Ga. 268, 55 S. E. 32; *Clayton v. Farrar Lumber Co.* 119 Ga. 37, 45 S. E. 723; *Royal v. McPhail*, 97 Ga. 457, 25 S. E. 512; *Castleberry v. Johnston*, 92 Ga. 499, 17 S. E. 772; *Lombard v. Young Men's Library Asso. Fund*, 73 Ga. 322; 33 L.R.A. (N.S.)

Philip Carey Mfg. Co. v. Viaduct Place, Ga. App. 707, 58 S. E. 274.

And upon the same grounds it was held in *Gilliam v. Black*, 16 Mont. 217, 40 P. 303, that a personal judgment must be obtained against the original contractor, and that for this purpose he is a necessary party to the foreclosure suit. *Missoula Mercantile Co. v. O'Donnell*, 24 Mont. 65, 60 P. 594, 991; and *Wagner v. St. Peter's Hospital*, 32 Mont. 206, 79 Pac. 1054, are to the same effect.

And in *O'Neil Lumber Co. v. Greffet*, Mo. App. —, 133 S. W. 113, it was said that where a materialman seeks to enforce a lien through the privity arising from an agreement between the original contractor and the owner, the former is an essential party.

In *Barnes v. Colorado Springs & C. Dist. R. Co.* 42 Colo. 461, 94 Pac. 570, the original contractor was regarded as a necessary party to a lien foreclosure action, though the specific question was not discussed.

In *Wakefield v. Van Dorn*, 53 Neb. 73 N. W. 226, where two contractors furnished materials toward the erection of an improvement, pursuant to separate contracts with the owner, it was held that the contractor was a necessary party to a suit by the other to establish and foreclose a mechanics' lien for the materials furnished by him, although the first had not filed a claim for a lien.

The following late cases construe the mechanics' lien laws which expressly require suits by a subcontractor or materialman to be brought against both contractor and owner jointly (no attempt has been made, however, to compile the statutes governing the question, except as they are shown in the adjudications). *John E. Burns Lumber Co. v. W. J. Reynolds Co.* 148 Ill. App. 356 (decided 1909); *Porter v. Western Tube Co.* 240 Ill. 151, 88 N. E. 472 (decided 1909); *Grandquist v. Western Tube Co.* 240 Ill. 132, 88 N. E. 468 (decided 1909); *Harty Bros. & H. Co. v. Polakow*, 237 Ill. 559, 86 N. E. 1085 (decided 1909); *O'Brien v. Gooding*, 194 Ill. 466, 62 N. E. 898 (

contractor who at the time was engaged in the erection of houses for different owners, and the sale of material being made on the contractor's own account, it might be that no one but himself would know what part of the material was used in a particular case; and therefore great injustice is liable to be done an owner by subjecting his property to a lien for material which was in fact used in the construction of his building, if the contractor is not made a party. In the present case Thomas does not even testify. Moreover, equity delights to do complete justice among all parties concerned in any litigation properly before the court, and thus prevent a multiplicity of suits. Consequently, having jurisdiction for the purpose of enforcing the lien, the

court could decree, as between Thomas and the plaintiff, the amount due the latter by the former; and such a decree would be *res judicata* upon Thomas in any future suit that Mrs. Warder might bring against him to recover what she would be compelled to pay to discharge the lien. Equity would unquestionably subrogate her to the rights of plaintiff; and if the amount adjudicated in the mechanics' lien suit were not made binding on Thomas, she would be compelled to relitigate the question in such other suit, and might be defeated by Thomas's proving that he owed the plaintiff nothing. The same principle would apply, whether the lienor be a materialman, a subcontractor, or a laborer; and it is clear to us that in a suit by any of them to enforce a mechan-

ical 1902); *Western Sash & Door Co. v. Man*, 65 Kan. 5, 68 Pac. 1080 (decided 1902); *Tracy v. Kerr*, 47 Kan. 656, 28 Pac. 17 (decided 1892); *Barnes v. Wright*, 2 Mart. 194, in which the reason for such a provision was stated as follows: "There is a great reason why the contractor should be made a party to the proceeding on *sci. fa.*, though the judgment and execution on it can only affect the house. He alone knows the person who supplied the materials, the price at which they were to be furnished, and who did the work, and the price agreed on. If he contracted to finish the building for a certain sum, he may become liable to the owner, who has been compelled to lose his house or pay debts on it. Justice to the owner and to the contractor then requires that the debtor be a party to the *sci. fa.*, as well as the owner of the building."

And where it is clearly the intention of the legislature that there shall be a complete determination in one suit of all matters in controversy, the principal contractor is held a necessary party. *Giant Powder Co. v. San Diego Flume Co.* 78 Cal. 193, 20 Pac. 419; *Davis v. John Mouat Lumber Co.* 2 Colo. App. 381, 31 Pac. 187; *Union P. R. Co. v. Davidson*, 21 Colo. 93, 39 Pac. 1095.

In *Warner v. Yates*, 118 Tenn. 548, 102 S. W. 92, in holding that both the principal contractor and the owner must be made parties to a proceeding to enforce a mechanics' lien, which, in Tennessee, is by suit against the debtor and attachment against the property, the court said: "The principal contractor is a necessary party, because he is the debtor sued, and the owner of the property, because it is sought to reach his or her property. They are both interested, and must have their day in court; otherwise, there would be a failure of due process of law. The principal contractor has the right to controvert the indebtedness claimed, and the owner of the property, the existence of the lien sought to be enforced, and the action cannot be maintained without establishing both the debt and the lien." And the same is true of a subcontractor. *Lutt-* 33 L.R.A. (N.S.)

rell v. Knoxville, La. F. & J. R. Co. 119 Tenn. 492, 123 Am. St. Rep. 737, 105 S. W. 565.

It has been held under a statute providing that the creditor may proceed "against the debtor and owner," that the principal contractor is a necessary party to a suit by a materialman to enforce a mechanics' lien. *Sinnickson v. Lynch*, 25 N. J. L. 317; *Ayres v. Revere*, 25 N. J. L. 474.

And under a statute providing that all persons having an interest in the controversy, and all persons claiming liens on the same property, "shall" be made parties to a suit to enforce a mechanics' lien, the principal contractor must be made a party to an action by a materialman to enforce a lien. *Flake v. Central Hardware Co.* — Miss. —, 51 So. 461. And this is true where the statute provides that "the parties to the contract shall, and all other persons interested . . . may be, made parties," and in addition it is made the duty of the principal contractor to defend the action, it being said that no valid judgment can be rendered in the absence of such party, even though there was a defect of parties, if such defect was not presented by demurrer or answer, as the rule whereby a defect of parties is considered waived if not so presented has no application in such case. *Russell v. Grant*, 122 Mo. 161, 43 Am. St. Rep. 563, 26 S. W. 958; *Johnson-Frazier Lumber Co. v. Schuler*, 49 Mo. App. 90; *Steinmann v. Strimple*, 29 Mo. App. 478.

But it has been held that the general rule as to waiver does apply where the lien claimant was one whose contract had been made, not with the principal contractor, but with a subcontractor under him, so that the principal contractor was not one of the "parties to the contract," and the subcontractor had been made a party. *Horstkotte v. Menier*, 50 Mo. 158; *Fruin v. Mitchell Furniture Co.* 20 Mo. App. 313; *Luttrell v. Knoxville, La. F. & J. R. Co.* 119 Tenn. 492, 123 Am. St. Rep. 737, 105 S. W. 565. See also *Osborn v. Logus*, as set out *infra*; *Carney v. La Crosse & M. R. Co.* 15 Wis. 504; *Harbeck v. Southwell*, 18 Wis. 418; and *Fredrickson v. Riebsam*, 72

ics' lien, the owner is vitally interested in having the amount judicially ascertained in a manner that shall be binding on both the lien claimant and his debtor. However, we find a contrariety of decisions on this question by the various courts of the country. But much of it is more apparent than real, because the decisions depend largely upon the statutes of the particular states. Some of the courts hold that the contractor is a proper, but not a necessary, party; others that he is not only a proper, but also a necessary, party. Many of the cases have been collated by Boisot, and are cited in a note to § 533 in his work on Mechanics' Liens. This author says: "According to most of the decisions, the contractor is a necessary party defendant to a suit to en-

force the lien of a subcontractor or a materialman in the second degree, on the theory that he should have a right to dispute the account, and that his duty to the owner requires him to do so, if the account is incorrect." To the same effect is Phillips' Mechanics' Liens, § 397. See also the dictum of Judge English, who wrote the opinion in *Central City Brick Co. v. Norfolk & W. R. Co.* 44 W. Va. 286, 295, 28 S. 926.

We hold that Henry Thomas, the principal contractor, was a necessary party, and that the court erred in overruling the demurrer to the bill. Being a necessary party, the fact that he was a nonresident of the state at the time the suit was brought furnishes no excuse for failure to make hi-

Wis. 587, 40 N. W. 501, which are to the same effect, with the exception that the materials were furnished directly to the principal contractor.

In *Rumsey & S. Co. v. Pieffer*, 108 Mo. App. 486, 83 S. W. 1027, however, it was held that it was not sufficient merely to make the subcontractor with whom the materialman claimant had dealt, and the owner, defendants, but that the original contractor must also be made a party, in order that a defense might be interposed as provided by the statutory provisions requiring him to defend.

In *Bombeck v. Devorss*, 19 Mo. App. 38, a holding that a mechanics' lien cannot be enforced by a materialman, unless the contractors are made parties defendant, was based on that phase of the statute providing that "the parties to the contract . . . shall be made parties."

And in the following cases similar conclusions were based on that clause providing that the principal contractor must defend a suit to enforce a subcontractor's or materialman's lien, it being said that he is the only one who can defend, and that if he is not a party, the action must be dismissed: *Ashburn v. Ayres*, 28 Mo. 75; *Wibbing v. Powers*, 25 Mo. 599; *Murdock v. Hillyer*, 45 Mo. App. 287; *Steinkamper v. McManus*, 26 Mo. App. 51.

But in *Osborn v. Logus*, 28 Or. 302, 37 Pac. 456, 38 Pac. 190, 42 Pac. 997, where the lien law provided that all persons liable, and all holders of filed liens, "shall," and all other persons interested "may," be made parties, and that the contractor must defend at his expense any action brought upon a lien for labor and materials furnished him, the original contractor was held not an indispensable party to a suit by a materialman to enforce a lien. This decision was upon the grounds, first, that, the contractor being the agent of the owner (so held in Oregon for the purposes of the mechanics' lien act), his acts may be said to be the acts of the owner, thereby establishing a privity for the purpose of the lien between the owner and the materialman, so that there is privity of contract, and the 33 L.R.A. (N.S.)

presence of the contractor is not necessary to complete the direct relationship, and, secondly, because the word "shall" as used is not mandatory in the sense that the absence of a person liable would render the judgment nugatory, it being said that the intention of the legislature was merely to designate such parties as were necessary and proper for a complete determination of matters pertaining to the foreclosure. As to the provision requiring the contractor to defend, the court relied upon *Horstkotte v. Menier*, supra, holding to the effect that the provision recognizes the right of the owner to look to the contractor for protection, and that if he is not made a party, and the action proceeds to judgment without objection by demurrer or answer, the right to object is waived.

In *Thomas v. Ownby*, 1 Tex. App. Civ. Cas. (White & W.) 694, it was held that the principal contractor is a necessary party, unless the materialman alleges facts showing that the contractor has no interest in the controversy.

In *Green v. Clifford*, 94 Cal. 49, 29 Pac. 331, it was held that the principal contractor is not a necessary party to an action to enforce a lien, so far, at least, as the rights of the owner of the building are concerned.

Where no judgment of any kind is demanded against the principal contractors in a proceeding by a materialman to enforce a mechanics' lien, they are not necessary parties. *Crawfordsville v. Barr*, 65 Ind. 367; *Hubbard v. Moore*, 132 Ind. 178, 3 N. E. 534; *Leeper v. Myers*, 10 Ind. App. 314, 37 N. E. 1070 (in this case, however it appeared that the amount due and owing the materialman was settled, and it had been agreed between the parties that the owner should pay the materialman, who had released the principal contractor).

And where a personal judgment is not desired against the principal contractor, it is held that he is not a necessary party. *McDonald v. Backus*, 45 Cal. 262; *Wood v. Oakland & B. Rapid Transit Co.* 107 Cal. 500, 40 Pac. 806; *Los Angeles Pressed Brick Co. v. Higgins*, 8 Cal. App. 514, 97

a party to the bill. True, no personal decree could have been rendered against him, or publication, without his appearance; but he might have appeared in obedience to an order of publication, if one had been executed against him. He should have been given an opportunity to do so.

It was also error to render a personal decree against Mrs. Warder. There is no contractual relation between plaintiff and her, and the statute does not authorize a personal decree against her. It only makes the owner's property liable for the lien. Code 1906, chap. 75, § 3; Boisot, Mechanics' Liens, § 212; May & T. Hardware Co. v. McConnell, 102 Ala. 577, 14 So. 768; Hasset v. Rust, 64 Mo. 325. However, if she had admitted that there was a fund in her hands due to the contractor, the court might have been warranted in giving a personal decree against her not exceeding such fund. Taylor v. Netherwood, 91 Va. 88, 20 S. E. 888. But we are not required to decide this question, and therefore do not decide it. Mrs. Warder did not record her contract with Thomas. If she had desired to limit the liability of her property, so that it would not exceed what she had agreed to pay him, she should have recorded it. Williams & D. Co. v. Bailey, — W. Va. —, 70 S. E. 696.

On account of the errors herein noted, the decree complained of will have to be reversed. It is therefore not necessary to pass upon the question whether the court erred in not recommitting the cause after the answer of the Yates, the holders of the vendors' lien, was permitted to be filed. They had a right to file their answer at any time before final hearing. Code 1906, chap. 125, § 53; Keck v. Allender, 37 W. Va. 201, 16 S. E. 520; Kimble v. Wotring, 48 W. Va. 412, 37 S. E. 606. They did not ask to have the cause delayed. Appellants are the ones who are complaining, because the cause was not delayed by a recommitment, to ascertain the amount of purchase money due; yet they did not reply to the answer, and do not deny the correctness of the amount found by the court, which is much less than the amount of the vendors' lien reported by the commissioner. When the cause goes back, Mrs. Warder will have a right to file her replication, and thereby put in issue, if she desires to do so, the amount which she owes her vendors.

We will reverse the decree, and remand the cause for further proceedings, with leave to plaintiff to amend his bill, making Henry Thomas a party.

Brannon and Robinson, JJ., absent.

Pac. 414, 420; Cooper Mfg. Co. v. Delahunt, 36 Or. 402, 51 Pac. 649, 60 Pac. 1; Hand Mfg. Co. v. Marks, 36 Or. 523, 52 Pac. 512, 53 Pac. 1072, 59 Pac. 549.

So, the principal contractor is not a necessary party to a suit to enforce a mechanics' lien against property for materials furnished upon the joint credit of the contractor and the ostensible owner, who was, in fact, the agent of an undisclosed principal, if such agent had authority to bind the property. O'Neil Lumber Co. v. Greffet, — Mo. App. —, 133 S. W. 113.

And a head contractor who has assigned all his rights against the owner to a subcontractor is not a necessary party to an action by such subcontractor against the owner, to enforce his lien upon money due the head contractor. Kloeppinger v. Grasser, 25 Ohio C. C. 90.

And in Wood v. Oakland & B. Rapid Transit Co. 107 Cal. 500, 40 Pac. 806, it was held that the original contractor is not a necessary party to an action to foreclose a mechanics' lien, where the contract between the owner and such contractor was void.

Nor is the principal contractor a necessary party to an action to enforce liens for labor and materials furnished after the abandonment by the contractor of his contract. Green v. Clifford, 94 Cal. 49, 29 Pac. 331.

In Hilton Bridge Constr. Co. v. New York C. & H. R. R. Co. 145 N. Y. 390, 40 N. E. 86, where it was contended

that the receiver of the insolvent principal contractor was a necessary party to a suit by a subcontractor, to enforce a materialman's lien, which cause of action depended upon payments made by the owner under the original contract, an order bringing such receiver in was affirmed on the ground that it was proper in order that the rights of all might be determined in one suit; but the court refused to say that the receiver was a necessary party.

And in Martens v. O'Neill, 131 App. Div. 123, 115 N. Y. Supp. 260, it was held that the original contractor was not a necessary party, first, because the statute did not enumerate him as such, and, second, because he was not united in interest with the owner. And Burgi v. Rudgers, 20 S. D. 646, 108 N. W. 253, and Maxon v. School Dist. No. 34, 5 Wash. 142, 31 Pac. 462, 32 Pac. 110, are to the same effect as regards the failure of the statute to make the contractor a necessary party.

Under a lien law which provides the manner in which a proceeding to foreclose a lien shall be instituted, but does not require the principal contractor to be made a party, and which directs that, upon the appearance of the claimant and the owner in court, the issues shall be joined, the principal contractor is not a necessary party, however proper it may be to call him in because he has an interest in the matter alleged. Foster v. Skidmore, 1 E. D. Smith, 719; Lowber v. Childs, 2 E. D. Smith, 577, 1 Abb. Pr. 415.

But in *Austin & N. W. R. Co. v. Rucker*, 59 Tex. 587, it was held that both the principal contractor and the subcontractor are necessary parties to a suit by the assignee of a laborer to foreclose a laborers' lien, although the statute does not declare who shall be made defendants in such suits. The court stated its reasons as follows: "The subcontractor is the principal debtor in this case, and the person to whom the facts necessary to be established to support or defeat the claims must be known, and of which the appellant [owner] is not presumed to have knowledge; and if the cause can be tried without making him a party, it may be that the appellant, for want of knowledge of the facts of the case, may have a lien foreclosed upon its property, when in fact no indebtedness such as would give the lien existed; and at the same time such judgment and the payment thereof would be no bar to a suit by the subcontractor against the contractor or the appellant. It would seem that such parties should be before the court, in actions of this character, as would enable the court to render a judgment binding upon the contractor, subcontractor, railway company [owner], and the laborer [claimant] alike. If the indebtedness is established as between the contractor and subcontractor, as well as between those persons and the railway company and the laborer, this gives protection to all, when the judgment is paid. This should be done in an action in which they are all parties, unless the claim of the laborer has been established, as against the other parties, by suit prior to the institution of suit to foreclose the lien given by the statute. If all the parties are before the court, all equities between them may be adjusted, and a judgment binding upon them all rendered. A payment under a judgment so rendered would, to its extent, protect a railway company against further demand by the contractor or subcontractor, as fully as would a payment by a person against whom a judgment in garnishment has been rendered protect him against his creditor whose debt he has paid. If the contractor and subcontractor are not made parties, such judgment would afford no protection against either of them, for they could not be bound by a judgment rendered in a cause to which they were not parties; and they would be permitted to show that the judgment against the railway company, in favor of the laborer, was erroneous, either for the reason that the services upon which the claim was based had never been rendered, or that, if rendered, they had been paid for. In such case a railway company could protect itself only by showing that the laborers' claim was well founded. Such burden should not be imposed, and multiplicity of actions encouraged, when the whole matter could be so easily settled in one suit in which all parties in interest are before the court." See, to the same effect, *Eastern Texas R. Co. v. Davis*, 37 Tex. Civ. App. 342, 83 S. W. 883; *Walter v. Dearing*, — Tex. Civ. App. —, 65 S. W. 380. In 33 L.R.A.(N.S.)

connection with the foregoing Texas cases, see also *Austin & N. W. R. Co. v. Daniels*, 62 Tex. 70, which is sometimes cited as laying down a contrary doctrine, but in which, as a matter of fact, the question here under discussion was not involved, as both the original contractor and subcontractor were parties. The statement referred to is to the effect that the statutes of Texas create such privity between mechanics and laborers and the owner or employer as will entitle the former to maintain a direct action against the latter.

In *Maneely v. New York*, 119 App. Div. 376, 105 N. Y. Supp. 976, in holding that contractors were proper, but not necessary, parties, the court said: "It would seem, also, that, since the lien is claimed upon a fund primarily to the contractor and subcontractor, they are necessary parties to an action by a lienor of the subcontractor to foreclose his lien, in the sense that the court should not undertake to determine the plaintiff's claim to a fund due to them without hearing them, because, although the judgment would not be binding upon them, such course might lead to a multiplicity of suits and to conflicting determinations with respect to the validity of the lien, or the amount due to the lienor, and might subject the owner or city or the general contractor to a double liability to the lienor and to the subcontractor as well, and therefore there could not be a complete and final determination of the controversy binding on all parties in interest." This language, however, must be limited to a holding to the effect that in such case the contractor is a proper party, and should be brought in.

In *Yancy v. Morgan*, 94 Cal. 558, 29 Pac. 1111, it was held without discussion that the contractors were not necessary parties to a foreclosure suit. G. J. C.

GEORGIA SUPREME COURT.

W. H. P. HODGES, Plff. in Err.,
v.

PINE PRODUCT COMPANY.

(135 Ga. 134, 68 S. E. 1107.)

Water — pollution — damages.

The plaintiff brought suit against the defendant, making, among other allegations, substantially the following: The defendant is engaged in a certain business, in the op-

Headnote by HOLDEN, J.

Note. — Injury to fishing right as damages from pollution.

A riparian owner's exclusive right to fish in the water upon his own land does not include the right to destroy the fish he does not take. *People v. Truckee Lumber Co.* 116 Cal. 397, 39 L.R.A. 581, 58 Am. St. Rep. 183, 48 Pac. 374.

It was held in *Fitzgerald v. Firbank*

eration of which it discharges into a ditch water which flows into a creek running through a tract of land owned by the plaintiff, part of which is used as a pasture. The water thus discharged is poisoned with gases and chemicals extracted from pine wood, and the water in such stream is thereby polluted and adulterated, rendering it unfit for the stock of the plaintiff to drink, and causing the plaintiff damages in specified ways. Held: (1) The adulteration of such stream by artificial means constitutes an invasion of the property rights of the plaintiff, for which he is entitled to nominal damages, even though he shows no special damages. (2) If one by artificial means pollutes the water in the stream on land of another, whereby the fishing privileges of the latter of a pecuniary value are destroyed or injured,

he is entitled to recover damages. (3) If, by reason of the conduct of the defendant in polluting the stream, the land was rendered unfit or less valuable for use as a pasture, or other purposes for which it was adapted, with the stream running through it unpolluted, in the absence of other items of special damages, the measure of damages of the owner would be the diminution in the market value of the property, if the injury was of a permanent nature, or the diminution in the rental value, if the injury was of a temporary nature.

(September 23, 1910.)

ERROR to the Superior Court for Tattall County to review a judgment in defendant's favor in an action brought to

[1897] 2 Ch. 96, 76 L. T. N. S. 584, 66 L. J. Ch. N. S. 529, that the exclusive right under a grant from a freeholder, to fish in a stream, was not a mere license, but a *profit à prendre*, and that therefore the grantee was entitled to maintain an action for damages against one whose act in casting silt into the river drove away the fish.

In *West Muncie Strawboard Co. v. Slack*, 164 Ind. 21, 72 N. E. 879, involving a suit by a riparian owner for an injunction and damages for the pollution of a stream, the refusal of the trial court to charge that the jury could not include in assessing damages any amount for any fish which were, or might have been, in the stream, was upheld upon the ground that such a charge might have misled the jury into assuming that the right to enjoy the waters of a stream for purposes of fishing was not a substantial right possessed by the plaintiff, and that an interference with it was no element of damage to the riparian land.

And in *Tutwiler Coal, Coke & I. Co. v. Nichols*, 145 Ala. 666, 146 Ala. 364, 119 Am. St. Rep. 34, 39 So. 762, involving an action for damages for the pollution of a stream, it was held that, although the plaintiff had no title in fish in the stream until they were caught, evidence was admissible to show that the fish had decreased in the stream, and that the plaintiff's catch had diminished, since the operation of the coal washer which was alleged to have been the source of the pollution, and also that dead fish were discovered in the stream.

In *Threatt v. Brewer Min. Co.* 49 S. C. 95, 26 S. E. 970, the owner of bottom lands upon a stream sued for an injunction and damages for the fouling of a stream by the deposit of tailings from a mine by an upper owner, and alleged, among other things, as injuries warranting the relief sought, that the fertility of the land was impaired and the crops destroyed, and that fish were killed or driven from the creek so that the plaintiff could not catch any. Apparently, the item of injury to the fish was set up more as a ground for injunctive relief, than for damages, but, at any rate,

the court said that the matter of injury to the fish was almost too trifling to be noticed, pointing out that the plaintiff himself had never tried to catch a fish in the stream in six or seven years, and that he almost never saw anyone else try to do so. But the court said that, granting that he could have no property in such fish as swim in the stream, yet he had the right to have it free from defiling matter that would prevent fish entering the water running over his land, and that where it appeared that fish were accustomed to come into the stream before the fouling thereof drove them away, this constituted an element of injury to the plaintiff.

Where one seeking to recover loss of profits that might have been realized by the operation of his fishing weir, but for the casting of refuse into the stream by the defendant, fails to satisfy the burden of proof as to such damages, he is entitled to recover only the expense of removing the refuse. *Lamond v. Seacoast Canning Co.* — Me. —, 79 Atl. 385.

So, profits that might have been realized from the operation of an unobstructed fishing weir are not recoverable in an action for casting refuse into a stream, which surrounded and entered the weir, so as to prevent the entry of fish therein, where the plaintiff, having the burden to establish the prospective profits claimed to have been lost, fails to adduce any evidence from which such profits might be computed, such as the continuance of favorable conditions for fishing during the period of interruption, the continuance of the fish to run over the ground in abundance equal to that before the interruption, and the market price during such period. *Ibid.*

And to warrant the recovery of a penalty for throwing or depositing any deleterious substance into any lake or stream within the limits of the state, within the meaning of a statute entitled, "An Act for the Preservation of . . . Fish and Other Game," the quantity of deleterious substance thrown into a stream must be such as to have the effect of destroying the life, or disturbing

recover damages for the alleged pollution of a water course. Reversed.

The facts are stated in the opinion.

Messrs. W. T. Burkhalter and Hines & Jordan for plaintiff in error.

Messrs. O'Byrne, Hartridge, & Wright and H. H. Elder's for defendant in error.

Holden, J., delivered the opinion of the court:

The plaintiff brought suit against the defendant for damages, making, among others, substantially the following allegations: Defendant is engaged in the business of extracting from wood, at its plant, "rosin, turpentine, creosote, etc., includ-

ing all the poisonous gases and chemicals contained in pine wood." From an artesian well the defendant pumps everyday thousands of gallons of water, which is discharged into a ditch used to convey the water into Cedar creek. "The said poisonous gases and chemicals extracted from the said wood contaminate the said artesian water, as used and discharged from further service in said plant, and let flow by said defendant into a ditch and over lands and on into Cedar creek." Cedar creek runs through a described track of land of 1,000 acres, more or less, owned by the plaintiff, and is "especially adapted for fishing and water for the stock of petitioner." Prior

the habits, of fish in some degree. Cartwright v. Canandaigua Gaslight Co. 32 Hun, 403.

In Oldaker v. Hunt, 31 Eng. L. & Eq. Rep. 503, 6 DeG. M. & G. 376, 1 Jur. N. S. 785, L. R. 3 Eq. 671, 3 Week. Rep. 296, affirming 19 Beav. 485, the court, while not deciding, the question, entertained serious doubt whether a right of fishery created by lease was "land," within the meaning of a statute providing that nothing in its authorization of the turning of sewerage into such places as might be fit or necessary should be construed to authorize the injury of any stream in which the owner of any "lands" should be interested, without his consent.

The lessee, in pursuance of statutory authority, of shellfish grounds in public waters, does not, by depositing shellfish thereon, abandon possession thereof, and he is entitled to recover from a manufacturer who causes damage to the shellfish and grounds by the pollution of the water. Payne v. Providence Gas Co. 31 R. I. 295, 77 Atl. 145.

So the owner of shellfish on beds leased to him by the state fish commissioners in pursuance of statutory authority is entitled to an injunction against a municipality, and to recover from it damages for the destruction of his crop of shellfish, which were killed by sewage flowing upon the bed as a result of the negligent manner in which the municipality repaired its sewers after a break had occurred therein. Bailey v. New York, 38 Misc. 641, 78 N. Y. Supp. 210.

It was held in Huffmire v. Brooklyn, 162 N. Y. 584, 48 L.R.A. 421, 57 N. E. 176, that the destruction of oysters by the casting of sewage upon them, though the sewer was constructed by a city under legislative authority, was as clearly a taking of the property of the owner of the oyster bed, for which he had a constitutional right to compensation, as if there had been a physical removal and conversion of the oysters.

And in Foster v. Warblington, [1906] 1 K. B. 648, 75 L. J. K. B. N. S. 514, 70 J. P. 233, 54 Week. Rep. 575, 94 L. T. N. S. 876, 22 Times L. R. 421, 4 L. G. R. 735, it was held that the owner of oyster ponds on the fore shore of a creek in a harbor was en-

titled to recover damages from a municipality which injured the oysters by increasing the flow of its sewage into the creek. To the same effect is Hobart v. Southend-on-Sea Corp. (1906) 75 L. J. K. B. N. S. 305, 70 J. P. 192, 54 Week. Rep. 454, 94 L. T. N. S. 337, 22 Times L. R. 307, 4 L. G. R. 757.

If one pollutes a stream leading to a private fish preserve upon the land of another, he is liable in damages for consequent injury to the fish. Smith v. Cranford, 84 Hun, 318, 32 N. Y. Supp. 375.

So, declaring that, while a landowner had no property in the waters of a stream as it passed through his land, he had a right to its use, the court in Seaman v. Lee, 10 Hun, 607, held that where he constructed ponds upon his land along the line of the stream for the purpose of propagating trout, he was entitled to enjoin an adjoining owner from fouling the stream, and to recover damages for trout killed by the pollution.

In Fischer v. Missouri P. R. Co. 135 Mo. App. 37, 115 S. W. 477, where the court enjoined as a nuisance the pollution of an artificial lake on the plaintiff's premises, by the casting of oil and shop refuse into a ravine leading to the stream, it was held that damages were recoverable upon the basis of a restoration of the property to its original condition, and that they should include, among other things, the cost of restocking the lake with fish, as well as the loss of income derived from letting fishing privileges to others for compensation.

For a general treatment of the question of the right to fish, see the note in 60 L.R.A. 481.

On governmental control over right of fishery, see the note in 39 L.R.A. 581.

See also the note on injunctions to restrain trespass upon or interference with oyster beds, in 3 L.R.A.(N.S.) 205; the note on injunction against fishing in navigable waters, or against interference therewith, in 17 L.R.A.(N.S.) 1236; the note in the effect of license to plant shellfish, in 6 L.R.A.(N.S.) 247; and the note on the extension of fishing regulations to private beds, in 12 L.R.A.(N.S.) 869.

L. A. W.

to the conduct of the defendant complained of, the plaintiff had fenced this tract of land. "Your petitioner is a sheep owner and stock raiser, and had this pasture especially prepared for his stock, consisting of sheep, cattle, hogs, goats, etc.; that their dependence for water was in said creek. Petitioner alleges, and shows to the court, that the said poisonous waters from defendant's plant has already destroyed all the fish in said stream; that your petitioner has no way to water his said stock in said pasture, because the said waters in the said creek have been poisoned by the said defendant.

. . . Your petitioner shows to the court that the said contaminated, poisonous waters kills vegetation and some trees." "That the said tract of land has been further damaged by the said poisonous waters, in the opinion of this plaintiff, by the said waters killing some of the small growth and timber and grasses growing thereon," and an offensive odor comes from the stream. Other allegations of the petition will be hereinafter stated. To the order of the court sustaining the general and special demurrers of the defendant, and dismissing the petition, the plaintiff excepted.

1. While the petition was subject to some of the grounds of special demurrer, as will be hereinafter pointed out, we do not think it was subject to general demurrer. Civil Code 1895, § 3879, provides: "The owner of land is entitled to the free and exclusive enjoyment of all water courses, not navigable, flowing over his land; and the diverting of the stream, . . . or the adulterating thereof, so as to interfere with its value to him, is a trespass upon his property." Section 3057 provides: "Running water, while on land, belongs to the owner of it, but he has no power to divert it from the usual channel, nor can he so use or adulterate it as to interfere with the enjoyment of it by the next owner." And § 3061 is as follows: "The owner of a stream not navigable is entitled to the same exclusive possession thereof as he has of any other part of his land; and the legislature has no power to compel or interfere with him in its lawful use, for the benefit of those above or below him on the stream, except to restrain nuisances." A private nuisance gives a right of action to the person injured thereby, and the fact that the act may be otherwise lawful does not keep it from being a nuisance. See Civil Code 1895, §§ 3858-3861. Any unlawful interference by one with the enjoyment by another of his private property gives a cause of action. Civil Code 1895, § 3874. In 2 Farnham on Waters, § 462, pp. 1565, 1566, it is said: "The right to have a natural water course continue its physical

existence upon one's property is as much property as is the right to have the hills or forests remain in place. . . . Such flow and use belong to the land through which it passes, as an incident, convenience, or easement, which inseparably connects itself therewith as a part thereof, and frequently gives or adds value thereto; and is a private property right in the proprietor thereof, within the protection of the constitutional provision that private property shall be forever held inviolate, subject to the public welfare, and shall not be taken for public use without compensation being first made. The property, therefore, consists, not in the water itself, but in the added value which the stream gives to the land through which it flows. This is made up of the power which may be obtained from the flow of the stream, from the increased fertility of the adjoining fields because of the presence of the water, and of the value of the water for the uses to which it may be put. The right to the continued existence of these conditions is property, to protect which the owner may resort to any or all the instrumentalities which may be employed for the protection of private property rights." According to the allegations of the petition, the defendant, in the operation of its plant, was continuously adulterating the waters of the stream passing through the land of the plaintiff, and the plaintiff was entitled to recover whatever damages he sustained by reason thereof. *Horton v. Fulton*, 130 Ga. 466, 60 S. E. 1059; *Satterfield v. Rowan*, 83 Ga. 187, 9 S. E. 677; *Price v. High Shoals Mfg. Co.* 132 Ga. 246, 22 L.R.A.(N.S.) 684, 64 S. E. 87; *Parker v. American Woolen Co.* 105 Mass. 591, 10 L.R.A.(N.S.) 584, 81 N. E. 468; *H. B. Bowling Coal Co. v. Ruffner*, 117 Tenn. 180, 9 L.R.A.(N.S.) 923, 100 S. W. 116, 10 A. & E. Ann. Cas. 581. There was an illegal invasion of the property rights of the plaintiff, and he was entitled to recover nominal damages, if he sustained no special damages. *Price v. High Shoals Mfg. Co. supra.*

2. The pollution of a stream by one riparian owner, so as to pollute the water as it passes through the land of a lower riparian owner, gives a right of action to the latter. If no measure of damages is furnished beyond the mere commission of the tort, nominal damages may be recovered. In the present case there is no allegation of diminution of market value of the land, or of its rental value. The only suggestion in that direction is an allegation that the plaintiff has been damaged in being deprived of the use of his pasture at least \$100 a year. This is not a suf-

ficient allegation as to rental value. The plaintiff relies upon items of special damages sought to be set up by him. One of these is comprised in allegations to the effect that the fish in the creek which passes through the plaintiff's land, down to its mouth at the river, had been totally destroyed, and that the fish in the river had been practically destroyed; also, that the plaintiff had been deprived of his fishing privileges in the creek passing through his land, which he had enjoyed all his life, and which had been valuable to him; and that thereby he had been damaged in the sum of \$300. This allegation also states that the privilege was valuable to him, his family, and his settlement. Of course, the statements of value to his family and his settlement are wholly irrelevant, and furnish no ground for recovery. The allegation is also imperfect in not distinctly alleging the value of the fishing privilege owned by the plaintiff; but the demurrer does not rest on either of these last two points. While, therefore, the allegation is imperfect, it amounts to a statement that the plaintiff owned a fishing privilege in the creek passing through his land, which had a pecuniary value; that this had been destroyed by the conduct of the defendant; and that the plaintiff had been damaged in the sum of \$300. Game running wild upon the plaintiff's land is not owned absolutely by him, and fish swimming in a stream running through his land are not his absolute property. He cannot recover the value of fish destroyed in the stream, or game killed on the land, by reason of the pollution of the stream, but a fishing privilege shown to have a pecuniary value is a property right, for the destruction of which damages are recoverable. As against the demurrer filed, it was error to strike the allegations on the subject of the plaintiff's fishing privilege and its destruction or injury by the defendant. As the plaintiff alleged an injury to his fishing privilege of pecuniary value, the allegation that the fish in the stream on his land were destroyed should not have been stricken. See, in this connection, 9 Cyc. Law & Proc. pp. 988-991, 1000; 23 Am. Dig. Century ed., "Fish," § 11. There was no allegation that there was any injury to or destruction of plaintiff's hunting privileges of any pecuniary value, and the allegation that game was destroyed should have been stricken. The demurrer admitted the facts alleged for the purpose of the argument. What the evidence may show will develop on the trial.

3. The petition also alleged: "Your petitioner shows that he has been actually damaged the cost of building his said pasture fence around the said 1,000 acres of

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land in the sum of \$500, or some other large sum. Your petitioner further shows that, in addition to this damage, he has been damaged in being deprived of the use of said pasture at least \$100 a year, and this damage is a continuous one; that the said damage in being deprived of the use of said pasture will amount to at least \$1,500." The demurrer to this paragraph should have been sustained, as the damages alleged were not such as were recoverable. The measure of his damages would not be the expense he incurred in building a pasture fence, as the pasture fence was not destroyed or injured by the pollution of the stream, nor would his measure of damages be the actual value of the pasture to him during any period. If, by reason of the conduct of the defendant in polluting the stream, the land was rendered unfit or less valuable for use as a pasture, or other purposes for which it was adapted, with the stream running through it unpolluted, in the absence of other items of special damages, the measure of damages of the owner would be the diminution in the market value of the property, if the injury was of a permanent nature, or the diminution in the rental value, if the injury was of a temporary nature. See *Muncie Pulp Co. v. Keesling*, 166 Ind. 479, 76 N. E. 1002, 9 A. & E. Ann. Cas. 530, and authorities cited in the note on page 534. It is also alleged "that the evaporation of the said waters from the said creek contaminated by the said poisonous gases and chemicals give out an odor in vapor when said stream is drying, or the waters evaporating, that is indeed offensive. Your petitioner shows to the court that the said contaminated poisonous waters kill vegetation and some trees." These allegations were too general in their nature, and were properly stricken on special demurrer. The petition further alleged: "Your petitioner shows that the said defendant operates its plant on Sunday in disregard of the laws of God and man, and setting an example to the said town of Collins to the injury of the morals and good citizenship of the inhabitants of that community, and especially the young boys therein." The demurrer to this allegation on the ground that it was irrelevant, and set up no liability "as against this defendant in favor of said plaintiff," should have been sustained. The fact that the conduct of the defendant operates "to the injury of the morals and good citizenship of that community, and especially the young boys therein," however reprehensible from a moral standpoint, gave to the plaintiff no legal right to damages because of such conduct, nor did the facts al-

leged illustrate any question involved in the case.

The allegation that the plaintiff was entitled to punitive and exemplary damages because of the destruction of the fish in the stream should have been stricken on demurrer, as there were no allegations in the petition entitling the plaintiff to recover damages of this nature.

The petition alleged: "Your petitioner further alleges and shows that the said defendant first turned its said poisonous waters down alongside the Seaboard Air-Line right of way, and got into trouble by reason of the injury they were doing said parties, and the said defendant changed its said poisonous waste waters into Cedar creek to avoid the trouble damages they had incurred on themselves by turning water down alongside the said Seaboard Air-Line Railway. Your petitioner shows that the said defendant has no regard for the rights of other folks or the welfare of the people, and especially your petitioner." These allegations were demurred to on the ground that they were irrelevant, and the demurrer should have been sustained. Proof of these allegations would give the plaintiff no right to damages, and would illustrate no question involved in the case.

The third paragraph of the petition was not subject to the demurrer filed thereto. The thirteenth paragraph of the petition was subject to the demurrer filed thereto, and should have been stricken.

Judgment reversed.

All the Justices concur.

MASSACHUSETTS SUPREME JUDICIAL COURT.

OTTO FLEISCHNER

v.

CHARLES E. DURGIN.

(207 Mass. 435, 93 N. E. 801.)

Master — driver of automobile — Liability.

The owner of an automobile, who employs a chauffeur to take the car from the

garage to a repair shop, is not liable for injury inflicted upon a stranger by his negligent handling of the car while he has gone on an errand of his own, requiring a journey six or seven times as long as was required by his employment, to a crowded part of a city, although, at the time of the injury, he was returning towards his original destination.

(January 5, 1911.)

EXCEPTIONS by plaintiff to rulings of the Superior Court for Middlesex County, made during the trial of an action brought to recover damages for personal injuries alleged to have been caused by the negligence of defendant's servant, which resulted in a verdict in defendant's favor. Overruled.

The facts are stated in the opinion.

Mr. Henry W. Beal for plaintiff.

Messrs. Bates, Nay, & Abbott and Robert E. Buffum for defendant.

Rugg, J., delivered the opinion of the court:

The plaintiff, while in the exercise of due care, and traveling on Dartmouth street opposite the Public Library, in Boston, was injured by the negligence of one Freeman, who was driving the defendant's motor car. Freeman was not in the general employ of the defendant, but on the day in question had been asked by him to drive the car from the Stevens garage in Winchester street, in the town of Brookline, to the shop of one Burlingame, on Aspinwall avenue, also in Brookline, and less than a mile away, for some repair. Late in the day, Freeman took the car, drove first to Coolidge Corner, a square in Brookline, not on the way to the Burlingame shop, where he had lunch. Then with a friend he drove the car about 6 miles further out of the way from the garage to the Burlingame shop, to a shop in Stanhope street, in Boston, for the purpose of getting a chain for his own uses. He had started to return to Brookline, and was bound for the Burlingame shop, when the accident occurred. The defendant gave no directions to go to Coolidge Corner or to Boston, and this ride was taken without

Note. — Liability of owner for injuries caused by automobile while being used by servant for his own business or pleasure.

The earlier decisions upon the question here considered are dealt with in the notes to Christy v. Elliott, 1 L.R.A.(N.S.) 215; Hayes v. Wilkins, 9 L.R.A.(N.S.) 1035; Jones v. Hoge, 14 L.R.A.(N.S.) 216; 3 L.R.A.(N.S.)

Danforth v. Fisher, 21 L.R.A.(N.S.) 93; Steffen v. McNaughton, 26 L.R.A.(N.S.) 382. The present note covers only the cases arising subsequently to the writing of those notes.

Where a city salesman is furnished an automobile for business use only, and is instructed to leave it at a garage, his employer is not liable for an injury occurring while the salesman, without the employers'

his knowledge. Freeman had worked at the Stevens garage where the defendant kept his motor car, and once before had driven it to Boston, but under what circumstances does not appear.

The principles which govern the rights of the parties are settled. The master is liable for the act of a servant in charge of his vehicle when the latter is acting in the main with the master's express or implied authority, upon his business, and in the course of the employment, for the purpose of doing the work for which he is engaged. The master is not liable if the servant has abandoned his obligations, and is doing something not in compliance with the express or implied authority given, and is not acting in pursuance of the general purpose of his occupation, or in connection with the doing of the master's work. Under this rule the employer has been held responsible for wrongs done to third persons by his driver during incidental departures from the scope of the authority conferred by the employment, and upon comparatively insignificant deviations from direct routes of travel, but within the general penumbra of the duty for which he is engaged. *Hayes v. Wilkins*, 194 Mass. 223, 9 L.R.A.(N.S.) 1033, 120 Am. St. Rep. 549, 80 N. E. 449. The employment of

Freeman was limited to a specific and short trip within a town. He took the car several miles out of the way, which was six or seven times as far as he had a right to go, to a crowded part of a large city, on an errand wholly of his own, and had only just commenced to return at the time the act occurred for which damages are sought in this action. He was acting in disregard of his instructions, and wholly outside his employment, and for a purpose having no relation, even remote, to the business of the master. The extent of the excursion which he undertook on his own account was so disproportionate to the length of the route he was authorized to go that it cannot be minimized to a deviation. It was in fact the chief journey. There is nothing to indicate that the defendant had any hint or ground for suspicion of this unwarranted use of his property. Under such circumstances he cannot be held liable. *McCarthy v. Timmins*, 178 Mass. 378, 86 Am. St. Rep. 490, 59 N. E. 1038; *Storey v. Ashton*, L. R. 4 Q. B. 476, 10 Best & S. 337, 38 L. J. Q. B. N. S. 223, 17 Week. Rep. 727; *Mitchell v. Crassweller*, 13 C. B. 237, 22 L. J. C. P. N. S. 100, 17 Eng. Rul. Cas. 252.

Exceptions overruled.

permission, has the machine out for the purpose of going to dinner. *McIntire v. Hartfelder-Garbutt*, — Ga. App. —, 71 S. E. 492.

And where an automobile which is used by a company to carry its employees to their places of employment, at the time an accident occurs is being used by an officer of the company for a pleasure trip, and is not being used about the business of the company, the company cannot be held liable. *Powers v. Arnold Engineering Co.* 126 N. Y. Supp. 839.

And where a son who was a clerk for his father, who dealt in automobiles, among other things, on a certain day was given a holiday, the father cannot be held liable for an injury which happened while the son for his own purposes, and without the express authority of his father, was driving a machine which the father had ordered put into the garage. *Reynolds v. Buck*, 127 Iowa, 601, 103 N. W. 946.

And it is immaterial that the car at the time was decorated in such a way that it might in a measure advertise the father's business. *Ibid.*

So, where a chauffeur has been instructed not to use a car without the owner's express orders, except for the purpose of going to his meals, and an accident occurs while he has the machine out with his companions, without the owner's consent, for 33 L.R.A.(N.S.)

the purpose, as the chauffeur testified, of taking a package to the laundry and getting a shave, neither of which he did, the evidence is insufficient to show that the chauffeur was acting in his employer's business, or within the scope of his employment. *Douglass v. Hewson*, 127 N. Y. Supp. 220.

And the mere fact that the owner of a car consents to the chauffeur's using it does not render him liable for an injury occurring while the car is being used by the chauffeur. *Ibid.*

The owner of a car, however, is liable for an injury done thereby, where, at the time, it was being run by one who was taking care of the car in return for the owner's teaching him to run it, although such person was, at the time, in the employ any pay of another person. *Irwin v. Judge*, 81 Conn. 492, 71 Atl. 572.

And an owner of a car is liable for an injury occurring while the car was being used by his minor son, who acts as chauffeur for the family, for his own pleasure, and with his father's consent, since the car was being used within the scope of the family uses for which it was kept. *Daily v. Maxwell*, — Mo. App. —, 133 S. W. 351.

For a note on liability of owner of automobile for negligence of borrower or hirer, see note to *Hartley v. Miller*, post, 81.

J. T. W.

MICHIGAN SUPREME COURT.

WILLIAM HARTLEY, Plff. in Err.,

v.

FRANK P. MILLER et al.

(— Mich. —, 130 N. W. 336.)

Automobile — loan — injury — liability of owner.

The owner of an automobile is not liable on the theory that it is a dangerous machine, for its negligent use to the injury of a stranger by one to whom he had loaned it and who was in complete control of its operation, although the owner is, at the time of the accident, present in the machine as a guest.

(March 13, 1911.)

Note. — Liability of owner for negligence of borrower or hirer of automobile.

This note does not include cases where the automobile had been borrowed or hired by the owner's servant. Cases passing upon that question are gathered in the notes to *Christy v. Elliott*, 1 L.R.A.(N.S.) 215; *Hayes v. Wilkins*, 9 L.R.A.(N.S.) 1035; *Jones v. Hoge*, 14 L.R.A.(N.S.) 216; *Danforth v. Fisher*, 21 L.R.A.(N.S.) 93; *Steffen v. McNaughton*, 26 L.R.A.(N.S.) 382; and *Fleischner v. Durgin*, ante, 79.

It may be stated that generally where the owner of an automobile merely lends or hires it out to another without more, he will not be liable for damage resulting from its use while under the control of the borrower or hirer.

Thus where two persons each own automobiles and have a mutual understanding whereby they use each other's car interchangeably, securing a chauffeur from a third party, the owner of one car is not liable for an injury which happens while the other has it out under such agreement, and while it is being operated by the chauffeur, hired by the latter. *Freibaum v. Brady*, 128 N. Y. Supp. 121. The court said: "There is nothing in the record to sustain the finding of the jury that the chauffeur, at the time the accident occurred, was acting as an employee of the defendant. The defendant did not employ, pay, direct, or control him in any way; in fact, he did not know that his car was being used at the time. His only connection with the accident was the fact that he owned the car and permitted his brother to use it. I know of no principle upon which, under such circumstances, he can be held liable; on the contrary, the authorities already cited are the other way. But, even if it be assumed that the chauffeur was employed and paid by the defendant, I do not think that would make him liable. The arrangement simply amounted to the loaning of the car with the driver, to the brother for his own use and purposes. The defendant would not be chargeable with the negligence of 33 L.R.A.(N.S.)

ERROR to the Circuit Court for Wayne County to review a judgment in favor of defendant Miller in an action brought to recover damages for personal injuries for which he was alleged to be responsible. Affirmed.

The facts are stated in the opinion.

Messrs. McHugh & Gallagher for plaintiff in error.

Mr. Albert McClatchey, for defendant in error:

No liability attaches to the owner of an automobile for the negligence of a person to whom it is loaned.

Doran v. Thomsen, 74 N. J. L. 445, 66 Atl. 897; *Cunningham v. Castle*, 127 App. Div. 580, 111 N. Y. Supp. 1057; *Jones v. Hoge*, 47 Wash. 663, 14 L.R.A.(N.S.) 216,

the driver while thus running the car, for the reasons stated by Lord Cockburn in *Rourke v. White Moss Colliery Co.* L. R. 2 C. P. Div. 205, as follows: "When one person lends his servant to another for a particular employment, the servant, for anything done in that particular employment, must be dealt with as the servant of the man to whom he is lent, although he remains the general servant of the person who lent him."

To the same effect is *Parsons v. Wisner*, 113 N. Y. Supp. 922.

And where the owner or person in possession of an automobile merely permits another to use it, no relation of principal and agent is established such as renders the owner liable for an injury resulting from the other's negligent use of the machine. *Lewis v. Amorous*, 3 Ga. App. 50, 59 S. E. 338.

So, where a car is taken from the garage at which the owner left it, without the latter's knowledge, by one old enough to be responsible in the eyes of the law, the owner is not liable for a negligent homicide which occurs while the car is being operated by the person taking it. *Ibid.*

And where the twenty-year old son of the owner of an automobile is permitted to drive the car whenever he wishes, the owner is not liable for any injury resulting while his son has the car out for his own purposes, without the father's consent. *Maher v. Benedict*, 123 App. Div. 579, 108 N. Y. Supp. 228.

And where a father buys an automobile for the use of his family, and when he was at home his daughter had to ask permission to use it but when absent she used it without his permission, she is not his agent or servant where she takes it without his permission for her own pleasure, and he is not liable for an injury resulting from such use. *Doran v. Thomsen*, 76 N. J. L. 754, 19 L.R.A.(N.S.) 335, 131 Am. St. Rep. 677, 71 Atl. 296.

So, the mere fact that a chauffeur in taking out his master's automobile in obedience to a command of the master's family, for the entertainment of friends and guests of

125 Am. St. Rep. 915, 92 Pac. 433; Clark v. Buckmobile Co. 107 App. Div. 120, 94 N. Y. Supp. 771; Slater v. Advance Thresher Co. 97 Minn. 305, 5 L.R.A.(N.S.) 598, 107 N. W. 133; Indiana Springs Co. v. Brown, 165 Ind. 465, 1 L.R.A.(N.S.) 238, 74 N. E. 615, 6 A. & E. Ann. Cas. 656; Herlihy v. Smith, 116 Mass. 265; Christy v. Elliott, 1 L.R.A.(N.S.) 233, and note, 216 Ill. 31, 108 Am. St. Rep. 196, 74 N. E. 1035, 3 A. & E. Ann. Cas. 487; Wright v. Big Rapids Door & Blind Mfg. Co. 124 Mich. 91, 50 L.R.A. 495, 82 N. W. 829.

Stone, J., delivered the opinion of the court:

This case is before us upon a case-made after judgment.

It appears that the plaintiff was a street car conductor in the employ of the D. U. R. in the city of Detroit. On Sunday, May 24, 1908, about 3:45 P. M., he was engaged in his duties as conductor on a Fourteenth avenue car, running east on Henry street from Grand River avenue to Cass avenue.

the family, disobeys the master's command not to take out the car unless the master accompanies it, does not show that he is acting outside the scope of his employment so as to relieve the master from liability for injury done by the negligent handling of the car. Moon v. Matthews, 227 Pa. 488, 29 L.R.A.(N.S.) 856, 136 Am. St. Rep. 902, 76 Atl. 219.

And where the owner of an automobile retained his chauffeur during a European trip, and an accident occurred while the machine was being driven by the chauffeur at the instance of the owner's married daughter, who had been accustomed, before her father's departure, to use the car, and who during his absence was an inmate of his household, it was held that the owner contemplated that his daughter should use the machine during his absence, and that the chauffeur was acting in the course of his employment in responding to her call, and that the owner was therefore liable for the damage resulting from the accident. Winfrey v. Lazarus, 148 Mo. App. 388, 128 S. W. 276.

In Simeone v. Lindsay, 6 Penn. (Del.) 224, 65 Atl. 778, the court in instructing the jury said: "If the automobile at the time of the accident was entirely operated and controlled by someone other than the defendant, the plaintiff could not recover. It is not, however, necessary that the defendant should have been the owner of the automobile, because if you believe that he had at the time of the accident control of the machine so as to be able to govern its management or operation, any negligence in operating the machine would be the negligence of the defendant."

And one who delivers an automobile to another under an agreement that the latter is to use it for hire and pay the purchase price to the first party out of the receipts is not liable for an injury resulting while it was being used by the purchaser, there being no relation of master and servant between the parties. Braverman v. Hart, 105 N. Y. Supp. 107.

The car was an open one with a running board on the right-hand side. The plaintiff was standing on this running board, collecting fares. The defendant Frank P. Miller, at this time was the owner of an automobile. On the night preceding the day in question the defendant August Lootens visited said Miller at his home and asked for the loan of his automobile on the succeeding day. Miller consented to let Lootens have the automobile on the following day. Accordingly, between 2 and 3 o'clock P. M., Lootens called at Miller's home for the automobile, and on his (Lootens') invitation, Miller entered the auto and rode to his (Lootens') home, Lootens operating the machine; and when they arrived there, Lootens and his company insisted upon Miller's accompanying them on the ride, and Miller finally acceded to their invitation and went with them. There were two front seats in the automobile. Lootens sat on the right-hand side, in the driver's seat, and operated the machine. Miller occupied the other front seat. It is admitted

But where the owner of an automobile rents it with a chauffeur for a certain time for a given price, he is liable for an injury resulting from the chauffeur's negligence, although the latter is bound to obey the orders of the hirer as to when and where to drive. Shepard v. Jacobs, 204 Mass. 110, 26 L.R.A.(N.S.) 442, 134 Am. St. Rep. 648, 90 N. E. 392.

And a company which hires electric vans for the purpose of delivering its express packages is not liable for an injury inflicted by a van operated by a chauffeur furnished by the bailor, either while on her way home for repairs, or while on the way to lunch, the injury appearing to have resulted from a defect in the steering gear, and the chauffeur not being a servant of the express company. Bohan v. Metropolitan Exp. Co. 122 App. Div. 590, 107 N. Y. Supp. 530.

Where there is a conflict upon the question of whether the operator of an automobile had hired it of the owner for his own use or whether he was acting as an employee of the owner, they are questions of fact for the jury, and their findings are conclusive. Ottomeier v. Hornburg, 50 Wash. 316, 97 Pac. 235.

The question of who is responsible for acts of a driver furnished with hired vehicle is covered in notes in 13 L.R.A.(N.S.) 1122, and 25 L.R.A.(N.S.) 33. See also note to Burns v. Michigan Paint Co. 16 L.R.A.(N.S.) 816, on "Cartman as an independent contractor."

J. T. W.

that Miller had loaned the machine to Lootens; that he (Miller) accompanied the party on Lootens' invitation, and as Lootens' guest, and that Miller did not in any way participate in the operation or control of the automobile. Lootens had had considerable experience in the operation of automobiles, though he had never driven this particular machine before the day of the accident. After leaving Lootens' home, the party started on the drive, and finally reached Second avenue, and proceeded north along that thoroughfare toward Henry street, and came into collision with the motor car on which plaintiff was employed, striking him, at the corner of Second avenue and Henry street. There was some dispute as to the manner of, and responsibility for, the accident, but it is not material to the question presented here. When the testimony had been submitted, defendant Miller moved the court to direct a verdict of no cause of action as to him, on the ground that the evidence showed that at the time of the accident the automobile had been loaned by defendant Miller to defendant Lootens, and that the latter was at such time in actual, active control and operation of the automobile in his own behalf, and was not in any way operating the same as the agent or employee of the defendant Miller; that defendant Miller was, at the time of the accident, a mere guest in the automobile, and not in any way responsible for its operation or control. This motion was granted, and a verdict and judgment were entered for defendant Miller, and the case proceeded to a verdict and judgment against defendant Lootens in favor of the plaintiff. The plaintiff has appealed, and assigns error in granting defendant Miller's motion, and in directing a verdict of no cause of action as to defendant Miller.

It will be noticed that there is nothing in the record to show that Miller had ever operated the auto, or that he could operate it, or that he had any greater knowledge or skill than Lootens possessed as to its operation.

It should be borne in mind that the alleged cause of action arose before the statute of 1909, regulating motor vehicles, was enacted.

It is the contention of the plaintiff that, because defendant Miller was present and the machine was being used with his consent at the time of the injury complained of, he is liable; that an automobile being a dangerous machine, its owner should be held responsible for the manner in which it is used. It is the claim of defendant Miller that it is understood that the automobile had passed into the possession and control of

defendant Lootens for the day, and that Miller did not have the right or authority to dictate or direct the manner in which the automobile should be operated; that it was as much in the control of Lootens for that day as it would have been had he been the absolute owner thereof; that an automobile is not a dangerous instrumentality, and under such circumstances there is no theory upon which Miller could be held liable for the negligence of Lootens. In our opinion this claim of defendant Miller is supported by the great weight of authority.

Doran v. Thomsen, 74 N. J. L. 445, 66 Atl. 897, is a leading case upon this subject. It was there held that the owner of a motor vehicle is not liable for an injury caused by the negligent driving of a borrower, if it was not used at the time in the owner's business. A number of cases are there cited, including Herlihy v. Smith, 116 Mass. 265. See also Cunningham v. Castle, 127 App. Div. 580, 111 N. Y. Supp. 1057, decided in 1908, where the same rule is applied, and where the authorities are reviewed at length.

The general proposition as to the responsibility for a tort is stated by Andrews, J., in King v. New York C. & H. R. R. Co. 66 N. Y. 181, 23 Am. Rep. 37, as follows: "Where one person has sustained an injury from the negligence of another, he must, in general, proceed against him by whose negligence the injury was occasioned. If, however, the negligence which caused the injury was that of a servant while engaged in his master's business, the person sustaining the injury may disregard the immediate author of the mischief and hold the master responsible for the damages sustained."

In Wyllie v. Palmer, 137 N. Y. 248, 19 L.R.A. 285, 33 N. E. 381, it was held that the doctrine of *respondeat superior* applies only when the relation of master and servant is shown to exist between the wrongdoer and the person sought to be charged for the result of some neglect or wrong at the time, and in respect to the very transaction out of which the injury arose. The following cases are also in point: Jones v. Hoge, 47 Wash. 663, 14 L.R.A.(N.S.) 216, 125 Am. St. Rep. 915, 92 Pac. 433; Slater v. Advance Thresher Co. 97 Minn. 305, 5 L.R.A.(N.S.) 598, 107 N. W. 133; Lotz v. Hanlon, 217 Pa. 339, 66 Atl. 525, 10 L.R.A.(N.S.) 202, 118 Am. St. Rep. 922, 10 A. & E. Ann. Cas. 731, and note; Reynolds v. Buck, 127 Iowa, 601, 103 N. W. 946.

The case is governed by the general rules of law governing the relation of master and servant, or principal and agent. The rule of law applicable to the care and protec-

tion of dangerous instrumentalities does not apply. *Cunningham v. Castle*, 127 App. Div. 580, 111 N. Y. Supp. 1057; *Jones v. Hoge*, 47 Wash. 663, 14 L.R.A.(N.S.) 216, 125 Am. St. Rep. 915, 92 Pac. 433.

Our examination has shown that the courts of last resort in all parts of the United States have, without exception, held that, in the absence of statutory liability, the owners of automobiles were not liable for the negligence of a borrower, where the machine was not used in the master's business. Counsel for plaintiff has cited the case of *Ingraham v. Stockamore*, in the supreme court of New York, reported in 63 Misc. 114, 118 N. Y. Supp. 399, in support of his position. This is not a court of last resort, and it stands alone in holding that, an automobile being a dangerous machine, its owner should be held responsible for the manner in which it is used, and that his liability should extend to its use by anyone with his consent. We do not understand this to be the law in any state, in the absence of statutory enactment.

We are of opinion that the circuit judge did not err in directing a verdict for the defendant Miller for the reasons stated by him, and the judgment below is affirmed.

MICHIGAN SUPREME COURT.

EDMUND L. EBERT, Appt.,
v.

JAMES H. CULLEN.

(— Mich. —, 130 N. W. 185.)

Statute of frauds — receipt for payment — sufficiency of contract.

Failure to mention the time for paying the balance of the purchase money in a receipt for a part payment towards the purchase price of real estate renders the receipt insufficient as a contract under the statute of frauds.

(March 13, 1911.)

Note. — Statute of frauds: necessity of specifying time of payment of purchase price in contract or memorandum for the sale of real property.

The decided weight of authority supports the rule that such an essential term as the time of payment of the purchase price must be stated in the contract or memorandum in order to render the contract enforceable as against a plea of the statute of frauds. A few cases, however, are to the effect that if the contract is entirely silent as to when the purchase money is to be paid a sale for cash will be presumed. But if the writings show a credit, even the 33 L.R.A.(N.S.)

APPEAL by complainant from an order of the Circuit Court for Wayne County, in Chancery, sustaining a demurrer and dismissing a bill filed to enforce specific performance of an agreement to sell certain lands. Affirmed.

The facts are stated in the opinion.

Mr. Denton Guinness, for complainant:

The contract is sufficient under the statute to bind defendant.

Webster v. Brown, 67 Mich. 328, 34 N. W. 676; *Browne*, Stat. Fr. § 384; *Reed*, Stat. Fr. § 400; *Fry*, Spec. Perf. § 221, p. 16; *Pomeroy*, Spec. Perf. § 91, p. 133; 9 Am. & Eng. Enc. Law, p. 204; *Atwood v. Cobb*, 16 Pick. 227, 26 Am. Dec. 657; *Hall v. Misenheimer*, 137 N. C. 183, 107 Am. St. Rep. 474, 49 S. E. 104; *Ellett v. Britton*, 10 Tex. 212.

Messrs. Cullen, Casgrain, & Hanley for appellee.

Brooke, J., delivered the opinion of the court:

Complainant filed his bill of complaint to enforce specific performance of an agreement to sell certain lands. The agreement is as follows:

Detroit, Mich.,

March 14, 1910.

Received of E. L. Ebert twenty-five dollars on sale to him or principal of the 2 feet N. E. cor. of Trowbridge and John R. price five hundred dollars.

[Signed] Jas. H. Cullen.

Defendant interposed a demurrer upon the following grounds: "(1) Because the alleged contract to sell, set up in complainant's bill, is not sufficient, under the statutes of the state of Michigan, to bind defendant to make the sale. (2) Because said bill of complaint is brought against James H. Cullen, trustee, and the alleged contract of sale therein contained is signed by James H. Cullen. (3) Because the said

latter class of cases, in general, support the majority rule.

The salient terms of the statutes involved have been set out where given in the cases.

In *Camp v. Moreman*, 84 Ky. 635, 2 S. W. 179, where the statute provides that any contract for the sale of real estate or some note or memorandum thereof must be in writing, but that "the consideration need not be expressed in the writing," it was held that a memorandum for the sale of land need not express either the amount of the consideration or the time of payment, the court saying that the purpose of the statute, viz., to prevent the fee-simple title of land from passing by mere parol, was accom-

bill does not show that the complainant has any interest in the subject thereof." From an order sustaining the demurrer, and dismissing the bill, complainant appeals.

Defendant urged in the lower court, and rests in this court, that this case is ruled by the decision in *Gault v. Stormont*, 51 Mich. 636, 17 N. W. 214. The alleged contract there considered was nearly identical with the one in the case at bar. It read:

Wyandotte,
April 26, 1881.

Received from George Stormont the sum of seventy-five dollars as part of the principal of ten hundred and fifty dollars on sale of my house and two lots on corner of Superior and Second streets in this city.

David Gault.

Witness: C. W. Thomas.

Commenting upon this agreement, Mr. Justice Cooley, speaking for the court, said: "There was no written evidence of the sale of the lots, except the receipt, which was given for the \$75, and that was insufficient to answer the requirements of the statute of frauds; for, though it specified the pur-

chase price, it failed to express the time or times of payment, and there is no known or recognized custom to fix what is thus left undetermined. A memorandum, to be sufficient under the statute, must be complete in itself, and leave nothing to rest in parol,"—citing cases. This case was cited and approved in *Webster v. Brown*, 67 Mich. 328, 34 N. W. 676, and in *Dayton v. Stone*, 111 Mich. 196, 69 N. W. 515, and was examined and distinguished without criticism in *Ryan v. United States*, 136 U. S. 68, 34 L. ed. 447, 10 Sup. Ct. Rep. 913.

Complainant contends, in effect, that we should overrule *Gault v. Stormont*. It is not apparent why this should be done. The cases of *Munro v. Edwards*, 86 Mich. 91, 48 N. W. 689; *Proctor v. Plumer*, 112 Mich. 393, 70 N. W. 1028; *Campbell v. Davidson-Martin Mfg. Co.* 126 Mich. 468, 85 N. W. 1093; *Mull v. Smith*, 132 Mich. 618, 94 N. W. 183, and *Miller v. Smith*, 140 Mich. 524, 103 N. W. 872, cited and relied upon by complainant, have been examined. They do not, in our opinion, modify or cast any doubt upon the correctness of the rule laid down in *Gault v. Stormont*.

The decree is affirmed.

ished when the land sold was sufficiently described in the writing to enable the conveyance to be decreed without resort to parol evidence for that purpose, and that those opinions to the effect that the entire contract must be set forth so as to enable the court to enforce its terms without the aid of parol proof do not conform to the correct rule.

And in *Ellis v. Bray*, 79 Mo. 227, a memorandum which merely acknowledged the receipt of a certain sum to apply on the purchase money on certain described lands was held sufficient under the statute of frauds, it being said that where a written memorandum, as here, does not purport to be a complete expression of the entire contract, the matter omitted might be supplied by parol, and therefore that the amount of consideration and the time or times when payable could be shown by parol. This case, however, is not good law, even in Missouri. It has been declared erroneous (*Darnell v. Lafferty*, 113 Mo. App. 282, 88 S. W. 784), and the general rule that the writing must contain all the essential terms of the complete contract, expressed with such a degree of certainty that they may be understood without recourse to parol, may be regarded as the accepted law of Missouri. See *Ringer v. Holtzclaw*, 112 Mo. 519, 20 S. W. 800; and *Boyd v. Paul*, 125 Mo. 9, 28 S. W. 171.

And in Texas, a memorandum, to be sufficient under a statute requiring definiteness as to parties and subject-matter, need not state consideration and time of payment, it being held that such facts may be

proven by parol. *Fulton v. Robinson*, 55 Tex. 401.

Where the note or memorandum is entirely silent as to when or how the purchase money is to be paid, a sale for cash will be presumed, and the requirement that the terms and conditions of the contract be shown held sufficiently complied with as to payments. *Eppich v. Clifford*, 6 Colo. 493. And in *Mull v. Smith*, 132 Mich. 618, 94 N. W. 183, it was held that a memorandum of a contract of sale of land, which stated that the owner agreed to give a deed upon payment of a certain sum (which represented the balance unpaid of the purchase price), was an agreement to pay cash within a reasonable time, and sufficiently fixed the time of payment to comply with the statute of frauds. And in *Ryan v. Hall*, 13 Met. 520, where there was no stipulation in the memorandum for credit, and no time limited, it was held that the contract was to pay the whole amount in cash on demand, within a reasonable time. And in *Smith v. Jones*, 7 Leigh, 165, 30 Am. Dec. 498, where there was no time limit for paying the price, it was held that the sale was for cash, and that either party might presently or without delay insist on carrying the contract into execution. But it has been held that if the memorandum shows that the sale was upon credit, the terms of such credit must be stated. *Eppich v. Clifford*, 6 Colo. 493; *Wood v. Midgley*, 5 DeG. M. & G. 41, 2 Eq. Rep. 729, 23 L. J. Ch. N. S. 553, 2 Week. Rep. 301; *Hussey v. Horne-Payne*, L. R. 4 App. Cas. 311, 48 L. J. Ch. N. S. 846, 41 L. T. N. S. 1, 27 Week. Rep. 585, 6 Eng. Rul.

Cas. 155; *Major v. Shepherd*, 18 Manitoba L. Rep. 504.

But in *Carroll v. Powell*, 48 Ala. 298, a memorandum which failed to state whether the sale was for cash or on credit was held insufficient under a statute requiring the terms of the sale to be stated, it being said that it could not be presumed that the sale was for cash.

In *Wright v. Weeks*, 25 N. Y. 153, affirming 3 Bosw. 372, it was held that a memorandum of a sale of lands which stated the price and made it payable upon "the terms as specified," which terms were not set out in the memorandum, could not be made good, under a statute of frauds requiring the consideration to be expressed, by parol evidence of the time agreed upon for payment. The court, speaking through Denio, Ch. J., said: "It is the obvious sense of the enactment that all the material parts of such a contract should be embraced in the writing. The policy which the act is intended to enforce arose out of a distrust of oral testimony, by which it was supposed that contracts to sell land, among some other arrangements, might be falsely set up, or, when actually made, might be perverted or changed by fraud, perjury, or mistake. But if any of the material terms of the bargain could be left out of the writing and be supplied by parol, the greater part of the mischief intended to be guarded against would remain. Thus if, as in this case, the terms of payment were the only portions of the contract depending upon verbal testimony, they might be so stated as materially to diminish the value of the bargain to the vendor. . . . If a reference in a writing to a verbal agreement would let in that agreement, where the subject was one which the statute required to be in writing, it would be sufficient for parties desiring to avoid the trouble of reducing their bargains to writing, to sign a statement that they had contracted verbally respecting a given subject, and they would thus dispense with the statute." And Allen, J., in a separate opinion, said: "The statute was passed to prevent fraud and perjury, in the establishment of fictitious or misrepresented contracts: and its object can only be effected by requiring not only that the fact that such contract was made, to be evidenced by writing, but that the contract itself, the entire agreement with all its terms and conditions, shall be in writing. Fraud and perjury may be as successful and as dangerous in interpolating or misrepresenting terms and conditions, as in describing the parties or subject-matter of a contract. Hence, our statute requires the contract, or some memorandum expressing the consideration, to be in writing. It does not prescribe any particular form of words; but it does make the writing of the essence of the contract, and requires an agreement for the sale of lands to be written, and in such terms that it can be ascertained, to a moral or reasonable certainty, what the parties mean. If the agreement be vague and indefinite, so that the full im-

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tention of the parties cannot be collected from it, it cannot be said that the contract is in writing, and it is therefore void. . . . The contract relied upon by the plaintiff must stand or fall by itself. Construction and effect must be given to it *per se*, and without the aid of extrinsic evidence. There were terms upon which the conveyance was to be made, or for the payment of the purchase money, which were not stated in the memorandum; and, in order to a specific performance of the agreement, these terms are to be ascertained, and, as they cannot be spelled out from the paper writing, it follows that the agreement is void, and cannot be enforced by the court. Looking at the paper alone, we are compelled to say either that there was no perfect agreement made between the parties, or they have failed to make a perfect memorandum of it; and either view is fatal."

And a similar conclusion was reached in *Wood v. Midgley*, 5 DeG. M. & G. 41, 1 Eq. Rep. 729, 23 L. J. Ch. N. S. 553, 2 Week Rep. 301, where "the terms [were] to be expressed in an agreement to be signed as soon as prepared." In this case, however, it was said that had the terms of the contract been concluded and had nothing remained but to reduce them to formal shape, instead of to be subsequently determined, the contract would have been enforced.

And in *Queen's College v. Jayne*, 10 Ont. L. Rep. 319, where the terms of the sale were not embodied in the writings, and it was known that the sale could not be for cash, but that terms of payment would have to be agreed upon, it was held that there was no enforceable contract.

And in *Hussey v. Horne-Payne*, L. R. App. Cas. 311, 48 L. J. Ch. N. S. 846, 4 L. T. N. S. 1, 27 Week. Rep. 585, 6 Eng. Rul. Cas. 155, where it appeared that the purchase price was to be paid in instalments which had not been agreed upon, it was held that the contract did not satisfy the statute of frauds. Here, too, it was said that had the writings stopped after naming the property, stating the price, and giving the names of the parties, it would have been implied that the purchase money was to have been paid in the usual way, namely, as soon as the title to the land could have been produced by the vendor and a conveyance offered, in which case the contract would have been complete and enforceable. But that there is no known and recognized custom by which the time of payment could be fixed when left undetermined by the contract, see *Gault v. Stormont*, 51 Mich. 636, 17 N. W. 214, as set out in *EBERT v. CULLEN*.

And in *Major v. Shepherd*, 18 Manitoba L. Rep. 518, it was held that specific performance of a contract evidenced by a memorandum providing that the purchase money was to be paid "as soon as a loan can be arranged" could not be had, as the contract was too indefinite, obscure, and uncertain as to time of performance. The court, after remarking that they could not make a

contract, said: "Bargains concerning the sale of real estate frequently take place, which are reduced to writings that do not comply with the requirements of the law for the plain reason that some of the terms are not decided upon and must be left undefined in the written documents, which thus become merely memoranda of the agreements, to be carried out presumably in good faith, with or without further supplementary writings. For instance, the parties may agree upon the consideration, but may leave part of it payable at a future time, fixing neither the amount nor the time when payable, leaving those items to be settled by some future verbal or written agreement or adjustment. The statute of frauds has been so long in force and the decisions upon it are so multitudinous that, in the case of an incomplete contract such as this, it may be fairly and reasonably presumed that the parties designedly left it in that form without any intention of considering it more than a mere memorandum to refresh the memory or to form a basis for future agreement."

And in *Nelson v. Shelby Mfg. & Improv. Co.* 96 Ala. 515, 38 Am. St. Rep. 116, 11 So. 695, a memorandum acknowledging the receipt of one-third cash, and providing that bond for title would be delivered "on execution of notes for balance of purchase money," was held not to state the terms of the contract, as required by the statute of frauds, in that there was nothing to show the number of notes, when they were to be made payable, or whether they were to bear interest, and, if so, at what rate.

And in *O'Donnell v. Leeman*, 43 Me. 158, 69 Am. Dec. 54, a memorandum which stated that the land was sold for a specified sum, one-third cash down, but which made no reference as to when the residue was to be paid, was held insufficient as a memorandum, for failure to show all material conditions of the contract.

And in *Elliot v. Barrett*, 144 Mass. 256, 10 N. E. 820, a memorandum of a sale of land which contained the date of the sale, the name of the purchaser, and the price, was held insufficient in that the terms of sale (times for payment of definite amounts) were not specified.

And in the following cases it was held, without assignment of grounds, that a memorandum which does not state the time for payment is not sufficient to satisfy a statute of frauds requiring the terms of the contract to be stated in the memorandum: *St. Louis, I. M. & S. R. Co. v. Beidler*, 45 Ark. 17; *Webster v. Brown*, 67 Mich. 328, 34 N. W. 676; *Harney v. Burhans*, 91 Wis. 348, 64 N. W. 1031; *Conrade v. O'Brien*, 1 Pa. Super. Ct. 104; *Greenlee v. Greenlee*, 22 Pa. 225.

In *Snow v. Nelson*, 113 Fed. 353, 22 Mor. Min. Rep. 32, it was held that a memorandum of a contract of sale of mining property which leaves uncertain the time when the first payment is to be made is insufficient to take the contract out of a statute of frauds requiring it to contain the essen-

tials of the contract, the decision being upon the ground that time is of the essence of contracts relating to the mining properties.
G. J. C.

MICHIGAN SUPREME COURT.

ANDREW T. SHERMAN, Plff. in Err.,

v.

GEORGE E. BURTON.

(— Mich. —, 130 N. W. 667.)

Physician — injured person — contract for percentage of recovery.

A contract by one injured by another's negligence, to pay his physician a percentage of the amount recovered against the one responsible for the injury, for his services in treating the injury, is against public policy and void where the parties contemplate that the physician shall be a witness for his employer in case suit is necessary.

(March 31, 1911.)

Note. — Validity of contract to pay attending physician percentage of damages recovered for personal injury.

In the earlier Michigan case, *Thomas v. Caulkett*, 57 Mich. 392, 58 Am. Rep. 369, 24 N. W. 154, upon which the decision in *SHERMAN v. BURTON* is based, the question was as to the validity of a contract by which one who had been injured in a railway accident employed a physician to lay the facts concerning his injuries before the railway company's counsel and medical advisers, upon the understanding that if the railroad company should pay \$1,500, he should have \$300, if \$2,000, \$500, and in similar way for a larger sum. The court, in holding the contract void, said: "The testimony of defendant, as well as of other witnesses, fails to indicate that plaintiff made any statements which were not accurate. But the contract must be measured by its tendency, and not merely by what was done to carry it out. There is no particular reason to suppose defendant got any more than he should have got. This, however, is not the test. When we come down to the real nature of this alleged contract, it is one which contemplated that plaintiff was to give his view of the facts relating to defendant's physical condition and injuries, as they had existed and been developed under his observation, and the medical bearing of these facts, and the extent of past or future dangers and sufferings. While it is probable, from the medical testimony, that the present condition and future prospects can be got at with considerable certainty, yet it is also possible that some complications may escape detection, and some appearances may be ambiguous, unless explained by previous symptoms or conditions. Beyond this there can be no doubt that suggestions may often

ERROR to the Circuit Court for Wayne County to review a judgment in defendant's favor in an action brought to recover the amount alleged to be due under an agreement for professional services rendered by plaintiff to defendant. Affirmed.

The facts are stated in the opinion.

Messrs. Cullen Casgrain, & Hanley, for plaintiff in error:

A physician is entitled to compensation for his services, either for the reasonable value thereof, or according to the terms of any lawful agreement there might be between the parties.

22 Am. & Eng. Enc. Law, 2d ed. p. 789.

A contingent contract for payment is not void by reason of the contingent feature.

Hollywood v. Reed, 55 Mich. 308, 21 N. W.

313; Beebe v. Koshnic, 55 Mich. 604, 22 N. W. 59.

Mr. James H. Pound, for defendant in error:

The so-called contract is not a contract.

Wardell v. Williams, 62 Mich. 50, 4 Am. St. Rep. 814, 28 N. W. 796.

The agreement is against public policy and an inducement to perjury and crime, and as such this claim is wholly unenforceable in the courts of law in this state.

Thomas v. Caulkett, 57 Mich. 392, 58 Am. Rep. 369, 24 N. W. 154.

Blair, J., delivered the opinion of the court:

Plaintiff brought this suit to recover the

be made by one physician which will aid others, to whom they might not have occurred from their own experience or observation. Under these circumstances, it is at least possible, if not probable, that the judgment ultimately formed will depend very much on the facts and opinions and the coloring of the statements furnished by the person relied upon as best informed. He puts himself in a position where both parties are expected to rely upon him, and to act on what he says. When, under such circumstances, he makes the disclosure of his knowledge and opinions the subject of a contract, whereby his compensation is to depend on the amount obtained by his employer by reason of the disclosure, it is plain that he puts himself in a position where it is his interest to exaggerate. If he were to explain to those whom he is to influence that he is acting under such an employment, and as a solicitor, then there would be nothing to put him on a different footing than other known agents. But no such explanation was contemplated, and none given. And, however honest a man's actual intentions may be, and however truthful he may be, there is a direct temptation to misrepresent, and a direct danger that the misrepresentation will operate injuriously to the parties dealt with. Such secret agreements by persons putting themselves in positions of confidence come within recognized prohibitory rules as tending to defraud."

So, also, in *Laffin v. Billington*, 14 N. Y. Anno. Cas. 360, 86 N. Y. Supp. 267, it was held that an agreement that the attending physician should receive for his fee 10 per cent of any amount realized out of an action for damages for personal injuries, which was to cover an unpaid balance of his bill for medical services and in full for expert testimony to be given upon the trial, was void as having a manifest tendency to pervert justice.

An agreement by which the amount of compensation to be received by an expert witness is made to depend upon the success of the suit has also been held void in *Pol-lak v. Gregory*, 9 Bosw. 116; and see *dic-33 L.R.A.(N.S.)*

tum to that effect in *Johnson v. Pietsch*, 94 Ill. App. 459.

And the same has been held of an agreement to pay a person, for his attendance as a witness, an amount contingent upon the success of the promisor. *Dawkins v. Gill*, 10 Ala. 206.

As to the validity of contracts to procure testimony, see notes to *Goodrich v. Tenney*, 19 L.R.A. 371, and *Neece v. Joseph*, 30 L.R.A.(N.S.) 278.

No right on the part of a physician to enhanced compensation for services rendered a lawyer in examining a client who claimed a right of action for personal injuries may be based on the theory that he might have been compelled to attend court as a witness. *Henderson v. Hall*, 87 Ark. 1, 25 L.R.A.(N.S.) 70, 112 S. W. 171.

An agreement to pay a doctor for being a witness as to matters in regard to which the law and his duty as a citizen compel him to testify is invalid as being without consideration and against public policy. *Burnett v. Freeman*, 125 Mo. App. 683, 103 S. W. 121, same case on subsequent appeal, 134 Mo. App. 709, 115 S. W. 488.

But if a physician at the request of a party performs any extra service in order to qualify himself as an expert, it is entirely proper and legal to receive payment therefor or to make an agreement whereby he is to receive such payment. *Lewis v. Blye*, 79 Ill. App. 256.

A case which may be of interest in this connection is *Perry v. Dicken*, 105 Pa. 83, 51 Am. Rep. 181, in which it was held that an agreement to pay a lawyer a contingent fee for professional services upon the trial of an action was not invalidated by the fact that he was the principal witness in behalf of his client, there being nothing in the evidence to indicate that there was any corrupt intention to influence his testimony; although it is said that if it had appeared that the contingent fee was a reward for his services as a witness, the contract would be not only reprehensible, but highly immoral, against public policy, and therefore illegal and void.

E. S. O.

amount alleged to be due upon the following agreement in writing:

Detroit, Mich.

March 14th, 1906.

I, Geo. E. Burton of the city of Detroit, hereby agree as follows with Dr. A. T. Sherman of the same place. I will pay to said Dr. A. T. Sherman for professional services, one third of any sum which I may receive from the Detroit United Railway, as damages, arising out of an injury to me said D. U. R. December 7th, 1905. And I further agree to pay to said Dr. Sherman the sum of ninety dollars (\$90) in addition to the above-mentioned one third if the amount received by me is two thousand or more dollars, that is, if the settlement is made outside of courts.

Geo. E. Burton.

The facts as stated by plaintiff are that he is a practising physician and was called to treat plaintiff December 10, 1905, for an injury to his knee, the result of a collision between cars of the Detroit United Railway Company; that the agreement was drawn at the urgent request of defendant and against the objection of plaintiff that he preferred to get pay for the work he did; that Mr. Martin, the claim agent of the Detroit United Railway Company, saw him with reference to the case several times at his office; that between the time he first attended defendant and the making of the agreement defendant told him that he was going to bring suit against the railway company: "When treating Mr. Burton, he told me he was contemplating bringing suit for the accident and, at his request, I took him to a lawyer, but that was after the signing of the contract. At Mr. Burton's request I had Dr. J. B. Kennedy examine him. The D. U. R. had Dr. Wyman examine him. I also called in Dr. Spademan and Dr. Walker at the request of Mr. Burton. I also called in Dr. McLean at Mr. Burton's request. . . . I never offered my influence with the Detroit United Railway, nor anything of that kind. I told Mr. Burton that if he thought Dr. Wyman could do more for him than I could, I was willing to give up the case and hand it over to Dr. Wyman, and have Mr. Burton pay me what was due me up to date. But he said no; he would not do that. This was two or three weeks before the settlement. . . . I gave Mr. Burton the bill, Exhibit 4, as he said he was figuring on a settlement with the Detroit United Railway, and he said the Detroit United Railway wanted a bill of me, and he said not to make the bill over \$300. He said that the Detroit United Railway wanted a bill of me. I made the bill at the

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first instance and fixed the amount at his instance at \$300. I drew it myself, it is in my handwriting."

Exhibit 4 is as follows:

"Detroit, Mich., June 1, 1906. Mr. George E. Burton, To Dr. Andrew T. Sherman, Dr., 205 Trumbull Av., corner Leverette, between Michigan Ave. and Baker St. To professional services: Calls, \$225; plaster casts, \$65."

"Before he closed the matter with the Detroit United Railway he came to my office and asked me if I would be satisfied if he settled for \$1,800, and I told him it made no difference to me what he settled for, as long as he was satisfied; and later he informed me that he had settled the claim for \$1,800. Later Mr. Burton paid me the \$100 that he borrowed, and \$290 for services. Ninety dollars of the \$290 was paid after suit was commenced by me, and I claim that there is still due to me upon the principal of the contract \$310."

The testimony in behalf of defendant tended to show that plaintiff suggested the making of the agreement; told defendant that he had a good case against the Detroit United Railway Company; told him that he had a very bad knee; spoke about tuberculosis in it; "said he was going to get me so many thousand dollars right away quick, from five to seven thousand dollars; but did not say how he was going to do it. I never knew about the contract until he put it under my nose. He said the leg might possibly run into that disease; that it would have to be amputated, which alarmed me. Before signing the contract, he never mentioned it to me. It was all done about 10 o'clock one morning. He said he had great weight with the Detroit United Railway; he had somebody in the office connected there that would give information, and that they were very willing to settle any cases where they were at fault, and by being a business man, drawing a salary as I am, would be of influence; that I had a good, big shove;" that it was finally agreed to destroy the agreement, and plaintiff reported that he had done so and put in the bill, Exhibit 4, to show the amount actually due him, and the payment thereof was a full settlement between them. Mr. Martin, the claim agent, testified that plaintiff told him he had no interest in the case whatever; this was denied by plaintiff.

The circuit judge directed a verdict in favor of defendant upon the ground that the agreement was in contravention of public policy, within the principle of *Thomas v. Caulkett*, 57 Mich. 392, 58 Am. Rep. 369, 24 N. W. 154. Plaintiff brings the record to this court for review upon writ of error.

We concur in the opinion of the circuit

judge that the principle of *Thomas v. Caulkett* applies to this case. The good faith of the parties to the contract is not the test of its validity; but, as said in the case referred to, "the contract must be measured by its tendency, and not merely by what was done to carry it out."

At the time the agreement was made, the parties contemplated that unless a settlement were made a suit would be instituted against the railway company, and the agreement expressly provided that, if the matter was settled out of court for \$2,000 or over, the plaintiff should receive \$90 in addition to one third of the amount received. The amount which the defendant could obtain from the railway company must depend principally upon the nature, extent, and character of his injuries, to be determined by the testimony of experts like the plaintiff, and in no small degree by their opinions, incapable of conclusive refutation before a jury on nonexperts. We think it necessarily follows from the circumstances of the case as disclosed by the plaintiff and the agreement that the parties contemplated that the plaintiff should be a witness in case of suit and should give a history of, and opinion upon, the case in the event of a proposed settlement. The plaintiff's interest in the amount of the damages furnished a powerful motive for exaggeration, suppression, and misrepresentation,—a temptation to swell the damages so likely to color his testimony as to be inimical to the pure administration of justice, and therefore invalid.

The judgment is affirmed.

WASHINGTON SUPREME COURT.

C. F. LATHROP, Appt.,

v.

JOHN C. SUNDBERG et al., Respts.

(— Wash. —, 113 Pac. 574.)

Libel — professional capacity — violation of statute.

1. An osteopath doing business as a doctor without a license, contrary to statute, cannot recover damages for libel upon him in his professional capacity, since he will not be permitted to recover for loss of earnings which he received by violation of law.

Same — character of acts.

2. An osteopath practising as a doctor without a license cannot recover damages for libel upon him in his common-law right to do business as an osteopath, since that was not the character in which he was attempting to carry on the business.

Same — theory of action — change.

3. An osteopath cannot, under a charge

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of libel in calling him a quack and charlatan, recover damages on the theory that the libel was in fact against osteopathy as a profession, and that he was injured as a member of the profession.

(February 7, 1911.)

Note. — Right to recover for slander or libel affecting one in his business or professional capacity, as affected by his own violation of law in respect thereof.

There is a familiar principle in the law to the effect that a plaintiff cannot found an action upon any cause or subject-matter which renders it necessary for him, in order to maintain the action, to prove that he was engaged in a violation of law. Hence, the general rule to be formulated by the proper application of this principle to actions of slander and libel is to the effect that no action will lie for defamatory words either spoken or written, which merely relate to the conduct of a party while engaged in some unlawful business, or in the pursuit of some profession without having complied with the requirements of the law. Besides *LATHROP v. SUNDBERG*, the following additional cases are among those which support the rule as stated: *Hargan v. Purdy*, 93 Ky. 424, 20 S. W. 432 (cited and discussed in *LATHROP v. SUNDBERG*); *Perry v. Man*, 1 R. I. 263 (one convicted of selling spirituous liquors in violation of license law designated "convicted felon" in a circular); *Dauphin v. Times Pub. Co.* 18 Reporter, 10, Fed. Cas. No. 3,584a (agent of Louisiana lottery, suing for libel); *Skirving v. Ross*, 31 U. C. C. P. 423 (physician practising without having registered in conformity with statute, suing for slander); *Collins v. Carnegie*, 1 Ad. & El. 695; 3 Nev. & M. 703, 3 L. J. K. B. N. S. 190 (physician unlawfully practising called among other characterizations, "a quack and imposter"); *Hunt v. Bell*, 1 Bing. 17; *J. B. Moore*, 212, 25 Revised Rep. 561 (exhibitor of sparring matches not allowed to recover for alleged libel as to his conduct of such business); *Manning v. Clement*, 7 Bing. 362, 9 L. J. C. P. 60, 5 Moor & P. 211 (rule inferentially sustained by holding evidence admissible to show that the plaintiff in an action for libel was not engaged in the lawful manufacture of biters, but made a composition of a very different description).

It is no matter how sever and unreasonable the strictures may be upon his conduct and motives, said Greene, Ch. J., in charging the jury in *Perry v. Man*, supra, if they apply to him as a man engaged in an illegal traffic. A man whose business is in violation of law cannot apply to the law to protect him from strictures on his illegal conduct.

One who is engaged in the business of selling the milk of cows fed on the refuse of distilleries, in contravention of an ordinance of the board of supervisors of a city

APPEAL by plaintiff from a judgment of Superior Court for King County in defendants' favor in an action brought to recover damages for the alleged publication of a libel. Affirmed.

The facts are stated in the opinion.

Mr. P. W. Willett, for appellant:

It was not necessary for plaintiff to prove his qualifications, for the law presumes that anyone engaged in an occupation does so legally, and that he possesses sufficient qualifications as such.

Adams v. Lawson, 17 Gratt. 250, 94 Am. Dec. 455; McKelvey, Ev. 53; Goggans v. Monroe, 31 Ga. 331.

Plaintiff was not prohibited by law from following his occupation and was empowered by the common law to pursue this system of healing.

State v. Carey, 4 Wash. 424, 30 Pac. 729;

forbidding such business, can maintain no action for libel, where the articles complained of appertained solely to the illegal character of his business. Johnson v. Simonton, 43 Cal. 242, wherein Wallace, Ch. J., was clearly of the opinion that the illegality of the plaintiff's business was a complete answer to his complaints.

The business of pretending to heal absent patients by supernatural powers, without medicine or surgery, is fraudulent, and not protected by the law against libel, although many persons claim to have been benefited by the treatment. Weltmer v. Bishop, 171 Mo. 117, 65 L.R.A. 584, 71 S. W. 167.

It has been held not actionable to charge a person who is not legally authorized to practise physic or surgery, and to receive compensation therefor, with ignorance of the healing art, or with having destroyed human life by lawful but misapplied efforts to preserve it. March v. Davison, 9 Paige, 580.

In Trimmer v. Hiscock, 27 Hun, 364, the defendant, when sued for an alleged slander of the plaintiff in his business as a hotel keeper, was held to be precluded from raising the question of the right of the plaintiff to maintain the action, for the reason that he had not procured a statutory license to keep a hotel, because he had admitted in his answer that the plaintiff was the keeper of a public inn or hotel, and ran it for profit, and as a means of livelihood for himself and family.

In White v. Carroll, 42 N. Y. 161, 1 Am. Rep. 503, it was said that the legislation of the state had so far and continuously recognized and regulated the practice of the allopathic system or school of medicine, as the only legal system or school of medicine, that it was questionable whether any person calling himself, or called by others, a physician, and not licensed as an allopathic physician, could, previous to the act of 1844, have maintained an action against anyone for calling him a quack.

And Richards v. Judd, 15 Abb. Pr. N. S. 184, is interesting in this connection, 33 L.R.A. (N.S.)

Hayden v. State, 81 Miss. 291, 95 Am. St. Rep. 471, 33 So. 653, 15 Am. Crim. Rep. 522; State v. Herring, 70 N. J. L. 34, 56 Atl. 670, 1 A. & E. Ann. Cas. 51; State v. Liffing, 61 Ohio St. 39, 46 L.R.A. 334, 76 Am. St. Rep. 358, 55 N. E. 168, 15 Am. Crim. Rep. 516; State v. Lawson, — Del. —, 65 Atl. 593; Nelson v. State Bd. of Health, 108 Ky. 769, 50 L.R.A. 383, 57 S. W. 501; State v. Biggs, 133 N. C. 729, 64 L.R.A. 139, 98 Am. St. Rep. 731, 46 S. E. 401; State v. McKnight, 131 N. C. 717, 59 L.R.A. 187, 42 S. E. 580.

Messrs. McBurney & Cummings, for respondents:

A person cannot recover for a libel published concerning him in his professional capacity when he is practising that profession illegally.

Hargan v. Purdy, 93 Ky. 424, 20 S. W.

though not directly in point. Here the defendant had published that the plaintiff was a quack and his "Golden Remedies" nonsensical quackery. In an action for the alleged libel, the plaintiff, when a witness, was asked as to the ingredients of his wonderful medicines, but would answer no further than to say that their compound was a secret. His complaint was thereupon stricken out, and upon his appeal it was said: "It is impossible to read the vulgar, and in many respects shameful, assertions and instructions that accompany the compounds of plaintiff, without being struck with the vileness of the impostures. That he can bring an action of libel for injury alleged to be done to his trade in his medicines, by denouncing them as arrant quackery, and at the same time protect himself against exposure by claiming them to be valuable secrets, is a proposition that cannot be maintained."

But where the conduct of the plaintiff in connection with the transaction to which the publication relates is open to comment and criticism for the reason that he participated in acts which are contrary to law, and in consequence thereof no action can be maintained for a libelous publication which relates solely to the plaintiff's connection with such unlawful acts, nevertheless there is a limit beyond, such immunity from liability for defamatory words cannot be carried. Unless the matters set forth in a declaration are of a nature which indicates that the plaintiff's acts and conduct in connection therewith necessarily involved moral turpitude, or might fairly be held to affect his general character in any particular, a publication which holds a party up to contempt and reproach as wanting in integrity, or as otherwise culpable in his general conduct or character, is actionable, although it may also relate to the plaintiff's participation in any illegal transaction. A person does not necessarily forfeit all legal claim to protection against defamatory matter affecting his character, because he has been guilty of a single illegal act.

432; *March v. Davison*, 9 Paige, 580; 25 Cyc. Law & Proc. p. 329; 18 Am. & Eng. Enc. Law, p. 947; Starkie, Slander & Libel, 5th ed. 522; *Tarleton v. Lagarde*, 26 L.R.A. 327, note.

Gose, J., delivered the opinion of the court:

There was a former appeal in this case. See *Lathrop v. Sundberg*, 55 Wash. 144, 25 L.R.A.(N.S.) 381, 104 Pac. 176. The complaint alleges that the plaintiff, upon the date hereinafter stated, was and is an osteopath, graduated from a school of osteopathy, holding a degree of that school, and practising his profession as such in the Eitel Building in Seattle; that about the 16th day of March, 1908, the defendants published in a newspaper in that city, of and concerning him, in his business and professional capacity, the following libel: "We, the following reputable physicians and dentists, occupying offices in the Eitel Building, endeavoring to uphold the honor and dig-

nity of our professions, and desiring to encourage only the best and most desirable tenants for our office building, and thereby conserve the best interests of the public at large, are most emphatically opposed to the indiscriminate rental of offices in this building to osteopaths, neuropaths, autopathists, chiropractors, umtomtereists, unprofessional masseurs, criminal practitioners, 'medical institutes,' advertising 'specialists,' patent medicine fakers, quacks, charlatans, and other fraudulent concerns. We therefore demand the removal of all such persons now holding offices in this building, and the exclusion therefrom of all such undesirable tenants in the future,"—thereby intending to and charging him with being a "quack and a charlatan" in his business and professional capacity, and diminishing his earnings to the extent of \$300 per month. His damages are laid at \$75,000. Issue was joined and the case proceeded to trial. After the plaintiff had testified, the court withdrew the case from the jury, and en-

Thus, in *Chenery v. Goodrich*, 98 Mass. 224, where the plaintiff, acting on certain facts, and in conformity to what he supposed to be the law and usage in similar cases, got the storekeeper of a warehouse at a customhouse to change a receipt so as to express the correct date of the importation of goods, in order to save an unjust payment of double duties thereon, and the collector of customs afterwards nullified the storekeeper's action, and decided that the receipt as first dated was correct, demanding the additional duties, which were paid under protest, it was held that a publication made with the intent to cause it to be believed that the plaintiff fraudulently induced the storekeeper to alter the receipt, so as to avoid the payment of the additional duties, and to bring the plaintiff into hatred, contempt, and ridicule, was libelous. Mr. Chief Justice Bigelow said: "Now, although it may be true that the alteration of the receipt was erroneous, and that, by the true construction of the acts of Congress, the original date was correct, it by no means follows that the plaintiff was guilty of a violation of law in any such sense as to justify or excuse the defendant in holding him up, in connection with the transaction, to public hatred, contempt, and ridicule. . . . Now, although the plaintiff, acting on certain facts, and in conformity to what he supposed to be the law and usage in similar cases, may have committed a violation of law, or participated in the illegal act of another, it by no means follows that his general character for commercial integrity and fair dealing was thereby forfeited, or so far affected that he could not maintain an action for a publication which held him up to the public as wanting in the qualities and characteristics of a merchant of integrity and honor. *Greville v. Chapman*, Dav. & M. 552, 53 L.R.A.(N.S.)

Q. B. 731, 13 L. J. Q. B. N. S. 172, 8 Jur. 189. Such, we think, was the fair import of a portion of the written words which are set forth in the declaration. For the publication of these, this action can be maintained, although it may be also true that it appears from the declaration that the publication related to the plaintiff's conduct in a transaction which was unlawful."

In *Greville v. Chapman*, supra, which was an action for a libel in imputing that plaintiff had entered a horse to run for certain stakes at Epsom races, and had afterwards fraudulently withdrawn him for the purpose of obtaining an unfair advantage over other persons with whom he had laid wagers on the expected race, it was held that he could recover. Lord Denman, Ch. J., said: "The objection to his right of suing, from being engaged in horse racing, appears on the record; but in truth it is wholly groundless. For even if running a race without fraud were altogether prohibited by the law, still the party infringing its provisions would not thereby be deprived of all protection to his character in other matters connected with the transaction . . . but, moreover, the fact of engaging in a horse race is not in itself an illegal act."

And Best, Ch. J., in *Yrisarri v. Clement*, 3 Bing. 432, 2 Car. & P. 223, 4 L. J. C. P. 128, 11 J. B. Moore, 308, while recognizing the general rule, as stated at the beginning of this note, said that an action for libel could be maintained where the publication complained of imputed misconduct to one in a matter independent of the illegal transaction, even though arising out of it. Thus it was said that a foreigner had no right to negotiate a loan in England for the use of a state which had separated itself from, and was at war with, one of England's allies (such state not being at the time recognized by England), without the permission

tered a judgment of dismissal. The plaintiff has appealed.

The appellant testified that, while pursuing his calling as a barber, he read four typewritten lessons a week for fifty-two weeks from an osteopathic correspondence school, embracing the subjects of anatomy, physiology, and pathology; that with such preparation he began practising as an osteopath in February, 1906, moved into the Eitel Building the latter part of that year, and remained there until after the publication of the article we have set forth, and that he had upon his office door the words "Dr. C. F. Lathrop, Osteopathic Physician," while in that building. The appellant earnestly insists that he should have been permitted to offer further evidence tending to show that he is an osteopath, and that his case should have been submitted to the jury. We think the learned trial court took the correct view of the case. When he withdrew it from the jury, it appeared from the testimony of the appellant himself that he

was pursuing his practice in a manner forbidden by the laws of the state. Section 3, p. 50, Laws 1901, makes it a misdemeanor, punishable by fine or imprisonment or by both, for a person to maintain "an office or place of business with his or her name and the words . . . 'Doctor' . . . in public view," without having obtained and filed a license, as provided by law. In *State v. Pollman*, 51 Wash. 110, 98 Pac. 88, it was held that a prefix or qualifying words to the title "Physician" did not relieve a party from the penalty of the statute; that the abbreviation "Dr." offended the law to the same extent as the word "Doctor;" that the purpose of the statute is to protect the people against deception; and that "it is practitioners of the regular schools, rather than the others, that the ill and infirm seeking relief usually expect to find when entering a room whose door has lettered upon it the name of a person, preceded by the title 'Dr.,' or followed by the letters 'M. D.,' or 'Physician and Surgeon.'"

of the English government; and where a letter in an English newspaper not only strongly animadverted upon the illegality of such a transaction but went beyond that, and imputed a moral fraud to the party engaged in the transaction, it was held to be libelous and actionable.

In *Crane v. Darling*, 71 Vt. 295, 44 Atl. 359, where the license of a physician to practise medicine was recorded before the speaking of the slanderous words complained of, it was held that he could maintain an action therefor, notwithstanding the fact that the actionable words had reference to the time when he was practising without having recorded his license, and a statute imposed a fine for so practising, where the slander charged him with incompetency in a particular case, as well as with general professional misconduct and dishonesty in his practice.

So, in *Jones v. Stevens*, 11 Price, 235, where the objection was made that an attorney could not recover for a libel upon him as an attorney, because he was not proved to be an attorney at the time of the grievances charged, Wood, Baron, said: "There can be no doubt, however, that he was an attorney at that time, for it was proved by the book of admissions produced by the proper officer. But then it was said, that he had not taken out and entered his certificate in due time, according to the provisions of the 37th of Geo. III., chap. 90, and therefore could not maintain this action. If he had not complied with the regulations of that statute, that would not have the effect of taking away from him altogether his character of an attorney. The consequence of that omission would be, that he might be subject to a penalty, and that he could not bring an action for fees and disbursements; because, under those circumstances, he would be disabled from so

doing by the provisions of that statute; but still he is not to be subjected, in addition to such penalty and disability, to be aspersed and ruined in his character of an attorney."

In *Moises v. Thornton*, 8 T. R. 303, 3 Esp. 4, where a physician brought an action of slander against one who called him a quack, etc., he was nonsuited because he did not produce the necessary evidence to prove the averment in his declaration to the effect that he was "a physician and had duly taken the degree of doctor of physic."

And in *Morris v. Langdale*, 2 Bos. & P. 284, where the slanderous words were spoken of one engaged in the business of stockjobbing of which there were two species, one of infamous practice and the other honest, and no averment in the plaintiff's declaration showed which was his species of business, the declaration was held to be bad.

But in *Fry v. Bennett*, 28 N. Y. 324, affirming 3 Bosw. 200, which was an action for libel, it was held that it was not necessary for one to aver or prove that he had taken out the required license to give operative representations, since the law would presume that he had not violated certain statutes, and the failure to obtain the license, if any there was, was a matter for the defendant to allege if he would take advantage of it. And this seems to be the effect of *Long v. Chubb*, 5 Car. & P. 55.

As to the right of one not specially named to maintain an action for libel or slander, based on charges made against a class or group of persons to which he belongs, see the note to *Levert v. Daily States Pub. Co.* 23 L.R.A. (N.S.) 726, and the supplemental note thereto in 25 L.R.A. (N.S.) 382.

E. M. S.

As we have seen, the appellant fixes his actual damages at \$300 per month. Without undertaking to define the words "quack" and "charlatan," the terms by which the appellant was characterized in the libel, it suffices to say that he was knowingly luring patients into his office by a method condemned by the penal laws of the state. This was a fraud and imposition upon the public, and the law will afford him no redress for the loss of earnings sought to be acquired in that manner. On the former appeal we said, speaking of the libel in question: "Clearly this is libelous *per se*, if published of and concerning the appellant, and he is engaged in a reputable practice, and that it was published of and concerning the appellant, and that his practice is reputable, was distinctly alleged in the complaint." He could not be engaged in a reputable practice while offending against the statute. As was said in *Hargan v. Purdy*, 93 Ky. 424, 20 S. W. 432: "If he was then undertaking to practise medicine in violation of the statute of the state, he could not, in contemplation of law, have been injured or sustained damage from being called an 'empiric' or 'quack;' or, at all events, he could not be heard in a court of justice to complain that words had been spoken or written of him having the simple effect to disable or deter him from violating a penal law." See also *Marsh v. Davison*, 9 Paige, 580.

He contends that he had a common-law right to practise osteopathy without a license; that he was libeled while pursuing that right; and that his damages should have been assessed by the jury. If he had advertised and practised as an osteopath, that question would be presented. He further complains that, as a matter of fact, the article was published of and concerning osteopathy as a profession, and that he, as a member of that profession, was damaged. The charge in the complaint, however, is not that he was damaged by a libel against the profession of osteopathy, but that "the defendants thereby intended to and did charge the plaintiff with being a quack and a charlatan." A litigant will not be permitted to recover damages because he has been prevented from pursuing his business in violation of the laws of the state.

The judgment is affirmed.

Dunbar, Ch. J., and Parker, Mount, and Fullerton, JJ., concur.
33 L.R.A.(N.S.)

ARKANSAS SUPREME COURT.

ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, Appt.,
v.

J. C. WILLIAMS, by Next Friend.

(— Ark. —, 135 S. W. 804.)

Negligence — railroad — leaving torpedo on track — injury to child.

A railroad company is not liable for injury to a child by the explosion of a torpedo which it finds upon the track, where it had been left to guard a train standing at a station against other incoming trains, although children were accustomed to play on the track at the place where it was left,— at least where the torpedo was picked up by the child before the necessity for its use had ceased.

(February 27, 1911.)

APPEAL by defendant from a judgment of the Circuit Court for Crawford County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Messrs. W. F. Evans and B. R. Davidson, for appellant:

The defendant company was not negligent in placing the torpedo on its track.

St. Louis & I. M. & S. R. Co. v. Monday, 49 Ark. 257, 4 S. W. 782; *Cauley v. Pittsburgh, C. & St. L. R. Co.* 95 Pa. 398, 40 Am. Rep. 664; *Buch v. Amory Mfg. Co.* 69 N. H. 257, 76 Am. St. Rep. 163, 44 Atl. 809; *McDermott v. Kentucky C. R. Co.* 93 Ky. 408, 20 S. W. 380; *Morgan v. Pennsylvania*

Note.—As to liability for injury to children from explosives left accessible to them, see notes to *Akin v. Bradley Engineering & Machinery Co.* 14 L.R.A.(N.S.) 586, and *Finkbeiner v. Solomon*, 24 L.R.A.(N.S.) 1257; and see also the later case, *Olson v. Gill Home Invest. Co.* 27 L.R.A.(N.S.) 884.

For explosives as attractive nuisance, see note to *Cahill v. E. B. & A. L. Stone & Co.* 19 L.R.A.(N.S.) 1094, 1127.

The question which sometimes arises in connection with the liability for injury to a child from explosives, as to whether the intervening act of a child will break the causal connection between defendant's negligence and the injury, is considered in the note to *United States Natural Gas Co. v. Hicks*, 23 L.R.A.(N.S.) 249.

R. Co. 19 Blatchf. 239, 7 Fed. 78; Gillespie v. McGowan, 100 Pa. 144, 45 Am. Rep. 365; McClaren v. Indianapolis & V. R. Co. 53 Ind. 319; Walsh v. Pittsburg R. Co. 21 Pa. 463, 32 L.R.A. (N.S.) 559, 70 Atl. 926; Hughes v. Boston & M. R. Co. 71 N. H. 279, 93 Am. St. Rep. 518, 51 Atl. 1070; Carter v. Columbia & G. R. Co. 19 S. C. 23, 45 Am. Rep. 754; Louisville & N. R. Co. v. Hart, 24 Ky. L. Rep. 1123, 70 S. W. 830.

Mr. Sam R. Chew, for appellee:

It was appellant's duty so to use and operate its property as not to do harm to its neighbor or the public, and especially to nonthinking, impulsive, playful, irresponsible children.

1 Thomp. Neg. §§ 758, 759; Shearm. & Redf. Neg. § 688; Harriman v. Pittsburgh, C. & St. L. R. Co. 45 Ohio St. 11, 4 Am. St. Rep. 507, 12 N. E. 451; Olson v. Gill Home Invest. Co. 58 Wash. 151, 27 L.R.A. (N.S.) 884, 108 Pac. 140; St. Louis, I. M. & S. R. Co. v. Coolidge, 73 Ark. 112, 67 L.R.A. 555, 108 Am. St. Rep. 21, 83 S. W. 333, 3 A. & E. Ann. Cas. 582; Southwest-ern Teleg. & Teleph. Co. v. Bruce, 89 Ark. 581, 117 S. W. 564; St. Louis & Southwest-ern R. Co. v. Mackey, — Ark. —, 129 S. W. 78.

McCulloch, Ch. J., delivered the opinion of the court:

The plaintiff, J. C. Williams, then eleven years of age, was injured by the explosion of a torpedo picked up on the railroad track of defendant by his younger brother, Ellis Williams, and sues to recover damages. The boys lived with their parents a short distance from the railroad track in the city of Fayetteville, Arkansas. They saw the brakeman of a train place the torpedo on the track, and the younger one went out on the track and picked it up and carried it to plaintiff, requesting him to "mash it," which he proceeded to do, placing it on a rock and striking it with an ax. Some of the particles struck plaintiff in the eye and destroyed the sight.

There was no dispute as to the material facts. The defendant operates a branch line known as the "St Paul Branch," which runs east from the main line at Fayette Junction, about 2 miles south of the passenger station at Fayetteville. Another branch, called the "O. & C.," runs west, leaving the main line a short distance south of the station. The trains from these branches come in on the main track to reach the Fayetteville station, which is used by all of defendant's trains on the main line as well as on the branch lines. The track between Fayette Junction and the Fayetteville station has frequent curves,

and there are obstructions which prevent a view up and down the track for any considerable distance. When the trains come in from the branch lines, while using the main line at the station for discharging passengers, baggage, express, etc., it is necessary to protect them by the use of torpedoes from other trains likely to come in. The undisputed evidence shows that this has been the custom for many years, and that it is considered necessary by those who have been operating trains there. It is explained that, where a brakeman gets off to protect a train with a flag, it is necessary to use a torpedo for protection while he goes back to his train.

The track near the place where the plaintiff was injured was on a high dump, and is curved, so that it has always been found necessary to place a torpedo at that place. It is not a crossing; but there was testimony tending to show that people walk the track a good deal along there, and that children play on or about the track. On the occasion in question, the mixed train from St. Paul Branch came in, being due at 3:45 P. M., and when it came up the main line Raedles, a brakeman, got off and placed a torpedo on the track, as usual, leaving it there when he was called to his train, as a signal to the other incoming trains. A train from the O. & C. Branch was due at 3:55, and another train on the main line was due from the south at 4:10 P. M. It was always considered necessary to put a torpedo on the track at that place to protect the St. Paul train from those trains while it was discharging passengers, baggage, etc., at the station and getting back to the switch. Raedles used a torpedo of approved pattern commonly in use. It had a lead strip attached to it, by which it was fastened to the rail, so that it would be exploded by the wheels of a passing train. The boys saw Raedles put the torpedo on the track, and in a short time thereafter, about fifteen minutes, the younger boy, Ellis, went over and picked it up and carried it to his brother, who exploded it, as already stated. The injury occurred in a very unusual and unexpected manner. Witnesses stated that torpedoes had been placed along there for ten years or longer, and that an accident had never before happened on that account. The use of torpedoes in that way is shown to be customary in railroading, yet experienced railroad men testified that they had never heard of anyone being injured as a result of that practice.

We need not spend any time in discussing the question of contributory negligence, or whether the negligence of defendant's servants, if there was any negligence,

was the proximate cause of the injury. The question of negligence of the plaintiff in exploding the torpedo was properly submitted to the jury, and, considering the plaintiff's age and inexperience, we think the jury were justified in finding that he was not guilty of negligence. In the case of *Pittsburg Reduction Co. v. Horton*, 87 Ark. 576, 18 L.R.A.(N.S.) 905, 113 S. W. 647, the court distinctly recognized the principle that negligence in unnecessarily leaving an explosive exposed so that children could have access to it would be the proximate cause of an injury resulting therefrom, under circumstances similar to the facts of this case, citing *Harriman v. Pittsburgh, C. & St. L. R. Co.* 45 Ohio St. 11, 4 Am. St. Rep. 507, 12 N. E. 451. The court there held that where the explosive was picked up by a child incapable of committing an act of negligence, and he immediately carried it to his companion, who exploded it, the causal connection with the original act of negligence in leaving the explosive exposed was not broken by an intervening act of negligence, and that it was a result to be reasonably anticipated, so as to make the injury the proximate result of the original act of negligence. The real question with which we must deal in this case is whether or not there is any evidence of negligence on the part of defendant's servants in leaving the torpedo on the track. Did they violate any duty which they owed to children who might come on the track?

Cases may readily be found where it is held to be negligence to leave explosives or other dangerous substances exposed so that injury may result therefrom. These are cases, however, where the method of using the substance is found to be negligent, or where there is negligence in unnecessarily leaving the substance exposed. We are not aware that any court has ever held that the necessary use in a careful manner of a dangerous substance in the operation of a lawful business constitutes negligence. There are many legitimate enterprises, the operation of which is necessarily dangerous. This is especially true of the operation of a railroad, which is necessarily a place of danger at all times. The locomotives, standing cars, hand cars, cattle guards, turntables, and numerous other things which could be mentioned, are in a sense dangerous; yet they are necessary, and may be used without rendering the company liable for damages. It is only the negligent use, or use in a negligent manner, which is actionable when injury results.

Railroad companies have the right to the exclusive possession of their own premises, including the right of way, except at 33 L.R.A.(N.S.)

crossings or about stations, where people have a right to go. The servants of the company are not required to anticipate the presence of trespassers except as to keeping a lookout in the operation of trains, which is now required by statute. Children may be trespassers the same as adults, and, except in the operation of trains, where the lookout statute applies, servants of the company are not required to anticipate their presence where they have no right to be.

What is known as the doctrine of the "Turntable Cases" forms an exception to this rule; but that is where an owner permits to remain unguarded on his premises something dangerous which is attractive to children, and from which an injury may reasonably be anticipated. The doctrine is stated by the court in *Brinkley Car Works & Mfg. Co. v. Cooper*, 60 Ark. 545, 46 Am. St. Rep. 216, 31 S. W. 154, as follows: "The owner of land is not required to provide against remote and improbable injuries to children trespassing thereon. But he is liable for injuries to children trespassing upon his private grounds, when it is known to him that they are accustomed to go upon it, and that, from the peculiar nature and exposed and open condition of something thereon which is attractive to children, he ought reasonably to anticipate such an injury to a child as that which actually occurs."

The doctrine of those cases proceeds entirely on the theory of negligence in using, or unnecessarily leaving exposed, the dangerous substance or machinery. In the *Cooper Case*, just referred to, the charge of negligence was that the defendant allowed to remain unguarded on its premises, which were frequented by children, a pool of hot water concealed by trash and bark, and the plaintiff, a child six years old, unwittingly walked into it and was scalded. When the case came back to this court on second appeal (70 Ark. 331, 57 L.R.A. 724, 67 S. W. 752), Judge Riddick, delivering the opinion, said: "We hold that if the company owning the premises had notice that children did frequent the place of this pool, or were from the nature of the surroundings likely to do so, and if it carelessly left a pool of hot water there concealed in such a way that one would reasonably expect it to occasion injury to such children, the company would be liable for damages to a boy who, by reason of its concealed nature, walked into the pool of hot water and was burned."

The doctrine was first announced by the Supreme Court of the United States in *Sioux City & P. R. Co. v. Stout*, 17 Wall. 657, 21 L. ed. 745, a case where a child

six years of age got his foot mashed while playing with a turntable on the premises of a railroad company. The court stated the facts and the rule applicable thereto as follows: "As it was in fact on this occasion, so it was to be expected, that the amusement of the boys would have been found in turning this table while they were on it or about it. This could certainly have been prevented by locking the turntable when not in use by the company. It was not shown that this would cause any considerable expense or inconvenience to the defendant. It could probably have been prevented by the repair of the broken latch. This was a heavy catch which, by tripping into a socket, prevented the revolution of the table. There had been one on this table weighing some 8 or 10 pounds, but it had been broken off and had not been replaced. It was proved to have been usual with railroad companies to have upon their turntables a latch or bolt, or some similar instrument. The jury may well have believed that, if the defendant had incurred the trifling expense of replacing this latch, and had taken the slight trouble of putting it in its place, these very small boys would not have taken the pains to lift it out, and thus the whole difficulty would have been avoided. Thus reasoning, the jury would have reached the conclusion that the defendant had omitted the care and attention it ought to have given, that it was negligent, and that its negligence caused the injury to the plaintiff."

In *Catlett v. St. Louis, I. M. & S. R. Co.* 3 Ark. 461, 38 Am. St. Rep. 254, 21 S. W. 1692, a boy sued for damages received while he was attempting to swing on the side of a moving train in the railroad yards at Winne, Arkansas. The boys were accustomed to steal rides on the trains at that place, and this was well known to the train men, who took no steps to prevent it. Sometimes they paid no attention to boys riding, and sometimes they made them get off. The doctrine just referred to was urged by able counsel, but the court rejected it. Chief Justice Cockrill, delivering the opinion of the court, said: "The appellant argues that a slow-moving train is 'dangerous machinery,' alluring to boys; and that it is therefore negligent of the company to fail to take precaution to keep them off such trains. That is the argument made to sustain a class of cases known as the 'Turntable Cases,' the leading one of which is *Sioux City & P. Co. v. Stout*, 17 Wall. 657, 21 L. ed. 745. . . . Whatever its merits may be, it has never been extended to such length as to control a case like this. . . . The youth of the person injured will sometimes excuse him 33 L.R.A. (N.S.)

from concurring negligence, but no amount of youthful recklessness can supply the place of proof of negligence on the part of a defendant sought to be charged on account of negligence." The point of that case undoubtedly is that there must have been some act of negligence in the use of the dangerous substance or machinery, or in leaving it unguarded when not in use. Other cases illustrate the doctrine in the same way. *Louisville & N. R. Co. v. Hart*, 24 Ky. L. Rep. 1123, 70 S. W. 830; *Pittsburgh, C. & St. L. R. Co. v. Shields*, 47 Ohio St. 387, 8 L.R.A. 464, 21 Am. St. Rep. 840, 24 N. E. 658; *Harriman v. Pittsburgh, C. & St. L. R. Co.* 45 Ohio St. 11, 1 Am. St. Rep. 507, 12 N. E. 451; *Olson v. Gill Home Invest. Co.* 58 Wash. 151, 27 L.R.A. (N.S.) 884, 108 Pac. 140.

In the *Harriman Case*, above cited, which is strongly relied on by learned counsel for plaintiff, the trial court sustained a demurrer to the complaint, which alleged that the servants of the railway company "wantonly placed said torpedoes upon the track of its road in an exposed place, where, if left undestroyed and unguarded, they would be likely to cause injury to others. That there was no reason for making use of said torpedoes at said time or place, nor was there any necessity of giving danger signals; but the same were used in mere wantonness, and with a view that said train, on being moved forward, would pass over and explode the same. That said defendant, so using said torpedoes in the manner aforesaid, so carelessly and negligently conducted itself in the management and care of its road, and management of its said train, that it negligently and carelessly failed to explode and destroy all of said torpedoes so placed on its track, and negligently and carelessly left upon its road exposed and unexploded, and in plain view, one of said torpedoes, at a point and place upon its road over which the inhabitants living along the line of said road, and other persons, were for years daily accustomed to travel and pass, and over which children were accustomed to go without hindrance; and all with the full knowledge of defendant. And that said defendant negligently, carelessly, and in wilful disregard of the safety of those who the defendant well knew were in the daily habit of using said road as a pathway, permitted said unexploded torpedo to remain upon its road undestroyed and unguarded from the reach and observation of all passers-by." The supreme court held that the complaint stated a cause of action, and that the demurrer should have been overruled.

Now, applying the law announced in the

foregoing cases to the facts of the present case, it is readily seen that no case of negligence has been made out against defendant. Its servants were using the torpedo in the customary way, as a signal to expected trains. No negligence is shown in placing it there, or in leaving it after the necessity for its use had ceased. The little boy Ellis picked up the torpedo a few minutes after it was placed there, and before the expected train came along to explode it. To hold that, under those circumstances, the servants of the company were guilty of negligence, would be to deny the company the right to use torpedoes at all. The undisputed evidence shows that it was necessary for the safety of trains to use them at the time and place named, and no negligence is shown in the method of using them, or that they were left unguarded after the necessity for their use ceased.

The case should not have been submitted to the jury. The judgment must therefore be reversed; and, as the facts were fully developed in the trial, no useful purpose will be served in remanding for a new trial.

Reversed and dismissed.

NEBRASKA SUPREME COURT.

IDA KURPGEWIT

v.

EDWARD KIRBY, Appt.

(88 Neb. 72, 129 N. W. 177.)

Trespass to person — aggravation — damages.

1. The facts set forth in the opinion held to show a wanton and wilful trespass upon the person of the plaintiff, accompanied by such circumstances of aggravation as justifies the inclusion of mental suffering, humiliation, and disgrace as proper elements of compensatory damages.

Definition — aggravation.

2. Matter in aggravation is something done by the defendant upon the occasion of the commission of the principal trespass, which is of a different legal character from, but not inconsistent with, the trespass.

Damages — measure — discretion of jury.

3. Where there is a direct invasion of personal rights under circumstances showing malice, or a wilful and wanton disregard of another's right to personal security, the amount of compensatory damages is not susceptible of exact computation, and must usually be left to the sound discretion of the jury.

Headnotes by LETTON, J.
33 L.R.A. (N.S.)

Appeal — excessive damages.

4. Where, in such a case, considering all the circumstances, the verdict is for such amount as clearly shows it is the result of passion or prejudice, it cannot be upheld, and a remittitur will be required, and the case reversed and remanded for a new trial.

(Rose, J., dissents.)

(December 10, 1910.)

Note. — Mental anguish as element of damages for trespass on the person of a woman affecting her character or reputation for chastity.

It is generally held that a recovery for mental anguish may be had where such suffering is the result of a wanton or intentional trespass on the person of a woman.

Thus, in an action for damages caused by an indecent assault upon a woman, recovery may be had for anguish of mind resulting therefrom. *Wolf v. Trinkle*, 103 Ind. 355, 3 N. W. 110; *Fay v. Swan*, 44 Mich. 544, 7 N. W. 215; *Ford v. Jones*, 62 Barb. 484; *Eaton Thrift*, — R. I. —, 69 Atl. 764; *Newell Whitcher*, 53 Vt. 589, 38 Am. Rep. 703.

And a recovery for such damages may be had against a common carrier for an indecent assault committed by its servant upon a woman passenger. *Campbell v. Pullman Palace-Car Co.* 42 Fed. 484, affirmed in 1 U. S. 513, 38 L. ed. 1069, 14 Sup. Ct. Rep. 1151; *Craker v. Chicago & N. W. R. Co.* Wis. 657, 17 Am. Rep. 504.

And in cases for indecent assaults, damages of this kind may be recovered, although the assault was not accompanied by a battery. *Leach v. Leach*, 11 Tex. Civ. App. 699, 33 S. W. 703.

And in *Ragsdale v. Ezell*, 20 Ky. L. R. 1567, 49 S. W. 775, which was an action for hugging and kissing a woman against her will, by reason of which she was greatly excited and suffered a nervous shock, exemplary damages were allowed and a verdict of \$700 was held not excessive, but no specific mention of mental anguish was made.

So recovery for shame and mortification resulting may be had in an action against a physician and an unmarried and unprofessional man, where the former took the latter with him to attend the plaintiff during her confinement. *DeMay v. Roberts*, Mich. 160, 41 Am. Rep. 154, 9 N. W. 146.

And in an action by a parent for battery on his daughter under circumstances aggravated and injurious to the parent's feelings and derogatory to the character of his family, recovery may be had for injury to the feelings of the parties and character of the family. *Trimble v. Spiller*, 7 T. Mon. 394, 18 Am. Dec. 189.

And in an action for depriving a husband of his wife's comfort, etc., and seducing her, recovery may be had for mental anguish. *French v. Deane*, 19 Colo. 504, 24 L. R. 387, 36 Pac. 609.

APPEAL by defendant from a judgment of the District Court for Madison County in plaintiff's favor in an action brought to recover damages for assault and battery. Affirmed on condition.

The facts are stated in the opinion.

Messrs. E. D. Kilbourn, H. H. Kilbourn, and M. F. Harrington for appellant.

Mr. Willis E. Reed, for appellee:

Practising any fraud or deception upon a person by which his or her consent is gotten to an undue liberty to his or her person is an assault.

1 Am. & Eng. Enc. Law, p. 805.

A wrongdoer is liable for the natural results of his trespass, and a jury may take into account the disgrace as well as physical suffering because of it.

In an action for assault and battery on a woman, alleging that it was with the intent and for the purpose of having sexual intercourse, failure to specifically instruct as to future mental pain and anguish is not error where there is no evidence tending to show that the injured person will suffer any such pain and anguish in the future. Luttermann v. Romey, 143 Iowa, 233, 121 N. W. 1040.

And it was held in Haupt v. Swenson, 125 Iowa, 694, 101 N. W. 520, in an action of simple assault upon a pregnant woman that the damages recoverable for mental suffering were such only as were the direct result of the assault upon the woman, apart from any alleged injury to the child.

In Atkins v. Gladwish, 25 Neb. 390, 41 N. W. 347, in an action for an indecent assault on a woman, an instruction that the jury might compensate the plaintiff for loss of good name, honor, and reputation, which included also mental anguish, was held erroneous, since the action was not for defamation of character.

In cases of seduction.

It is held, both in actions by one who has been seduced and in those brought by a parent, or one standing *in loco parentis* for the seduction of a child, that mental suffering constitutes an element of damages.

Thus, in an action for seduction brought by an unmarried woman she is entitled to recover for the mental suffering caused by the seduction. Gemmill v. Brown, 25 Ind. App. 6, 56 N. E. 691; Lampman v. Bruning, 120 Iowa, 167, 94 N. W. 562; Wilson v. Shepler, 86 Ind. 275; Simons v. Busby, 119 Ind. 13, 21 N. E. 451.

And there are dicta in Breon v. Henkle, 14 Or. 494, 13 Pac. 289, that where a statute intends giving an unfortunate woman an action for seduction where her consent to sexual intercourse has been secured through hypocrisy and artifice, she may recover for the mental anguish resulting.

And it is held that a parent may recover in an action for the seduction of his daughter, as an element of damages, the in-

Fay v. Swan, 44 Mich. 544, 7 N. W. 215; Sloan v. Edwards, 61 Md. 89; 5 Am. & Eng. Enc. Law, p. 11; West v. Forrest, 22 Mo. 344; Hawes v. Knowles, 114 Mass. 519, 19 Am. Rep. 383; Merest v. Harvey, 5 Taunt. 442, 1 Marsh. 139, 15 Revised Rep. 548.

Mental suffering and humiliation are proper to be considered, regardless of whether actual physical injury has been done.

Stewart v. Maddox, 63 Ind. 51; Lake Erie & W. R. Co. v. Fix, 88 Ind. 381, 45 Am. Rep. 464; Chicago, St. L. & P. R. Co. v. Holdridge, 118 Ind. 281, 20 N. E. 837; Pennsylvania Co. v. Bray, 125 Ind. 229, 25 N. E. 439; Smith v. Holcomb, 99 Mass. 552; Hamilton v. Third Ave. R. Co. 53 N. Y. 25; Sprenger v. Tacoma Traction Co.

jury resulting to his feelings from the disgrace caused. Patterson v. Thompson, 24 Ark. 55; Simpson v. Grayson, 54 Ark. 404, 26 Am. St. Rep. 52, 16 S. W. 4; Robinson v. Burton, 5 Harr. (Del.) 335; Herring v. Jester, 2 Houst. (Del.) 66; Kendrick v. McCrary, 11 Ga. 603; Taylor v. Shelkett, 66 Ind. 297; Grable v. Margrave, 4 Ill. 372; 38 Am. Dec. 88; Ball v. Bruce, 21 Ill. 161; Garretson v. Becker, 52 Ill. App. 257; Mighell v. Stone, 175 Ill. 261, 51 N. E. 906; Palmer v. Baum, 123 Ill. App. 585; Pruitt v. Cox, 21 Ind. 15; Felkner v. Scarlet, 29 Ind. 154; Wilhoit v. Hancock, 5 Bush, 567; Emery v. Gowen, 4 Me. 33, 16 Am. Dec. 233; Cook v. Bartlett, 179 Mass. 576, 61 N. E. 266; Stoudt v. Shepherd, 73 Mich. 588, 41 N. W. 696; Fox v. Stevens, 13 Minn. 272, Gil. 252; Russell v. Chambers, 31 Minn. 54, 16 N. W. 458; Ellington v. Ellington, 47 Miss. 329; Morgan v. Ross, 74 Mo. 318; Comer v. Taylor, 82 Mo. 341; Rollins v. Chalmers, 51 Vt. 592; Clark v. Clark, 63 N. J. L. 1, 42 Atl. 770; Middleton v. Nichols, 62 N. J. L. 636, 43 Atl. 575; Magee v. Holland, 27 N. J. L. 86, 72 Am. Dec. 341; Hogan v. Cregan, 6 Robt. 138; Stiles v. Tilford, 10 Wend. 339; Kerns v. Hagenbuchle, 28 Jones & S. 228, 42 N. Y. S. R. 699, 17 N. Y. Supp. 369; Holliday v. Parker, 23 Hun, 74; Knight v. Wilcox, 18 Barb. 212; Badgley v. Decker, 44 Barb. 577; Scarlett v. Norwood, 115 N. C. 284, 20 S. E. 459; Ingwaldson v. Skrivseth, 7 N. D. 388, 75 N. W. 772; Parker v. Monteith, 7 Or. 277; Breon v. Henkle, 14 Or. 494, 13 Pac. 289; Phelin v. Kenderdine, 20 Pa. 354; Milliken v. Long, 188 Pa. 411, 41 Atl. 540; Love v. Masoner, 6 Baxt. 34, 32 Am. Rep. 522; Clem v. Holmes, 33 Gratt. 722; 36 Am. Rep. 793; Riddle v. McGinnis, 22 W. Va. 253; Barbour v. Stephenson, 32 Fed. 66, affirmed in 140 U. S. 48, 35 L. ed. 338, 11 Sup. Ct. Rep. 690; Andrews v. Askey, 8 Car. & P. 7; Hope v. Davidson, 33 U. C. Q. B. 550; Tullidge v. Wade, 3 Wils. 18; Dodd v. Norris, 3 Campb. 519, 14 Revised Rep. 832; Bedford v. McKowl, 3 Esp. 119; Terry v. Hutchinson, L. R. 3 Q. B. 599, 9 Best & S. 487, 37 L. J. Q. B. N. S. 259, 18 L. T. N. S. 521, 16 Week. Rep. 932.

15 Wash. 660, 43 L.R.A. 706, 47 Pac. 17; Eddy v. Syracuse Rapid Transit R. Co. 50 App. Div. 109, 63 N. Y. Supp. 645; Ray v. Cortland & H. Traction Co. 19 App. Div. 530, 46 N. Y. Supp. 521; Sutherland, Damages, ¶ 943; Thomp. Neg. ¶ 3288; Ballou v. Farnum, 11 Allen, 73; Young v. Western U. Teleg. Co. 107 N. C. 370, 9 L.R.A. 669, 22 Am. St. Rep. 883, 11 S. E. 1044; Lucas v. Flinn, 35 Iowa, 9; Indiana R. Co. v. Orr, 41 Ind. App. 426, 84 N. E. 33; God-

dard v. Grand Trunk R. Co. 57 Me. 202, 2 Am. Rep. 39; International & G. N. R. Co. v. Brett, 61 Tex. 483; International & G. N. R. Co. v. Gilbert, 64 Tex. 536; Bass v. Chicago & N. W. R. Co. 42 Wis. 654, 24 Am. Rep. 437.

Letton, J., delivered the opinion of the court:

The plaintiff is a young married woman living upon a farm with her husband. The

The court in Riddle v. McGinnis, 22 W. Va. 253, said: "It has long been well settled that in an action for seduction, and also in other actions for wilful and wanton injuries done to the person and reputation, as for assault and battery, libel, slander, false imprisonment, malicious prosecution, and the like, the plaintiff is entitled to recover damages not only for expenses incurred by him, but for the loss of his time, his bodily sufferings, and if the injury was wilful, for his mental anguish also (Sweeney v. Baker, 13 W. Va. 158, 31 Am. Rep. 757; 2 Greenl. Ev. § 267); and verdicts of juries awarding to the party injured, exemplary or punitive damages, have uniformly been sustained by the courts, except in cases where the damages were so enormous as to satisfy the court that the verdict was the result of 'prejudice, partiality, passion, or corruption.' Especially has this been done, and the verdicts upheld, in actions for seductions where the loss of the daughter's services and the value thereof have always been regarded as innocent legal fictions, used to give the court jurisdiction, while the real measure of damages was the shame, mortification, disgrace, dishonor, and mental suffering inflicted upon the parent by the wrongful act of the seducer."

And a recovery for mental anguish may be had although the daughter is of age. Lipe v. Eisenlerd, 32 N. Y. 229.

And an action for seduction may be maintained by a grandmother for the seduction of her granddaughter, and recovery may be allowed for the grief and affliction suffered in consequence of the act. Anderson v. Aupperle, 51 Or. 556, 95 Pac. 330.

And a brother in whose family his sister lives may recover for the distress of mind caused by her seduction. Paterson v. Wilcox, 20 U. C. Q. B. 385.

And a brother-in-law may also recover under such circumstances. Wilson v. Sproul, 3 Penr. & W. 49.

And one who has adopted in its infancy the child of a friend may recover, in an action for debauching her and getting her with child, for damages, in addition to the mere loss of service. Irwin v. Dearman, 11 East, 23, 10 Revised Rep. 423.

And in an action by the guardian of a minor for the latter's abduction recovery may be had for the mental pain inflicted upon the child. Brown v. Crockett, 8 La. Ann. 30.

And injury to the parents' feelings need not be separately averred in the declaration. 33 L.R.A.(N.S.)

Rollins v. Chalmers, 51 Vt. 592; Phillips v. Hoyle, 4 Gray, 568; Hatch v. Fuller, 131 Mass. 574; Lunt v. Philbrick, 59 N. H. 59. The court in the last case said: "General damages are such as may be presumed to result necessarily from the wrong complained of. The plaintiff's suffering from wounded feelings, including a sense of personal and family disgrace, being inferred as a natural and necessary consequence of the seduction of his daughter, a special averment of such damage is unnecessary."

And a parent may recover, in an action for the seduction of his daughter, for the anxiety of mind caused him as the parent of other children whose morals may be corrupted by the example set before them in the family. Stevenson v. Belknap, 6 Iowa, 97, 71 Am. Dec. 392.

And, in an action by a father for harboring, secreting, and concealing his minor daughter, and for persuading her to remain absent from his family against his will, recovery may be had for sorrow and distress of mind suffered by him. Stowe v. Heywood, 7 Allen, 118.

And in an action by a parent for the debauchment of his daughter where the debauchment was accomplished by force and arms, recovery may be had for mental anguish, although there was no seduction. Mohelsky v. Hartmeister, 68 Mo. App. 318.

Proof of unchastity, in actions by the parent for the seduction of his daughter goes only in mitigation of damages, and it is only where she was so notoriously unchaste prior to the seduction that the act added nothing to her parent's suffering that no damages could be awarded beyond what is suffered by the master as distinguished from the parent. Simpson v. Grayson, 54 Ark. 404, 26 Am. St. Rep. 52, 16 S. W. 4.

This note does not cover the question of whether mental anguish constitutes an element of damages in an action for breach of promise to marry, the plaintiff in which has been seduced.

For a note on right to recover for physical injury resulting from fright caused by a wrongful act, see note to Huston v. Freemansburg, 3 L.R.A.(N.S.) 49, and the supplemental note thereto accompanying the case of Chittick v. Philadelphia Rapid Transit Co. 22 L.R.A.(N.S.) 1073.

For a note on right to recover for mental suffering caused by an assault where no bodily injury is inflicted, see note accompanying the case of Small v. Lonergan, 2 L.R.A.(N.S.) 976.

J. T. W.

defendant is a widower, a farmer residing in the same neighborhood. On the night of August 9, 1906, somewhere between the hours of 9:00 and 11:00 o'clock, and after the plaintiff's family had retired, the defendant came to her home and stated that Mrs. Stubbert, a neighbor who lived with her husband about 2½ miles away, was about to be confined and was very sick; that two other women of plaintiff's acquaintance were at her home, and that they had requested that the plaintiff come over at once to assist. After some conversation the plaintiff took her three months' old infant and started for Stubbert's with the defendant, in his buggy. When they arrived close to the Stubbert home, which stood back from the road and was reached by a lane, the defendant drove beyond the lane in the direction of his own home, and, upon plaintiff stating that that was the Stubbert place, he turned back and was about to drive beyond the lane again, when the plaintiff jumped from the buggy with her infant and went to the house. She knocked at the door, and when it was opened asked Mrs. Stubbert if the other women whom defendant represented had sent for her were there, and was told they were not. She then asked if Mrs. Stubbert was sick, and was informed that there was nothing the matter with her. Upon thus finding out the deception which had been practised upon her, she went into the house and became very much agitated and alarmed, crying and lamenting her condition, and foreseeing neighborhood gossip. The defendant, in the meantime, had stopped his team near the house, and after some conversation with Mr. Stubbert had come into the room. Some conversation then was had as to her going home. Mrs. Stubbert suggested that her son Frank, a young man, take her home, but plaintiff testifies she was afraid to go with him on account of the defendant saying he would meet them at the corner. Mrs. Stubbert then sent Frank for the plaintiff's husband, who came and took her home. It was proved that in the conversation with Mr. Stubbert, defendant used language implying that plaintiff was a lewd and immoral woman. It was also shown that after this event gossip was rife in the neighborhood with respect to plaintiff's character, and that some of these rumors and stories had been communicated to her, but the court instructed the jury to disregard all the evidence with regard to such matters, except as to what was said to plaintiff herself by others. These are, in substance, the facts testified to by the plaintiff.

The defendant admitted that the story by which he procured the plaintiff to leave
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home and ride with him that night was false, and the only explanation he offers for his despicable conduct is that he had been drinking that day, and that it was his intention in this way to play a joke on the Stubberts, who had been married late in life. He denies any improper advances or that he laid hands on the plaintiff, except that he put the corner of her apron over the baby's face to protect it from the cold. The petition pleads the fraud and deception whereby plaintiff was decoyed from her home, an assault when she left the buggy, the derogatory statements as to her character made by defendant to Stubbert, loss of reputation and mental anguish, humiliation, mortification, and disgrace by reason of the position she was placed in, and consequent gossip in the community. The answer is a general denial. The plaintiff apparently is not very ready in her use of English. Her testimony is meager, and much of it was drawn out by the use of leading questions. There is absolutely no evidence of any physical injury either direct or indirect to her person. The evidence clearly shows that she wept and was greatly agitated after she had been informed of the deception practised upon her, and it is further shown that, in consequence of being told by neighbors that her reputation was suffering on account of the night ride with the defendant, she became somewhat nervous and suffered to some extent from sleeplessness. In this state of the evidence the court gave the following instructions among others:

"No. 7. If you find for the plaintiff you will assess her damages at only such sum as you believe and find, from a full and fair consideration of all the facts and circumstances in evidence before you, will compensate her for the physical and nervous pain, mental distress and agony, if any you find, resulting from such deceit and unlawful acts of the defendant, which you find were committed by him, and, in determining the amount of such damages, you will also consider mental pain and suffering, resulting from communications, which you find were made to her, that she was a subject of public notoriety and scandal in the community where she lived, naturally resulting from such wrongful act of defendant, such damages, however, in no case to exceed the sum of \$25,000.

"No. 8. You are instructed that this is not an action for slander or libel, but an action for damages by reason of the alleged assault and assault and battery, and deceit practised upon plaintiff by defendant to induce her to accompany him from her home, and if you find for the plaintiff, in determining the amount of her damages,

you will in no manner consider or allow any sum as damages by reason of any alleged injury to her character and reputation by any statements concerning the same made by defendant or other persons."

"No. 2, tendered by plaintiff. Notwithstanding you may find from the evidence that the plaintiff bore no outward sign of physical suffering and pain, yet if you find from the evidence that plaintiff has by reason of defendant's acts and conduct toward and concerning plaintiff upon the night of July 27, 1906, suffered mental pain and anguish, your verdict should be for the plaintiff, and you should assess full damages therefor not exceeding the amount claimed in her petition."

Defendant's counsel insists that there was error in the giving of these instructions; that where the evidence shows mental anguish unaccompanied by any physical injury there can be no recovery, citing *Atkins v. Gladwish*, 25 Neb. 390, 41 N. W. 347, and a number of other cases mostly involving negligence or breach of contract. There is a decided conflict in the authorities as to whether in such cases there can be a recovery for mental suffering if unaccompanied by physical injury.

In states allowing punitive or exemplary damages, such suffering may usually be considered by the jury as an element of damages, but in states where only compensatory damages are allowed the prevailing rule, with some exceptions, seems to be that there must be some physical injury either directly or proximately caused by the wrongful act or omission before mental pain and anguish may be taken into account, although in telegraph cases this distinction does not seem to exist. The reason given for the rule usually is that, in the absence of any visible evidence of injury to the person, the opportunities for putting forth unfounded claims for damages would be so numerous, and the facilities afforded for depriving persons of their property by false charges would be so great, that the courts will not open the door to the train of evils that might in all probability be expected to enter if such a rule were adopted. We do not think it necessary to consider or distinguish the cases bearing upon this subject here. A number of them may be found collected and reviewed in note to *West v. Western U. Teleg. Co.* 7 Am. St. Rep. 530, in note to *Green v. Western U. Teleg. Co.* 1 A. & E. Ann. Cas. 349, and in note to *Gulf, C. & S. F. R. Co. v. Hayter*, 77 Am. St. Rep. 856, which latter note, though dealing mainly with the subject of fright, includes many cases upon the general subject.

We consider the peculiar circumstances

of this case to place it within the reason of another class of cases, where by an active and wilful or wanton act one has been injured in his personal rights and privileges, has been deprived of his liberty, or damaged in reputation, or outraged and humiliated in his personal self-respect or in the finer sentiments of his nature. Recovery for mental anguish, humiliation, and loss of reputation may be compensated without proof of actual pecuniary loss, in actions for libel and slander, where the matter is libelous *per se* (*Laing v. Nelson*, 40 Neb. 252, 58 N. W. 846; *Boldt v. Budwig*, 19 Neb. 739, 28 N. W. 280; *Brooks v. Dutcher*, 24 Neb. 300, 38 N. W. 780; *Williams v. Fuller*, 68 Neb. 354, 94 N. W. 118, 97 N. W. 246); in actions for malicious prosecution, which is held to be an attack on one's reputation (*Miles v. Walker*, 66 Neb. 728, 92 N. W. 1014; *Minneapolis Threshing Mach. Co. v. Regier*, 51 Neb. 402, 70 N. W. 934); in actions for criminal conversation (*Smith v. Meyers*, 52 Neb. 70, 71 N. W. 1006); for breach of promise (*Musselman v. Barker*, 26 Neb. 737, 42 N. W. 759); for digging up the dead body of plaintiff's son (*Meagher v. Driscoll*, 99 Mass. 281, 96 Am. Dec. 759); for wrongful ejection from cars, and for a conductor kissing a female passenger against her will (*Smith v. Pittsburg, Ft. W. & C. R. Co.* 23 Ohio St. 10; *Lake Erie & W. R. Co. v. Fix*, 88 Ind. 381, 45 Am. Rep. 464; *Quigley v. Central P. R. Co.* 11 Nev. 350, 21 Am. Rep. 757; *Chicago & A. R. Co. v. Flagg*, 43 Ill. 365, 92 Am. Dec. 133); for being deprived of the remains by an undertaker to whose care the dead body of a daughter had been committed (*Renihan v. Wright*, 125 Ind. 536, 9 L.R.A. 514, 21 Am. St. Rep. 249, 25 N. E. 822); in an action for the abduction of a child (*Magee v. Holland*, 27 N. J. L. 86, 72 Am. Dec. 341).

The question whether such damages are of the nature of exemplary or compensatory is sometimes a very close one, but even in states which allow compensation only, damages are allowed which are not susceptible of precise computation and the amount of which must be left largely to the discretion of the jury, as witness the Nebraska cases above referred to. Note to *Spellman v. Richmond & D. R. Co.* 28 Am. St. Rep. 870; 1 *Sutherland, Damages*, §§ 95, 96. The subject is discussed at length in *Smith v. Pittsburg, Ft. W. & C. R. Co.* and in *Quigley v. Lake Erie & W. R. Co.* supra. The latter is a Nevada case, in which state it is held (*Johnson v. Wells, F. & Co.* 6 Nev. 224, 3 Am. Rep. 245) that ordinary mental anguish without physical injury is not a proper element of damages. If one is taken openly from his home by arrest under color of process, he may be permitted to recover

damages for loss of reputation and mental suffering. What reason can there be for refusing a like compensation to one who is removed from her home by fraud and deceit, under circumstances which cast a cloud upon her reputation and caused unfavorable comment upon her character? Moreover, the acts of the defendant resulted in damage of precisely the same character as that which would have been caused by an oral or written attack on her reputation. Why should it not be compensated for in a like manner and to the same extent?

Conceding, for the purpose of argument, the soundness of the contention by defendant's counsel, that mental anguish without physical injury is not a proper element of damages in an action purely for assault, in this case the wrong was caused, and recovery is sought, not by and for the assault alone, but by the conjoined acts of deceit by which the plaintiff was induced to leave her home, the trespass upon her person by taking hold of her arm before reaching the Stubbert's home, the statements derogatory to her reputation made at the time by the defendant to Stubbert, and the mental suffering caused by the knowledge brought to the plaintiff as to the neighborhood gossip. We are of opinion that the argument does not fit the circumstances of this case, that *Atkins v. Gladish*, supra, is distinguishable, and that the jury properly took into account all the circumstances accompanying the transaction. As the case was submitted to the jury it was really an action for a trespass upon the person of plaintiff, a direct invasion of her personal rights; and the accompanying circumstances of mental suffering, humiliation, and injury to her social standing and reputation in the neighborhood constituted matter in aggravation. Matter in aggravation is something done by the defendant upon the occasion of the commission of the principal trespass, which is of a different legal character from, but not inconsistent with the trespass. Thus, upon a trespass for breaking and entering a house under a false charge that the plaintiff was concealing stolen property, whereby her quiet enjoyment was interrupted, and her character was injured, it was held that the trespass was the substantial allegation, and the rest matter of aggravation only. *Bracegirdle v. Orford*, 2 Maule & S. 77.

In trespass *quare clausum fregit* the gist of the action was the unlawful entry, but it was alleged in aggravation that the plaintiff's daughter was assaulted and ravished by the defendant. The assault was held to be merely matter of aggravation, and it was unnecessary to allege or prove a contract or loss of service. *Bennett v. Alcott*, 2 T. R. 31 L.R.A. (N.S.)

166; *Donohue v. Dyer*, 23 Ind. 521. See also *East v. Cain*, 49 Mich. 473, 13 N. W. 581, 14 N. W. 822. *Anonymous, Minor* (Ala.) 52, 12 Am. Dec. 31. The case is unusual in its facts, and we have devoted more time and labor to the investigation of the legal principles governing its disposition than perhaps was necessary or appears in this opinion.

We are satisfied the jury were entitled to consider the elements of damage submitted to them. In all cases of this class the damages are difficult of ascertainment, and must be left to the sound discretion of the jury. It is impossible to ascertain with any degree of precision what amount will compensate the plaintiff for the wrong suffered. Of course, if the verdict is for such an amount as to shock the conscience, or if it appears to be so disproportionate to the injury suffered that it appears to be the result of passion or prejudice, it cannot be upheld. The verdict for \$3,000, however, seems to be excessive, and, considering all the circumstances, we think it must have been the result of passion or prejudice on the part of the jury. The plaintiff, therefore, will be required to remit the sum of \$1,500 as a condition of affirmance, otherwise the case will be reversed and remanded for a new trial.

Rose, J., dissenting:

I dissent from the order requiring a remittitur as a condition of affirmance, for the reason that in my judgment the verdict is not excessive.

TEXAS SUPREME COURT.

MRS. M. W. CATHEY, Plff. in Err.,
v.

MISSOURI, KANSAS, & TEXAS RAIL-
WAY COMPANY OF TEXAS.

(— Tex. —, 133 S. W. 417.)

Evidence — record copies — admissibility.

1. Record copies of reports by train men as to the time of passing of trains are not

Note. — Waiver of objection to testimony by cross-examination.

Cases are omitted where it was sought to rebut improper testimony, not by cross-examination, but by putting other witnesses on the stand. Only cases are included where the objection was raised and overruled on direct examination.

Majority rule.

By the weight of authority and of reason the objection that evidence offered is in-

admissible in evidence upon the question of liability for setting out fire, where the reports are in existence, and not produced, and there is nothing to show that the testimony of those operating the trains could not have been produced.

Same. — inadmissibility — cross-examination — waiver.

2. One does not waive his objection to the incompetency of evidence which has been admitted by the court, by eliciting a repetition of it on cross-examination of the witness.

(January 18, 1911.)

ERROR to the Court of Civil Appeals for the Fifth Supreme Judicial District to review a judgment affirming a judgment of the District Court for Dallas County in

admissible is not waived by the objecting party cross-examining the witness regarding the matter after the evidence has been admitted over his objection. *Scarborough v. Blackman*, 108 Ala. 656, 18 So. 735; *Laver v. Hotaling*, — Cal. —, 46 Pac. 1070; *Ætna L. Ins. Co. v. Paul*, 23 Ill. App. 611; *Chicago v. Spoor*, 190 Ill. 340, 60 N. E. 540; *Metropolitan Nat. Bank v. Commercial State Bank*, 104 Iowa, 693, 74 N. W. 26; *Tabor v. Hardin*, 9 Ky. L. Rep. 491; *United R. & Electric Co. v. Corbin*, 109 Md. 442, 72 Atl. 606; *Barker v. St. Louis, I. M. & S. R. Co.* 126 Mo. 143, 26 L.R.A. 843, 47 Am. St. Rep. 646, 28 S. W. 866.

Johnston v. Johnston, 173 Mo. 91, 61 L.R.A. 166, 96 Am. St. Rep. 486, 73 S. W. 202; *Rourke v. Holmes Street R. Co.* 221 Mo. 46, 133 Am. St. Rep. 468, 119 S. W. 1094; *Costigan v. Michael Transp. Co.* 33 Mo. App. 269; *Pugh v. Ayres*, 47 Mo. App. 590; *Miles v. Chicago, R. I. & P. R. Co.* 76 Mo. App. 484; *Pratt v. Missouri P. R. Co.* 139 Mo. App. 502, 122 S. W. 1125 (*dictum*); *Reynolds v. Publishers: Geo. Knapp & Co.* — Mo. App. —, 135 S. W. 103 (admission of hearsay testimony); *Marsh v. Snyder*, 14 Neb. 237, 15 N. W. 341, distinguishing *Cropsey v. Averill*, 8 Neb. 151; *Boylan v. Meeker*, 28 N. J. L. 274; *Finkelstein v. Keene Electric R. Co.* 75 N. H. 303, 73 Atl. 705; *Duff v. Lyon*, 1 E. D. Smith, 536; *Offitt v. State*, — Okla. Crim. Rep. —, 113 Pac. 554; *Horres v. Berkeley Chemical Co.* 57 S. C. 189, 52 L.R.A. 36, 35 S. E. 500; *Siebert v. Lott*, 20 Tex. Civ. App. 191, 49 S. W. 783.

Thus, it has been held that the objection that evidence as to a custom among architects as to the amount of their compensation is inadmissible in a suit for compensation brought by an architect against one who had employed him, when there was no evidence that such custom was generally known to the public, is not waived by cross-examination regarding the matter, after the objection is overruled. *Laver v. Hotaling*, — Cal. —, 46 Pac. 1070.

In *Laver v. Hotaling*, *supra*, the court said: "It is urged that the existence of 33 L.R.A.(N.S.)

defendant's favor in an action brought to recover damages for the destruction of plaintiff's house by fire alleged to have been caused by the negligence of defendant's servants. Reversed.

The facts are stated in the opinion.

Messrs. Carden, Starling, & Carden, for plaintiff in error:

A record kept by a station agent purporting to show the time of the arrival and departure of trains is not admissible in evidence for the purpose of showing such time or times, unless the party making the record is competent to testify that such record is correct, and they are properly identified and supported by the oath of the party making them as being correct.

the rule or custom of architects was developed on cross-examination of plaintiffs' witnesses; also that testimony concerning the same matter was given by a witness called by defendant, and hence that the latter cannot complain of the error. But the evidence of plaintiffs related to an alleged customary rule of charges, and we think defendant might, without waiving his objections, produce evidence either by cross-examination or from his own witnesses to exhibit the source of the alleged custom, and to show more clearly the incompetence of the plaintiffs' evidence in that behalf."

So, where plaintiff in an action for alleged libel has been allowed, in the first instance and before any other testimony has been given, to introduce witnesses to testify that plaintiff's general character for honesty and integrity was good, an objection to the admissibility of such testimony is not waived by cross-examination regarding such matter. *Ætna L. Ins. Co. v. Paul*, 23 Ill. App. 611.

In an action against a city by a landowner to recover damages caused by a viaduct in front of his land erected by the city, where by law such owner is not entitled to recover any damages caused by diversion of traffic, and where a witness for the plaintiff in testifying as to the damages stated the amount of damages, but did not specify any of the elements, the defendant city does not waive the right to object to such evidence, by eliciting on cross-examination the fact that the witness had included damages from the diversion of traffic as one of the elements in making up his estimate of damages, since his only purpose was to show that an improper element had been included. *Chicago v. Spoor*, 190 Ill. 340, 60 N. E. 540.

Asking a witness to repeat on cross-examination his account of an interview, improper because not part of the *res gestæ*, does not amount to a waiver of his right to urge an exception already saved to his direct testimony on the subject. *Barker v. St. Louis, I. M. & S. R. Co.* 126 Mo. 143, 26 L.R.A. 843, 47 Am. St. Rep. 646, 28 S. W. 860.

8 Enc. Pl. & Pr. p. 135; Ft. Worth & D. C. R. Co. v. Garlington, 41 Tex. Civ. App. 340, 92 S. W. 270; Texas & P. R. Co. v. Leggett, — Tex. Civ. App. —, 86 S. W. 1066; Missouri P. R. Co. v. Johnson, — Tex. —, 7 S. W. 838; Watson v. Miller, 82 Tex. 279, 17 S. W. 1053; Western U. Teleg. Co. v. Christensen, — Tex. Civ. App. —, 78 S. W. 746; Cole v. Dial, 8 Tex. 347; Townsend v. Coleman, 18 Tex. 418, 20 Tex. 820.

Messrs. Thomas and Rhea, for defendant in error:

Record copies of reports by train men are admissible in evidence.

Missouri P. R. Co. v. Johnson, — Tex. —, 7 S. W. 838; Atchison, T. & S. F. R. Co. v. Williams, 38 Tex. Civ. App. 405.

The objection that a witness ought not to be permitted to testify to an impression which was not really a recollection is not waived by a cross-examination as to the source whence he derived his recollection. Pugh v. Ayres, 47 Mo. App. 590.

An overruled objection to the admissibility of declarations by a plaintiff, made to an agent of the defendant, which the latter was requested not to communicate to his principal, is not waived by cross-examination regarding the same. Miles v. Chicago, R. I. & P. R. Co. 76 Mo. App. 484.

In an action for the price of a machine where the defense was a breach of warranty, the improper admission of evidence, under objection, on behalf of the defendant, that another machine sold by plaintiff to a third party was defective, was not waived by cross-examination respecting it. Marsh v. Snyder, 14 Neb. 237, 15 N. W. 341.

In a personal injury action against a street railway company, the improper admission, at the instance of the defendant, of the conductor's report of the accident, as a part of the conductor's testimony, is not waived by the plaintiff cross-examining the motorman, who has testified that the report stated the truth, as to his recollection of the report; since the witnesses' credibility was properly tested in this way after the report had been admitted as evidence before the jury. Finkelstein v. Keene Electric R. Co. 75 N. H. 303, 73 Atl. 705.

The error in allowing a witness to usurp the function of the jury by giving his opinion as to the amount of damage caused by a trespass is not waived by cross-examining the witness as to the items of this estimate of damage. Duff v. Lyon, 1 E. D. Smith, 536.

Testimony given on behalf of a defendant by a witness in a deposition, inadmissible because concerning hearsay and self-serving declarations made by another, is not made admissible because the plaintiff filed cross-interrogatories to the witness touching the matters about which she had testified in response to the direct inter-

86 S. W. 38; International & G. N. R. Co. v. Startz, 42 Tex. Civ. App. 85, 94 S. W. 207; Rogers v O'Barr, — Tex. Civ. App. —, 81 S. W. 750; 9 Am. & Eng. Enc. Law, pp. 918, 925; Post v. Kenerson, 52 L.R.A. Note (b) 577; Donovan v. Boston & M. R. Co. 158 Mass. 450, 33 N. E. 583; Firemen's Ins. Co. v. Seaboard Air Line R. Co. 138 N. C. 42, 107 Am. St. Rep. 517, 50 S. E. 452; Louisville & N. R. Co. v. Daniel, 122 Ky. 256, 3 L.R.A.(N.S.) 1190, 91 S. W. 691; Big River Lead Co. v. St. Louis, I. M. & S. R. Co. 123 Mo. App. 394, 101 S. W. 636; Mexican National R. Co. v. Musette, 7 Tex. Civ. App. 169, 24 S. W. 520; Gilmour v. Heinze, 85 Tex. 78, 19 S. W. 1075; Crystal Ice Mfg. Co. v. San Antonio

rogatories. Siebert v. Lott, 20 Tex. Civ. App. 191, 49 S. W. 783.

In Tabor v. Hardin, 9 Ky. L. Rep. 491, the court said: "It would be a severe rule which would hold that because a party cross-examines a witness upon evidence he has objected to, he thereby renders the evidence competent if the witness repeats it on the cross-examination, but this rule must be restricted to the cross-examination on the matter illegally drawn from the witness on the direct examination. If the party cross-examining interrogates as to new matter, he cannot then object to the answers, unless they really go to contradict the illegal testimony."

Minority rule.

But there are authorities which hold that an overruled objection to the admissibility of testimony is waived by eliciting a repetition of such testimony on cross-examination. Morrison Mfg. Co. v. Bryson, 129 Iowa, 645, 103 N. W. 1016, 106 N. W. 153; Gautieri v. Romano, 28 R. I. 246, note, 66 Atl. 652; Finnegan v. Waterhouse, — R. I. —, 67 Atl. 427; McClellan v. Carroll, — Tenn. —, 42 S. W. 185; Gammel-Statesman Pub. Co. v. Monfort, — Tex. Civ. App. —, 81 S. W. 1029; Sullivan v. Fant, 51 Tex. Civ. App. 6, 110 S. W. 507; Birkman v. Fahrenthold, 52 Tex. Civ. App. 335, 114 S. W. 428; Texas & N. O. R. Co. v. Broom, — Tex. Civ. App. —, 114 S. W. 655; Eastham v. Hunter, 98 Tex. 560, 86 S. W. 323; Covington v. Sloan, — Tex. Civ. App. —, 124 S. W. 690 (citing no authorities); Trinity & B. Valley R. Co. v. Johnson, — Tex. Civ. App. —, 131 S. W. 1137.

Thus, it has been held that the error, if any, in allowing, over objection, a party to question one of his own witnesses concerning a memorandum used by such witness to refresh his memory, is waived by the opposite party asking the witness on cross-examination as to the whole matter. Morrison Mfg. Co. v. Bryson, supra.

So, it has been held that cross-examination as to the contents of a letter waives

Brewing Asso. 8. Tex. Civ. App. 1, 27 S. W. 210.

On petition for rehearing.

The fact that plaintiff's attorney caused the witness to repeat and reread the testimony on cross-examination precludes him from complaining of the admission of said testimony in the first instance by the defendant over his objection.

Eastham v. Hunter, 98 Tex. 560, 86 S. W. 323; Birkman v. Fahrenthold, 52 Tex. Civ. App. 335, 114 S. W. 428; Texas & N. O. R. Co. v. Broom, — Tex. Civ. App. —, 114 S. W. 655; Missouri, K. & T. R. Co. v. Pettit, — Tex. Civ. App. —, 117 S. W. 894; Gammel-Statesman Pub. Co. v. Monfort, — Tex. Civ. App. —, 81 S. W. 1029; Sullivan v. Fant, 51 Tex. Civ. App. 6, 110 S. W. 507; Kingsley v. Schmicker, — Tex. Civ. App. —, 60 S. W. 331; McDonald v. McCrabb, 47 Tex. Civ. App. 259, 105 S. W. 238.

an objection that verbal testimony as to its contents cannot be given where the letter itself is not produced or its absence accounted for. McClellan v. Carroll, — Tenn. —, 42 S. W. 185.

And that one whose objection to testimony has been overruled waives the objection by asking the witness on cross-examination to repeat what he said before, in the hope that the witness's testimony would be discredited by repeating it differently. Sullivan v. Fant, 51 Tex. Civ. App. 6, 110 S. W. 507.

And that in a suit for damages suffered in a horse trade, inadmissible testimony as to the market value of one of the horses is waived where on cross-examination the same testimony is elicited. Covington v. Sloan, — Tex. Civ. App. —, 124 S. W. 690.

And in Texas & N. O. R. Co. v. McCoy, —Tex. Civ. App. —, 117 S. W. 446, where a witness had testified as an expert, but cross-examination made it doubtful whether he was an expert, and a motion was made and overruled to strike out all his testimony as expert, it was held that the error, if any, was waived by further cross-examination which again brought out all the evidence which it had been sought to exclude.

The cases above from the Texas court of civil appeals which followed the minority rule must be considered overruled by CATHEY v. MISSOURI, K. & T. R. Co.

In Scott v. Union & P. Bank & T. Co. — Tenn. —, 130 S. W. 757, the court said: "While a cross-examination, with regard to incompetent testimony admitted over the objection of counsel, may be made, without waiving the objection, we do not think the cross-examiner can have a witness embody such testimony in his cross-examination, and yet rely upon his original objection," but how it is possible to cross-examine effectively, as to incompetent testimony admitted over objection, and yet embody such 33 L.R.A. (N.S.)

Ramsey, J., delivered the opinion of the court:

This suit was instituted in the district court of Dallas county by Mrs. Cathey against the Missouri, Kansas, & Texas Railway Company of Texas for the sum of \$3,605 for the destruction of certain property belonging to her by fire, due to and occasioned by the negligence of certain employees of said company. On trial a verdict and judgment was rendered for the company. On appeal to the court of civil appeals for the fifth supreme judicial district the judgment of the court below was reversed. On rehearing, this reversal was set aside, and a judgment rendered affirming the judgment of the trial court.

1. In the opinion of the court of civil appeals it was correctly held that there was error in permitting the witness Tate-man to use the register purporting to show the time that passenger trains passed the

testimony in the cross-examination, is a little difficult to see.

Where cross-examination supplies omissions.

While a party upon cross-examination does not necessarily waive his right to insist upon his objection to the evidence in chief, which he claims was incompetent, yet if the evidence in chief was immaterial, he cannot afterwards complain if his cross-examination has made it material. Leathers v. Bailer, 12 Ky. L. Rep. 190.

In an action upon the warranty of the soundness of a horse on its sale, the allowance of a hypothetical question, calling for the opinion of an expert as to the disease of which the animal died and as to whether it was sound on the day of sale, erroneous because it omitted to state the condition of the horse on that day, is cured when the other party on cross-examination supplies the omission and includes the omitted facts in his question. Van Hoesen v. Cameron, 54 Mich. 609, 20 N. W. 609.

Objections to competency of witnesses.

A timely objection to the competency of a witness is not waived by a cross-examination of such witness as to matters covered by the examination in chief after such objection is overruled. Goodlett v. Kelly, 74 Ala. 213; Scarborough v. Blackman, 108 Ala. 656, 18 So. 735; Johnston v. Johnston, 173 Mo. 91, 61 L.R.A. 166, 96 Am. St. Rep. 486, 73 S. W. 202; Gardner v. St. Louis, I. M. & S. R. Co. 124 Mo. App. 461, 101 S. W. 684; Bentley v. Bentley, 72 Neb. 803, 101 N. W. 976 (rule in case of depositions only was considered); Ogden v. Robertson, 15 N. J. L. 124; Boylan v. Meeker, 28 N. J. L. 274; Rogers v. Dibble, 3 Paige, 241; Neilson v. Bowman, 29 Gratt. 732; Calwell v. Prindle, 11 W. Va. 307; Carpen-

yards of the company at the place where the fire occurred on the date of such fire, and to read and state to the jury the time when the company's trains passed said yards, it appearing that while the witness had made such entries in said register on the date of the arrival and departure of such trains, that such entries were made from slips or cards prepared and furnished him by employees operating same, which cards were then in his possession, and not produced. In this connection it should also be stated that these agents were not shown to have left the employment of the company, nor was there any showing made that their testimony could not have been produced. It was not contended that Tate-
man had any knowledge of the times of the arrival and departure of trains, except such as came to him from the original data, not produced, from which he states, and we assume states truly, he made up the

register from which he testified. The time of the arrival of trains in Greenville, where the fire occurred, was a matter of first importance. The testimony of Tateman touching these matters was therefore undoubtedly material. That it was, under the circumstances, inadmissible cannot, we think, under the authorities, or on reason, be doubted. *Missouri P. R. Co. v. Johnson*, — Tex. —, 7 S. W. 838; *Texas & P. R. Co. v. Leggett*, — Tex. Civ. App. —, 86 S. W. 1066; *Western U. Teleg. Co. v. Christensen*, — Tex. Civ. App. —, 78 S. W. 744; *St. Louis Southwestern R. Co. v. McLeod*, — Tex. Civ. App. —, 115 S. W. 85. The treatment of this question by the court of civil appeals in the original opinion filed in the case is so thorough and satisfactory that we do not need to say more on this point.

2. On motion for rehearing the court of civil appeals set aside its judgment on

tr. v. Ginder, 1 Wis. 243 (witness incompetent on the ground of interest).

—where witness is testifying at the trial.

Thus, it has been held that the objection that a witness, being a party, cannot testify against another as to the contents of letters received from a deceased person whose estate is interested in the result of the suit, is not waived by cross-examination regarding the matter after the objection is overruled. *Scarborough v. Blackmar*, 108 Ala. 656, 18 So. 735.

So the objection to the testimony of the surviving party to a cause of action, in his own behalf, which is forbidden by statute, is not waived by cross-examining him only as to matters covered by his examination in chief. *Johnston v. Johnston*, 173 Mo. 91, 17 L.R.A. 166, 96 Am. St. Rep. 486, 73 S. W. 202.

The objection that a witness, who is a party defendant, cannot testify as to a personal transaction with plaintiff's intestate, is not waived by a cross-examination of such witness even though the facts are more fully brought out on such cross-examination than they had been in chief, where the court, in accordance with equity practice, made no ruling, and permitted the defendant to testify, to the end that the question might be fully presented and determined by the appellate court. *Donnell v. Braden*, 70 Iowa, 551, 30 N. W. 777.

The objection that a husband cannot testify in favor of his wife is not waived by a cross-examination as to matters touched upon in the examination in chief after the objection is overruled. *Gardner v. St. Louis, I. M. & S. R. Co.* 124 Mo. App. 461, 101 S. W. 684.

But where the objection that a wife, who is a party to a suit, is incompetent to testify as to matters occurring between her and her deceased husband, is overruled, and she testifies, but the objection is there-
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after sustained and the testimony excluded, the objection is waived where, after such exclusion, she is cross-examined as to such matters and the rejected evidence elicited anew; and such evidence cannot then be stricken out. *Ables v. Ackley*, 126 Mo. App. 84, 103 S. W. 974.

—where testimony is taken by deposition.

At the taking of the deposition of the complainant in a suit for the specific performance of a contract instituted by him as purchaser against the heirs of the deceased vendor, the objection that such complainant cannot testify as a witness in his own behalf as to the terms of the contract between himself and the deceased vendor is not waived by a mere cross-examination of the complainant, coupled with a timely objection to his competency previously interposed. *Goodlett v. Kelly*, 74 Ala. 213.

So, at the taking of the deposition of a party to a suit in which the adverse party is the representative of a deceased person, the objection that such witness cannot testify as to transactions with the deceased is not waived by a cross-examination of such witness as to such matters. *Bentley v. Bentley*, 72 Neb. 803, 101 N. W. 976; *Calwell v. Prindle*, 11 W. Va. 307.

And where on the trial the evidence in chief is excluded on the objection of the personal representative, on the ground that the witness is incompetent, the cross-examination should also be excluded on the objection of the opposite side; since it falls with it. *Bentley v. Bentley*, supra.

So, should such cross-examination be excluded on the objection of the personal representative. *Calwell v. Prindle*, supra.

In *Bentley v. Bentley*, 72 Neb. 803, 101 N. W. 976, supra, the court said: "The notary has no power to exclude testimony, but must receive all that is offered, noting the objections and exceptions of the parties, to be ruled upon at the trial. The

original hearing, and while adhering to its opinion that the testimony considered was inadmissible, ruled that since, on cross-examination, plaintiff in error caused the witness Tateman to repeat and reread the testimony theretofore objected to by her, that this constituted a waiver of her objection to same, and precluded her from complaining of the admission of the incompetent evidence. In support of this view the court cites the following authorities: *Eastham v. Hunter*, 98 Tex. 560, 86 S. W. 323; *Gammel-Statesman Pub. Co. v. Monfort*, — Tex. Civ. App. —, 81 S. W. 1029; *Sullivan v. Fant*, 51 Tex. Civ. App. 6, 110 S. W. 507; *Birkman v. Fahrenthold*, 52 Tex. Civ. App. 335, 114 S. W. 428; *Texas & N. O. R. Co. v. Broom*, — Tex. Civ. App. —, 114 S. W. 655; *Missouri, K. & T. R. Co. v. Pettit*, — Tex. Civ. App. —, 117 S. W. 894; *Kingsley v. Schmicker*, — Tex. Civ. App. —, 60 S. W. 331; *McDonald v. McCrabb*, 47 Tex. Civ. App. 259, 105 S. W. 238. That some of these authorities do sustain this position, notably *Sullivan v. Fant* and *Railway v. Petit*, supra, does not admit of question. That the position is, however, unsound to our minds seems to be beyond dispute. Nor when read in the light of the facts and issues then before

this court is this position sustained by the case of *Eastham v. Hunter*, 98 Tex. 560, 86 S. W. 323. A careful reading of the case, as contained in the official reports, and an inspection of the original record will demonstrate that the court was not then considering the admissibility of the testimony there discussed, but the language there used was with reference to its effect and probative force. In that case *Hunter* and others had sued *Eastham* and others for certain lands. An important issue in the case was: Was *B. Eastham*, then deceased, an innocent purchaser? To prove that *B. Eastham* did not have knowledge of such facts or any fact which would defeat his title, and the title of those claiming under him, as an innocent purchaser, the *Easthams* introduced one *Pace*, who testified that "at the time *Eastham* bought the land from me he did not know and did not have any knowledge, than that I had paid to *Robert Hunter* the full consideration named in the deed from *Robert Hunter* to me, but had reason to know that I had paid every cent called for in the said deed. If any part of the consideration named in the deed from *Robert Hunter* to me went to pay *Robert Hunter's* debt, *Mr. Eastham* did not know it." On cross-examination *Pace*

only safe manner in which a defendant can proceed in such a case is to make his objection to each question on the direct examination, and to cross-examine upon the theory that the direct examination may be admitted by the trial court. If the direct examination, however, is excluded at the trial upon his objections upon the ground that the witness is incompetent, the cross-examination falls with it for the same reason, if objected to, and the plaintiff is not entitled to use it independently. A different rule would be decidedly unfair, since a party might fail to cross-examine because he believed the trial court would exclude the examination in chief, while, if the trial court admitted it in evidence, he would be deprived of the benefit of cross-examination entirely."

In *Calwell v. Prindle*, 11 W. Va. 307, supra, the court said: "I do not understand that it has ever been held that a party makes a witness, produced and examined by his adversary, his witness simply by cross-examining the witness as to matters and facts to which he has testified in his testimony given in chief. He does not, by such cross-examination, admit the competency of the witness to testify as to those matters, any more than he does the truth of his evidence, or his integrity of character."

The incompetency of a witness whose deposition is being taken by commission is not waived by putting in cross-interrogatories. *Ogden v. Robertson*, 15 N. J. L. 124.

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Where the incompetency of a witness is discovered only during the progress of the examination in chief at the taking of his deposition, an objection to his competency then raised is not waived by subsequent cross-examination of such witness; and the deposition may be suppressed. *Rogers v. Dibble*, 3 Paige, 241.

Where an objection to the competency of a party as a witness is written at the commencement of the deposition, the objection is not waived by cross-examination. *Neilson v. Bowman*, 29 Gratt. 732.

—where testimony in equity is taken before a master.

In a suit by a widow against the heirs of her deceased husband to set aside an antenuptial contract on the ground of misrepresentations by the deceased as to the extent of his property, where the matter was referred to a master merely to take proofs, an objection to the competency of the widow to testify in her own behalf as to transactions with the deceased, made at the taking of testimony before the master was not waived by a cross-examination of the widow; since the master was given authority merely to take proofs, and not to pass upon the competency of testimony, and he merely notes the objections as made and leaves their validity to be determined by the court. *Achilles v. Achilles*, 137 Ill. 589, 28 N. E. 45.

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testified upon the same subject as follows: 'Eastham did not know anything about the transaction until after it was completed, and at the time of my transaction with him we discussed the matter fully.' . . . At the time I traded with Robert Hunter I knew that Eastham knew nothing about it, but when I traded with Eastham I then explained to him the whole transaction.'"

On the evidence adduced on the trial, the court of civil appeals held in effect that, under the undisputed facts, Eastham was not an innocent purchaser, and that there was no evidence or not sufficient evidence on this question to form an issue for submission to the jury. This was the question and the sole question which Judge Brown was discussing in that portion of the opinion which is relied on to sustain the final conclusion of the court of civil appeals. When the opinion is read in the light of the facts, and with reference to the question before the court, that it does not sustain and support the conclusion which seems to have been understood by some of the courts is manifest.

It would indeed be a strange doctrine, and a rule utterly destructive of the right and all the benefits of cross-examination, to hold a litigant to have waived his objection to improper testimony because by further inquiry he sought on cross-examination to break the force or demonstrate the untruthfulness of the evidence given in chief, in the event, as would most usually occur, that the witness should on cross-examination repeat or restate some or all of his evidence given on his direct examination. In this case it was a matter of prime importance to the plaintiff in error to test the accuracy of Tateman's evidence, to show the inaccuracy of his means of information, and if it could be done to place before the jury the fact or any evidences of his unworthiness. In view of the fact that his testimony related to the movement of many trains, identified largely by names, it was practically impossible to conduct any intelligent or effective cross-examination without, as a basis of such inquiry, causing the witness to repeat, at least substantially, the testimony theretofore given by him. Believing and holding that the court of civil appeals erred in its judgment and opinion that the plaintiff in error had waived her objection to the incompetent evidence referred to above, its judgment is hereby reversed, and the cause will be remanded for further proceedings in accordance with law.

Petition for rehearing denied.
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WASHINGTON SUPREME COURT.

ROSCOE BRITTON, by Guardian *ad Litem*,
Resp't.,

v.

WASHINGTON WATER POWER COMPANY, Appt.

(59 Wash. 440, 110 Pac. 20.)

Evidence — *res gestæ* — statements of person regaining consciousness.

1. Statements made by one rendered unconscious by a personal injury, immediately upon his regaining consciousness, eight days later, as to the cause of the injury, are admissible in evidence against one alleged to be responsible therefor, and the fact of the appearance of semiconsciousness before full consciousness returns goes to the weight of the evidence, and not to its admissibility.

Same — declarations of bystander.

2. The declaration of a passenger on a street car at a time when the conductor is attempting to drive a boy off the step, to the effect that he is off, before the conductor opens the door, is admissible in evidence as *res gestæ*, in an action by the boy to hold the company liable for injury alleged to have been caused by the conductor kicking him off the car.

Appeal — evidence — improper objections.

3. The objection that an answer of a witness was not responsive to the question propounded to him is not available on appeal, if not taken at the trial, where the answer was ruled out because inadmissible.

(August 1, 1910.)

Note. — Does the fact that one was not a participant or actor in an accident or affray render his statements or exclamations inadmissible as *res gestæ*.

The position taken in this case, that declarations of a character, and uttered under circumstances, which would make them otherwise admissible as *res gestæ*, are not to be excluded because they were uttered by a bystander who was not an actor or participant in the transaction, except as he was made such by the declarations themselves, is sustained by the great weight of authority, as shown in the note to Louisville R. Co. v. Johnson, 20 L.R.A.(N.S.) 133.

The same position is taken, at least by a majority of the court, in Cromeenes v. San Pedro, L. A. & S. L. R. Co. — Utah —, 109 Pac. 10; and while there are expressions in the opinion of McCarthy, J., which, taken apart from the context, might be regarded as sustaining the contrary position, it is apparent from his opinion as a whole that the only sense in which the person whose statements or declarations are offered as *res gestæ* must be a participant or actor in the transaction is that the declarations or statements must be so contemporaneous, and so calculated to elucidate the event or transaction, as to be in themselves, as it were, a

APPEAL by defendant from a judgment of the Superior Court for Spokane County in plaintiff's favor in an action brought to recover damages for personal injuries for which defendant was alleged to be responsible. Reversed.

The facts are stated in the opinion.

Messrs. Post, Avery, & Higgins for appellant.

Messrs. Plummer & Latimer, for respondent:

The court did not err in permitting the plaintiff, when on the stand as a witness, over defendant's objection, to state what he told his mother concerning the accident, and how it happened, eight days thereafter.

Dixon v. Northern P. R. Co. 37 Wash. 310, 68 L.R.A. 895, 107 Am. St. Rep. 810, 79 Pac. 943, 2 A. & E. Ann. Cas. 620.

The court did not err in refusing to permit the defendant to prove that, at the time of the accident, when the conductor started to open the car door, someone on the rear platform, who was observing the transaction said, "The boy is off!"

Ibid.

Gose, J., delivered the opinion of the court:

This is a suit to recover damages for personal injuries sustained by a minor. The

part of the transaction, and thus make the person who uttered them an actor or participant therein. The question in issue in that case was the negligence of an engineer in charge of a train that ran over a boy in the street, and the declarations which the majority of the court held admissible, and the minority inadmissible, as *res gestæ*, were those of an eyewitness of the accident, who walked about a car's length, to where the engineer was standing, and said to him: "You have done a damn fine job. Why didn't you stop before you ran over him?" In arguing against the admissibility of these declarations as *res gestæ*, the minority opinion not only alluded to the fact that the witness did no act which contributed to the unfortunate occurrence, and was in no way connected with it, except as a mere spectator, but also to the fact that the statement made by him to the engineer did not tend to explain or illustrate any fact or circumstance leading up to or in any way connected with the accident. It is to be observed that the latter point in itself, if well founded, would have been sufficient to exclude the declarations as *res gestæ*, irrespective of the question whether they proceeded from a participant or actor in the transaction or not. The majority of the court were of the opinion that the declarations were in themselves properly admissible as *res gestæ*, and that they were not to be excluded because they were made by a mere bystander, who was otherwise not a participant or actor in the transaction. The opinion of McCarthy, J., on this point, 33 L.R.A. (N.S.)

fact asserted and relied upon for a recovery is that Roscoe Britton, a minor thirteen years of age, was stealing a ride on the step of one of the defendant's street cars, and that the conductor opened the door of the vestibule and kicked him off, causing him serious injury. There was a verdict and judgment for the plaintiff. The defendant has appealed. The admitted facts are that the appellant, at the time of the happening of the accident, was a common carrier of passengers for hire, and operating electric cars in the city of Spokane; that the car upon which the accident occurred has a vestibule, opening on each side onto steps used by passengers in entering and leaving the car; that the left door is kept closed, and the right one open, when the car is in service, and that the boy was stealing a ride on the step on the closed side of the car at the time he sustained the injury. The appellant asserts that the boy fell from the step, whilst he insists that he was kicked off the car by the conductor. This was the chief issue at the trial. It is conceded that, immediately after the accident happened, the boy was taken to his home in an unconscious condition.

The boy and his mother, who is also his guardian *ad litem*, were permitted to testify in substance that the boy remained uncon-

seems to lend some support to the suggestion made in the note already referred to, that the view that declarant must have been an actor or participant in the transaction in the sense that he must have been the victim of the transaction, or have had some responsibility connected therewith, may have grown out of a misapprehension of the language employed by the courts in expressing the inherent necessity that the declarations must have been so close in point of time, and of so spontaneous and unreflective a character, and so calculated to elucidate the transaction, as to make the declarant, as it were, an actor or participant therein. It is to be observed, as pointed out in that note, that participation in this sense is essential in all cases to render the declarations admissible as *res gestæ*, whether the declarant was otherwise connected with the transaction or not; and therefore cases that merely insist upon participation in this sense do not lend any real support to the view that the mere fact that declarations or statements proceed from one not an actor or participant in the transaction renders inadmissible statements which would otherwise be admissible as *res gestæ*. The opinion of the chief justice in the Cromeenes Case approves the suggestion in the note that, if there is any difference at all in this respect between one who was an actor and participant and one who was not, it would seem to be in favor of the declarations of the nonactor or participant, assuming that they were otherwise proper matter of *res gestæ*:

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scious for a period of eight days, when he became conscious, and at once stated to the mother that the conductor kicked him off the car. The appellant contends that this was error. We think the statement was a part of the *res gestæ*. One exception to the rule excluding hearsay evidence is that, when something has occurred, startling enough to produce nervous excitement, spontaneous utterances of parties present are admissible in evidence as a part of the *res gestæ*. It is not always necessary that the statement be made at the exact time that the shock occurs. The material inquiry always is whether the statements offered as evidence were made at a time and under such circumstances as to induce the belief that they were not the result of reflection or premeditation. They derive their admissibility and credibility purely from the circumstances out of which they arise. "The utterance must have been before there has been time to contrive and misrepresent; i. e., while the nervous excitement may be supposed still to dominate, and the reflective powers to be yet in abeyance." 3 Wigmore, Ev. § 1750. "There is no imaginary line somewhere between a few hours and a few days, or a few weeks, on one side of which declarations in favor of a party are admissible in evidence, while on the other they are inadmissible. Unless such complaints form a part of the *res gestæ*, they cannot be admitted. And if they are so far detached from the occurrence as to admit of the deliberate design and be the product of a calculating policy on the part of the actors, then they cannot be regarded as a part of the *res gestæ*." Kennedy v. Rochester City & B. R. Co. 130 N. Y. 654, 29 N. E. 141. "The time of the occurrence of the principal act is sometimes, by reason of some special circumstance, extended forward so as to make it coincident and connected with subsequent declarations by constructive continuity of time; as, for instance, when the party making the declarations, having become unconscious at the very moment of the occurrence of the principal act, the declarations are made by him at the very moment of his regaining consciousness; under such conditions the act and the declarations are said to be simultaneous by relation, the declarations being spontaneous." 24 Am. & Eng. Enc. Law. 2d ed. p. 685. See also Walters v. Spokane International R. Co. 58 Wash. 293, 108 Pac. 593.

In the case last cited we said that it is not always essential that the declarations and principal occurrence shall concur in point of time, but that in many instances the fact that a considerable period of time has intervened does not destroy their admissibility as evidence. We further said

that the circumstances of each case "should be carefully weighed by the trial judge in exercising his sound discretion." The controlling consideration in each case is, Was the declaration a spontaneous, impulsive statement of a fact? If so, it is a part of the occurrence and is admissible. Dixon v. Northern P. R. Co. 37 Wash. 310, 68 L.R.A. 895, 107 Am. St. Rep. 810, 79 Pac. 943, 2 A. & E. Ann. Cas. 620.

Tested by the principles we have stated, it is clear that the evidence was properly admitted. The declarations were made, as the witnesses assert, as soon as consciousness was restored. There had been no opportunity for reflection or deliberation. They were as much a part of the occurrence as if they had been made when the boy was raised from the street, immediately after falling. So far as he was concerned, there was no conscious intervening time between the injury and the declaration.

The appellant criticizes the form of the questions, and urges that the evidence does not show that the statement was made as soon as the boy regained consciousness. We do not think a fair reading of the evidence warrants the criticism. The fact that Dr. Martin testified that the boy was semiconscious on the fifth or sixth day after the accident does not make the declaration of the boy inadmissible. It goes to the weight, and not to the admissibility, of the declaration as evidence. But it is said: "If such evidence is admissible, then unscrupulous persons can dishonestly flood the record with evidence that can be neither combated nor anticipated, for the sole purpose of mulcting a defendant in damages." The answer is that no rule of evidence has been formulated by man that can prevent perjury. Litigants must, in the last analysis, rely upon the justice and good sense of juries. The authorities cited by counsel from other jurisdictions need not be reviewed, as they are not in harmony with the view hitherto taken by this court.

One of the respondent's witnesses upon direct examination stated that, when the boy was observed riding upon the step, the conductor pulled the bell cord and started to open the door, when someone said, "The boy is off!" This statement was stricken on motion of the respondent. The boy testified that, when he got onto the step, the door was closed, and that the conductor opened the car door and kicked him off. The appellant insisted at the time the statement was stricken, and insists here, that it was admissible as a part of the *res gestæ*. The learned trial court, however, ruled that it was inadmissible. In this, we think, he committed prejudicial error. If the declaration of the boy is admissible as forming a

part of the occurrence, as we have held, it would seem to follow that the exclamation of a bystander, contemporaneous with the occurrence, is also admissible. The exclamations of the third parties present are as much a part of the *res gestæ* as those of the parties themselves. 3 Wigmore, Ev. § 1755; Johnson v. St. Paul & W. Coal Co. 126 Wis. 492, 105 N. W. 1048; Dale v. Colfax Consol. Coal Co. 131 Iowa, 67, 107 N. W. 1096; Harrill v. South Carolina & G. Extension R. Co. 132 N. C. 655, 44 S. E. 109; Gulf, C. & S. F. R. Co. v. Tullis, 41 Tex. Civ. App. 219, 91 S. W. 317; Seawell v. Carolina C. R. Co. 133 N. C. 515, 45 S. E. 850; Atlantic Coast Line R. Co. v. Crosby, 53 Fla. 400, 43 So. 318; Wharton, Ev. § 262; 24 Am. & Eng. Enc. Law, 2d ed. pp. 685, 686.

Johnson v. St. Paul & W. Coal Co. was an action to recover damages for personal injuries. The plaintiff, a hatch tender, alleged that he was struck by a sheave hook used to lower coal buckets into the vessel. A witness, having testified that he saw the boy fall, was permitted to state that a moment later he heard someone say: "The hook hit him!" The court said that the exclamation was clearly a part of the *res gestæ*. In Dale v. Colfax Consol. Coal Co. the plaintiff, a brakeman, attempting to alight to make a coupling, fell to the track, and was run over by the car on which he had been riding. The negligence charged was that the defendant's employees failed to stop the train after they knew of the plaintiff's peril. It was held, as bearing on the question whether the conductor had actual knowledge of the plaintiff's situation, that the statements of persons on the car in the presence of the conductor, and their acts within the scope of his observation, could be shown as tending to establish his actual knowledge. In Harrill v. South Carolina & G. Extension R. Co. a personal injury suit, the deceased was killed, while moving an engine over a bridge, by the falling of the bridge. The engine had crossed that part of the bridge over the water, and had reached the trestle on the ground, when bystanders exclaimed: "Jake is safe!" The trestle suddenly gave way, and the engine and tender were thrown back and fell into the water. It was held that the exclamation was competent evidence, going to show the dangerous condition of the bridge, the peril of crossing, and the effect the effort to cross had on the bystanders. In Walters v. Spokane International R. Co. we held that there was a large discretion in the trial judge in receiving and rejecting evidence of this nature. A due regard for the administration of justice, however, forbids that declarations forming a part of the occurrence out of which the cause of action

springs shall be admitted as to one litigant and denied as to another. The exclamation was so clearly a part of the *res gestæ*, and so vitally affected the issue to which it referred, that its rejection was highly prejudicial. The respondent relies upon Dixon v. Northern P. R. Co. 37 Wash. 310, 68 L.R.A. 895, 107 Am. St. Rep. 810, 79 Pac. 943, 2 A. & E. Ann. Cas. 620. In that case it was said that "there is no showing that the stranger, who was not able to be found at the trial, was in any way connected with the accident." In the case at bar the evidence shows that there were passengers upon the car who were not produced as witnesses. The exclamation, "The boy is off!" shows that it was made under the pressure of excitement, and that it was the spontaneous, impulsive statement of one who believed that it expressed the truth.

The respondent asserts that the question is not properly before us, for the reason that the statement was not responsive to the question propounded to the witness. The record, however, shows that the appellant's counsel stated to the court that the exclamation was a part of the *res gestæ*, and reserved his exception to the ruling. Neither the objection to the statement nor the ruling of the court was placed upon the technical ground that the answer was not responsive to the question, but upon the broad ground that it was not competent. The appellant was not required to pursue the matter.

The judgment is reversed.

Rudkin, Ch. J., and Chadwick and Fullerton, JJ., concur.

SOUTH CAROLINA SUPREME COURT.

STATE OF SOUTH CAROLINA

v.

ED. L. ABBOTT et al., Appts.

(— S. C. —, 70 S. E. 6.)

Criminal law — suspension of sentence — power of court.

1. A court has no power to suspend a sentence of imprisonment during the good behavior of the convict.

Note. — Power of court to suspend sentence or stay execution of sentence.

It may be stated generally that a court has power temporarily to suspend sentence in order to afford time for motions for new trials, appeals, etc., and to inform itself as to sentence to be pronounced. A conflict, however, exists as to the power of courts to suspend sentence indefinitely, some decisions holding such a suspension

Same — effect — enforcement of sentence.

2. The invalidity of an attempt by a court to suspend a sentence of imprisonment during good behavior of the convict does not affect the validity of the sentence, and it may be enforced even though the time covered by the sentence has expired.

Same — shortening of term by statute — effect.

3. The right to require a convict whose sentence was illegally suspended by the court, to serve his full term of imprisonment, is not affected by the fact that, since suspension took effect, the legislature shortened the term for which persons convicted of the offense involved could be imprisoned, to a period less than that imposed by the original sentence.

(February 2, 1911.)

to be an infringement upon the executive power to reprieve and pardon.

Power to suspend sentence temporarily.

Little conflict exists upon the question of the power of courts to suspend sentence temporarily. It is generally held, without mention being made of statutory authority, that sentence may be suspended for a reasonable time. *Ragland v. State*, 55 Fla. 157, 46 So. 724; *Harris v. Nixon*, 27 App. D. C. 94; *People v. Mueller* (Ill. C. C.) 4 Crim. L. Mag. 725; *People v. Reilly*, 53 Mich. 260, 18 N. W. 849; *State v. Addy*, 43 N. J. L. 113, 39 Am. Rep. 547; *United States v. Folsom*, 8 N. M. 651, 46 Pac. 447; *People v. Blackburn*, 6 Utah, 347, 23 Pac. 759; *United States v. Wilson*, 46 Fed. 748.

And it is expressly held in some of the decisions that this right exists at common law. *People ex rel. Dunnigan v. Webster*, 14 Misc. 617, 36 N. Y. Supp. 745, affirmed in 1 App. Div. 631, 37 N. Y. Supp. 1148; *People v. Graves*, 31 Hun, 382; *People v. Harrington*, 3 N. Y. Crim. Rep. 139; *People ex rel. Forsyth v. Court of Sessions*, 141 N. Y. 288, 23 L.R.A. 856, 36 N. E. 386, 15 Am. Crim. Rep. 675; *State v. Hilton*, 151 N. C. 687, 65 S. E. 1011.

And courts have power to suspend sentence pending an appeal. *People v. Felker*, 61 Mich. 110, 27 N. W. 869; *State ex rel. Cary v. Langum*, — Minn. —, 127 N. W. 465; *King v. Johnston*, 16 Kan. C. C. 296.

And a court may suspend sentence after conviction, to ask advice of the upper court on points of law which arose upon the trial. *People v. Barmo*, 6 Park. Crim. Rep. 657.

And they may suspend sentence for the purpose of enabling the defendant to move for a new trial. *Weaver v. People*, 33 Mich. 296, 1 Am. Crim. Rep. 552; *People v. Brown*, 54 Mich. 15, 19 N. W. 571; *People v. Kennedy*, 58 Mich. 372, 25 N. W. 318; *Re Strickler*, 51 Kan. 700, 33 Pac. 620; *Re Beck*, 63 Kan. 57, 64 Pac. 971; *State v. Schierhoff*, 103 Mo. 47, 15 S. W. 151.

And to enable the court to determine what sentence should be imposed. *People* 33 L.R.A. (N.S.)

APPEAL by defendants from a judgment of the General Sessions Circuit Court for Spartanburg County, convicting them of gaming. Affirmed.

The facts are stated in the opinion.

Messrs. C. P. Sims and H. E. DePass, for appellants:

Sentences, unless legally stayed,—that is, by appeal,—commence to run at once, and continue in full force from that date until they cease to operate by their own terms; and after the period or term of a sentence has expired the court loses further jurisdiction of the defendant, and all orders and judgments rendered in the case after the expiration of the term of the sentence are void.

Re Markuson, 5 N. D. 180, 64 N. W. 939; *State v. Voss*, 80 Iowa, 467, 8 L.R.A.

v. Kennedy, 58 Mich. 372, 25 N. W. 318; *People v. Felker*, 61 Mich. 110, 27 N. W. 869.

And for the purpose of awaiting the result of another pending trial of the defendant. *People v. Robertson*, 6 Cal. App. 514, 92 Pac. 498; *Ex parte Williams*, 26 Fla. 310, 8 So. 425.

But where trial of another indictment is not prosecuted with despatch, the court will not stay judgment on an indictment for not repairing a bridge. *Rex v. Southampton*, 2 Chitty, 215.

It is held that every reasonable presumption will be made on appeal in favor of the propriety of the court's actions in granting a suspension of sentence. *Harris v. Nixon*, 27 App. D. C. 94; *Smith v. Hess*, 91 Ind. 424.

And it was held in *Webster v. State*, 43 Ohio St. 696, 4 N. E. 92, that the circuit court had power to suspend sentence pending a hearing on error, and that this power was not defeated by a statute providing for the execution of the death sentence, unless suspended by the supreme court, or two judges thereof.

But it is doubtful whether a magistrate making a summary conviction can suspend the issue of the warrant of commitment. *Re Lynch*, 12 Can. C. C. 141.

And it has been held that the court of oyer and terminer ought not to delay sentence after a verdict of guilty, for the purpose of having the decision reviewed, except in cases of great doubt. *Colt v. People*, 1 Park. Crim. Rep. 611.

And it has been held that even in capital cases it is seldom necessary to delay the sentence, since the governor is authorized to act in such cases. *Ibid.*

And it has been held that in cases where the law gives the judges discretion over the quantum of punishment, they may suspend sentence, but that it is irregular in other cases to annex to the sentence any condition for its subsequent remission. *State v. Bennett*, 20 N. C. 170 (4 Dev. & B. L. 43).

767, 45 N. W. 898; *Re Strickler*, 51 Kan. 700, 33 Pac. 620; *Weaver v. People*, 33 Mich. 296, 1 Am. Crim. Rep. 552; *Com. v. Foster*, 122 Mass. 317, 23 Am. Rep. 326, 2 Am. Crim. Rep. 499; *Re Webb*, 89 Wis. 354, 27 L.R.A. 356, 46 Am. St. Rep. 846, 62 N. W. 177, 9 Am. Crim. Rep. 702; *Neal v. State*, 104 Ga. 509, 42 L.R.A. 190, 69 Am. St. Rep. 175, 30 S. E. 858; *Miller v. Evans*, 115 Iowa, 101, 56 L.R.A. 101, 91 Am. St. Rep. 143, 88 N. W. 198; *Fults v. State*, 2 Sneed, 232; *State v. Crook*, 115 N. C. 763, 29 L.R.A. 260, 20 S. E. 514; *People ex rel. Forsyth v. Court of Sessions*, 141 N. Y. 288, 23 L.R.A. 856, 36 N. E. 386, 15 Am. Crim. Rep. 675; *Tuttle v. Lang*, 100 Me. 123, 60 Atl. 893; *People ex rel. Boenert v. Barrett*, 202 Ill. 287, 63 L.R.A. 82, 95

Am. St. Rep. 230, 67 N. E. 23; *People v. Blackburn*, 6 Utah, 347, 23 Pac. 759; *Re Flint*, 25 Utah, 338, 95 Am. St. Rep. 853, 71 Pac. 531; *People v. Kennedy*, 58 Mich. 372, 25 N. W. 318; *United States v. Wilson*, 46 Fed. 748; *People ex rel. Smith v. Allen*, 155 Ill. 61, 41 L.R.A. 473, 39 N. E. 568; *Weaver v. People*, 33 Mich. 296, 1 Am. Crim. Rep. 552; *People v. Morrisette*, 20 How. Pr. 118, 2 Am. Crim. Rep. 475; *Ex parte Clendenning*, 1 Okla. Crim. Rep. 227, 19 L.R.A.(N.S.) 1042, 97 Pac. 650.

Mr. J. C. Otts, for the State:

The attempted suspension of the execution of so much of the sentence as imposed imprisonment upon the defendants was void.

Ex parte Nixon, 2 S. C. 4; *State v. Full-*

And in *White v. State*, 134 Ala. 197, 32 So. 320, it was held that the mere prosecution of an appeal does not have the effect of suspending sentence, but that only an order of the court which pronounced sentence can suspend it.

Where a writ of error is taken out before sentence has been pronounced, an order staying proceedings until determination of the case on error will be denied, with permission, however, to take out a new writ of error if sentence is pronounced, and to file another application for a stay of proceedings. *People v. West*, 143 Mich. 586, 107 N. W. 283.

—indefinitely.

There is a conflict among the decisions as to whether a court has power to suspend sentence indefinitely.

Some cases deny the power of the court to suspend sentence indefinitely, since it infringes on the pardoning power vested in the executive branch of the government. *Grundel v. People*, 33 Colo. 191, 108 Am. St. Rep. 75, 79 Pac. 1022; *Republic v. Pedro*, 11 Haw. 287; *People ex rel. Smith v. Allen*, 155 Ill. 61, 41 L.R.A. 473, 39 N. E. 568; *People ex rel. Boenert v. Barrett*, 202 Ill. 287, 63 L.R.A. 82, 95 Am. St. Rep. 230, 67 N. E. 23; *Gray v. State*, 107 Ind. 177, 8 N. E. 16; *Re Strickler*, 51 Kan. 700, 33 Pac. 620; *Tuttle v. Lang*, 100 Me. 123, 60 Atl. 892; *Com. v. Maloney*, 145 Mass. 205, 13 N. E. 482; *People v. Brown*, 54 Mich. 15, 19 N. W. 571; *Re Flint*, 25 Utah, 338, 95 Am. St. Rep. 853, 71 Pac. 531; *United States v. Wilson*, 46 Fed. 748.

The court in *People ex rel. Smith v. Allen*, supra, said: "Our Constitution confers the pardoning power upon the executive branch of the state government, and the governor alone can prevent the infliction of punishment after a legal conviction. Courts may undoubtedly set aside verdicts of guilty, and grant new trials, or arrest the judgment; but they have no power to allow the conviction to stand, and at the same time defeat its operation by an indefinite postponement of sentence. If 33 L.R.A.(N.S.)

the conviction is wrongful, or the punishment fixed by the jury excessive, or if material and substantial errors have intervened in the finding and return of the indictment or upon the trial, the court has ample power, and it is its duty, to interfere; but when that relief is denied the prisoner, it is the plain duty of the court to pronounce judgment."

See also *Ex parte Peterson*, — Idaho, —, — L.R.A.(N.S.) —, 113 Pac. 729, holding that, by an indefinite suspension of sentence, the court loses jurisdiction of the defendant, and cannot thereafter order his commitment.

And a police magistrate has no such power. *Blazier v. Keffer*, — N. J. L. —, 75 Atl. 439.

In other cases it has been held that an indefinite suspension of sentence is within the power of the court. *People v. Mueller* (Ill. C. C.) 4 Crim. L. Mag. 725; *State ex rel. Buckley v. Drew*, 75 N. H. 402, 74 Atl. 875; *State ex rel. O'Connor v. Drew*, — N. H. —, 76 Atl. 191.

And in 9 Am. L. Rev. 600, an account taken from a newspaper is given of the suspension of sentence in a case of manslaughter, upon the defendant's own recognition, where the defendant was the wife of the deceased, and upon great provocation had thrown an instrument which resulted in her husband's death.

And judgment was suspended in *Reg. v. Richardson*, 4 Jur. 104, 8 Dowl. P. C. 511, upon condition that defendant should not again repeat the offense. No question of the court's power, however, seems to have been raised in the case.

It was held in *State v. Brewer*, — N. J. L. —, 59 Atl. 31, that a writ of error would not lie where the court had suspended sentence, since the writ lies only to review a final judgment.

The fact that the order of suspension, entered at the instance of the prisoner, after judgment and sentence, does not show that he was present, does not vitiate the trial, judgment and sentence. *State v. Young*, 50 W. Va. 96, 88 Am. St. Rep. 846, 40 S. E. 334.

McCord, L. 178; *State v. Smith*, 1 Bail. L. 283, 19 Am. Dec. 679; *State v. Kitchens*, 2 Hill, L. 612, 27 Am. Dec. 410; *State v. Chancellor*, 1 Strobb. L. 350, 47 Am. Dec. 557; 2 Hawk, P. C. chap. 21, § 1.

Woods, J., delivered the opinion of the court:

Under a plea of guilty to an indictment for gaming against the defendants, Ed. L. Abbott and Frank Dearman, the following sentence was imposed by the Honorable R. C. Purdy, Presiding Judge, at the July term of the court of general sessions for Spartanburg county: "It is the sentence and judgment of the court that the defendants, E. L. Abbott and Frank Dearman, do each pay a fine of \$60, and do each per-

suspension upon suggestion of insanity.

The court has power to suspend sentence where there is reasonable ground to believe defendant insane. *Ince v. State*, 77 Ark. 416, 88 S. W. 818; *People v. Knott*, 122 Cal. 410, 55 Pac. 154; *Williams v. State*, 45 Fla. 128, 34 So. 279; *State ex rel. Chandler*, 45 La. Ann. 696, 12 So. 884; *Bonds v. State*, Mart. & Y. 142, 17 Am. Dec. 795.

And the power of the judge before whom an application for an examination as to the sanity of one convicted of a capital offense is authorized is necessarily implied from his authority to make the investigation. *State v. Barker*, 79 Neb. 361, 112 N. W. 1143, 113 N. W. 197.

And in some states it is provided by statute that in case a defendant is found insane after verdict, and before sentence, he shall be confined in an asylum until he becomes sane, when sentence shall be pronounced. *State v. Helm*, 69 Ark. 167, 61 S. W. 915.

It was held in *State v. Brinyea*, 5 Ala. 241, that if a person after verdict, and before sentence, becomes insane, it is a good reason to stay sentence.

And it was held in *State v. Vann*, 84 N. C. 722, that where the defendant in a capital case, after conviction, suggests insanity, the judgment must be suspended until this issue can be tried; and if such suggestion is made after judgment, execution must be stayed.

But where the jury have passed on the defendant's sanity, and no change in his condition is shown to have taken place, no reason for suspending sentence is shown. *State v. Brinyea*, supra; *Nobles v. Georgia*, 168 U. S. 398, 42 L. ed. 515, 18 Sup. Ct. Rep. 87.

And where the court is satisfied that there is no doubt as to the sanity of one who has been found guilty of murder, he may pronounce sentence, although a plea of insanity had been interposed after verdict. *Bonds v. State*, Mart & Y. 142, 17 Am. Dec. 795.

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form hard labor upon the public works of Spartanburg county for one year or each be imprisoned in the jail of said county, or the state penitentiary, at hard labor, for one year. Upon the payment of the fine imposed above this sentence will be suspended as to either or both defendants paying their fines, respectively, as to imprisonment during the good behavior of the defendants, respectively."

The defendants paid the fines imposed, and have since been at large. In July, 1910, orders were made by Hon. W. B. Gruber, Special Judge, reciting that it had been made to appear to the court that the defendants had violated the terms on which the sentence of imprisonment was suspended, and requiring the defendants to show

And after a conviction in a case where the jury have found the defendant sane at the time the crime was committed, the court will not entertain a plea that the defendant became insane after the commission of crime, which is offered when the defendant is called for sentence, where there are no corroborative affidavits filed or any fact stated which might move the court to further inquiry. *Com. v. Buccieri*, 153 Pa. 535, 26 Atl. 228.

It was held in *Wilson's Case*, 2 Pa. Co. Ct. 575, that, in case of the prisoner's alleged insanity, when the object was to stay the execution, the proper application was to the governor, who was the one empowered to act effectually in the matter.

And it was held in *Cribb v. Parker*, 119 Ga. 298, 46 S. E. 110, that after the date of the passage of an act providing for trials or inquisitions after conviction, as to the sanity of persons accused of capital offenses, a judge of the superior court could not entertain an original application for an inquisition, or grant an order suspending sentence.

And in this case it was held that even if the decision of a judge in refusing to entertain an application for an inquisition as to defendant's sanity would authorize the tender of a bill of exceptions, the judge, when signing such bill, has no authority to suspend sentence merely because the bill of exceptions has been signed. *Ibid*.

—power to suspend part.

A court cannot impose a fine at one term and defer sentence of imprisonment to a subsequent term. The judgment, when pronounced, must embrace the whole of the punishment. *People v. Felker*, 61 Mich. 110, 27 N. W. 869.

And a court, after sentencing a defendant found guilty on a number of counts of an information, cannot, after having sentenced him for one of the offenses, and after the defendant has served a part of the imprisonment, sentence him on the other offenses, since a single judgment should be

cause "why the stay as to the sentence heretofore imposed should not be revoked and said sentence fully enforced." By their return, the defendants first took the position that there was nothing before the court to show that they had violated the condition on which the sentence had been suspended. Thereafter the court took testimony tending to prove that the defendants, since the sentence was imposed, had again violated the statute against gambling. As a further return, and as a ground for arrest of judgment, the defendants took the position that Judge Purdy had no authority to suspend the sentence during good behavior, and that the effect of his attempt to exercise such power, and the failure to en-

force the sentence of imprisonment in consequence of such attempted suspension, was to make the sentence void, and leave the court powerless to enforce it at this time.

Critical comment on the numerous cases decided in the several states on the subject of the extent of the power of the trial court to suspend a sentence imposed on a convict would not be enlightening. They are irreconcilable in their reasoning and conclusions. Some courts hold that, under the common law, the trial court has the power to suspend a sentence imposed, whenever, in the opinion of the court, the ends of justice would be promoted by the suspension, and that this power is unaffected by the constitutional provisions vesting the

declared. *Re Beck*, 63 Kan. 57, 64 Pac. 971; *Com. v. Foster*, 122 Mass. 317, 23 Am. Rep. 326, 2 Am. Crim. Rep. 499.

And where a court orders costs and a fine paid, and suspends further sentence, it amounts to a judgment, and the court cannot, at a subsequent term, impose further punishment. *Com ex rel. Nuber v. Keeper of Workhouse*, 6 Pa. Super. Ct. 420; *Whitney v. State*, 6 Lea, 247.

And an order that sentence be suspended on payment of costs so long as the defendant shall abate the nuisance of obstructing a culvert, and keep it clear, is a rendition of judgment; and the declaration that sentence was suspended is contrary to the fact, and no reserve power remains in the court further to punish the offender. *State v. Addy*, 43 N. J. L. 113, 39 Am. Rep. 547.

So, where the effect of a sentence as a whole is that the accused should be released upon payment of a certain sum, the recorder has no authority to add a further sum to the judgment, and provide that it shall be indefinitely suspended during good behavior. *Gordon v. Johnson*, 126 Ga. 584, 55 S. E. 489.

And under a statute giving a court power to impose a fine or an alternative sentence to hard labor, where a question of law is reserved, and a judgment of conviction entered, and fine assessed, the court cannot, at a subsequent term, after the appellate court has affirmed the judgment, sentence the defendant to hard labor. *Ex parte State*, 94 Ala. 431, 10 So. 549.

But where a requirement to pay costs is imposed at the term when a verdict is rendered, and further sentence is suspended, sentence may be pronounced at a subsequent term, since the costs are not a part of the sentence. *Ex parte Williams*, 26 Fla. 310, 8 So. 425; *Gibson v. State*, 68 Miss. 241, 8 So. 329; *State v. Crook*, 115 N. C. 760, 29 L.R.A. 260, 20 S. E. 513.

And a court may impose sentence on one count of an indictment, and suspend sentence on other counts, where the offenses set forth are distinct and such as another indictment would lie for. *United States v. Blaisdell*, 3 Ben. 132, Fed. Cas. No. 14,-608.

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—statutes regulating suspension.

In some states by statute the court, with the consent of the defendant, is authorized to place a case on file after conviction, in case of extenuating circumstances, pendency of like case on appeal, or other sufficient cause. *Marks v. Wentworth*, 199 Mass. 44, 85 N. E. 81; *Com. v. Dowdican*, 115 Mass. 133.

But the court cannot make an order without the defendant's consent, and thereby render him indefinitely subject to be sentenced. *Marks v. Wentworth*, *supra*.

In New York it is held that the court of special sessions has the power at common law to suspend sentence indefinitely or for a limited period; and that this power is recognized, if not expressly given, by statute. *People ex rel. Dunnigan v. Webster*, 14 Misc. 617, 36 N. Y. Supp. 745; *People v. Graves*, 31 Hun, 382; *People v. Harrington*, 3 N. Y. Crim. Rep. 139.

And in *People v. Markham*, 114 App. Div. 387, 99 N. Y. Supp. 1092, it was held that power to suspend sentence after conviction was conferred by statute.

And it was held in *Ex parte Cameron*, 81 Ala. 87, 1 So. 20, that by statute, where any question of law is reserved for the appellate court, execution of sentence must be suspended until the decision of the court.

And courts are authorized by statute in some jurisdictions to release a defendant after conviction, upon probation. *King v. Bonnevillie*, 38 N. S. 560; *Spade v. State*, 44 Ind. App. 529, 89 N. E. 604; *Smith v. Hess*, 91 Ind. 424; *King v. Davies* [1909] 1 K. B. 892, 78 L. J. K. B. N. S. 363, 100 L. T. N. S. 305, 73 J. P. 151, 25 Times L. R. 279, 21 Cox, C. C. 776.

Whether a petition for probation should be granted rests in the discretion of the trial court. *People v. Bartley*, 12 Cal. App. 773, 108 Cal. 868; *People v. Johnson*, 9 Cal. App. 233, 98 Pac. 682.

A statute authorizing a court to suspend sentence in a criminal case after conviction has been held not to encroach upon the constitutional power of the executive to grant reprieves and pardons. *People v. Stickle*, 156 Mich. 557, 121 N. W. 497;

pardoning power in the governor, and requiring that the several departments of the government shall be independent of each other. *People ex rel. Forsyth v. Court of Sessions*, 141 N. Y. 288, 23 L.R.A. 856, 36 N. E. 386, 15 Am. Crim. Rep. 675; *Weber v. State*, 58 Ohio St. 616, 41 L.R.A. 472, 31 N. E. 116. Other courts deny that the judge of a trial court possesses such discretionary power to suspend sentence unless the power be conferred by statute. *Gray v. State*, 107 Ind. 177, 8 N. E. 16; *Miller v. Evans*, 115 Iowa, 101, 56 L.R.A. 111, 91 Am. St. Rep. 143, 88 N. W. 198; *Neal v. State*, 104 Ga. 509, 42 L.R.A. 190, 29 Am. St. Rep. 175, 30 S. E. 858; *Re Markuson*, 5 N. D. 180, 64 N. W. 939; *Re Webb*, 89 Wis. 354, 27 L.R.A. 356, 46 Am.

St. Rep. 846, 62 N. W. 177, 9 Am. Crim. Rep. 702; *United States v. Wilson* (C. C.) 46 Fed. 748; *People ex rel. Boenert v. Barrett*, 202 Ill. 287, 63 L.R.A. 82, 95 Am. St. Rep. 230, 67 N. E. 23. The Supreme Court of the United States, in *Pointer v. United States*, 151 U. S. 419, 38 L. ed. 217, 14 Sup. Ct. Rep. 419, referred to the question, but in the following language reserved its opinion: "It is necessary, however, in order to avoid any misapprehension, to say that this court must not be understood as expressing any opinion upon the question suggested by the words of that order, whether a court of the United States, in the absence of authority conferred by statute, has the power, after passing sentence in a criminal case, to suspend its execution indefinitely,

People ex rel. Forsyth v. Court of Sessions, 141 N. Y. 288, 23 L.R.A. 856, 36 N. E. 386, 15 Am. Crim. Rep. 675; *People ex rel. Sullivan v. Flynn*, 55 Misc. 639, 106 N. Y. Supp. 925.

The court in the first case said: "The power to suspend sentence and the power to grant reprieves and pardons are distinct and different in origin and in nature. It has never been supposed that the power of courts to suspend sentence was other than a judicial function. It has been frequently and constantly exercised by courts of record before and since the adoption of the Constitution. . . . Assuming the power to be, as it was at common law asserted to be, a power inherent in courts, no new power is conferred upon courts when the legislature in terms authorizes courts to suspend sentence."

But a constitutional provision that no power of suspending laws shall be exercised except by the legislature is violated by a statute permitting the court to release from custody one convicted of abandoning his wife, upon his entering into a recognizance to pay her a weekly sum. *Ex parte Smythe*, 56 Tex. Crim. Rep. 376, 23 L.R.A.(N.S.) 854, 120 S. W. 200.

And where a statute provides that, in certain criminal cases, the court "shall have power . . . upon the entry of judgment of conviction of such person, to suspend such sentence and parole such person by an order of such court, duly entered of record as a part of the judgment," the order suspending sentence must be entered as part of the judgment, and the court has no power to make such order subsequently. *State v. Smith*, 173 Ind. 388, 90 N. E. 607.

And where a statute provides that the only ground upon which a judgment shall be arrested is that facts stated in the indictment do not constitute a public offense, an arrest of judgment will not be allowed on the ground that, at the time of trial and verdict, there was another indictment pending and undisposed of. *Clampitt v. United States*, 6 Ind. Terr. 92, 89 S. W. 666, 10 A. & E. Ann. Cas. 1087, 33 L.R.A.(N.S.)

So no suspension of sentence can be granted unless the defendant has reserved a question of law for the consideration of the appellate court, where a statute provides for the suspension of sentence pending the determination of questions of law reserved for the appellate court; and merely excepting to the judgment is not sufficient. *Ex parte Knight*, 61 Ala. 482.

And the record must show that the question was reserved at the time the ruling was made. *Bolling v. State*, 78 Ala. 469.

See also cases involving statutes under subdivision on "Power to sentence after suspension."

Power to sentence after suspension.

As to power to impose upon pardon conditions extending beyond term of sentence, see notes 5 L.R.A.(N.S.) 1064; 20 L.R.A.(N.S.) 337; 26 L.R.A.(N.S.) 110.

In the absence of a permissive statute, the indefinite postponement of sentence upon one convicted of a crime deprives the court of jurisdiction to pronounce sentence at a subsequent term. *Grundel v. People*, 33 Colo. 191, 108 Am. St. Rep. 75, 79 Pac. 1022; *Republic v. Pedro*, 11 Haw. 287; *Com. v. Maloney*, 145 Mass. 205, 13 N. E. 482; *Com. v. Dunleavy*, 16 Pa. Super. Ct. 380; *Re Flint*, 25 Utah, 338, 95 Am. St. Rep. 853, 71 Pac. 531; *United States v. Wilson*, 46 Fed. 748.

And where the court, without any legal cause therefor, passes the case over under an entry that, by agreement, the assessing of punishment and sentence is deferred to some future time, it loses its jurisdiction, and cannot pronounce sentence at a subsequent term. *State v. Hockett*, 129 Mo. App. 639, 108 S. W. 599; *State v. Dibert*, — Mo. App. —, 108 S. W. 600; *State v. Jacobs*, — Mo. App. —, 108 S. W. 601.

The court, in the first case, said: "It seems to us that it is an exercise of the power of pardon to withhold the sentence which the law imposes. The court is but the instrument,—the arm of the law. The only power to indefinitely stay the force of that arm is lodged with another depart-

and until the court, in its discretion, removes such suspension. A decision of that question is not necessary to the disposition of this case upon its merits."

It seems to us clear that trial courts had no such general and unlimited power at common law. The common-law rule is thus stated by Blackstone: "A reprieve (from *reprendre*, to take back) is the withdrawing of a sentence for an interval of time, whereby the execution is suspended. This may be first *ex arbitrio judicis*, either before or after judgment; as where the judge is not satisfied with the verdict, or the evidence is suspicious, or the indictment is insufficient, or he is doubtful whether the offense be within clergy; or sometimes if it be a small felony, or any favorable cir-

cumstances appear in the criminal's character, in order to give room to apply to the Crown for either an absolute or conditional pardon. These arbitrary reprieves may be granted or taken off by the justices of goal delivery, although their session be finished and their commission expired; but they are rather by common usage than of strict right." 4 Bl. Com. chap. 31; 2 Hale, 1 C. 412. At common law there was no appeal, the trial court had no power to grant new trials in cases of treason and felony, and the punishments were often by branding or other physical infliction; and hence the temporary suspension of the sentence which would otherwise be fully suffered was necessary, to the end that the convict might not suffer the penalty without having

consent of the government. If the power be granted, where is it to be limited? It is asserted to be a discretionary power. Therefore it would be in great part a power practically beyond control, and might be exercised in cases where the general good demanded the law's enforcement. If a court refuses to render a judgment in a civil case, it may be compelled to perform that duty; and we can think of no good reason why it should not be likewise compelled to pass a sentence in a criminal case."

And the court cannot pronounce sentence after an indefinite suspension of sentence, when every condition attached to it has been complied with, and the defendant discharged by order of the court, and the cause removed from the docket. *State v. Hilton*, 151 N. C. 687, 65 S. E. 1011.

But it has been held that where a defendant pleads *nolo contendere*, and is released in pursuance of an order that sentence be suspended on payment of costs, on condition that the defendant do not again commit the offense, the court does not lose jurisdiction, where a breach of the condition occurs. *Philpot v. State*, 65 N. H. 250, 20 Atl. 955; *Sylvester v. State*, 65 N. H. 193, 20 Atl. 954.

And it is held that a mere temporary suspension of sentence does not prevent the court from passing sentence at a subsequent term. *United States v. Guiteau*, 1 Mackey, 498, 47 Am. Rep. 247; *Joiner v. State*, 94 Ark. 198, 126 S. W. 723; *Ledgerwood v. State*, 134 Ind. 81, 33 N. E. 631; *Clampitt v. United States*, 6 Ind. Terr. 92, 89 S. W. 666, 10 A. & E. Ann. Cas. 1087; *State v. Ray*, 50 Iowa, 521; *State v. Schierhoff*, 103 Mo. 47, 13 S. W. 151; *State v. Overton*, 77 N. C. 485; *State v. Miller*, 6 Baxt. 513; *Greenfield v. State*, 7 Baxt. 18; *United States v. May*, 2 McArth. 512.

And one convicted at a regular term may be sentenced at an adjourned term. *Williams v. Com.* 29 Pa. 102.

And a court may pronounce sentence two years after verdict, where it was not before awarded, because of an appeal. *State v. Watson*, 95 Mo. 411, 8 S. W. 383. The 33 L.R.A. (N.S.)

court said: "After the motion for new trial is overruled, the defendant should be brought before the court, and given an opportunity to show cause, if any he has why sentence should not be pronounced. He may then present matters which will render it proper for the court to postpone a final disposition of the case until a future term of the court. It would be highly prejudicial to the administration of the criminal law, both as to the state and as to the defendant, to deny the court power to render final judgment at a term subsequent to conviction. The power to pass sentence is not confined to the term at which the defendant was convicted by any statute of this state, nor, we conclude, by the law, in the absence of any statute."

And a conviction will not be set aside although over a year elapsed between the conviction and sentence. *People v. Reilly* 53 Mich. 260, 18 N. W. 849.

And where, after a plea of guilty, a court of general jurisdiction ordered that the case be suspended for sentence, it may sentence the defendant at a subsequent term, although several years have elapsed. *Re St. Hilaire*, 101 Me. 522, 64 Atl. 882, 8 A. & E. Ann. Cas. 385.

And the fact that sentence was not pronounced for over a month after verdict will not avoid the conviction, where the defendant absented himself from court, and prevented earlier sentence. *Sturgeon v. Gray* 96 Ind. 166.

And under a statute which does not require that sentence be pronounced at the same term that judgment is entered, where the court adjourns without pronouncing sentence, it may pronounce sentence at a subsequent term. *Thurman v. State*, 5 Ark. 120, 15 S. W. 84; *Greene v. State*, 58 Ark. 290, 114 S. W. 477.

And where a statute stipulates for the lapse of a given period before sentence is pronounced, but contains no provision that it must be pronounced at the same term at which the trial is had, the court may award sentence at a subsequent term. *People v. Felix*, 45 Cal. 163.

So, under a statute providing that where

ing an opportunity to apply for pardon or other relief provided by law. On this principle of implied power arising from necessity, it was held in this state to be within the power of the court to postpone until the next term of the court the imposition and execution of the sentence of burning in the hand, provided by law, so that the convict might apply to the governor for a pardon. *State v. Frink*, 2 Bay, 168. But the common-law power to suspend sentence has been expressly held in this state to be limited by this principle of necessity, as having application only to cases where but for a suspension, the convict would irretrievably lose some legal right. *State v. Chitty*, 1 Bail. L. 379.

Beyond the common law, and under the

from any cause whatever, a verdict of conviction has been returned, and there is a failure to enter judgment and pronounce sentence during the term, the judgment may be entered and sentence pronounced at the next succeeding term of the court, unless a new trial has been granted, or the judgment arrested, or an appeal has been taken. The court has power to render judgment at a term subsequent to that when the defendant was convicted, although a defective appeal was taken. *Ex parte Beard*, 41 Tex. 234.

And where a statute merely provides that where a defendant is found guilty, the court shall render judgment, it may be rendered within a reasonable time; and a suspension by a justice of the peace until the day following a conviction will not deprive him of jurisdiction. *Re Terry*, 71 Kan. 362, 80 Pac. 586.

And where a pardon had been granted after conviction, upon condition that the defendant leave the state within two weeks, upon a failure to comply with such condition, the court will award sentence. *State v. Fuller*, 1 McCord, L. 178. To the same effect is *State v. Chancellor*, 1 Strobb. L. 350, 47 Am. Dec. 557.

So, where a defendant pleads guilty, and a verdict is rendered, but no sentence is pronounced at that term, a sentence may be awarded at a subsequent term, if the case has regularly been kept in court. *Clanton v. State*, 96 Ala. 111, 11 So. 299.

And where, after a conviction, the court adjourns without sentencing another judge, at a subsequent term, has power to award sentence. *Charles v. State*, 4 Port. (Ala.) 108.

And where the judgment awarded is invalid, the court may, at a subsequent term, render a judgment on the verdict for the penalty prescribed by law. *Easterling v. State*, 35 Miss. 210.

And an order-book entry that the court "now suspends the sentence herein, and cause continued for alias process," is not a final judgment, and the defendant may subsequently be sentenced. *Shaffer v. State*, 100 Ind. 365.

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statute law allowing new trials, there can be no doubt that the trial court may, in its discretion, suspend a sentence which a convict has not commenced to serve, pending a motion for a new trial either on the minutes of the court or on after-discovered evidence. This is on the principle that, under the statute, the sentence is imposed subject to the power of the court to grant a new trial, and the power of suspension of the sentence is incidental to the power to set aside the conviction and the sentence and to order a new trial. It is important to observe, however, that the exercise of this power is not demandable as a matter of course on notice of a motion for a new trial. On the contrary, the power is discretionary, and to be exercised with great

But where the trial judge suspended sentence until the next term, and allowed the defendant to go on his own recognizance of a nominal sum, a judge sitting temporarily at a subsequent term cannot sentence the defendant to the state prison, since such action is not supplying omissions of the trial judge, but is overruling his decision. *Weaver v. People*, 33 Mich. 296, 1 Am. Crim. Rep. 552.

And where sentence is delayed from time to time without the defendant's request, until the period of imprisonment to which he could have been sentenced has elapsed, the court has no jurisdiction thereafter to pass sentence. *People v. Kennedy*, 58 Mich. 372, 25 N. W. 318.

And a statute which provides that, after a conviction, the county attorney shall have the accused sentenced at the same term, unless, for reasons satisfactory to the court, the case is continued for sentence one term, but not longer, is merely directory to the county attorney, and even if it were held mandatory, the statute could not limit the discretion of the court. *Re St. Hilaire*, 101 Me. 522, 64 Atl. 882, 8 A. & E. Ann. Cas. 385.

Power to stay execution of sentence.

It is held by some decisions that a court has inherent power to stay the execution of sentence. *State v. Vaughan*, 71 Conn. 457, 42 Atl. 640; *Re Collins*, 8 Cal. App. 367, 97 Pac. 188.

And it was held in *Weber v. State*, 58 Ohio St. 816, 41 L.R.A. 472, 51 N. E. 116, that a court, unless otherwise provided by statute, has inherent power to stay the execution of sentence, in whole or in part; whether consented to by the prisoner or not.

And where the law upon conviction inflicts a specific and infamous punishment, the court has power to postpone punishment to enable the defendant to apply for a pardon. *State v. Chitty*, 1 Bail. L. 379; *Allen v. State*, Mart. & Y. 294.

But where the punishment depends upon

caution, and only where, pending the hearing of the motion for a new trial, a *prima facie* showing is presented of merit in the motion, and of serious hardship to be expected as a result of a refusal to grant the stay. The necessity and propriety of great caution in the exercise of this discretionary power follows from the consideration that the solemn judgment of a court after a jury trial should not be suspended except for cogent reasons.

Attempts by courts to suspend the execution of sentence, or to postpone sentence beyond what is necessary to preserve the legal rights of the convict, or to make effective the power of the court to relieve from hardship pending a motion for a new trial, are violative of the Constitution as

well as the statute law of the state. It is a function of the legislative branch of the government to affix punishment to conviction of crime, subject to the pardoning power of the governor. The legislative power to set punishment for crime is very broad, and in the exercise of this power the general assembly may confer on trial judges, if it sees fit, the largest discretion as to the sentence to be imposed, as to the beginning and end of the punishment, and whether it should be certain or indeterminate or conditional. But when the general assembly provides punishment, the trial court cannot set the provision aside. For example, the statute has affixed the penalty of death to conviction without recommendation to mercy of the crimes of

the discretion of the court, no such power exists. *State v. Chitty*, *supra*.

In *State v. Whitt*, 117 N. C. 804, 23 S. E. 452, it was held that the court had power to suspend sentence on defendant's undertaking to pay costs, although he had served a part of his sentence.

And it was held in *Fults v. State*, 2 Sneed, 232, that a court has power to suspend the execution of judgment, upon a sufficient reason appearing.

And it has been held that the court may suspend the imposition of sentence or the execution thereof for an indefinite time. *State ex rel. Buckley v. Drew*, 75 N. H. 402, 74 Atl. 875; *State ex rel. O'Connor v. Drew*, — N. H. —, 76 Atl. 191.

But there are decisions to the contrary. *State v. Voss*, 80 Iowa, 467, 8 L.R.A. 767, 45 N. W. 898; *O'Dwyer v. Kelly*, 133 Ga. 824, 67 S. E. 106.

It was held in *Miller's Case*, 9 Cow. 730, that the court had the power to stay the execution of sentence in a capital case, notwithstanding the power to grant reprieves and pardons rested with the executive. The court said: "Far be it from me to call in question the wisdom of placing the power of granting reprieves and pardons in the executive. All that I contend for is, that although he indubitably has the ultimate or superior power, and that there is no power which can prevent him from relieving, yet that there is nothing in the Constitution annulling the qualified limited power of the judges. Constitutions, like laws, should receive such a construction as will advance the remedy and suppress the mischief. The object of this provision is to enable the executive, in all cases, to prevent injustice. The limited power of the judges is only to remove an obstruction of their own creating, in the way to the mercy seat,—a power necessary to enable the executive to exercise his prerogative upon every suitable occasion,—a power which has been sanctioned by the experience of our ancestors for ages, and which was the offspring of the imperious dictates of justice and humanity. That which I contend against is a harsh

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and rigid construction of the Constitution, which would insure a haste in shedding of blood, as foreign to the humane spirit of our Criminal Code as to the benign precepts of our religion."

By some decisions, however, it is held that the act of a court after passing sentence, in suspending the execution of sentence, is an unwarranted interference with the powers and functions of the executive. *Neal v. State*, 104 Ga. 509, 42 L.R.A. 190, 69 Am. St. Rep. 175, 30 S. E. 858; *Wall v. Jones*, 135 Ga. 425, 69 S. E. 548; *Re Webb*, 89 Wis. 354, 27 L.R.A. 356, 46 Am. St. Rep. 846, 62 N. W. 177, 9 Am. Crim. Rep. 702; *People v. Morrisette*, 20 How. Pr. 118, 2 Am. Crim. Rep. 475.

And some courts hold that no inherent power exists in a court to stay execution of sentence. *Ragland v. State*, 55 Fla. 152, 46 So. 724; *Tanner v. Wiggins*, 54 Fla. 203, 45 So. 459, 14 A. & E. Ann. Cas. 718; *Re Markuson*, 5 N. D. 180, 64 N. W. 939.

And it was held in *Miller v. Evans*, 115 Iowa, 101, 56 L.R.A. 101, 91 Am. St. Rep. 143, 88 N. W. 198, that a court has no power to suspend sentence after it has been pronounced, except for the purpose of appeal.

And it is generally held that the court, upon a proper showing, has the power to grant a stay of execution of sentence, pending an appeal. *Tanner v. Wiggins*, 54 Fla. 203, 45 So. 459, 14 A. & E. Ann. Cas. 718; *People v. Hobson*, 48 Mich. 27, 11 N. W. 771; *Lowenberg v. People*, 5 Park. Crim. Rep. 414; *King v. Johnston*, 16 Can. C. C. 296.

And in *State ex rel. Stafford v. Hawk*, 47 W. Va. 434, 34 S. E. 918, 15 Am. Crim. Rep. 659, it was held that by statute the court should postpone the execution of its sentence until a reasonable time beyond the first day of the next term of the supreme court of appeals; and that where the time allowed, through no fault of the defendant, proved insufficient, he was entitled to a further extension of the time.

But the right of a defendant to a stay of execution of sentence in case of appeal is not an absolute one, and the court may

murder and rape, and the court is obliged, to sentence the convict to death. So, also, if the statute provides that the punishment of some other crime shall be imprisonment, in the discretion of the court, for not less than six months nor more than twelve months, the court must, on conviction, actually impose a sentence of imprisonment for not less than six months, to be actually suffered, not to be suspended. Is it not perfectly obvious that when the court undertakes to suspend such a sentence, either during good behavior or at its own discretion, it really refuses to enforce the statute unless it shall at some future time conclude that it is proper to do so? Is it not equally obvious that the power to exercise discretion as to the en-

and should refuse it, if clearly satisfied, upon an inspection of the record, that there is no merit in the appeal. *State v. Waterman*, — Minn. —, 127 N. W. 473; *State v. Chounnard*, 93 Minn. 176, 100 N. W. 1125; *State v. Holong*, 38 Minn. 368, 37 N. W. 587.

And where a statute provides that no judge, court, or officer other than the governor, can reprieve or suspend the execution of a judgment of death, a trial judge has no authority to order a stay of execution during an appeal. *Opinion of Judges*, 3 Okla. Crim. Rep. 315, 105 Pac. 684.

And where the Constitution confers upon the executive the exclusive power to remit fines and forfeitures, and to grant reprieves, commutations, and pardons, a statute authorizing the supreme court, on an appeal from a judgment of conviction, to suspend sentence of death and to remit forfeitures, is unconstitutional. *Butler v. State*, 97 Ind. 373.

But it was held in *Parker v. State*, 135 Ind. 534, 23 L.R.A. 859, 35 N. E. 179, that granting a stay of execution by an appellate court pending an appeal in a capital case is not a reprieve, within the meaning of a constitutional provision giving the governor power to grant reprieves.

In some states the power to stay execution of sentence is regulated by statute and the statutory requirements must be complied with. *People v. Fritch*, 161 Mich. 111, 125 N. W. 785.

And where a statute provides that for prudential reasons, and for the purpose of perfecting an appeal, sentence may be suspended for a period of not more than thirty days, a court cannot, after actually pronouncing sentence, order that it be suspended thirty days, for the purpose of allowing an appeal. *Re Markuson*, 5 N. D. 180, 64 N. W. 939.

Where a statute provides that no appeal from a judgment of conviction, unless it be one imposing a fine only, shall stay the execution of judgment, but that the defendant shall remain in custody unless admitted to bail according to another section, the court has no power, in a case where a

judgment of imprisonment is entered, to order a stay of execution. *State v. Murphy*, 23 Nev. 390, 48 Pac. 628.

Except where the conviction is for treason or murder in the first degree, writs of error issue as of course; and in order for them to stay the execution of sentence, an express order must be obtained from a justice of the supreme or circuit court. *People v. West*, 143 Mich. 586, 107 N. W. 283.

It is true that in the case of *Ex parte Bond*, 9 S. C. 80, 30 Am. Rep. 20, it was held, contrary to the conclusion of the Supreme Court of the United States in *Ex parte Lange*, 18 Wall. 163, 21 L. ed. 872, that if the trial court imposed a sentence

judgment of imprisonment is entered, to order a stay of execution. *State v. Murphy*, 23 Nev. 390, 48 Pac. 628.

Except where the conviction is for treason or murder in the first degree, writs of error issue as of course; and in order for them to stay the execution of sentence, an express order must be obtained from a justice of the supreme or circuit court. *People v. West*, 143 Mich. 586, 107 N. W. 283.

Power to enforce after stay of execution.

It is generally held that a court does not lose its power to enforce sentence by granting a stay of execution.

Thus, it is held that a court, by staying execution of sentence until the full expiration of the time for appeal, does not lose its power to enforce the sentence. *People v. Walker*, — Cal. —, 61 Pac. 800.

And after an order that execution of sentence be suspended until further order of the court, it has jurisdiction several years afterward to set aside the order, and commit the defendant. *People v. Patrich*, 118 Cal. 332, 50 Pac. 425.

And where a sentence of five years has been suspended on condition that the defendant pay costs, the court may, at a subsequent term, sentence him to one year's imprisonment, where he has failed to keep the condition imposed. *State v. Whitt*, 117 N. C. 804, 23 S. E. 452.

So, the court may revoke a suspension of sentence upon breach of the condition imposed, and sentence the accused at a subsequent term. *Ex parte Moore*, 12 Cal. App. 161, 107 Pac. 129; *State v. Hatley*, 110 N. C. 522, 14 S. E. 751; *Re Lee*, 3 Ohio N. P. N. S. 533, 16 Ohio S. & C. P. Dec. 259.

And it was held in *Schaefer v. State*, 27 Ohio C. C. 791, that a court might revoke the suspension of the execution of sentence at a subsequent term.

And an adjournment *sine die* of a justice's court does not prevent the court's right to enforce a sentence passed before the adjournment. *Mann v. People*, 16 Colo. App. 475, 66 Pac. 452.

But a court has no power, after imposing

in excess of that provided by the statute, the error could be corrected only by appeal. But the case of *Ex parte Bond* is not this case. There the court, having the power to sentence, merely made a mistake in the degree of punishment; here the court in passing sentence exhausted its power, and undertook to exercise an entirely different power, for which it had no legal warrant,—the power to make the sentence inoperative. In the one case, the imposition of the excessive sentence was a mere error of law, to be corrected as other like errors, by appeal; in the other, the attempt to suspend the sentence was a nullity, because suspension of a sentence under conditions was without any foundation in judicial power. In this case the sentence was not suspended on the ground that such action was necessary to the preservation of any legal right of the defendants, or because of the pendency of a motion for a new trial, but merely as an act of clemency to the defendants; and it follows that the attempt to suspend was beyond the authority of the court and without legal effect. The result is that the sentence must be regarded as legal and valid, and the clause of suspension mere surplusage, having no force.

The remaining question is whether the court was without power to enforce the sentence after the expiration of the one year for which the convicts would have suffered imprisonment had they not been illegally set at large under the suspension clause. As the point has not been decided in this state, and the views of the courts of other states are irreconcilable, we are entirely free to adopt the rule which seems to us logical and reasonable. Some cases hold that the sentence not being legally stayed by the attempt to suspend, it begins its operation when it is pronounced, and ends when the time of imprisonment therein mentioned has expired, although no imprisonment be suffered. *Re Webb*, 89 Wis. 354, 27 L.R.A. 356, 46 Am. St. Rep. 846, 62 N. W. 177, 9 Am. Crim. Rep. 702; *Re Markuson*, 5 N. D. 180, 64 N. W. 939. The rule insisted on by some other courts is that the court loses jurisdiction after it has discharged the prisoner, although the

discharge was in violation of the Constitution and statute law of the state. *United States v. Wilson* (C. C.) 46 Fed. 748; *Grundel v. People*, 33 Colo. 191, 108 Am. St. Rep. 75, 79 Pac. 1022; *People ex rel. Boenert v. Barrett*, 202 Ill. 287, 63 L.R.A. 82, 95 Am. St. Rep. 230, 67 N. E. 23.

The reasoning of the cases first cited we think sophistical, because it rests upon the false assumption that a sentence necessarily begins to run and to be satisfied the moment it is pronounced. The execution of a sentence may be postponed by appeal, by escape, and by the other causes; but the time of delay in the execution is not counted as a part of the time of imprisonment fixed by the sentence. No more can the delay due to the release of the convict under a void order of the court, attempting to suspend the sentence, be so counted. The sentence is satisfied, not by the lapse of time after it is pronounced, but by the actual suffering of the imprisonment imposed by it. The rule is that jurisdiction remains in a court to enforce its valid judgments according to law, against those who are parties to them (*O'Dwyer v. Kelly*, 133 Ga. 824, 67 S. E. 106; *Ex parte Moore*, 12 Cal. App. 161, 107 Pac. 129); and therefore we think the reasoning in the second class of cases also unsound. This conclusion is supported by high authority. The following cases hold that, as the attempt to suspend was of no effect, the sentence is not satisfied until it has been actually suffered: *Neal v. State*, 104 Ga. 509, 42 L.R.A. 190, 69 Am. St. Rep. 175, 30 S. E. 858; *Gray v. State*, 107 Ind. 177, 8 N. E. 16; *Miller v. Evans*, 115 Iowa, 101, 56 L.R.A. 101, 91 Am. St. Rep. 143, 88 N. W. 198; *State v. Cockerham*, 24 N. C. (2 Ired. L.) 204.

The appellants further contend that even if this conclusion be correct, the sentence of one year's imprisonment cannot now be enforced against them, for the reason that, since the sentence was pronounced, the punishment for gaming has been reduced by statute. This position would be sound if the court were now called upon to pass sentence upon the defendants; but that is not the case. Judge Gruber had no power to pass sentence or to change the sentence

a fine and imprisonment, to order the defendant into custody nearly two years afterwards, no mittimus or other precept in execution of the sentence having been issued or prepared at the time sentence was pronounced and the court thereby having surrendered further control over the defendant. *Tuttle v. Lang*, 100 Me. 123, 60 Atl. 892.

It is expressly provided in Rhode Island that defendants who are committed to the control of probation officers continue to be

subject to the authority and direction of the court placing them under such control. And the appellate court will not consider a petition for habeas corpus, based upon the officer's conduct, until such conduct has been brought before the lower court. *Scamporrino's Petition*, 30 R. I. 587, 76 Atl. 761.

For a note on power to commit after expiration of term of sentence, see note to *Ex parte Clendenning*, 19 L.R.A. (N.S.) 1041.

J. T. W.

which had been pronounced by Judge Purdy. All that Judge Gruber could do, and all that he attempted to do, was to enforce the sentence which had been imposed by Judge Purdy. The statute did not purport to affect sentences already pronounced. The court is not unmindful that a case might have arisen in which hardship would have resulted from holding that an attempt of the court to suspend a sentence already pronounced was without authority and of no effect. Fortunately no hardship results in this case, for the evidence taken in the mayor's court, which was before Judge Gruber, showed clearly that the defendants had been caught gambling, and had thus violated the condition upon which Judge Purdy had attempted to suspend the sentence.

It is the judgment of this court that the judgment of the Circuit Court be affirmed.

INDIANA SUPREME COURT.

FERDINAND EFFINGER, Appt.,

v.

FORT WAYNE & WABASH VALLEY
TRACTION COMPANY.

(— Ind. —, 93 N. E. 855.)

**Interurban railway — frightening horse
— liability for injury.**

1. An interurban electric railway company may be liable for injury to one driv-

**Note. — Frightening horse on highway
by locomotive, car, or train running
parallel therewith.**

This note includes cases of fright by locomotives, cars, or trains on steam railroads in or alongside of public streets and highways, as well as cases of fright by interurban and suburban electric cars in or alongside of public highways, but does not include the frightening of horses by street cars, for which see notes to Hoag v. South Dover Marble Co. 21 L.R.A.(N.S.) 283, and Doster v. Charlotte Street R. Co. 34 L.R.A. 481.

The classes of cases covered by the following notes are also excluded from this note: Liability for discharge of steam near street or highway so as to frighten horses, see note to Ft. Wayne Cooperage Co. v. Page, 23 L.R.A.(N.S.) 946; duty of a railroad company to give crossing signals for the benefit of persons near to a crossing, but who are not about to use the same, including duty as to persons on a parallel road, not intending to cross track, see notes to Missouri, K. & T. R. Co. v. Saunders, 14 L.R.A.(N.S.) 1000, and Warn v. Chicago G. W. R. Co. 31 L.R.A.(N.S.) 667.

As to the liability of a railroad company for injuries caused by a horse taking fright at a car or locomotive standing on or near a highway, see note to Norfolk & W. R. Co. v. Gee, 3 L.R.A.(N.S.) 111.

As to liability of railway company for
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ing on a highway running parallel to its tracks, by the fright of his horse and overturning of the carriage, where its motor-man in charge of the car, upon approaching the traveler at high speed, sees that the horse is frightened and that the roadway is narrow, with a ditch on either side, and refuses to slacken his speed upon signal, the result of which is that the horse becomes unmanageable and causes the injury.

Pleading — definiteness — sufficiency.

2. One injured by the fright of his horse while driving on a roadway running parallel to an electric railway track, through the negligent operation of the car, need not, in order to hold the railway company liable for the injury, allege that he would have controlled the horse and avoided the injury had the speed of the car been slackened, if he alleges that the accident would have been avoided in such event.

Same — proximate cause.

3. A definite charge that the negligence of a street car company in refusing to stop its car when the one in charge of it saw a horse on a road running parallel to its track frightened at the approaching car, and its driver in peril, was the proximate cause of the resulting accident, is not necessary where the accident is alleged to have been caused by the negligence of the corporation.

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frightening horses by escape of steam from engine standing on highway crossing, see note to Weller v. Lehigh Valley R. Co. 24 L.R.A.(N.S.) 1202.

As to duty to give signals upon approaching overhead crossing, see notes to Johnson v. Southern P. R. Co. 1 L.R.A.(N.S.) 307, and Barton v. Southern R. Co. 22 L.R.A.(N.S.) 915.

Ordinary operations.

A railroad company is not liable for injuries resulting from the fright of horses on highways parallel with its tracks at the ordinary appearance of moving locomotives, cars, or trains, or the noise naturally incident to their ordinary operation under prudent and careful management. Southern R. Co. v. Flynt, 2 Ga. App. 162, 58 S. E. 374; Ohio Valley R. Co. v. Young, 19 Ky. L. Rep. 158, 39 S. W. 415; Gulf, C. & S. F. R. Co. v. Hord, 39 Tex. Civ. App. 319, 87 S. W. 848.

Nor is a railroad company, merely by reason of its failure to give any signal when approaching a place where a parallel highway is adjacent to its track, liable for injuries to one traveling on such highway at that place, resulting from the fright of his horse at a train. Melton v. St. Louis & S. F. R. Co. 99 Mo. App. 282, 73 S. W. 231.

As said in Southern R. Co. v. Flynt, supra: "The law simply imposes upon rail-

A PPEAL by plaintiff from a judgment of the Appellate Court, affirming a judgment of the Circuit Court for Wells County, sustaining a demurrer to complaint in an action brought to recover damages for personal injuries alleged to have been caused by the negligent operation of defendant's car. Reversed.

The facts are stated in the opinion.

Messrs. Levi Mock, John Mock, and George Mock, for appellant:

The court erred in sustaining the demurrer.

Defendant must use ordinary care in running its cars, so as to avoid injury to those having an equal right to use the public highway in close proximity to its road.

Indianapolis Traction & Terminal Co. v.

road companies the duty of operating trains relatively to adjacent highways so as not unnecessarily to interfere with the rights of individuals traveling such highways, or to endanger such travelers by unusual and unnecessary noises. The duty of keeping a lookout and of giving warning is limited to the track and the public crossing. It does not extend to travelers on adjacent highways."

So, in the following cases, railroad companies have been held not liable for injuries resulting from the fright of horses on streets or highways in or parallel with which their tracks run, caused as indicated: *Hahn v. Southern P. R. Co.* 51 Cal. 605 (blowing off steam, necessary in the prudent management of locomotive, when opposite team); *Bailey v. Hartford & C. Valley R. Co.* 56 Conn. 444, 16 Atl. 234 (sounding in reasonable manner whistle on passenger train at regular whistling post, as signal of its approach to a grade crossing); *Douglas v. East Tennessee, V. & G. R. Co.* 88 Ga. 282, 14 S. E. 616 (headlight of train rapidly and quietly approaching from behind one driving at night, suddenly flashing out); *Southern R. Co. v. Chance*, 7 Ga. App. 650, 67 S. E. 836 (usual and necessary noise made by application of steam or more steam to freight engine, preparatory to ascending grade); *Lamb v. Old Colony R. Co.* 140 Mass. 79, 54 Am. Rep. 449, 2 N. E. 932 (smoke of engine of train passing in opposite direction occasioned by "firing up," where "firing up" at that point was necessary in the practical running of the train, and an ordinary incident of running it); *Fouhy v. Pennsylvania R. Co.* 1 Sadler (Pa.) 377, 17 W. N. C. 177, 2 Atl. 536 (ringing of bell on engine of approaching train, where it was not shown that the bell was rung in an unusual manner or at an improper place); *Philadelphia, W. & B. R. Co. v. Stinger*, 78 Pa. 219 (locomotive whistle blown in the ordinary manner and at the usual place, as a necessary warning to travelers and a bridge tender of the approach of the train to several crossings and a drawbridge).

And in *Gulf, C. & S. F. R. Co. v. Hodges*, 33 L.R.A. (N.S.)

Smith, 38 Ind. App. 160, 77 N. E. 1140; *Lake Erie & W. R. Co. v. Juday*, 19 Ind. App. 436, 49 N. E. 843; *Louisville N. A. & C. R. Co. v. Stanger*, 7 Ind. App. 179, 32 N. E. 209, 34 N. E. 688; *Billman v. Indianapolis, C. & L. R. Co.* 76 Ind. 166, 40 Am. Rep. 230; *Louisville & N. R. Co. v. Schmidt*, 81 Ind. 264; *Ohio & M. R. Co. v. Trowbridge*, 126 Ind. 391, 26 N. E. 64; *Indianapolis Street R. Co. v. Bolin*, 39 Ind. App. 169, 78 N. E. 210; *McIntyre v. Orner*, 166 Ind. 57, 4 L.R.A. (N.S.) 1130, 117 Am. St. Rep. 359, 76 N. E. 750, 8 A. & E. Ann. Cas. 1087; *Christy v. Elliott*, 216 Ill. 31, 1 L.R.A. (N.S.) 215, 108 Am. St. Rep. 196, 74 N. E. 1035, 3 A. & E. Ann. Cas. 487; *Ft. Wayne Cooperage Co. v. Page*, 170 Ind. 585, 23 L.R.A. (N.S.) 946, 84 N.

76 Tex. 90, 13 S. W. 64, it was held that a railroad company operating trains through a city street is not liable for injuries to one driving along a narrow space between its track and the curbing of the street, by the fright of his horse at steam and smoke blown from a passing engine, where the engineer was managing the train with such care and prudence as a reasonably prudent man would have observed under the circumstances, and the escaping smoke and steam were not unnecessarily or negligently let off or blown from the engine.

A railroad company is not liable for injuries to one driving on a country road parallel with its track, and on top of an embankment at the side of a deep cut, through which the track runs on a curve, occasioned by the fright of his horse at the blowing of a locomotive whistle and the emission of steam and smoke, where the engineer blew the whistle as he approached the cut, and the smoke and steam escaped from the locomotive, drawing a train, when it was entering and when in the cut, and only 400 yards from the station where it had just stopped. *Webb v. Philadelphia & R. R. Co.* 202 Pa. 511, 52 Atl. 5.

And a railroad company is not liable for injuries to one driving along the highway parallel with and close to its track, through a narrow canon, occasioned by the fright of his team at an engine backing toward them from ahead, and making only the ordinary noise of an engine as it rolls over the rails, where those in charge of the engine did not see him, and before entering the canon he had seen the engine standing at a water tank therein. *Fares v. Rio Grande Western R. Co.* 28 Utah, 132, 77 Pac. 230, 3 A. & E. Ann. Cas. 1065.

Where an engineer in charge of a locomotive drawing a train has blown his whistle for the crossing when 40 or 50 rods from a team on a parallel highway, and, thinking that the team was about to turn and take the crossing ahead of the train, has blown one blast for brakes when about 400 or 500 feet from the team, and the team has not been excited by, or appeared to notice, such blowing of the whistle, the railroad com-

E. 145; Wright v. Compton, 53 Ind. 337, 2 Mor. Min. Rep. 189; Island Coal Co. v. Gemmitt, 19 Ind. App. 21, 49 N. E. 38.

Messrs. Eichhorn & Vaughn, Barrett & Morris, and Samuel L. Morris, Jr., for appellee:

Failure of appellant to allege that the object or act done had a tendency to, or was likely to, frighten a horse of ordinary gentleness, is bad on demurrer.

Keeley Brewing Co. v. Parnin, 13 Ind. App. 592, 41 N. E. 471.

A railroad company is entitled to operate its railroad in the usual manner, without becoming liable to travelers upon highways running parallel with the railroad.

New York, C. & St. L. R. Co. v. Martin, 5 Ind. App. 673, 72 N. E. 654; Lamb v.

Old Colony R. Co. 140 Mass. 79, 54 Am. Rep. 449, 2 N. E. 932.

Where a horse is being driven or is running uncontrolled along a highway parallel to a railway, though it gives unmistakable evidence that it is alarmed at an approaching car, the motorman in charge is not negligent in failing to diminish the speed of the car.

Doster v. Charlotte Street R. Co. 117 N. C. 651, 34 L.R.A. 481, 23 S. E. 449; Terre Haute Electric R. Co. v. Yant, 21 Ind. App. 490, 69 Am. St. Rep. 376, 51 N. E. 732; Folz v. Evansville Electric R. Co. 40 Ind. App. 307, 80 N. E. 868.

The complaint, to be sufficient to withstand a demurrer, must aver that the running of the car was unusual, unneces-

ary is not liable for an injury to the driver of the team, after he has turned away from the track, and into an adjoining field on the opposite side of the highway, caused by the fright of the team at two blasts of the whistle of the locomotive, given for "off brakes," when at least 120 feet from the team, unless the engineer, in the exercise of reasonable prudence, knew or should have known that the blowing of the whistle might frighten the team. Ochiltree v. Chicago & N. W. R. Co. 93 Iowa, 628, 62 N. W. 7, rehearing denied in 96 Iowa, 246, 64 N. W. 788.

A railroad company is not liable for injuries to one driving on a highway parallel with its tracks, caused by the fright of his horse at the noise and dust caused by the use of an air brake to prevent a collision, if such noise and dust were necessarily incident to the prudent and careful operation and movement of a train. Louisville & N. R. Co. v. Street, — Ky. —, 129 S. W. 570.

And a railroad company which, pursuant to its charter, has purchased a turnpike road running parallel with its proposed railroad, assuming the liability of the turnpike company, and has laid out and constructed its road upon a line in some places in close proximity with the turnpike, is not liable for injuries to one traveling upon the turnpike, by the fright of his horse at a passing train on the railroad, unless such injuries were caused by some wrongful or negligent act of the company, its agents or servants. Coy v. Utica & S. R. Co. 23 Barb. 643.

Where there is no showing that a railroad company owning and operating a bridge knew that a person was driving along a wagon way thereof, used as a public toll bridge, when it ran one of its trains on the overhead railway across the bridge, or that it was under any duty to such person not to cross the bridge thus with its train at the time and under the existing circumstances, it is not liable for an injury sustained by him in consequence of his horse becoming frightened by the passage of the train. Levin v. Memphis & C. R. Co. 109 Ala. 332, 19 So. 395.

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And a railroad company authorized by statute and city ordinances to operate steam engines in and along a certain city street is not liable for injuries to a pedestrian on the sidewalk of that street, struck by a horse being driven along the street and frightened, when directly opposite a dummy engine which had been standing in one place for a half hour, by a sudden puff of steam from the safety valve thereof. Howard v. Union Freight R. Co. 156 Mass. 159, 30 N. E. 479.

A railroad company is not liable for injuries to one traveling on a highway parallel with its track, caused by the running away of his team when frightened by the whistling of the locomotive of a passing train, where the signal causing the fright was given in the usual way and for a necessary and lawful purpose, and those in charge of the train were not aware of the presence of the team in the vicinity. Atchison, T. & S. F. R. Co. v. Walkenshaw, 71 Kan. 742, 81 Pac. 463.

Nor is a railroad company liable for injuries to one driving on a parallel highway 300 feet from its track, where his horse was frightened by whistling for a crossing and station ahead, and the company's employees in charge of the train did not see the driver, and did not whistle wantonly, negligently, or unnecessarily. Louisville & N. R. Co. v. McCandless, 123 Ky. 121, 93 S. W. 1041.

A railroad company is not liable for injuries sustained by one driving on a parallel, adjacent highway, in consequence of the running away of his horse when frightened by the whistle of a passing locomotive, which was the usual and customary signal for a near-by crossing, given in the usual and customary manner, unless the employees in charge of the engine, after seeing that, if they continued to blow, it would cause the horse to be frightened, failed to cease blowing. Louisville & N. R. Co. v. Smith, 107 Ky. 178, 53 S. W. 269.

And a railroad company is not liable for injuries to one riding a horse along a highway parallel with its track, caused by the running away of the horse when frightened

sary, and improper; and that failure to check the speed of the car was the proximate cause of appellant's injuries.

Terre Haute Electric R. Co. v. Yant, 21 Ind. App. 491, 69 Am. St. Rep. 376, 51 N. E. 732; *Folz v. Evansville Electric R. Co.* 40 Ind. App. 307, 80 N. E. 868.

Morris, J., delivered the opinion of the court:

This suit is brought by appellant against appellee. The circuit court sustained a demurrer to the complaint for want of facts. Appellant declined to plead further. Judgment was thereupon rendered in favor of appellee, from which judgment this appeal is prosecuted.

The only error assigned is in sustaining

by a train, and its being struck by the train at a near crossing, unless the engineer knew, or, by the exercise of ordinary care, could have known, that the horse was frightened and running away, and the circumstances were such as to induce a person of reasonable prudence to believe that he would attempt to cross the track in front of the train, or come in contact with it at the crossing. *Conway v. Louisville & N. R. Co.* 135 Ky. 229, 119 S. W. 206, 122 S. W. 136.

In *Whistenant v. Southern States Portland Cement Co.* 2 Ga. App. 598, 59 S. E. 920, it is held that a corporation operating a private line of railroad parallel with and close to a public highway is not liable for the fright of a horse on such highway and consequent injuries, caused by the mere operation of an engine without any unusual or unnecessary noise, although the engineer in charge of the engine, after seeing the frightened and unmanageable condition of the horse, made no effort or attempt to slow down or stop the engine, but continued to operate it back and forth near the horse, in carrying out the work in which he was engaged.

Negligent or unnecessary act or omission.

Where, however, the fright and consequent injury are caused by some negligent or unnecessary act or omission of the company or its servants, it is liable therefor. Thus, a railroad company using a track passing along a public street in a city is liable for injuries resulting from the fright of horses in the street, if the engineer in charge of a passing engine negligently and unnecessarily permits steam to escape against the horses when the locomotive is opposite them (*Hahn v. Southern P. R. Co.* 51 Cal. 605); or if, by needlessly or negligently sounding the whistle, he causes them to take fright and run away (*Weil v. St. Louis Southwestern R. Co.* 64 Ark. 535, 43 S. W. 967).

And a railroad company is liable for injuries to one riding in a wagon on a city street running alongside its track, where it

the demurrer. The complaint, omitting formal parts, is as follows: "The plaintiff complains of the defendant for complaint in the above-entitled cause, and for cause of action says and avers: That the defendant, the Ft. Wayne & Wabash Valley Traction Company, is a corporation, organized and doing business under the laws of the state of Indiana. That the business of said corporation is that of a common carrier, and in its said capacity of a common carrier it operates a line of railway between the city of Ft. Wayne, Indiana, and the city of Bluffton, Indiana, over which line of railway cars are propelled by means of electricity, said cars being what are commonly called interurban railway cars, and said line of railway being commonly called

unlawfully and unnecessarily blows the whistle on an approaching train, frightening the horse and causing it to run away. *Georgia R. Co. v. Carr.* 73 Ga. 557.

Or where the engineer, when opposite the horses, unnecessarily or negligently sounds his whistle and opens the cylinder cocks and allows steam to escape, in violation of an ordinance, frightening the horses, whereby the driver is thrown to the ground and run over. *Chicago, R. I. & P. R. Co. v. Steckman*, 125 Ill. App. 299, affirmed in 224 Ill. 500, 79 N. E. 602.

Where an engineer in charge of a locomotive saw a traveler driving along a public road near the railroad right of way, and blew his whistle, either knowing or having reasonable grounds to believe that to sound it in the manner and at the time he did would frighten the team and endanger the driver, the railroad company is liable for injuries occasioned by the fright of the team at the sound of the whistle. *Ft. Worth & D. C. R. Co. v. Partin*, 33 Tex. Civ. App. 173, 76 S. W. 236.

And a railroad company is liable for injuries to one traveling on a parallel highway between a deep ditch and its track caused by the fright of his team at the negligent sounding of the whistle of, and an emission of steam from, one of its locomotives, in an unusual manner, and not at a customary place, where the position of the traveler could have been readily seen by the engineer and fireman at least 150 yards before reaching him, and the engineer knew or had reason to believe that the team would become frightened and that injury would probably result therefrom, when he blew the whistle and allowed the steam to escape. *Gulf, C. & S. F. R. Co. v. Spence* — Tex. Civ. App. —, 32 S. W. 329.

So, a railroad company is liable for injuries to one employed with a horse and cart in drawing dirt onto a highway parallel with and near to its track, occasioned by the fright of his horse at the sound of the whistle on a locomotive of a train standing on the railroad, if the whistle was blown carelessly, by being unduly prolonged or if the engineer was negligent in blow

an interurban railway. That on and prior to the 27th day of September, 1906, the said defendant owned and was operating said railway as aforesaid. That for a mile north of the city of Bluffton said railway runs parallel with and on the west side of the public highway, and the center of said railway track is within 30 feet of the center of said public highway throughout said distance. That there was on said day a deep ditch on both sides of said public highway, and that for three quarters of a mile south from the place of the accident hereinafter mentioned and complained of there were no trees of any kind, hills, or obstructions of any sort between said highway and said interurban railway. That on said 27th day of September, 1906, the plaintiff was

in a single buggy, the top of which was up, which said buggy was drawn by a six-year-old horse that had always been gentle, quiet, and safe to drive, and was owned and driven at said time by one Luther Brown. That on said day the plaintiff and said Brown were seated in said buggy, and the horse was being driven by said Brown from the north towards said city of Bluffton, on and along said public highway, on the east side of said railway. That on said day said defendant was running one of its cars north from said city of Bluffton, over said railway track, at a rate of speed not less than 20 miles per hour at said time. That at said time said Brown was driving said horse in a careful manner on said public highway. That, when said horse and

ing it, even as an established signal, when he knew that men were at work with teams only a short distance from the place where the train stood,—although the company is not liable for the consequences of the giving by its servants of reasonable and proper signals in a proper manner under circumstances which justified them in so doing. *Flynn v. Boston & A. R. Co.* 169 Mass. 35, 47 N. E. 1012.

Where an injury occasioned by the fright of a horse results from the manner in which the company's track is laid along a city street, the condition of its track may be one element of negligence rendering it liable for the injury. Thus, a railroad company which, pursuant to statutory authority, has laid down and maintains its tracks in and along a city street, but has unnecessarily impaired the usefulness of the street by leaving its rails 4½ inches above the surface of the street without planking over or filling in between them so as to permit driving over them, is liable for injuries to one driving along the street beside the tracks, and unable, by reason of the raised rails, to turn and avoid meeting an approaching train, whose horses are frightened by such train and by an unnecessary and negligent discharge of steam from the locomotive thereof, in violation of an ordinance, and back against the train. *Bell v. New York C. & H. R. R. Co.* 29 Hun, 560. (As to liability of street railway company for defect in track or street, see notes in 52 L.R.A. 448 and 15 L.R.A. (N.S.) 840).

Or for injuries to one on the street with a horse and wagon, occasioned by the fright of the horse at an approaching train, which injury would not have occurred if the track had been in condition to permit the wheels of the wagon to pass readily over it, or if the train had not approached at an excessive rate of speed, prohibited by ordinance. *Wasmer v. Delaware, L. & W. R. Co.* 80 N. Y. 212, 36 Am. Rep. 608.

—excessive speed.

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to one driving along a city street in which its tracks are located, resulting from the fright of his horses, by reason of which he is forced into close proximity to the tracks while trying to get himself and his team to a safe place, and is struck by a locomotive approaching at an excessive rate of speed, in violation of an ordinance, where such excessive speed is the proximate cause of the injury, and if the locomotive had not been run in excess of the legal rate of speed, he could have withdrawn himself from the place of danger. *Colorado Midland R. Co. v. Robbins*, 30 Colo. 449, 71 Pac. 371.

And a railroad company may be liable for injuries to one riding a mule alongside a track on a city street, in consequence of the fright of the mule and its carrying him onto the railroad track in front of an approaching train, where, in consequence of the train being run at a greater rate of speed than allowed by the city ordinances, the company's servants in charge of it, after seeing that the mule had become frightened and unmanageable and had run away and onto the track, were unable to stop the train in time to avoid striking the mule and rider, as they could have done had the train been going at a proper rate of speed. *Prewitt v. Missouri, K. & T. R. Co.* 134 Mo. 615, 36 S. W. 667.

—unusual and unnecessary noises and sights.

A railroad company is liable for injuries caused by frightening a horse upon a highway parallel with its tracks, if its employees in charge of a train know of the driver's presence and danger, and make an unusual and unnecessary noise. *Louisville & N. R. Co. v. Street*, — Ky. —, 129 S. W. 570.

Thus, a company operating an electric railway along a public road is liable for injuries to one driving a mule along such road, caused by its taking fright and running away as the result of the company's running a car across a railroad track at an unusually high rate of speed, thereby making an unusual and unnecessary noise which

buggy were over 100 feet from said car, as it was approaching said horse and buggy, said horse became frightened at said approaching car and the appearance thereof, and began to jump and rear. That said Brown threw up his hand, and signaled the motorman in charge of said car to stop. That, while said horse was so frightened, jumping, and rearing at the approach of said car, defendant's agent, and motorman, saw and was fully aware of the frightened condition of said horse and the cause thereof in ample time to have stopped the speed of said car and the motion thereof, in time to have prevented the injuries to the plaintiff hereinafter complained of, and said motorman and agent of the defendant in charge of said car, with full knowledge

of the facts aforesaid, carelessly, negligently, and unlawfully failed, refused, and neglected to stop or check the speed of said car, though signaled and requested to do so by said Brown, and negligently and carelessly ran said car at said high rate of speed of 20 miles per hour towards and in the direction of said horse and buggy, in close proximity to them, thus greatly increasing the fright of said horse, by reason of which and on account of the negligence of said motorman and agent of the defendant, as aforesaid, it rendered it impossible for said Brown or this plaintiff to hold, manage, or control said horse. That, on account of the said negligence and carelessness of said motorman and agent of the defendant, the said horse was caused to

its servants in charge know is likely to frighten the mule, which they see in close proximity to the crossing. *Georgia R. & Electric Co. v. Joiner*, 120 Ga. 905, 48 S. E. 336.

And a suburban railway company may be found guilty of negligence rendering it liable for injuries to one driving along a public highway on which its motorman and conductor are running an electric car on its tracks toward him, occasioned by the fright of his horse at the unusual but natural sounds and the splashing of water caused by the company's running the car at an ordinary rate of speed through a long pool of water covering its tracks, where the motorman saw the pool and continued to run through it without slackening speed until he passed the point where the traveler was injured, although the horse became frightened as soon as the car entered the highway. *Ayars v. Camden & Suburban R. Co.* 63 N. J. L. 416, 43 Atl. 678.

A railroad company is liable for injury sustained by the killing of horses so frightened by the whistling of a locomotive that they become unmanageable, plunge into a river, and are drowned, where the engineer, seeing the team, and seeing that it is frightened, or knowing that it is in danger of being frightened, sounds the whistle in an unusual manner, or when it is not necessary, or for the purpose of frightening the horses. *Everett v. Richmond & D. R. Co.* 121 N. C. 519, 27 S. E. 991.

And a railroad company may be liable for personal injuries sustained by one thrown to the ground and dragged some distance when his mule runs away on account of fright caused by an unusual and unnecessary noise made because of a defective stopping or plugging up of a broken cylinder cock. *Hutcheson v. Southern R. Co.* 134 Ga. 602, 68 S. E. 323.

Where a company operating electric cars on and along a suburban highway uses a car so constructed that when operated it rocks, teeters, and swings up and down at the ends, thereby causing the fenders

to toss upward and downward, frightening a horse being driven along the highway, and where the motorman and conductor in charge of the car do not stop, although they know of the horse's fright in time to avoid an accident by stopping the car, it is a question for the jury whether the company is guilty of negligence rendering it liable for injuries to the driver by the fright and rearing and plunging of the horse. *Fowler v. Ft. Wayne & W. Valley Traction Co.* — Ind. App. —, 91 N. E. 47.

And a company operating an interurban railroad on and along a public highway is liable for injuries resulting to one driving along such highway from the fright of his horse, caused by a large advertising banner attached to the front of one of its approaching cars, which banner was not necessary for the proper management or running of the car, or in any manner required in the operation of the road, and, together with the motion and speed of the car, was well calculated to frighten horses unaccustomed thereto, and was negligently and carelessly adopted and used for advertising purposes. *Indianapolis & G. Rapid Transit Co. v. Haines*, 33 Ind. App. 63, 69 N. E. 187.

Duty to keep lookout.

While ordinarily the duty of a railroad company to keep a lookout does not extend to travelers on adjacent highways (*Southern R. Co. v. Flynt*, 2 Ga. App. 162, 58 S. E. 374), if the circumstances are such as to require the engineer, in the exercise of ordinary care to keep a lookout for danger to persons traveling on a parallel highway, and he fails to do so, the railroad company is liable, in the absence of contributory negligence, for injuries to the traveler which are proximate consequences of such failure. *Johnson v. Texas & G. R. Co.* 45 Tex. Civ. App. 146, 100 S. W. 206.

Thus, a railroad company operating a dummy railroad in and along the public streets of a city, connecting its lines with those of another company, is liable for injuries to one riding along one of such

jump into said ditch on the east side of said highway, and to upset said buggy in said ditch, thereby throwing the plaintiff violently against the east bank of said ditch, on his shoulders and face, causing concussion from the shoulder to the hip joint, and going around the entire body, producing ecchymosis and great pain and anguish. That, had said motorman shut off the electricity from the motors on said car, the noise caused by said car would have been greatly lessened, and had said car been stopped or the speed thereof slackened, said accident would have been averted; all of which could have been done without danger or damages to said car or any of the occupants thereof. That at the time of said injury this plaintiff was in

the real estate business and earning \$200 per month. That, on account of said injury, the plaintiff was confined to his bed three weeks, and unable to do any work or follow his occupation until the 18th day of December, 1906. That, on account of said injury, he has been compelled to pay for medical attention the sum of \$25 and the further sum of \$12 for medicine. All to the plaintiff's damage in the sum of \$1,000, for which plaintiff demands judgment and for all other proper relief."

Counsel for appellant, in their brief, state that the lower court sustained the demurrer on the theory that defendant owed no duty to one driving along a highway running parallel with its road. While as a general rule, those in charge of a rail-

roads, in consequence of the fright of his horses at the noise of a blower in operation or a dummy engine standing on the street, even if it is a usual and necessary noise, if, by the exercise of reasonable care, the train men could have discovered the fright of the horses and the peril of the driver in time to have avoided the injury by stopping the noise. *Feeney v. Wabash R. Co.* 123 Mo. App. 420, 99 S. W. 477.

And where a public road, established before the location and construction of a railway, runs along and on its right of way, and the railroad company has since permitted it to be used continuously as a public road for more than ten years, it is liable for injuries to one driving thereon, occasioned by the fright of his horse at an approaching and passing train, where its employees in charge of the train have failed to exercise ordinary care to ascertain the traveler's position and danger, or, knowing that his horse is frightened and running away, and that its fright is caused by the approach and noise of the train, have failed to exercise ordinary care to avoid injuring him by slackening the speed or lessening the noise of the train. *Missouri, K. & T. R. Co. v. Belew*, 22 Tex. Civ. App. 264, 54 S. W. 1079, later appeal in 26 Tex. Civ. App. 8, 62 S. W. 99.

Where railroad tracks run through a city parallel with and so near to a public street that the public safety requires that engineers should look out for persons lawfully using the street, in order to prevent the frightening of teams, and an engineer should know that, by running alongside the street at an excessive rate of speed, and by unnecessarily and repeatedly sounding the whistle, teams traveling on the street near the track may become frightened, the railroad company is liable for injuries to one traveling on such street, caused by the fright of his team, where the engineer in charge of an engine ran it at a rate in excess of the speed allowed by an ordinance of the city, and either did discover, or, by the exercise of ordinary care, could have discovered, the fright of the team, and unnecessarily sounded the

whistle, which should not have been sounded under the circumstances. *Missouri, K. & T. R. Co. v. Sanders*, 42 Tex. Civ. App. 545, 94 S. W. 149.

And a railroad company may be found guilty of negligence rendering it liable for injuries sustained by one driving along a highway parallel with and near to one of its tracks, in consequence of the fright of his horse at the noise of a train approaching from the rear, where, although the engineer in charge could have seen the buggy on the highway for a distance of a quarter of a mile, such train, an hour late, approached without whistle or other notice, until within a few yards of the team, when its whistle was blown, and the horse became more frightened, and ran away. *Hudson v. Louisville & N. R. Co.* 14 Bush, 303.

Discovered peril.

While the cases are comparatively few in which the circumstances are such as to impose upon railroad companies the duty to keep a lookout for travelers upon adjacent parallel highways, it seems clear in all cases, as illustrated in *EFFINGER v. FT. WAYNE & W. VALLEY TRACTION CO.*, that if the employees in charge of a locomotive, car, or train actually see that the team has been frightened, and know or have reason to believe that it is likely to become unmanageable and cause injury, they are guilty of negligence rendering the company liable for resulting injuries, if they fail to use all reasonable means at hand which a man of ordinary prudence would use to allay the fright or avoid injury. Thus, a railroad company is liable for injuries to one driving along a public road on its right of way, parallel with its railroad track, and at a distance of 15 to 25 feet therefrom, with a barbed wire fence a few feet away on the opposite side of the road, which injuries are occasioned by the fright of his horse at a train approaching from the rear, where the proximate cause of the injuries is the failure of those in charge of the train, after seeing the traveler's danger, to do everything in their power, consistent

way train are not required to watch an abutting highway to discover frightened horses, and while it is not negligence in itself to run a train or electric car at a speed of 20 miles an hour, it does not follow therefrom that there may not be circumstances under which a duty might arise on the part of the railway company to avoid an injury to a traveler on such highway. As was said by Mr. Justice Brewer in *Culp v. Atchison & N. R. Co.* 17 Kan. 475: "That a party has a right to do a given act at certain times and under certain circumstances does not prove that the same act is right under all circumstances and at all times." 2 *Thomp. Neg.* §§ 1909-1911; *Billman v. Indianapolis, C. & L. R. Co.* (1881) 76 Ind. 167, 40 Am. Rep. 230.

with the safety of the train and those upon it, to stop the train, decrease its speed, stop its noise, or lessen the same, and thus avoid the danger of increasing the fright of the horse by running upon him in his frightened condition. *Johnson v. Texas & G. R. Co.* 45 Tex. Civ. App. 146, 100 S. W. 206.

And a company operating electric street cars over and along a highway outside of a city is liable for injuries to one driving along such highway, caused by the fright and running away of his horse, where its servant in charge of a car approaching the traveler from the rear at a high rate of speed sees that his horse is frightened at the car and the ringing of its gong, and fails to make any effort to stop the car, although he has time, and could, by reasonable effort, stop it, but carelessly or wantonly keeps up the speed of the car and continues ringing the gong. *Owensboro City R. Co. v. Lyddane*, 19 Ky. L. Rep. 698, 41 S. W. 578.

Where a horse has become frightened at a proper sounding of the whistle of a locomotive on a railroad running parallel with the highway, the railroad company may be found guilty of negligence rendering it liable for injury to the driver, if its engineer unnecessarily uses the whistle a second time at the same place, when he sees, or, with proper care, might see, the traveler, and that his horse is becoming unmanageable. *Philadelphia, W. & B. R. Co. v. Stinger*, 78 Pa. 219.

And a railroad company is liable for injuries to one driving along the highway running parallel with its road, resulting from the fright of his team, if its engineer unnecessarily continues to blow his whistle after discovering that a blast of the whistle, given as a signal of approach to a station in a town, has frightened the team, which the driver is trying to control, and that it probably will be more frightened by continued blowing (*Akridge v. Atlanta & W. P. R. Co.* 90 Ga. 232, 16 S. E. 81); or after he has been notified by the fireman that the team is frightened (*Lyons v. Chicago, M. & St. P. R. Co.* — S. D. —, 128 N. W. 134).

So, a railroad company operating a por-

"Negligence" is a relative term, and of necessity must depend upon the circumstances of each particular case. All the attendant circumstances, including the degree of danger and the defendant's knowledge, if any, of plaintiff's peril, should be considered in determining the standard of care which may be reasonably required in the particular case. 29 Cyc. Law & Proc. p. 417. It is not sought in this complaint to charge the defendant with negligence in the first instance by reason either of the speed of the car or its appearance; but the theory of the pleading is that plaintiff was in a situation of imminent peril, and defendant, with full knowledge of the situation, afterwards increased that peril, and thereby caused the injury

tion of one of its bridges as a toll highway bridge may be liable for injuries to one who has paid toll and is driving over such portion of the bridge, resulting from the fright and running away of his horse, where he meets on the bridge a train with an engine at each end, and those in charge of the second engine, although seeing that the horse has become frightened, permit the engine to throw out an unusual quantity of smoke, steam, and cinders. *Kentucky & I. Bridge Co. v. Montgomery*, 24 Ky. L. Rep. 167, 57 L.R.A. 781, 67 S. W. 1008, 68 S. W. 1097.

And where the horse of one riding along a highway parallel with and near to a railroad, having been frightened by a train approaching from behind, runs nearly a mile, and then, the train having caught up with it, throws its rider, and the train men claim as their reason for not applying the brakes that it would have been necessary for that purpose to sound the whistle which would have increased the fright of the horse, the railroad company is liable for the rider's injuries, if the jury find that under all the circumstances, it would have been prudent to sound the whistle for the application of brakes. *Louisville & N. R. Co. v. Pipes*, 10 Ky. L. Rep. 590 (abstract).

A company operating an electric car over a track in a highway may be liable for an injury to one riding in a carriage along side the track, by reason of the fright of the mules drawing the carriage, where the motorman in charge of the car, which was running at a high rate of speed, after seeing the team and their frightened condition, made no effort to stop the car or to prevent a collision with the carriage, but continued to approach, and ran by the frightened team at a high rate of speed. *Dabbs v. Rome R. & Light Co.* 8 Ga. App. 350, 69 S. E. 38.

And a railroad company may be liable for injuries to one driving upon a city street along the side of its track, in consequence of the fright of his team, causing a collision between his wagon and a locomotive, where the company's servants operating such locomotive saw, or, by the ex-

It may be stated as a general rule that when one sees another in imminent peril, from which he cannot extricate himself, it is the duty of such person to so act as not to increase the peril; and, if he does act in a manner to increase the danger, after he has knowledge thereof, it is negligence. *Indianapolis Union R. Co. v. Boettcher* (1891) 131 Ind. 82, 28 N. E. 551; *Billman v. Indianapolis, C. & L. R. Co.* (1881) 16 Ind. 167, 40 Am. Rep. 230; *Louisville, N. A. & C. R. Co. v. Stanger* (1893) 7 Ind. App. 179, 32 N. E. 209, 34 N. E. 688; *Lake Erie & W. R. Co. v. Juday* (1897) 19 Ind. App. 436, 49 N. E. 843; *Kentucky L. Bridge Co. v. Montgomery*, 24 Ky. L. Rep. 167, 57 L.R.A. 781, 67 S. W. 1008, 68 S. W. 1097; *Ward v. Maine C. R. Co.*

96 Me. 136, 51 Atl. 947; *Hanlon v. Philadelphia & W. C. Turnp. Road Co.* 182 Pa. 115, 37 Atl. 943; *Fares v. Rio Grande Western R. Co.* 3 A. & E. Ann. Cas. 1070, note; *Illinois C. R. Co. v. Martin* (1908) 33 Ky. L. Rep. 666, 110 S. W. 815; *Louisville & N. R. Co. v. Smith*, 107 Ky. 178, 53 S. W. 269.

The complaint alleges that plaintiff and another were driving on a public highway, running parallel with defendant's road, and only 30 feet from the center thereof; that there was a ditch on each side of the highway; that the horse became frightened at the approaching car, and began to jump and rear; that the buggy top was up; that defendant's motorman saw and was fully aware of plaintiff's situation while the car

was in the exercise of ordinary care and diligence, could have seen, the fright of the team and the driver's peril in time to avoid the collision, but failed to do so (*Moore v. Kansas City & I. Rapid Transit R. Co.* 126 Mo. 265, 29 S. W. 9); or where those in charge of a locomotive caused great and unusual volumes of steam to be suddenly emitted from the locomotive, enveloping the team, and after they saw that the team was frightened, and had backed the wagon onto the track, and that the driver was helpless, made no effort to stop the locomotive, but negligently and unnecessarily ran it against the wagon, injuring the driver. *Brunswick & B. R. Co. v. Hoodenpyle*, 129 Ga. 174, 58 S. E. 705.

A company operating an electric railway along a public highway between two cities is liable for injuries resulting to one driving along such highway in a wagon drawn by two horses, if its motorman in charge of a car approaching at a high rate of speed from the rear, having sounded a whistle which frightened one of the horses, and caused it to rear and plunge and run upon the railroad track, and having seen the frightened and unmanageable condition of the horse, and the close proximity of the wagon to the track, so that the car could not pass without striking it, negligently ran the car against the wagon and team, causing the injury, although he could, by the exercise of ordinary care, have stopped the car and avoided the collision. *Cincinnati, L. & A. Street R. Co. v. Cook*, — Ind. App. —, 90 N. E. 1052.

And a railroad company is liable for injuries to one driving along a highway parallel with its track, in consequence of the fright and running away of his horses, and collision of a train therewith at a crossing ahead, where the employees in charge of the engine of a freight train at which the team became frightened failed to exercise ordinary care to prevent injury to him, after they had seen, or, by the exercise of ordinary care, could have seen and known, that the team was unmanageable and running away, going in the direc-

tion of the crossing, and the situation was such as to induce a person of ordinary prudence to believe that there was danger of a collision at the crossing. *Chesapeake & O. R. Co. v. Pace*, 32 Ky. L. Rep. 806, 106 S. W. 1176.

Likewise, a railway company is liable for injuries to one driving along a highway parallel with its tracks, by the fright and running away of his horses, where the engineer in charge of a locomotive and train approaching from the rear, after seeing the driver struggling to control the frightened horses, negligently and unnecessarily permitted steam to escape and blew his whistle, at which the horses took new fright and became unmanageable and ran away along the highway toward a point where it was crossed by the railway; and the engineer, watching them run, and knowing that the driver's only chance of escape was by crossing the railroad ahead of the train, and continuing along the highway, made no effort to stop or check his train, but increased its speed, so that when the horses reached the crossing, the locomotive and two or three cars had passed, blocking the highway, and the horses turned and dashed through a fence and down a bank into a creek. *Louisville, N. A. & C. R. Co. v. Stanger*, 7 Ind. App. 179, 32 N. E. 209, 34 N. E. 688.

But in *Evansville Electric R. Co. v. Folz*, — Ind. App. —, 93 N. E. 866, it was held that an electric railway company operating cars on a suburban highway was not liable for injuries to one driving a team of mules on such highway, resulting from the fright and unmanageableness of the mules, where it appears only that the motorman in charge of the car did not stop after the mules became frightened at the approach and noise of the car, and more and more frightened and unmanageable as the car came nearer, and that the occupants of the wagon signaled and called to the motorman,—there being no showing as to the width and condition of the highway at the place, or as to the proximity of the team to the track.

was 100 feet away, and in time to have slackened the speed of the car, and prevented plaintiff's injury, and without danger of injury to the passengers or car; but that, with full knowledge of the situation, he neglected to stop or check the speed of the car, thereby increasing the horse's fright, and rendered it impossible for the driver to control the horse; that by reason of the motorman's said conduct, after knowing plaintiff's peril, the horse was caused to jump into one of the ditches at the side of the highway, thereby causing the plaintiff's injury. The complaint charges negligence under the above rule.

Counsel for the appellee assert that the complaint is insufficient because there is no allegation that the appearance of the car, or any act complained of, was calculated to frighten horses of ordinary gentleness. The complaint does not proceed on that theory, but on the theory above indicated.

Appellee also contends that the complaint is defective because it fails to aver that plaintiff would have been able, because of

the gentleness of the horse, or other reason, to have controlled it, had the car been stopped. In view of the facts alleged, such allegation was unnecessary.

Appellee further says the complaint is insufficient because it fails to allege that defendant's failure to check the speed of the car was the proximate cause of the injury. The complaint alleges sufficient facts in regard to this matter to justify the submission of the question of negligence to a trial. *Baltimore & O. S. W. R. Co. v. Slaughter* (1906) 167 Ind. 330, 7 L.R.A. (N.S.) 597, 119 Am. St. Rep. 503, 79 N. E. 186; *Rodgers v. Baltimore & O. S. W. R. Co.* (1898) 150 Ind. 397, 49 N. E. 453.

Appellee suggests other objections to the complaint that might be well taken on a motion to make the complaint more specific but which are not involved in the ruling on a demurrer for want of facts. The court erred in sustaining the demurrer to the complaint.

Judgment reversed, with instructions to the lower court to overrule the demurrer

Wanton or malicious acts.

Where acts of servants of a railroad company in the use of instrumentalities of the company placed in their hands are wanton and malicious, the company is liable for injuries resulting from the fright of horses on parallel highways, caused thereby. As held in *Texas & P. R. Co. v. Scoville*, 27 L.R.A. 179, 10 C. C. A. 479, 23 U. S. App. 506, 62 Fed. 730, the engineer and fireman in charge of a railroad locomotive on a regular run, who wantonly and maliciously blow the whistle to frighten a horse being ridden along a public road running parallel with the railroad, are acting within the scope of their employment, so as to render the company liable for injuries to the rider.

And under statutes providing that a railroad company shall be liable in damages for any injury done to persons or property by the improper conduct of any person in its employment, in running locomotives or cars, a railroad company is liable for injury to one riding in a buggy near its track, by the fright of his horse, causing him to be thrown from the buggy, where an engineer, as his train passes, unnecessarily and maliciously, and for the purpose of frightening the horse and hurting the driver, causes the engine to whistle twice in quick succession. *Georgia R. Co. v. Newsome*, 60 Ga. 492.

A railroad company is liable for injuries to one traveling along a public highway through a narrow lane parallel with and near to its railroad track, by the fright of his horse and overturning of his buggy, where the engineer on a train approaching from the rear unnecessarily, wantonly, and

maliciously sounded the whistle in a harsh and unusual manner, so as to frighten the horse, and after seeing that the sounds had frightened the horse, continued whistling until the carriage was overturned and the injury inflicted. *Chicago, B. & Q. R. Co. v. Dickson*, 63 Ill. 151, 14 Am. Rep. 114.

Or where he needlessly, wantonly, willfully, and recklessly, if not maliciously sounded the whistle in such manner, and after seeing that the horses were running away, continued to whistle thus until the train came abreast of the running team *Chicago, B. & Q. R. Co. v. Dickson*, 88 Ill. 431.

Likewise, a lumber company operating a private railroad for conveying its lumber is liable for injuries to one traveling on a highway parallel with and near to its track by the fright of his horse, where the engineer of one of its log trains, as he was passing near the traveler, wantonly and unnecessarily blew the whistle of the engine on purpose to frighten the horses. *Stewart v. Cary Lumber Co.* 146 N. C. 47, 59 S. E. 545.

And a turnpike company operating a steam passenger railway on and along its turnpike road may be liable for injuries to one driving along the road, by the fright of his horses, where its engineer and conductor in charge of a combined steam engine and passenger car, running at the rate of 3 miles an hour, saw the horse take fright when 30 or 40 yards off, and did not stop, but the engineer recklessly blew off three or four spurts of steam as he approached nearer, as if to aggravate the terror of the horse for his own amusement. *Hanlon v. Philadelphia & W. C. Turnpike Road Co.* 182 Pa. 115, 37 Atl. 943.

Contributory negligence.

Contributory negligence on the part of an injured driver is, of course, a bar to his recovery against a railroad company for injuries resulting from the fright of his team by a locomotive, car, or train on a railroad parallel with the highway on which he is traveling, unless the fright is caused by some wanton or malicious act on the part of the company. But a person is not, as a matter of law, guilty of contributory negligence in driving along a public highway, along which an electric railway runs, because he knows that his team is liable to become frightened at the cars. *Cincinnati, L. & A. Street R. Co. v. Cook*, — Ind. App. — 90 N. E. 1052.

Nor is a person with a horse, doing business in a street through which a railroad track runs, guilty of negligence as a matter of law in leaving such horse, not shown to be vicious, unsafe, or unmanageable, standing in his immediate presence while he attends to such business, or in trying, without time for cool reflection, to catch the horse when it has been frightened by an approaching train, and starts across the tracks. *Wasmer v. Delaware, L. & W. R. Co.* 80 N. Y. 212, 36 Am. Rep. 608.

But a person driving an unbroken or vicious horse, or one that is easily frightened by a locomotive, along a public road running side by side with a railroad, where he is liable to be met or overtaken by a train, does so at his own risk; and it is immaterial that there is no other road for his use. *Philadelphia, W. & B. R. Co. v. Stinger*, 78 Pa. 219.

And a person who knows that his horses are afraid of cars, and that a train is likely to come along at any time, should remove them a safe distance from a railroad track alongside which he is traveling on a public street, provided he has time and opportunity to do so; and if, knowing the situation, he chooses to have them remain near the track, and by reason thereof his conduct contributes directly to an injury by collision with a train at which his team becomes frightened, he cannot recover against the railroad company. *Moore v. Kansas City & I. Rapid Transit R. Co.* 126 Mo. 265, 29 S. W. 9. A. C. W.

KENTUCKY COURT OF APPEALS.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appt.,

v.

WILLIAM RENFRO'S Admr.

(142 Ky. 590, 135 S. W. 266.)

Carrier — separation of races — failure to enforce — liability for injury.

1. A railroad whose conductor fails as soon as practicable, and within a reasonable time after discovering a white passenger

in a negro compartment, to require him to leave it, is, where the statute provides a penalty for permitting passengers to occupy compartments set apart for the other race and charges the conductor with the enforcement of the law, liable in damages for the unprovoked shooting by him of a negro.

Evidence — failure to separate races in car — acts of conductor.

2. Upon the question of the liability of a railroad company for an assault upon a colored passenger, because of the conductor's failure to obey the statutory requirement to remove a white man from the colored compartment of a train, evidence is not admissible of his failure to remove other white persons therefrom, of his failure to station a guard to prevent white passengers from entering the compartment, or of the manner in which white passengers were behaving in their own compartment.

Same — failure to notify conductor — liability of carrier.

3. Although the duty of enforcing a statute requiring the separation of white and colored passengers is imposed upon conductors of trains, a railroad company may be held liable for injury inflicted upon a passenger of one race by a member of the other who is allowed to be in the wrong compartment without the knowledge of the conductor, if a subordinate employee, upon discovering his presence there, fails, as soon as practicable and within a reasonable time, to notify the conductor of that fact.

Same — self-defense — effect.

4. A railroad company cannot be held liable for the killing of a negro passenger by a white person permitted to be in the negro compartment of a train, contrary to the provisions of the statute, if the shooting was done in necessary self-defense.

(March 7, 1911.)

Note. — Carriers: liability for injury to passenger by another passenger permitted to remain in car in violation of separate coach law.

In an action against a carrier for assault upon a colored passenger by a white passenger permitted to remain in the car set apart for colored persons, it is error for the court to omit from his charge any reference to the statute requiring that the two races be separated, as whether the carrier complied with that statute is a material issue. *Hillman v. Georgia R. & Bkg. Co.* 126 Ga. 814, 56 S. E. 68, 8 A. & E. Ann. Cas. 222.

The effect of such statutes seems to be that if the carrier assigns a passenger to the wrong car, or compartment, or permits him to remain therein after knowledge of his presence, it becomes liable to other passengers, rightfully in the car, for any injury inflicted upon them by such passenger, although its employees did not have notice of the violent conduct of such passenger or reason to anticipate it.

Thus, in *Quinn v. Louisville & N. R. Co.*

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APPEAL by defendant from a judgment of the Circuit Court for Bell County in plaintiff's favor in an action brought to recover damages for the death of plaintiff's intestate alleged to have been caused by the failure of defendant's servant to obey the statutory requirement to remove a white man from the colored compartment of a train. Reversed.

The facts are stated in the opinion.

Messrs. Charles W. Metcalf, J. W. Alcorn, and Benjamin D. Warfield for appellant.

Mr. W. F. Davis for appellee.

Carroll, J., delivered the opinion of the court:

In July, 1908, William Renfro, a colored man, while a passenger on one of appellant's trains, was shot and killed in the compartment set aside for colored passengers by Carlo Jones, a white man, also a white passenger, who went from the compartment for white passengers into the compartment for colored passengers. This action was brought by the administrator of Renfro to recover damages for his death, the ground of the action being that the appellant company subjected itself to liability for the death of Renfro by permitting, through its employees, Jones to be and remain in the colored compartment in violation of the statute. Upon a trial before a jury, a verdict was returned in favor of the appellee, and it is the judgment on that verdict we are asked to reverse.

The errors complained of are that the trial court erred in the admission and re-

jection of evidence, in giving and refusing instructions, and in declining at the conclusion of the evidence to direct a verdict in favor of the railroad company.

The facts are substantially as follows: Renfro, Jones, and a number of other white and colored passengers got on the train at Middlesboro in the night. The first passenger coach on the train was divided by a partition, with a door in the aisle, into two compartments; one being set apart for colored passengers, and the other used as a smoking car for white passengers. Renfro and a number of his colored companions and friends took seats in the colored compartment; and Jones and a number of other white persons took seats in the smoker. Shortly after leaving Middlesboro, the conductor commenced taking up tickets in the colored compartment, which was at the front of the train, and from there went into the smoker, where the white passengers were, and thence into other cars in the rear of the train. It appears from the evidence that, as he passed through the colored compartment taking up tickets, there was at least one and probably two white passengers, Jones not being one of them, in this compartment, and that he saw or could have seen them, and was requested by one or more of the colored passengers to make them go into their own compartment, and was also asked to keep the partition door closed, but that he did not give any attention to either of these requests, but went on about his business of collecting tickets. Jones did not go into the colored compartment until after the conductor had passed

98 Ky. 231, 32 S. W. 742, it was held that the carrier was liable to a colored woman for grossly insulting language and conduct used by a white man who was permitted by the brakeman to remain in the colored car until he finished talking with a colored man with whom he had some business.

In Wood v. Louisville & N. R. Co. 101 Ky. 703, 42 S. W. 349, it was held that defendant was liable for the use, by white passengers permitted in the colored car, of profane and indecent language in the presence of plaintiff, a colored woman, although the employees of defendant did not know of such conduct.

That knowledge of the presence of the offending passenger in the wrong compartment is essential to the liability of the carrier is shown by Bailey v. Louisville & N. R. Co. 19 Ky. L. Rep. 1617, 44 S. W. 105, in which the court says that defendant would not be liable unless its employees permitted the white persons to enter the colored compartment, or, knowing of their presence there, permitted them to remain.

In Louisville & E. R. Co. v. Vincent, 20 Ky. L. Rep. 1040, 96 S. W. 898, the carrier was held liable for injuries received by a

white woman during a panic ensuing as a result of a fight growing out of a controversy over fares, between its employees and a colored man who had been permitted to ride in the car assigned to white persons.

In Hale v. Chesapeake & O. R. Co. — Ky. —, 135 S. W. 398, where the conductor requested an intoxicated white passenger to leave the colored car, and he did so peaceably, it was held that the company was not liable for his conduct after he returned to the car without the conductor's knowledge, the court saying that the evidence failed to show failure on the part of the conductor to exercise the utmost degree of care and skill that ordinarily prudent persons would exercise under similar circumstances to protect plaintiff.

And in Walker v. International & G. N. R. Co. — Tex. Civ. App. —, 117 S. W. 1020, where it was not shown that the passenger for whose insulting language action was brought, was assigned to the colored car, or that any of defendant's employees knew of his presence there until the disturbance, it was held that the company was not liable.

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cut of it, and there is no evidence whatever that the conductor or the brakeman on the train knew that Jones had gone into the colored compartment or that he was in there until after the trouble between himself and Renfro. But the colored porter testifies that he saw Jones in the colored compartment a few minutes before the shooting occurred that resulted in Renfro's death. That he did not request him to leave it, nor did he inform the conductor that he was in the colored compartment. About 6 miles from Middlesboro there is a station called "Ferndale," and it was here that the train made the first stop after leaving Middlesboro. Some place between Middlesboro and Ferndale—the weight of the evidence conducing to show that it was shortly before the train reached Ferndale—Jones went from the white compartment into the colored compartment, and was engaged for the few minutes that elapsed between the time he entered until the train reached Ferndale in friendly conversation with an old colored man he had known for many years. This old man left the train at Ferndale, and about the time the train started Jones went to the front end of the colored compartment where Renfro was, and in a moment Renfro and Jones commenced shooting at each other, with the result that Renfro was killed, and Jones dangerously, but not fatally, wounded, although he died from other causes before the trial. What occasioned the difficulty between Jones and Renfro is entirely unexplained. There was no quarrel or disturbance between them preceding the shooting. They were seen engaged in conversation, and Jones was heard to say to Renfro, "What did you say anything about that for?" and this was the only part of the conversation between them that any of the witnesses who testified heard, but immediately after these words were spoken the shooting commenced. Renfro, who was a man of bad reputation, had been drinking, but to what extent he was intoxicated is not shown. Jones was perfectly sober, and, except for the difficulty with Renfro, he did not do or say anything that did or would have caused the slightest disturbance. Nor is there any evidence that the other white men who were in the colored compartment created any disorder or attempted in any manner to insult, abuse, or harm any of the colored passengers. Indeed, although several of the white as well as colored passengers were drinking, and in a more or less degree under the influence of liquor, there was no disorder or quarrel or excitement on the train, except between Jones and Renfro.

Under these facts the first question to be disposed of is: Should the request for a

peremptory instruction have been granted? Section 795 of the Kentucky Statutes (Russell's Stat. § 5343), reads in part: "Any railroad company or corporation, person, or persons, running or otherwise operating railroad cars or coaches, by steam or otherwise, on any railroad line or track within this state, . . . are hereby required to furnish separate coaches or cars for the travel or transportation of the white and colored passengers on their respective lines of railroad. Each compartment of a coach divided by a good and substantial wooden partition, with a door therein, shall be deemed a separate coach within the meaning of this act. . . ." Section 797 (§ 5345) reads in part: "That any railroad company or companies that shall fail, refuse, or neglect to comply with the provisions of §§ 795 and 796 shall be deemed guilty of a misdemeanor." And § 799 (§ 5347) provides: "The conductors or managers on all railroads shall have power, and are hereby required, to assign to each white or colored passenger his or her respective car or coach or compartment, and should any passenger refuse to occupy the car, coach, or compartment to which he or she may be assigned by the conductor or manager, said conductor or manager shall have the right to refuse to carry such passenger on his train, and may put such passenger off of the train. . . ." And § 800 (§ 5348) reading: "That any conductor or manager on any railroad who shall fail or refuse to carry out the provisions of § 799, shall, upon conviction, be fined. . . ." It will be noticed that under this statute railroad companies are required to provide separate compartments or coaches for white and colored passengers, and that the conductors or managers of trains are required to assign white and colored passengers to the respective cars or compartments set apart for their use, and to compel them, upon pain of ejection from the train, to occupy such cars or compartments. There is no complaint that the railroad company did not provide compartments in accordance with the statute, and so this part of the statute need not be further noticed. But, under this statute, if the conductor or manager of a train permits white or colored passengers to be or remain in a coach or compartment set apart for the other race, after he knows or has information they are in such coach or compartment, the company will be liable in damages if any passenger rightfully occupying his coach or compartment is humiliated, insulted, injured, or killed by a passenger who is permitted to remain in a coach or compartment set apart for the use and occupancy of the race of which he is

not a member. The duties and liabilities of railroad companies in this respect were considered by this court in *Quinn v. Louisville & N. R. Co.* 98 Ky. 231, 32 S. W. 742. In that case Fannie Quinn, a colored woman, brought suit against the company, charging that, with the consent of the conductor, white passengers were permitted to enter and remain in the car set apart for colored people in which she was riding, and while in the car used violent, profane, abusive, and indecent language in her hearing, and otherwise humiliated and disturbed her. The evidence showed that the conductor knew the white men were in the car, but did not, as directed by the statute, compel them to go and remain in another car. On these facts, the court said: "While the mere presence of the intruder into this coach for colored persons, with the knowledge of the conductor, would not give to the occupants a cause of action against the corporation, we cannot concur with counsel or the court below that the separate coach law has no application to the facts of this case. It is not necessary, in order to permit a recovery, to show that the conductor knew of this bad treatment of the colored passenger, or from his condition had the right to anticipate it was the purpose of the intruder to produce trouble. He should not be allowed to enter the car, or to remain there after his presence is discovered. . . . If, as we shall assume was the case, each one of the passengers had been assigned the coach required by the statute, and the white passenger had left his coach and gone into the coach with these colored people without the knowledge of the conductor, while he was attending to his duties in the other cars, and had there abused and insulted the appellant, it is plain no action could be maintained against the company, but, when the white passenger is assigned to the car set apart for those of another race, the company will be held responsible for his bad conduct affecting the rights of other passengers, although the conductor may be ignorant of what is transpiring, and, where the conductor or those managing the train know that one is in the wrong car, it is his duty to expel him, and by consenting to his remaining the company becomes responsible for his conduct so long as he does remain. . . . It may be contended that the white passenger having been assigned to his proper coach, and then leaving it without the knowledge of the conductor, exempts the company from liability, unless the conductor knows of the wrongs being committed or the purpose of the passenger, by reason of his conduct, to mistreat passengers. This would, perhaps,

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be a rational conclusion unless it further appeared the conductor, or those controlling the train, knew of the white passenger's presence in the colored compartment, and took no steps to require him to leave. Here the conductor assented to his remaining in the car until he despatched his business with the old negro, and the company should be held responsible for his conduct so long as he remained, and any other construction of the duties of corporations and their agents, arising from the passage of this law, would nullify its provisions or amount to a disregard of the manifest purpose of the legislature in enacting it. . . . Conductors, or those in charge of passenger trains, are invested with the power to protect those who for the time being are under their charge, and when it is shown they have exercised that vigilance that prudent men would exercise for the protection of the passenger, the company is relieved from liability." To the same effect is *Wood v. Louisville & N. R. Co.* 101 Ky. 703, 42 S. W. 349; *Louisville & E. R. Co. v. Vincent* 29 Ky. L. Rep. 1049, 96 S. W. 898.

Under the principles announced in these cases, which we approve, there could be no doubt that, if Jones had been assigned to or permitted to be or remain in the colored compartment by or with the consent of the conductor, the railroad company would be liable to a passenger in the colored compartment for any misconduct or violence of Jones. But there is no evidence that the conductor who was in charge of the train knew or had any information that Jones was in or intended to go into the colored compartment until after the difficulty. Jones was not in this compartment when the conductor passed through it, and at the time he went in the conductor was in another part of the train collecting tickets and fares. It therefore cannot be said that the conductor was in any respect neglectful of his duties under the statute. The fact that he failed or refused to remove from the colored compartment the two white men it was said were in there when he passed through taking up tickets or failed to lock or station at the partition door the porter or brakeman to prevent white passengers from going into the colored compartment, did not constitute a violation of the statute, and evidence upon these points should not have been admitted. Nor was it competent or relevant to show how passengers in the white compartment were conducting themselves. When the conductor went through the colored compartment and saw the two white men in there, it was undoubtedly his duty to have compelled them to leave the compartment but his failure to do this did not visi-

any civil or criminal liability upon the company or any civil liability upon the conductor, as these white men were not guilty of any misconduct while in the colored compartment. But their mere presence there, with the knowledge of the conductor, subjected him to the penalty denounced by the statute against any conductor who fails or refuses to carry out the provisions of the statute. In other words, if a conductor knows or has information that white or colored passengers are in coaches or compartments set apart for the other race, and he fails or refuses to expel them from the coach or compartment they are wrongfully in, as soon as practicable and within a reasonable time, he may be punished for a violation of the statute; but, unless the passenger who is in the coach or compartment set apart for the other race commits some act of violence or is guilty of rude, insulting, or abusive conduct that is calculated to humiliate or wound the feelings of passengers rightfully occupying the coach or compartment, no one of these passengers will have any cause of action against the company for the failure of the conductor to observe the law. It will be noticed that the statute uses the words "conductor or manager" in defining the duty of trainmen and fixing the penalty for disobedience of the statute. Generally speaking, the conductor is the manager of the train, and we think the words "conductor" or "manager" are used interchangeably and intended to mean the same person, unless it should be that a person not called or designated a "conductor" should be in charge of a train, and in a state of case like this he might appropriately be called the "manager." It has always been the practice of railroad companies in this state to have a conductor on every passenger train, and it is a matter of common knowledge that the conductor is the person who has charge of the train, controls its movements, and is held responsible by the company for obedience to its rules and regulations. It is also a matter of common knowledge that on all passenger trains there are brakemen, and on some of them porters, who assist in looking after the safety and comfort of passengers and in performing other duties incident to the operation of the train. But these brakemen and porters are under the control and supervision of the conductor, and do as he directs them. The method of operating passenger trains and the designation given to employees was well known to the legislature that adopted this carefully prepared law, and, if it had been intended to embrace brakemen or porters or other agents or employees, except conductors

or managers, the act would have so provided. The failure to mention in the act any servants or employees, except conductors or managers, was not the result of inadvertence or mistake. It therefore seems obvious that in designating only conductors and managers it was intended to exclude other servants or employees, and to hold only the conductor or manager of the train responsible for the observance of the law, and consequently the company is only civilly liable in cases like the one under consideration when the conductor or manager violates the law. As it was the purpose of this statute to only hold responsible, and punish for a failure to perform the prescribed duty, the person in charge of the train, whether he be called a conductor or manager, and as no other person except the one in control of the train is charged with the duty of enforcing the law or punished for his failure to do so, the company cannot be held responsible in a civil action for any act or omission of duty in respect to the enforcement of this law, unless it is committed by the person in charge of the train, to wit, the conductor or manager. But, we are further of the opinion that if a brakeman, porter, or other employee connected with the passenger department of the train in the performance of duties that relate to the comfort, convenience or safety of the passengers, knows or has information that a passenger is riding in a car or compartment set apart for another race, that he should as soon as practicable and within a reasonable time notify the conductor of this fact, and that the conductor, upon receiving the information, should as soon as practicable and within a reasonable time remove the offending passenger. Brakemen and porters are servants of the company, under the control of the conductor, and while they are not charged with the enforcement of the law, or personally responsible for a failure to execute it, it is nevertheless their duty as servants of the company and assistants of the conductor to use all reasonable means to secure obedience to the statute, and when one of these subordinate employees knows or has information that this statute is being violated, and fails as soon as practicable and within a reasonable time to notify the conductor of the fact, the company should be held responsible upon the ground that through its employees it is consenting to or acquiescing in a violation of the law. The statute imposes upon all railroad companies the duty of providing separate coaches or compartments for the white and colored races, and therefore the company, through all its servants who are connected with the passenger service,

should make every reasonable effort to require passengers to obey the law. It is not meant by what we have said to leave the impression that brakemen and porters should not, without calling on or notifying the conductor, enforce obedience to the statute, as there is no doubt that, as agents and servants of the company, it is not only their right, but their duty, to make reasonable efforts to require its observance; but, for the failure to do so, the company will not be civilly liable for a violation of the statute. Nor would we be understood as holding that the duty and liability of the conductor, as well as the company, for his acts, is confined to instances in which he knows or has information from an agent or employee of the company that the statute is being violated. When the conductor receives information from any source that the statute is being violated, he should as soon as practicable and within a reasonable time take appropriate steps to compel its observance.

Having this view of the law of the case, it will be seen that the liability of the company in this case depends upon the question whether or not the porter performed his duty in the manner we have ruled he should. In other words, it was the duty of the porter as soon as practicable, and within a reasonable time after discovering that Jones was in the colored compartment, to notify the conductor, and the duty of the conductor as soon as practicable, and within a reasonable time after receiving the notice, to eject him. Therefore, if the porter had exercised the diligence required, and the conductor could within the time indicated have removed Jones from the car before he killed Renfro, the company is liable, unless Jones killed Renfro in self-defense. The porter is the only witness who testifies that he, the porter, saw Jones in the colored compartment, but it is not shown by his evidence, or that of any other person, that after he first saw him there it was practicable for him within a reasonable time to notify the conductor, or that it would have been practicable for the conductor within a reasonable time after receiving the information, if it had been conveyed to him, to have ejected Jones before the difficulty.

It results from these considerations that the motion for a peremptory instruction should have been sustained. If there is a retrial, the court, in addition to instructing the jury as indicated, should instruct them that, if Jones shot and killed Renfro in his necessary self-defense, they cannot allow any damages for his death. In other words, upon this point the court should

give the instruction usually given in criminal cases.

Wherefore the judgment is reversed, with directions for a new trial in conformity with this opinion.

MISSISSIPPI SUPREME COURT.

RAS NEELY, Appt.,

v.

STATE OF MISSISSIPPI.

(— Miss. —, 54 So. 315.)

Contempt—Intoxication in court.

Being in a court room in an intoxicated condition does not constitute contempt of court if the fact is not brought to the attention of the judge and the business of the court is in no way interfered with.

(February 27, 1911.)

Note.—Intoxication in court room as contempt.

It is said in 7 Am. & Eng. Enc. Law, p. 28, that a direct contempt or a contempt *in facie curiæ* is noisy or tumultuous conduct in the presence of the court, or so near thereto as to interrupt its proceedings; or an open defiance to its powers or authority; or disrespectful behavior or language to the presiding judge; or any improper conduct tending to defeat or impair the administration of justice.

If this definition be taken as the criterion, it would seem to follow as a natural conclusion that, as held in NEELY v. STATE, merely going into a court room in an intoxicated condition, without indulging in boisterous conduct, or in any way interfering with the conduct of the business of the court, is not a contempt, at least where the court does not know of the person's drunken condition.

On the other hand, in the only additional case found to discuss this matter (Com. v. Clark, 13 Pa. Co. Ct. 439) the court seemed inclined to take a contrary view. There seems to have been a question in that case whether the defendant had actively created any disturbance, and the court in discussing this question said that it was a disturbance for him really to come into court with a prisoner in a drunken condition, and, at another point in its discussion, the court said a little more guardedly, that if the defendant came into court drunk, not simply being under some influence of liquor, but intoxicated, as the term is usually understood, so as really to be disorderly from that very circumstance, he would be guilty of a contempt. It is possible that the result in this case was somewhat influenced by the fact that the defendant was an officer of the court, acting as such at the time the contempt was alleged to have been committed. L. A. W.

APPEAL by defendant from a decree of the Circuit Court for Rankin County convicting him of contempt of court. Reversed.

Statement by Anderson, J.:

The appellant, Ras Neely, was fined \$100 by the circuit court of Rankin county for contempt, and appeals to this court. The facts in reference to such alleged contempt are as follows:

The appellant was convicted of the unlawful sale of intoxicating liquors, and made a motion for a new trial. One ground of the motion, among others, is that he was not represented by counsel when tried, and, being in a state of intoxication, was incapacitated to properly conduct his defense. The testimony of witnesses was taken on the trial of the motion. Touching appellant's intoxication, the testimony was substantially this: That while being tried he appeared to be sober, and to understand what was going on, and fully able to conduct his defense; that, if he was intoxicated, it was not noticeable. The trial judge stated, which is embodied in the bill of exceptions, that he paid particular attention to the appellant during his trial, and did not notice that he was intoxicated, if he was. The sheriff testified that on the day before the trial he saw the appellant in the court room in a drunken condition. There is no testimony whatever that, either on the day before the trial or the day of the trial, the appellant was disorderly or in any manner interfered with the proceedings of the court; and the judge in his statement does not show that he knew of his drunken condition the day before the trial, until it was testified to by the sheriff. There is an entire absence of any testimony tending to show that on either day the appellant was guilty of any conduct which interfered with the orderly administration of the business of the court.

At the conclusion of the testimony, on the motion for a new trial, the judge entered an order overruling the motion, and at the same time another order, adjudging the appellant guilty of contempt of court for being intoxicated in the court room on the day previous to the trial, and fined him \$100.

Messrs. Lamar F. Easterling and W. H. Thompson, for appellant:

Before a person can be found guilty of contempt not committed in the presence of the court, he must have due and reasonable notice of the proceeding. The rule to show cause should inform the defendant of the nature of the contempt alleged.

9 Cyc. Law & Proc. pp. 39, 41; Shattuck 33 L.R.A. (N.S.)

v. State, 51 Miss. 50, 24 Am. Rep. 624; State v. Charleston Dist. Sheriff, 1 Mill, Const. 145.

An affidavit charging the facts constituting the contempt is absolutely necessary to support a judgment of contempt, unless the alleged contempt is committed at the time, and in the actual presence of the court.

4 Enc. Pl. & Pr. p. 779; Saunderson v. State, 151 Ind. 550, 52 N. E. 151.

Mr. Carl Fox for the State.

Anderson, J., delivered the opinion of the court:

A direct contempt is a contempt *in facie curiæ*. It consists of such conduct or language on the part of the contemner as interferes with the orderly administration of justice. It may consist of an open insult, in the presence of the court, to the person of the presiding judge, or a resistance to or defiance of the power and authority of the court. "Misconduct in the presence of the court, which shows disrespect of its authority, or which obstructs or has a tendency to interfere with the due administration of justice, is contempt. Thus, disorderly conduct in the court room, or the use of violent, threatening or insulting language, to the court, witnesses, or opposing counsel, is contempt." 9 Cyc. Law & Proc. pp. 18 and 19. There can be no such contempt of court, unless the trial judge is conscious of it. The testimony in this record falls short of establishing such contempt. There is an entire absence of testimony that the judge knew of the drunken condition of the appellant on the day before he was tried, and there is also no testimony whatever to show that his drunkenness in any wise interfered with the conduct of the business of the court.

Reversed and appellant discharged.

KENTUCKY COURT OF APPEALS.

CHARLES WILLIAM MERRITT, Appt.,
v.

SUE MORTON, Admr., etc., of Sarah E. Morton Deceased, et al.

(143 Ky. 133, 136 S. W. 133.)

Adoption — inheritance from relatives of foster parent.

An adopted child will not inherit from the mother of its deceased foster parent, under a statute which provides that the

Note. — Right of adopted child to inherit property from a relative of the adoptive parent.

This was the subject of notes to Warren v. Prescott, 17 L.R.A. 435, and Hockaday v. Lynn, 8 L.R.A. (N.S.) 117. It is in-

adopted child shall become the heir at law of the parent adopting it, and be as capable of inheriting as though it was the child of such parent.

(April 13, 1911.)

APPEAL by plaintiff from a judgment of the Circuit Court for Warren County in defendants' favor in a suit to recover an interest in the estate of the mother of plaintiff's deceased foster parent. Affirmed.

The facts are stated in the opinion.

Messrs. Grider & Harlan and W. R. Speck for appellant.

Messrs. Rodes & Wallace, for appellee:

Appellant was heir at law of his adopted parents, and as capable of inheriting from them as if he had been born to them.

Power v. Hafley, 85 Ky. 671, 4 S. W. 683; Atchison v. Atchison, 89 Ky. 488, 12 S. W. 942.

An adopted child cannot inherit from the collateral kindred of its adoptive parent, nor from the ancestors of such parent, or from his natural children.

Van Matre v. Sankey, 148 Ill. 538, 23 L.R.A. 665, 39 Am. St. Rep. 196; 36 N. E. 628; Keegan v. Geraghty, 101 Ill. 26; Meader v. Archer, 65 N. H. 214, 23 Atl. 521; Phillips v. McConica, 59 Ohio St. 1, 69

Am. St. Rep. 753, 51 N. E. 445; Quigley v. Mitchell, 41 Ohio St. 375; Sunderland's Estate, 60 Iowa, 732, 13 N. W. 655; Moore v. Moore, 35 Vt. 98; Helms v. Elliott, 89 Tenn. 446, 10 L.R.A. 535, 14 S. W. 930.

Lassing, J., delivered the opinion of the court:

The Louisville Baptist Orphans' Home was incorporated by an act of the legislature January 29, 1870. Its charter was amended by another act of the legislature of March 19, 1873, and again on January 31, 1880. In 1883 it took into its custody an infant child named Charles Buel Davis, and on the 21st day of November, 1883, it apprenticed this child to W. W. Merritt. Under this apprenticeship, the infant remained in the custody of Merritt until the 19th day of July, 1884, at which time Merritt and his wife, Carrie Merritt, made and executed a contract of adoption with the said Louisville Baptist Orphans' Home, as provided for and authorized by the act of the legislature creating said home. After the execution of this contract, Merritt and his wife kept and reared the child as their own until he reached his majority. They never had any children born to them. In the year 19—, and prior to 1910, Carrie Merritt, his foster mother,

tended herein to include only cases decided subsequently to the latter note.

Adoption in and of itself confers no right of inheritance upon either party to the adoption proceeding, and hence whatever rights exist in that regard depend either upon special provisions contained in the statutes authorizing adoption, or special provisions relating to descent and distribution, and where, by statute, the right is not expressly conferred upon an adopted child to inherit from the collateral kindred of the adopted parent, such right does not exist. Wallace v. Noland, 246 Ill. 535, 92 N. E. 956; Boaz v. Swinney, 79 Kan. 332, 99 Pac. 621; Hockaday v. Lynn, 200 Mo. 456, 8 L.R.A.(N.S.) 117, 118 Am. St. Rep. 672, 98 S. W. 585, 9 A. & E. Ann. Cas. 775; Stout v. Cook, — N. J. Eq. —, 75 Atl. 583; Re Leask, 197 N. Y. 193, 27 L.R.A.(N.S.) 1158, 134 Am. St. Rep. 866, 90 N. E. 652, 18 A. & E. Ann. Cas. 516; Kettell v. Baxter, 50 Misc. 428, 100 N. Y. Supp. 529; Burnett's Estate, 219 Pa. 599, 69 Atl. 74; Rhode Island Hospital Trust Co. v. Humphrey, — R. I. —, 79 Atl. 829.

It was said by the court in Kettell v. Baxter: "Adoption is the taking of a stranger in the blood as one's own child. The proceeding of adoption and the relation established is personal to the foster parent and the child. The statute gives to them all the rights to be derived from the legal relation of parent and child, including the 'right of inheritance from each other.' The right is not given, however, either ex-

pressly or by implication, to the child, to inherit through the foster parent from his collateral kin. In other words, the child becomes heir only to the foster parent. This right of inheritance flows from the artificial relation established at the request of the one, and with the consent of the other. The adoption proceedings perpetuate the desire of the parent that the child shall be his heir. But a stranger to the adoption proceedings, who has never recognized the existence of any artificial relation, should not have his property diverted from the natural course of descent."

An adopted child is not a child or heir of an adopted parent, within the meaning of a devise or bequest with a limitation over, dependent on the foster parent dying without heirs, and the rights of the remainderman under such provision are not defeated by the adoption. Stout v. Cook, — N. J. Eq. —, 75 Atl. 583; Re Leask, 197 N. Y. 193, 27 L.R.A.(N.S.) 1158, 134 Am. St. Rep. 866, 90 N. E. 652, 18 A. & E. Ann. Cas. 516; Wallace v. Nolan, 246 Ill. 534, 92 N. E. 956.

An adopted daughter does not take under the will of her deceased foster parent's brother as a "right heir" of her foster parent where, by statute, an adopted daughter is not entitled to inherit real estate from her foster parent's deceased brother, as representing her deceased foster parent. Brown v. Wright, 194 Mass. 540, 80 N. E. 612.

A. G. S.

died intestate. In 1910 Sarah E. Morton, the mother of Carrie Merritt, died intestate, possessed of a considerable estate. Claiming that he was entitled to that share in the estate of Sarah E. Morton which his foster mother would have received if living at her death, Charles W. Merritt, the adopted child, brought a suit to recover his interest in her estate. The chancellor was of opinion that he could not inherit from any of the kindred of his foster or adoptive parents, and dismissed his petition. Being dissatisfied with this finding and judgment, he appeals.

So much of the act as bears upon the question at issue is as follows: "Said corporation may, through its president or vice president, in the manner prescribed by its by-laws, permit any suitable person to adopt any child in its custody and control, as his or her own child. It may contain all suitable covenants for the care, education, and nurture of such child; and when such instrument shall be so executed and recorded, such child shall become the heir at law of such person so adopting him or her, and be as capable of inheriting as though he or she were the child of said person; and said person shall have the same parental control and be under the same responsibilities, as if the child so adopted were his or her own child."

This identical question has not heretofore been presented to this court. In *Power v. Hafley*, 85 Ky. 671, 4 S. W. 683, and *Atchison v. Atchison*, 89 Ky. 488, 12 S. W. 942, it was held that a child adopted as appellant was by W. W. Merritt and his wife becomes the heir at law of those adopting him, and is made as capable of inheriting from them as if he had been born to them, and were in fact their child. But we are cited to no authority, statutory or otherwise, where it has been held that an adopted child is thereby made capable of inheriting from the kindred of those who have adopted him. But in the cases of *Van Matre v. Sankey*, 148 Ill. 536, 23 L.R.A. 665, 39 Am. St. Rep. 196, 36 N. E. 628, *Meador v. Archer*, 65 N. H. 214, 23 Atl. 521, *Phillips v. McConica*, 59 Ohio St. 1, 69 Am. St. Rep. 753, 51 N. E. 445, and *Sunderland's Estate*, 60 Iowa, 732, 13 N. W. 655, it is expressly held that an adopted child cannot inherit from the collateral kindred of its adoptive parents, nor from the ancestors of such parents, nor from their natural children. And in Vermont, where by special statute an adopted child is made an heir at law in as full and perfect a manner as if born to the adopting parents, it is held that the adopted child cannot become an heir of a brother of his adoptive mother, although she would be an

heir if living. *Moore v. Moore*, 35 Vt. 98. And in *Helms v. Elliott*, 89 Tenn. 446, 10 L.R.A. 535, 14 S. W. 930, it is held that an adopted child cannot inherit from the natural children of the man adopting him or their descendants. The reason for the uniformity of this rule is apparent. The act of the foster parents in adopting the child is a contract into which they entered with those having the lawful custody of the child, an agreement personal to themselves, and, while they have a perfect right to bind or obligate themselves to make the child their heir, they are powerless to extend this right on his part to inherit from others. All inheritance laws are based or built upon natural ties of blood relationship, whereas an adopted child's right to inherit rests upon a contract, and hence only those parties to the contract are bound by it.

Judgment affirmed.

MAINE SUPREME JUDICIAL COURT.

JULIUS JENSEN, Admr., etc., of Mary J. Jensen, Deceased,

v.

MAINE EYE & EAR INFIRMARY.
(Two cases.)

(— Me. —, 78 Atl. 898.)

Charity — hospital — liability for negligence.

1. A corporation organized to conduct a hospital as a public charity is not liable for the negligence of its servant in failing to prevent a patient, in a private room engaged for his use, under the direction of his private physician, from falling from the window, although the use of the room includes necessary care and attention by employees of the hospital.

Same — taking pay patients — effect.

2. A hospital supported mainly by charity does not lose its character as a charitable institution by the fact that it makes a charge for the use of rooms to those who are able to pay for them.

(December 15, 1910.)

EXCEPTIONS by plaintiff to rulings of the Supreme Judicial Court for Cumberland County, made during the trial of an action brought to recover damages for the death of plaintiff's intestate, alleged to have been caused by the negligence of defendant's servants, which resulted in a verdict in defendant's favor. Overruled.

The facts are stated in the opinion.

Messrs. D. A. Meaher and M. T. O'Brien, for plaintiff:

There is an analogy between the liability

Note. — See note to *Hordern v. Salvation Army*, 32 L.R.A. (N.S.) 62.

of a charitable corporation, so called, and a municipal corporation, and the liability should be the same in each case where the business carried on is for its own emolument, profit, and advantage.

Libby v. Portland, 105 Me. 370, 26 L.R.A. (N.S.) 141, 74 Atl. 805, 18 A. & E. Ann. Cas. 547; 2 Dill, Mun. Corp. § 566; 2 Abbott, Mun. Corp. § 720; *Milton v. Scarborough*, 71 Me. 267, 36 Am. Rep. 308; *Larrabee v. Peabody*, 128 Mass. 561; *Glavin v. Rhode Island Hospital*, 12 R. I. 411, 34 Am. Rep. 675; *People ex rel. New York Inst. v. Fitch*, 154 N. Y. 32, 38 L.R.A. 591, 47 N. E. 983; *Powers v. Massachusetts Homeopathic Hospital*, 65 L.R.A. 372, 47 C. C. A. 122, 109 Fed. 294; *Ward v. St. Vincent's Hospital*, 39 App. Div. 624, 57 N. Y. Supp. 784; *Winnemore v. Philadelphia*, 18 Pa. Super. Ct. 625; *Hewett v. Woman's Hospital Aid Soc.* 73 N. H. 556, 7 L.R.A. (N.S.) 496, 64 Atl. 190; *Phillips v. St. Louis & S. F. R. Co.* 211 Mo. 419, 17 L.R.A. (N.S.) 1167, 124 Am. St. Rep. 786, 111 S. W. 100, 14 A. & E. Ann. Cas. 742; *Davis v. Central Cong. Soc.* 129 Mass. 367, 37 Am. Rep. 368; 5 Thomp. Corp. § 6364.

Messrs. Seth L. Larrabee and Sidney B. Larrabee, for defendant:

Defendant is a charitable institution.

Webber Hospital Asso. v. McKenzie, 104 Me. 320, 71 Atl. 1032; *Farrington v. Putnam*, 90 Me. 405, 38 L.R.A. 330, 37 Atl. 652; *McDonald v. Massachusetts General Hospital*, 120 Mass. 432, 21 Am. Rep. 529; *Jackson v. Phillips*, 14 Allen, 539; *Powers v. Massachusetts Homeopathic Hospital* 65 L.R.A. 372, 47 C. C. A. 122, 109 Fed. 294; *Thornton v. Franklin Square House*, 200 Mass. 465, 22 L.R.A. (N.S.) 486, 86 N. E. 909; 6 Cyc. Law & Proc. p. 974; *Fire Ins. Patrol v. Boyd*, 120 Pa. 624, 1 L.R.A. 417, 6 Am. St. Rep. 745, 15 Atl. 553; *Parks v. Northwestern University*, 218 Ill. 381, 2 L.R.A. (N.S.) 556, 75 N. E. 991, 4 A. & E. Ann. Cas. 103; *Hearns v. Waterbury Hospital*, 66 Conn. 98, 31 L.R.A. 224, 33 Atl. 595; *Downes v. Harper Hospital*, 101 Mich. 555, 25 L.R.A. 602, 45 Am. St. Rep. 427, 60 N. W. 42; *Gooch v. Association for Relief of Aged Indigent Females*, 109 Mass. 558.

A charitable corporation is not liable for injuries resulting to a patient from the negligent acts of its servants or agents in the course of their employment.

McDonald v. Massachusetts General Hospital, 120 Mass. 432, 21 Am. Rep. 529; *Powers v. Massachusetts Homeopathic Hospital*, 100 Fed. 896, 65 L.R.A. 372, 47 C. C. A. 122, 109 Fed. 294; *Parks v. Northwestern University*, 218 Ill. 381, 2 L.R.A. (N.S.) 556, 75 N. E. 991, 4 A. & E. Ann. Cas. 103; *Hearns v. Waterbury Hospital*, 66 Conn. 98, 33 L.R.A. (N.S.)

31 L.R.A. 224, 33 Atl. 595; *Downs v. Harper Hospital*, 101 Mich. 555, 25 L.R.A. 602, 45 Am. St. Rep. 427, 60 N. W. 42; *Williamson v. Louisville Industrial School*, 95 Ky. 251, 23 L.R.A. 200, 44 Am. St. Rep. 243, 24 S. W. 1065; *Fire Ins. Patrol v. Boyd*, 120 Pa. 624, 1 L.R.A. 417, 6 Am. St. Rep. 745, 15 Atl. 553; 6 Cyc. Law & Proc. p. 975.

Spear, J., delivered the opinion of the court:

These are actions brought against the Maine Eye & Ear Infirmary by Julius Jensen, in his own behalf and as administrator of the estate of Mary J. Jensen, charging the defendant with negligence of its servants in allowing the plaintiff's decedent, while an inmate of the Infirmary, to evade the supervision of her attendants and fall through a window to the sidewalk; the accident resulting in fatal injuries. The case shows that Mary J. Jensen was ill with typhoid fever, and that her attending physician had arranged with the defendant for her to occupy a private room in one of the wards of its building. But she was not a patient of the Infirmary. She remained the private patient of Dr. Connellan, who had full charge of her case and attended her daily while she was in the institution. He directed the nurses and house doctors, and says, so far as he knows, his directions were complied with. He also understood the regulation of the institution, requiring a specific contract for the employment of a constant nurse, but says he considered the attendance of such a nurse unnecessary, and employed none. It appears, however, that it was the duty of the nurses connected with the institution, although Mrs. Jensen was in a private room and under the direction of a private physician, to give her such attendance in her room as was necessary for her care and the execution of the physician's orders. Further than this Mrs. Jensen was not under the control of the officers of the corporation. She was put there by her husband, by the advice of her physician. The Infirmary did not engage to cure her or take care of her. It undertook to do nothing more than to give her the benefit of one of the rooms and beds and her share of the nursing.

The case also clearly shows that the defendant was not a money-making corporation, nor a business corporation organized for profit, but purely a charitable institution, having no stockholders and paying no dividends. All its receipts are consigned to the general fund for the benefit of charity. Upon this state of facts the presiding justice, at the conclusion of the testimony, directed a verdict in each case for the de-

defendant. To this ruling the case comes to the law court on exceptions.

The defendant in its brief sets up two grounds of defense: (1) That defendant is not a corporation for the treatment of sick and injured persons for hire, as the plaintiff in his writ has alleged against it. (2) The defendant is a corporation organized and existing solely as a public charity, its organization having been ratified, confirmed, and declared to be legal and valid as such by chapter 519 of the Private and Special Laws of Maine, approved March 25, 1897.

It is the opinion of the court that the order of the presiding justice can be sustained upon both grounds; but the second being conclusive as a matter of law, the first need not be considered. No principle of law seems to be better established, both upon reason and authority, than that which declares that a purely charitable institution, supported by funds furnished by private and public charity, cannot be made liable in damages for the negligent acts of its servants. Were it not so, it is not difficult to discern that private gift and public aid would not long be contributed to feed the hungry maw of litigation, and charitable institutions of all kinds would ultimately cease or become greatly impaired in their usefulness.

The defendant is a charitable institution. It is so declared by a decision of our own court. In *Farrington v. Putnam*, 90 Me. 405, 38 L.R.A. 339, 37 Atl. 652, it is said, referring to this very defendant: "Here is an institution, and the only one of the kind in the state, and virtually a state charitable institution of the most beneficent and humane kind, seeking money for supporting its very life and existence, and to enable it to render assistance free of charge to the poor of the state suffering from diseases of the eye and ear." The constituent elements which are regarded as characteristic of charitable institutions are defined in *Webber Hospital Asso. v. McKenzie*, 104 Me. 320, 71 Atl. 1032, as follows: "It comes within the letter and the spirit of a charitable corporation whose distinctive feature is that it has no capital and no provision for making dividends or profits, deriving its funds mainly from public and private charity, and holding them in trust for the object of the institution." The same doctrine is also emphatically established in *Massachusetts*. In *McDonald v. Massachusetts General Hospital*, 120 Mass. 432, 21 Am. Rep. 529, the court says: "The corporation has no capital stock, no provision for making dividends or profits, and whatever it may receive from any source it holds in trust, to be devoted to the object of sustaining the hospital and increasing its benefit to the
33 L.R.A. (N.S.)

public, by extending or improving its accommodations and diminishing its expenses. Its funds are derived mainly from public and private charity; its affairs are conducted for a great public purpose,—that of administering to the comfort of the sick, without any expectation on the part of those immediately interested in the corporation, or receiving any compensation which will inure to their own benefit, and without any right to receive such compensation. This establishes its character as a public charity."

It is claimed, however, that the defendant charges a compensation for the use of its rooms to those who are able to pay, and thereby loses one of the essential attributes of a charitable institution. But this in no way changes the character of the institution. In the *McKenzie Case*, above cited, the testator provided in his will that part of the income from his estate should be used for the maintenance of a "free hospital." In this case it was contended that it was the purpose of the testator "to establish a hospital absolutely and entirely free,"—not one which might provide a certain number of free beds to charity patients, and that neither of the hospitals claiming to meet the conditions of the bequest claimed to be free in this sense. But the court, in construing the word, says: "Nor is the word 'free' used in the sense of without compensation from anyone receiving its benefits. Such a hospital is practically unknown. Income may be received from such as are able to pay, and yet the hospital be free." It is the opinion of the court that the defendant is a charitable institution in fact and in law.

Exceptions in each case overruled.

OREGON SUPREME COURT.

STATE OF OREGON, Respt.,

v.

GEORGE MEYERS, Appt.

(— Or. —, 110 Pac. 407.)

Evidence — trial for murder — threats.

1. Upon trial of one for killing a policeman, evidence of a casual remark of accused several months before, to the effect that "if they arrested me like that fellow

Note. — Homicide in resisting arrest.

The present note is complementary to that appended to *Keady v. People*, 66 L.R.A. 353.

On the question of self-defense in resisting an officer, see note in 5 L.R.A. (N.S.) 1016.

The question of assault in resisting un-

was arrested I would shoot them," is not admissible in evidence if there is nothing to show the circumstances of the arrest alluded to.

Arrest — wrongful — right to resist — taking life.

2. Resistance to the extent of taking life cannot be made to an unlawful arrest where the arrest is attempted by a known officer and nothing is to be reasonably apprehended beyond a mere temporary detention in jail.

Homicide — wrongful arrest — sudden heat — presumption of law.

3. The court cannot assume as matter of law, on a trial of one accused of killing an officer who was attempting to arrest him, that the arrest had the effect of exciting in his mind a sudden heat of passion such as to make the desire to kill irresistible, and thereby reduce the offense to manslaughter.

Appeal — homicide — conviction of lesser degree — error in higher degree.

4. Failure to take from the jury the

lawful arrest is made the subject of the note which is appended to *State v. Gum*, post, 150.

Lawful arrest.

An officer may lawfully arrest his worst enemy, and the motive with which the arrest is begun is of no importance in determining whether it was originally a lawful arrest conducted lawfully and with proper force. *McDuffie v. State*, 121 Ga. 580, 49 S. E. 708.

One may with reasonable force resist an unlawful attempt to arrest him, but he cannot offer any resistance whatever to a lawful effort to arrest him. *Yates v. State*, 127 Ga. 813, 56 S. E. 1017, 9 A. & E. Ann. Cas. 620.

If the arrest is lawful and is conducted in a lawful manner, resistance culminating in homicide amounts to murder. *McDuffie v. State*, supra; *Johnson v. State*, 130 Ga. 27, 60 S. E. 160.

But if the officer comes upon the citizen and, without apprising him of his purpose, or whether he apprises him of his purpose or not, commences a deadly assault upon the citizen, the latter has the same right to defend himself against the act of the officer as he would have against a similar act of an individual, and the fact that the officer is armed with a warrant does not in any way license him or give him authority to assault the party against whom he holds it. *Owen v. State*, — Tex. Crim. Rep. —, 125 S. W. 405.

Where the person arrested caught the officer around the body and arms and was separated by bystanders from the officer, who thereupon struck the other upon the head with a pistol, it was held that if passion was engendered thereby so as to render the party's mind incapable of cool reflection, and he killed while his mind was in that

question of murder in the first degree on a trial for homicide is not subject to review in favor of the accused, if the verdict is murder in the second degree.

Trial — argument — reading of authorities.

5. It is not error for a trial court to refuse to listen to the reading of authorities upon the argument of a cause.

(August 3, 1910.)

APPEAL by defendant from a judgment of the Circuit Court for Marion County convicting him of murder. **Reversed.**

Statement by McBride, J.:

The defendant was indicted for murder in the first degree committed by shooting one Thomas Eckhart.

The evidence as to the immediate fact of the shooting consisted principally of the dying declaration of the deceased and the testimony of defendant. Defendant was occupying a room in a building owned by

condition, the offense would be no greater than manslaughter, irrespective of whether the arrest was legal or not. *Scott v. State*, 49 Tex. Crim. Rep. 386, 93 S. W. 112.

And if the slayer had no notice of the officer's official character, and if the killing was apparently necessary to save his life, the killing will be regarded as homicide in self-defense. *State v. Spaugh*, 200 Mo. 571, 98 S. W. 55.

As a general rule, it is the duty of an officer in making an arrest, to state his official character and the cause of the arrest exhibiting his warrant if he has one; but the failure to take these precautions does not justify homicide or even physical resistance by the party arrested, without inquiry on his part as to the authority for his arrest. *A fortiori* resistance of lawful arrest cannot be justified upon the ground of want of express notice, if the person resisting knew that the other was an officer. *State v. Byrd*, 72 S. C. 104, 51 S. E. 542.

And one who knows the official character as well as the purpose of the officer, and shoots him down before he has an opportunity to declare his purpose or to make any move toward its consummation, cannot be heard to say that he shot in self-defense. *Smith v. State*, 48 Tex. Crim. Rep. 233, 89 S. W. 817.

So, the mere intention of a posse to arrest a suspect does not justify him in killing one of their number before they have had an opportunity to announce their official characters; and unless there has been such an opportunity followed up by a failure to announce their character and also by the use of force to restrain the suspect, the latter cannot set up the plea that he shot in self-defense and that he had no knowledge of their official character. *State v. Rudolph*, 187 Mo. 67, 85 S. W. 584.

And where one is approached by a per-

his father and occupied by his brother Arthur Meyers, and occasionally by himself. On the evening of the shooting, a dispute arose between the brothers, caused by defendant's placing his wet boots on some sofa pillows which were in the room, and Arthur went upon the street and requested deceased, who was a policeman, to put defendant out of the room, but not to arrest him. Deceased went to the room and found defendant asleep in a chair. That part of deceased's dying declaration which was admitted in evidence is as follows: "I, Thomas M. Eckhart, being conscious of my present condition, and realizing no hope of recovery, do make this my final declaration: Then I went to room with Arthur and found George Meyers who was sitting in a chair sleeping. I woke him up and says: 'Moley says his father gave him orders to keep you out.' George says: 'All right, I will pack my clothes.' George put his clothes in a small box. I started downstairs with him. He says:

'What are the charges?' I says: 'I don't know, but have orders to lock you up when I found you.' I had hold of his left arm. We walked along to place of shooting and talking friendly on the way. We walked down High street to the city hall, then turned west on Chemeketa and stopped a few feet from outside jail door, then he says, 'Some one in there looking in the window.' I says, 'There might be,' and, as I turned from the window and faced him, he says, 'Take that you son of a bitch,' and then shot me, pulling a pistol out of a slicker coat, standing at the time beside me while I was holding his arm. I was shot first in the abdomen. Then I went down. He made two or three steps, turned around, and shot me again, this time in the leg. Then he ran across street north and turned down the alley."

The testimony of defendant is as follows:

A. The first I remember of Mr. Eckhart

son whom he knows to be a sheriff with a warrant for his arrest, it is his duty to submit to arrest, and in resisting it, with a gun in his hand, he has precluded himself from saying that he acted in self-defense, even though, in refusing to submit to the arrest, he went away from the officer, who thereupon unjustifiably shot him, for if, after such shooting by the officer, there appeared to be a necessity for shooting the officer to save his own life, it was the result of the unlawful resistance of the mandate of the law, and the slayer's position is similar to that of one who brings on or provokes a difficulty and in the progress of it kills. *State v. Horner*, 139 N. C. 603, 52 S. E. 136, 4 A. & E. Ann. Cas. 841.

Although one may not be subject to arrest or search without a warrant, upon mere suspicion that he is carrying a concealed weapon, where, in such circumstances, he is told by an officer that an arrest or search is about to be made, and he draws the weapon and attempts to frighten the officer therewith, and the officer is shot during a struggle for its possession, he is guilty of the statutory offense of going armed with a concealed weapon, and is therefore subject to arrest under a statute authorizing the officer to arrest a person found violating a state law; and therefore the slayer is not resisting an unlawful arrest within the meaning of the homicide statute, so as to reduce the killing from murder to manslaughter. *Anderson v. State*, 133 Wis. 601, 114 N. W. 112.

Notwithstanding the duty of an officer to give notice of his intention to arrest, the person sought to be arrested may not properly resist or kill his assailant until all other means of peaceably avoiding the arrest have been exhausted. The omission of the officer to exhibit his warrant or declare his authority can do no more than deprive

him of the protection which the law affords him in the rightful discharge of his duty, and does not justify the person sought to be arrested in killing him, if the apparently illegal arrest can be otherwise resisted. The question of the knowledge of the person sought to be arrested, of the official character of the person seeking to arrest him, is one of fact for the jury. *Hurd v. State*, 119 Tenn. 583, 108 S. W. 1064.

Where one committing a crime warranting his arrest without a warrant shoots for the purpose of avoiding arrest, a person whom he knows is an officer authorized to arrest him without a warrant, he does so at his peril, and where the officer is thereby killed, the offense is murder. *State v. Byrd*, supra.

And the fact that an officer attempting to rearrest one who, having been arrested under a warrant for a misdemeanor, has escaped from custody, menaces his life, does not authorize him to kill the officer in self-defense, especially where the statute makes one guilty of a misdemeanor who obstructs an officer in the discharge of his duty. *State v. Durham*, 141 N. C. 741, 5 L.R.A.(N.S.) 1016, 53 S. E. 720.

So, an escaped felon may be arrested by a public officer without a warrant, and if, when the officer attempts to make the arrest, the other slays him for the purpose of preventing the arrest, the offense is murder irrespective of whether the officer had a warrant or whether the slayer knew that he was an officer. *Harper v. State*, 129 Ga. 770, 59 S. E. 792.

So, an escaped misdemeanor convict is guilty of murder when he kills without warning and merely for the purpose of preventing his recapture, one who was lawfully attempting to take him without a warrant. *Williford v. State*, 121 Ga. 173, 48 S. E. 962.

being around me when he woke me up. I was sitting in a big rocking chair in the room. My feet were on the other chair. He had knocked my feet off of the chair. He woke me up. I don't know the exact words he used. I had been out horseback riding. I was kind of dazed. I had been drinking some, I will admit. He said something about coming out of there. I says, "All right." I don't know the exact words he used. Of course, I was nervous; in fact, I didn't pay much attention to him. So I started to go out, and he says, "Hurry up, I can't wait here all evening." I says, "All right;" I says, "Is it raining?" He says, "I don't know. It may be." I says, "I will put on my slicker, maybe it is raining." I got my slicker, and we started down the steps. I asked him what the charges were, and he said he didn't know, he had orders to lock me up. I didn't say anything to him until we got in front of Yannke's livery stable.

Q. Just opposite the courthouse?

In *State v. Franklin*, 80 S. C. 332, 60 S. E. 953, involving a prosecution apparently for the killing of an officer, the following general charge upon the question of self-defense was upheld: "Where a person is without fault in bringing about the difficulty, where they are in danger of losing their lives or of sustaining serious bodily harm, and where there are no other probable means of escape save to kill the assailant, then the law says they have a right to kill, and this is self-defense." The following charge was also upheld: "A constable stands on the same footing as a sheriff. If a warrant is placed in his hands to make an arrest, it becomes his duty to make that arrest, and the law clothes him with the power to do all that is necessary to make the arrest. . . . Ordinarily, if a constable goes up to a man and says, I arrest you, that is usually as far as he has to go, and that is all that is necessary if the other party submits to the arrest. The other party has a right to ask the reason for his arrest and his authority, if he has a warrant; it then becomes his duty to exhibit the same; then, if the party submits, that is as far as the officer has the right to go. If he refuses to submit to the arrest then the officer has the right to go to whatever length is necessary to make him submit. . . . If an arrest is resisted and active resistance is resorted to, then the officer still has the right to use, as a matter of fact, whatever force is necessary to accomplish his purpose."

It seems that the statutory requirement that, before making an arrest, a private person must inform the person to be arrested of the cause thereof and require him to submit, does not apply to a case where the person arrested is in the actual commission of the crime or is arrested on pursuit immediately after its commis-

A. Yes; I asked if he had a warrant for me, and he said, "No." I broke away from him. I says, "You have no right to take me without a warrant." He says, "God damn you, I will take you anyway." He twisted my arm back and pushed me along. He said, if I couldn't come along decent, he had a way of taking me. I kept talking to him the best I could under the circumstances. He told me to keep my mouth shut and come along. He had hold of my arm practically until we got to the city hall. I told him he was hurting me, and asked if he would let go of my arm. He did, and grabbed me by the shoulder on the left side. After we turned the corner at the city hall and got pretty close to the office of the city marshal, I says, "Will you let me phone to Doc. Gibson?" He says, "No; I won't." I kind of thought over the matter, and I thought, if anybody knew what I was arrested for, he would surely know. I knew I had not done anything. I says, "I will be damned if I go

sion. *People v. Governale*, 193 N. Y. 581, 86 N. E. 554.

In view of a statute permitting any private person to arrest another for a public offense committed or attempted in his presence, where one, upon attempting to commit a robbery, is ordered to hold up his hands, by his intended victim, who draws his own gun, it is his duty to throw down his gun and surrender himself as a prisoner; and the other has the right to use whatever force is necessary to disarm him and prevent his escape, for the aggressor, in such a case, does not occupy as favorable a position as the aggressor in an ordinary combat, who is entitled in good faith to withdraw from the place of encounter and thus render the party assailed the aggressor, if he follows for the purpose of continuing the affray. In such case, the aggressor is acting in the role of an outlaw and hold-up, and having been, in effect, placed under arrest, the killing of the intended victim by the other in order to make good his escape is just as culpable and indefensible as though he had without warning shot him down in the first instance. *State v. Shockley*, 29 Utah, 25, 110 Am. St. Rep. 639, 80 Pac. 865.

And to make applicable a statute providing that anyone who kills a private person endeavoring to apprehend a criminal, with knowledge of the intention with which such private person interposes, is guilty of murder, it is not necessary that the citizen, before answering to the call of a police officer for assistance in the arrest of a criminal, shall have been first informed of the particular crime charged to have been committed, nor is it essential that the citizen shall have been specially selected by the officer. *State v. Bertchey*, 77 N. J. L. 640, 73 Atl. 524, 18 A. & E. Ann. Cas. 931.

To justify a conviction under a statute

in there." I broke away from him. He turned and says, "By God you will go in there!" He reached for his hip pocket. At that I fired the shot.

Q. Did you realize at the time how many shots you fired?

A. No, sir; I did not.

The defendant also denied that he had the alleged conversation related by the witness, Sol Anderson.

Arthur Meyers testified, among other things, as follows:

Q. What did you do after you went down?

A. I walked up and down the street a few times, and didn't see anybody. I walked down by the White House restaurant. Mr. Eckhart was in there. I motioned for him to come out. I says, "George is up in my room, and I cannot do anything with him. I would like for you to come up there and take him out." I says, "I don't want him arrested. I just

want him taken out." He went up there with me, and George was asleep. He woke him up and says, "George, Arthur wants you out of the room. You had better get up and put on your coat and come on; by the way, I have orders to arrest you on sight." I spoke up and asked what he was arrested for. He said he didn't know; that Doc. Gibson told him to arrest him when he saw him. George said, all right, he would go. He went over and got his coat and started out with him.

Q. Where was his coat?

A. Hanging up in the partition. The room is a large room. In one end is a partition about 8 or 9 feet high. It was hanging on the other side of the partition, the side away from the main part of the room.

Q. What kind of a coat did he get?

A. A black slicker.

There is evidence tending to show that deceased fell at the first shot; that defend-

providing that anyone who shall kill a private person endeavoring to apprehend a criminal, with knowledge of the intention with which such private person interposes, is guilty of murder, it must be established that the defendant was a criminal, that the private person was endeavoring to apprehend him at the time of the shooting, and that the defendant knew the purpose with which the private person interposed; and the first requisite may be found from evidence that the defendant made a burglarious entry into a building and committed a theft therein; and the other requisites may be found from proof that several persons pursued the defendant, raised a hue and cry, fired several shots, and that the deceased joined the pursuit from a point at which the hue and cry and shots were clearly audible. Ibid.

The deliberate purpose necessary to sustain a conviction for murder in the first degree is sufficiently shown by evidence that the slayer together with others, in getting ready to commit a burglary, made preparations to kill, and that when an officer approached them, although the burglary had been abandoned, under circumstances indicating the probability that the officer would make an arrest or a search of their persons, the defendant shot such officer. *People v. Woods*, 147 Cal. 265, 109 Am. St. Rep. 151, 81 Pac. 652.

And the fact that the accused, who had violated a municipal ordinance and had avoided arrest for four months, came to an understanding with the town marshal that he would come to town on a certain day to stand trial, constitutes no reason why the marshal should not attempt to arrest him on that day, and, especially since the accused came armed, affords no excuse for not submitting to arrest, which can be interposed in his behalf on a trial for the

killing of the officer. *Yates v. State*, 127 Ga. 813, 56 S. E. 1017, 9 A. & E. Ann. Cas. 620.

Where one who has committed an offense announces that he will shoot anyone who attempts to arrest him, and thereafter, upon seeing one whom he knows to be the sheriff, approaching for the purpose of arresting him, retreats, arms himself, and shoots the sheriff when the latter follows him, the killing is murder, and not manslaughter. *State v. Spaugh*, 200 Mo. 571, 98 S. W. 55.

Where one charged with killing an officer who was pursuing him after he had shot another, claimed that he shot his pursuer in self-defense and upon the supposition that the pursuer was a friend of the victim of the first shooting, bent on doing the slayer personal injury, he may nevertheless be properly found guilty of murder in the first degree where it appeared that he had no reasonable ground to apprehend a design upon the part of the pursuer to do him any personal injury. *People v. Governale*, supra.

Unlawful arrest.

Whether the person whose right to liberty and freedom from illegal arrest is invaded is guilty of any offense when he kills the aggressor depends upon the circumstances of the case. He has no right to kill an officer who attempts to commit a trespass upon his person, and nothing more; and the degree of force that he may use in resistance depends upon that used or attempted by the officer. Where a person resists an attempt to arrest him, made without legal authority, and the resistance is only proportionate to the assault, and is provoked by it, the killing, if without malice, is neither murder nor manslaughter. *Perdue v. State*, 5 Ga. App. 821, 63 S. E. 922.

ant shot him again, wounding him in the arm, then ran a short distance, stopped, and fired a third shot, which did not take effect.

It was admitted by the state that no order had been given or warrant issued for defendant's arrest, and there is no testimony indicating that defendant had been guilty or accused of any offense against the law at the time Eckhart arrested him.

During the trial the state called one Sol Anderson as a witness, and propounded to him the following questions, over the objection of defendant:

Q. Do you recall a conversation you had with him (referring to defendant) some time last spring about the time that Mr. Swegle was arrested?

A. Yes; I don't know his name.

Q. You may state to the jury what, if anything, he said that time with reference to shooting a policeman? . . .

A. We was running an automobile garage down here, Mr. Linn and I, and he came down to the shop. He used to clean Mr. Hauser's machine before he gave us the job of taking care of the machine. He laid a gun up in the side. I asked him what he carried that around for. He said, "I use that to shoot down the river." A short

time after this man Swegle was arrested he was pretty mad. He said, "If they arrest me like that fellow, I would shoot them." I didn't think he meant it when he said it. When he did what he did it came to our minds.

A motion was made to strike out the testimony, but was overruled, except as to the last sentence, which was stricken out.

Messrs. John A. Carson, P. H. D'Arcy, S. T. Richardson, and W. M. Kaiser for appellant.

Messrs. I. H. Van Winkle and W. C. Winslow for respondent.

McBride, J., delivered the opinion of the court:

We are of the opinion that the court erred in admitting the testimony of the witness Anderson. Evidence of threats made by defendant against a person subsequently killed by him may be introduced to show deliberation, premeditation, or malice. Wharton, Homicide, § 601, and cases there cited. And threats against a particular class of persons, as, for instance, a threat to kill all policemen, are admissible in a prosecution for killing a member of the particular class indicated in the

A person seeking unlawfully to arrest another is a trespasser, and the trespass is a ground of provocation sufficient to reduce the homicide of such person in resistance of the arrest from murder to manslaughter, though it is not so reduced unless the person sought to be arrested actually acted under the influence of hot blood induced by the provocation. And such an attempt unlawfully to arrest gives the person sought to be arrested the right to resist, even to the extent of killing his opponent, if such killing is necessary to save himself from serious bodily harm; but the necessity must have been real and apparent. *Hurd v. State*, 119 Tenn. 583, 108 S. W. 1064.

If the authority to make an arrest is wanting, the person attempting it is a trespasser, and the person arrested can resist, using such force only as is necessary to prevent the arrest. *Demarco v. State*, — Tex. Crim. Rep. —, 131 S. W. 589.

And if the person sought to be arrested kills the officer in resisting him, he is ordinarily guilty of no greater offense than manslaughter. *Jenkins v. State*, 3 Ga. App. 146, 59 S. E. 435.

In such case the killing of the person attempting the arrest is, as a general rule, manslaughter only. *Hurd v. State*, and *Yates v. State*, supra.

If the person sought unlawfully to be arrested is thereby enraged to such an extent that he is incapable of cool reflection at the time of the killing, his offense will be no greater than manslaughter. *Earles v. State*, — Tex. Crim. Rep. —, 94 S. W. 464 (see 33 L.R.A.(N.S.)

former appeal 47 Tex. Crim. Rep. 559, 85 S. W. 1).

But an attempted arrest, even if illegal, does not justify a homicide committed in resisting it, unless such killing is necessary in self-defense, that is, to prevent death or great bodily harm. *State v. Byrd*, 72 S. C. 104, 51 S. E. 542.

In such circumstances the killing is not justifiable homicide unless the slayer had reason to believe and did believe that he was in imminent danger, and that it was necessary to do so in order to save himself from some great bodily harm; and if he kills merely for the purpose of avoiding the arrest, it is manslaughter. *State v. Clark*, 64 W. Va. 625, 63 S. E. 402.

And if an officer arrests a party illegally, but the latter does not know whether the arrest is illegal or not, and he draws a pistol and kills the officer, no question of the legality or illegality of the arrest enters into the case. *Earles v. State*, 52 Tex. Crim. Rep. 140, 106 S. W. 138 (overruling opinion on former appeal, 47 Tex. Crim. Rep. 559, 85 S. W. 1).

In no circumstances can a party threatened with arrest upon a warrant appearing upon its face to be legal, although in fact defective in some particular, do more than offer force commensurate with the danger threatened, and if he knows that the person is an officer acting in that capacity, the mere fact that such officer will arrest him and hold him without inflicting any personal violence will not authorize the use of a deadly weapon upon the officer. In such

threats. Wharton, Homicide, § 603. In the case at bar it appears that defendant had said, in effect: "If they arrest me like that fellow was arrested, I would shoot them." No showing was made of the circumstances attending the arrest in question, whether it was made by an officer or by some private person, and the witness Anderson was unable to state even the name of the person arrested. It was a casual remark made several months before, and evidently did not refer to deceased. Nor was it shown to have referred to policemen or arresting officers as a class. The evidence was too remote to have any legitimate bearing upon the case at bar. *Stenson v. United States*, 29 C. C. A. 600, 52 U. S. App. 647, 86 Fed. 106; *Earles v. State*, 47 Tex. Crim. Rep. 559, 85 S. W. 1. The admission of this testimony was highly prejudicial to defendant, and was reversible error.

Several requests were made for special instructions. Many of these were substantially covered by the general charge, and as to those not so included the refusal was proper. They may, for the sake of brevity, be divided into two classes: (1) Those which assume that a person unlawfully arrested has a right to take life, if necessary;

in circumstances, the arrest becomes a mere detention, and while it may be unlawful, it is not such an invasion of rights or such an offer of personal violence as justifies the use of a lethal weapon. *Coile v. State*, 28 Ohio C. C. 827.

And it seems that the illegality of a warrant upon which one was sought to be arrested for a crime for which he might have been arrested without a warrant cannot be urged to reduce from murder to manslaughter the offense of killing the officer, especially where such killing occurred as the result of hours of premeditation and determination to kill anyone attempting to make the arrest, and before any personal violence or show thereof had been manifested by the officer. *Ibid.*

While it has been declared to be the general rule that it is manslaughter to kill an officer or other person to prevent an illegal arrest, there can be no conviction when the slayer uses no more force than is necessary, or where the officer or other person making the illegal arrest uses more force than is necessary to overcome the resistance, and puts the person whom he arrested in fear of his life or of great bodily harm. *Holmes v. State*, 5 Ga. App. 166, 62 S. E. 716.

So, a conviction of manslaughter cannot be sustained against one who committed a homicide while being pursued by officers unlawfully attempting to arrest him without a warrant for a trivial offense, where he did not shoot until he had fled a considerable distance and had been wounded twice by the pursuing officers. *Ibid.*

And a conviction of murder cannot be

to free himself from such unlawful detention. (2) That a homicide committed in resisting an unlawful arrest cannot as a matter of law be a greater offense than manslaughter. Neither of these propositions are sound law. While there are cases holding that one threatened with unlawful arrest may use such force as may be necessary to free himself, and maintain his liberty, even to the extent of taking the life of the aggressor, we are inclined to adopt the more humane and civilized rule that, where the arrest is made by a known officer and nothing is to be reasonably apprehended beyond a mere temporary detention in jail, resistance cannot be carried to the extent of taking life. This is the doctrine announced by Mr. Wharton in his work on Homicide, and the authorities cited by him amply sustain it. Wharton, Homicide, § 409, and cases there cited.

We do not wish to be understood as holding that cases may not arise in which one may use a deadly weapon to protect himself against an unlawful arrest. Thus where the arresting party himself uses a deadly weapon or signifies his immediate intention to do so, or where an unauthorized person, being armed, attempts to break into one's dwelling to make an unlawful

sustained against one who killed a police officer in a scuffle which ensued when the officer grabbed him and demanded whatever he had in his pocket apparently for the purpose of ascertaining if he was carrying a concealed weapon, where the officer wore plain clothes and bore no insignia to indicate that he was an officer, and was not known to the slayer to be such; and in such circumstances the nature of the crime, if any was committed, is to be determined without reference to the official character of the officer and just as if the affray had occurred between private individuals. *People v. Bissett*, 246 Ill. 516, 92 N. E. 949.

Where an escaped convict shoots and kills a private person who has been unlawfully deputized by the jailer to arrest him, he may be acquitted of the charge of killing such private person, if, and only if, the circumstances were such as to create the belief based upon reasonable judgment that he was in imminent danger of death or great bodily harm, and that there was no apparent way to avoid such death or harm except to shoot the person attempting to make the arrest. *Mann v. Com.* 118 Ky. 800, 82 S. W. 438.

The principles relating to the question of homicide in resisting unlawful arrest have no application to a case in which it appears that the accused was attacked by another, and shot him in self-defense without knowing that he was an officer, and thinking him to be a third person who had made threats against the accused. *McPhay v. State*, 87 Miss. 456, 40 So. 17. L. A. W.

arrest, or where it is attempted in such a way as to put one in fear of death or great bodily harm, in such rare instances one may be justified in using a deadly weapon. But we wish to be understood as holding emphatically that, where the attempted arrest is made by a known officer, and there is nothing to be apprehended beyond a mere temporary detention, the question of the right of such officer cannot be tried out with a pistol.

We do not think that the court had a right as a matter of law to assume that the arrest had the effect of exciting in the mind of the prisoner a sudden heat of passion, such as to make the desire to kill irresistible, and therefore manslaughter. The jury had all the facts before them, and it was for them to judge what effect the arrest had or might have had on the defendant. While the arrest was practically admitted by the state to have been unlawful and without cause, there was some evidence which the jury had a right to consider which tended to show malice. The facts, as claimed by deceased, that before leaving the room defendant put on a "slicker" having a pistol in the pocket, that he told deceased that somebody was looking out of the jail window, apparently with a design to attract his attention, and thereafter immediately shot him, and that he continued to fire after deceased had fallen, were circumstances which might well have justified the jury in finding that there was express malice.

It is unnecessary to consider the alleged error of the court in refusing to take from the jury the question of murder in the first degree, as the verdict of murder in the second degree operated in any event to acquit defendant of the higher crime, and he was therefore not prejudiced by any ruling made on that subject.

It was not error in the court to refuse to listen to the reading of authorities upon the argument of the cause. If the court thought itself sufficiently advised as to the law, it had the right to refuse to hear counsel further, and the very clear and exhaustive charge given in this case indicates that the court was well advised as to the law.

We find no other error in the record, but for the reasons given above this cause must be reversed, and a new trial ordered.

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WEST VIRGINIA SUPREME COURT OF APPEALS.

STATE OF WEST VIRGINIA

v.

WOODS GUM, Plff. in Err.

(68 W. Va. 105, 69 S. E. 463.)

Arrest — forcible resistance — use of deadly weapon.

If an attempted arrest be unlawful, the party sought to be arrested may use such reasonable force, proportioned to the injury attempted upon him, as is necessary to effect his escape, but no more; and he cannot do this by using or offering to use a deadly weapon, if he has no reason to apprehend a greater injury than a mere unlawful arrest. Instructions to the jury, not so limited, were properly refused.

(November 1, 1910.)

Headnote by MILLER, J.

Note. — Assault in resisting unlawful arrest.

For a note on the question of homicide in resisting arrest, see the note to *State v. Meyers*, ante, 143; references therein to notes on kindred questions.

In order to throw the shield of the law over an officer, so as to make it criminal for another to resist him in what he is attempting to do, he must not only be a legal and proper officer, but he must have a good and sufficient precept, which he is attempting to execute, and he must be attempting to execute it in a legal way. *State v. Hooker*, 17 Vt. 658.

One cannot be convicted of wounding an officer in resisting arrest, where the officer was unlawfully attempting to make the arrest under a warrant directed to another officer. *Reg. v. Sanders*, 36 L. J. Mag. Cas. N. S. 87, L. R. I. C. C. 75, 16 L. T. N. S. 331, 15 Week. Rep. 752, 10 Cox, C. C. 445.

And it was held in *Reg. v. Crompton*, 49 L. J. Mag. Cas. N. S. 41, L. R. 5 Q. B. Div. 341, 42 L. T. N. S. 543, 28 Week. Rep. 539, 44 J. P. 480, that the offense of assaulting an officer in the execution of his duty was not committed by resisting an arrest in a city, by county officers, under a warrant issued by a county justice, but not backed by any city justice.

And in *Rex v. Gay*, Quincy (Mass.) 91, one was acquitted of assaulting a sheriff in the execution of his duty, where force was used in resisting the execution of a warrant issued without right.

On the other hand, it was held in *Rex v. Sabeans*, 37 N. S. 223, that a person who, although misled by an officer putting for-

ERROR to the Circuit Court for Pochontas County to review a judgment convicting defendant of assault with intent to kill. Affirmed.

The facts are stated in the opinion.

Mr. N. C. McNell for plaintiff in error.

Messrs. William G. Conley, Attorney General, and D. E. Matthews for the State.

Miller, J., delivered the opinion of the court:

The indictment charges that the defendant did maliciously and feloniously cut, stab, and wound one John Waugh, a sergeant of the town of Marlinton, while the latter was attempting to place him under arrest for being drunk and disorderly, with the intent to then and there maim, disfigure, disable, and kill the said Waugh.

Upon the trial, upon his plea of not guilty, the jury found the defendant guilty

of an insufficient warrant as the sole authority for the arrest, acted on what appeared to be justifiable grounds in resisting the arrest, was, nevertheless, punishable for an assault upon the officer, where the arrest was capable of justification, under a statute authorizing arrest without a warrant in certain cases.

One whom an officer unlawfully attempts to arrest for an alleged misdemeanor not committed in the officer's presence may use whatever force is necessary to resist the arrest, without being liable to a prosecution for assault and battery. *Com. v. Bryant*, 9 Phila. 595.

And before one can be convicted for a felonious assault and battery, with intent to kill, in resisting a person seeking to arrest him without a warrant, upon the ground that he had committed a felony, it must appear that the person seeking to make the arrest had at least reasonable ground to believe that he had committed the felony. *Spradley v. State*, 80 Miss. 82, 31 So. 534, 13 Am. Crim. Rep. 36.

And one who resists an attempted arrest by a private person bearing a warrant unlawfully issued to him by a justice of the peace cannot be convicted of assault and battery. *Com. v. Foster*, 1 Mass. 488.

So, one who at first submits to an unlawful arrest may thereafter use what force is necessary to free himself from the unlawful custody; but if he goes further and uses more force than is necessary, and commits a violent assault upon the officer, he may be convicted therefor. *Com. v. Cosler*, 8 Kulp, 97.

And where one is unlawfully taken into custody by a private person, he is justified in committing an assault in order to free himself from custody, upon discovering that the other is not a peace officer. *People v. Denby*, 108 Cal. 54, 40 Pac. 1051.

And it seems one may aid another in defending against an unlawful arrest, and in so doing he is not guilty of an assault pro-

of unlawful, but not malicious, wounding, as charged in the indictment. Upon this verdict the court below pronounced the judgment complained of, that the defendant be confined in the penitentiary for the period of three years, at hard labor, and to be further dealt with according to law.

In his petition to this court for the writ of error allowed him, petitioner alleges numerous errors committed on the trial, but no oral argument was made or printed brief filed on his behalf on the final hearing here. The attorney general filed a brief on behalf of the state, and the case, thus presented, was submitted for decision.

Upon the trial below there was substantially no conflict in the evidence, and there is practically but one question, a question of law, presented by defendant's instructions to the jury numbered three and four, rejected, presented for decision. These instructions, poorly drawn, would have told

provided that no more force is used than is necessary. *People v. Craig*, 152 Cal. 42, 91 Pac. 997.

But a person is guilty of an assault upon a person whom he deliberately trips while such person is chasing one whom he is seeking illegally to arrest. *State v. Hedrick*, 95 N. C. 624.

One unlawfully arrested and restrained of his liberty has the right to use such force as is necessary to regain his liberty, short of taking life. *Goodman v. State*, 4 Tex. App. 349.

And if he uses no more force than is necessary, he cannot be convicted even of a simple assault. *Brown v. State*, 43 Tex. Crim. Rep. 411, 66 S. W. 547, 13 Am. Crim. Rep. 118.

Thus, one whom it is sought unlawfully to arrest by holding the horse upon which he is riding is justified in striking with a whip the person seeking to make the arrest, for the purpose of forcing him to release his hold. *Massie v. State*, 27 Tex. App. 617, 11 S. W. 638.

And a conviction of the offense of assault is unauthorized when the evidence discloses that the only act of the accused relied on to sustain the conviction is that he, having committed no offense and against whom no warrant had been issued, raised a stick and drew it back in a striking position, with a threat to use the same, when officers with a warrant against a relative approached him and endeavored to compel him to go with them until they made the arrest; and even if in ordinary circumstances such conduct would have amounted to an assault, the accused was justified in the act that he committed. *Shubert v. State*, 127 Ga. 42, 55 S. E. 1045.

The evasion of an illegal arrest, which the person sought to be arrested accomplished by running away from the officer when first approached by him, does not render him a fugitive from justice, whom the officer may thereafter arrest without a war-

the jury, substantially, number three, that if they believed from the evidence that Waugh was attempting to arrest the defendant without a warrant or other proper authority, defendant had the right to resist said arrest, and that they should find the defendant not guilty, unless they should find that said officer was attempting to make the arrest for the violation of the law committed in his presence or view; the fourth, that if they believed from the evidence that Waugh went upon the premises of defendant, and attempted to arrest him in his own house, without proper legal authority, by a warrant issued by a proper officer, or for some violation of law committed in his presence, he had the right to resist said arrest "in any manner he chose,"

rant, as an "escape," whenever and wherever the officer may find him, for, if one accused of a misdemeanor or a violation of a municipal ordinance may oppose an illegal arrest with commensurate resistance or by flight, it would be begging the question to say that an evasion of an illegal arrest by flight would authorize his arrest as a fugitive endeavoring to escape. *Porter v. State*, 124 Ga. 297, 2 L.R.A. (N.S.) 730, 52 S. E. 283.

The shooting by one who has committed no offense, of an officer attempting to make an illegal arrest, is *prima facie* not an assault with intent to murder, but the statutory crime of shooting at another not in self-defense, or assault and battery; but the shooting is justifiable if it is done as an apparently necessary course, to avoid apprehended death or great bodily injury from the use by the officer of a deadly weapon or excessive violence. *Jenkins v. State*, 3 Ga. App. 146, 59 S. E. 435.

But one has no right to use more force than is necessary to resist an unlawful arrest, and where an officer attempts to arrest another with open hands and apparently without a weapon, even if the arrest is unlawful, the other will be guilty of an assault if he strikes at the officer with an open knife. *People v. Murray*, 54 Hun, 406, 7 N. Y. Supp. 548.

And one is not justified in shooting an officer who merely announces the intention to arrest him, although the character of the officer does not appear, and the arrest would be unwarranted. *Keady v. People*, 32 Colo. 57, 66 L.R.A. 353, 74 Pac. 892.

And one innocent of the offense for which he is sought to be arrested, who knows the officers, and that they intend to arrest him, but has no reasonable cause to believe that they intend to do him any personal injury, is not justified in assaulting the officer by shooting him, upon his first uttering a word, and without making any explanation himself, or inquiring the purpose of the arrest, or giving the officer an opportunity to state the purpose. *Robinson v. United States*, — Okla. Crim. Rep. —, 111 Pac. 984.

It would be a pernicious doctrine to hold 33 L.R.A. (N.S.)

and they should find the defendant not guilty.

The facts proven in brief were, that Waugh, at the time of the alleged offense, at the request of defendant's wife, entered the home of defendant by the kitchen door, the witness Dennison accompanying him to the door, and being informed, first by Dennison before entering and after entering by defendant's wife, that she wanted him to do something with defendant, because she was afraid he would do something before morning, he went on into the adjoining room where Woods was quietly sitting, and, to quote his own language, addressing the defendant, said: "I asked him what was the matter, and he said, 'I wont stand what is going on in my home,' and I said, 'You

that an officer, known to be such, while attempting to make an arrest, could be shot down, and the defendant or the person who did the shooting allowed to go free, because it might, upon due investigation, be discovered that the officer did not in fact have proper authority for making the arrest *People v. Price*, 9 Cal. App. 218, 98 Pac. 547.

No excuse for the shooting and wounding of a constable, which will avoid a conviction for assault with a deadly weapon, is afforded by the fact that the constable had no warrant or legal authority for making the arrest, where he approached the person to be arrested in a peaceable manner, informed him that he was a constable, that he was performing his official duty, and at the same time showed the badge of his office, and did not assault the other in a violent manner, or attempt in any way to injure him. *Ibid*.

The offense which one commits who fires at an officer attempting an illegal arrest, with a gun, and misses him, when such resistance is unnecessary to defend himself from the illegal arrest, is that of unlawfully shooting at another not in his own defense, and does not amount to an assault with intent to murder. *Porter v. State*, 124 Ga. 297, 2 L.R.A. (N.S.) 730, 52 S. E. 283.

An offender who knows of the intention to arrest upon the part of one whom he knows to be an officer, and in whose presence he has committed the offense, cannot, where he shoots the officer upon his first uttering a word, justify the assault upon the ground that the attempted arrest was illegal because the officer did not comply with the statutory requirement that one about to be arrested shall be informed of the intention to arrest, and of the offense with which he is arrested. *Robinson v. United States*, *supra*.

If one is suddenly ordered at the point of a gun to throw up his hands, by another whom he knows to be an officer attempting to arrest him in pursuance of a valid warrant, it is his duty to submit, and if he resists the efforts of the officer to arrest him,

had better keep quiet and go to bed and sleep this off,' and he said, 'No, by God, there is a man and a woman in this room, and a man and a woman in the other room, and I will be God damned if I am going to stand it any longer,' and I said, 'Mr. Gum, you will have to get quiet now, or I will have to put you under arrest,' and he said, 'God damn you, you can't do it,' and at that I got him by the arms and I called Mr. Dennison, he was standing at the door, and when he come in, Mr. Gum threw his right hand up and I discovered his knife for the first time, and he said to Mr. Dennison, 'By God, you stand back,' and I said to Dennison, 'Look out, he will cut you,' and just as I said that Gum made a vicious lick at him with the knife, and I

jumped behind him and grabbed him by both arms, and he struck back at me with his knife that way (indicating), and struck me here and cut me. . . . He threw back his hand and struck me there, and I thought from the sting of the knife that he had cut me pretty badly, but after I had him arrested and took him to jail, I did not think so much of it. It was a small place, but was cut deep, and it was six weeks before it was entirely healed up."

At another point in his evidence, this witness testified:

Q. When you first went in the sitting room, who was in there?

A. Nobody but Gum.

he might be guilty of an assault with intent to murder; but if the officer comes upon the citizen, and without apprising him of his purpose, or whether he apprises him of his purpose or not, commences a deadly assault upon the citizen, the latter has the same right to defend himself against the act of the officer, as he would against an individual; and the fact that the officer is armed with a warrant does not in any way license him or give him authority to assault the party against whom he holds the warrant. *Owen v. State*, — *Tex. Crim. Rep.* —, 125 S. W. 405.

And the fact that a person is an officer gives him no greater rights than any other citizen, when he is engaged in a mere personal encounter, for it is only while an officer is actually engaged in performing some official duty that the law throws around him its special protection, and the guilt or innocence of another of an assault upon him is to be determined without reference to his being a peace officer. *State v. Clayton*, 100 Mo. 516, 18 Am. St. Rep. 565, 13 S. W. 819.

If the officer has no authority to make an arrest, or, having authority, is not known to be an officer, and does not in some way notify the party that he is an officer and has authority, the party arrested may lawfully resist the arrest, as if it were made by a private person, and if, in doing so, he does not use excessive violence, his act is justified, and he cannot be convicted of an assault. *State v. Belk*, 76 N. C. 10.

And if one who has committed no offense is suddenly approached by one who does not make it known that he is an officer, and who strikes the former upon the head, and, as the former believes at the time, shoots him, the fact that the person committing such acts was an officer attempting to make an arrest does not alter the position of the other, for in such circumstances the officer stands in the same relation to the other as any other citizen, and the other has a right to defend himself. This was the holding in *Lynch v. State*, 41 *Tex. Crim. Rep.* 510, 57 S. W. 1130, where the defendant was charged with assault with intent to mur-

der, alleged to have been committed by shooting the officer.

So, where one is engaged in a fight against several persons, and is grabbed by another whom he does not know to be an officer, but in fact is such, apparently trying to stop the fight, he is justified in striking the officer in resistance of what may appear to him to be an assault by the officer, if the circumstances are such as to make it reasonably appear that the officer is in fact joining his adversaries; and in such circumstances he cannot be convicted of an assault. *Franklin v. State*, 27 *Tex. App.* 136, 11 S. W. 35.

An officer who is resisted in making an arrest which he is authorized to make is justified in using the force necessary to prevent an escape, and to defend himself or others from injury; but if there is no attempt to escape, and no forcible resistance, it is an excess of authority and a criminal offense in the officer to inflict any blow or violence upon the prisoner, and the latter is justified in using any force not excessive in defending himself from such an unauthorized assault. *State v. Belk*, 76 N. C. 10.

Thus, if the person sought to be arrested knows the officer and his intention to make the arrest, yet makes no effort to injure him, but, nevertheless, the officer makes such a demonstration with his pistol as would cause a reasonable man in like situation to believe that he is about to be killed or seriously injured, and the person about to be arrested perceives such demonstration, and honestly believes that unless he shoots his life will be taken or he will receive great bodily injury, and he shoots in such circumstances, and not in a spirit of malice or revenge, he cannot be convicted of assault with intent to kill. *Robinson v. United States*, — *Okla. Crim. Rep.* —, 111 *Pac.* 984.

So, where one about to be arrested offers no violence toward the officer, but merely flees or attempts to flee, and thereupon the officer shoots at him, or makes such a demonstration as to give him reasonable cause to believe that the other is about to shoot him, and he shoots at the officer in

Q. I want you to tell the jury what he was doing.

A. He was sitting there in the chair when I went in.

Q. He wasn't saying anything to you or anyone else, was he?

A. No, not at that time, he wasn't.

Q. Who spoke first?

A. I did,—I said, "Woods, what is all this excitement about?" and then he commenced.

Q. The trouble started as soon as you said that?

A. Yes, he commenced whenever I said that. I went in there at the instance of Mrs. Gum, because she asked for protection.

Defendant's wife corroborates the officer in his testimony, but says, in addition, that before entering the room where defendant was, and where he was quietly sitting, the officer told her she would have to get a warrant before the arrest could be made.

There is no evidence of any offense committed by defendant in the presence of the officer, or within his hearing, unless the offense of attempting an assault upon Dennison with the knife be an offense; but this was after Dennison had been called in to assist in making the arrest, and Waugh had taken hold of defendant's arms. The charge of the indictment is that the offense was committed while Waugh was attempting to arrest the defendant on the charge of being drunk and disorderly.

Did the facts proven entitle the defendant to the instructions refused, or either of them? As stated by Bishop (Bishop, Crim. Proc. § 181): "Their powers of arrest do not differ greatly; or, at least, the differences at common law are not distinctly defined in the books. . . . For a past offense lower than felony, none of these officers can make an arrest without warrant; unless, for example, it is such a dangerous assault as may end in felony, by the death

such circumstances, and not in a spirit of unlawfulness or revenge, but honestly believing that unless he does so he will probably be killed or seriously injured, then he cannot be convicted of assault with intent to kill. Ibid.

And where officers attempt without a warrant to make an arrest upon the mere oral complaint of another, they are guilty of assault and battery upon the person so seized, and the latter has the right to defend himself against such assault, and, after having already been seized by two officers, and the third who has a pistol in his hand has been told to shoot him, he is justified in using any weapon to protect himself, and if, in attempting to effect his escape, he

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of the injured person." See also 3 Cyc. Law & Proc. p. 880.

The offense of being drunk and disorderly is not a felony. Section 9, chap. 153, Code 1906, among other things, provides: "If any person shall, in the presence of a constable, . . . appear in a state of gross intoxication in a public place, such constable may, without warrant or other process, or further proof, arrest such offending person, and carry him before some justice of the peace in the county in which such offense is committed. . . ." The statute, § 15, chap. 149, Code 1906, punishing drunkenness, provides: "If a person arrived at the age of discretion, profanely curse, or swear, or get drunk, he shall be fined by a justice \$1 for each offense." Under neither of these statutes was the sergeant justified, without warrant, in making the arrest.

What rights, then, has a citizen in resisting an unlawful arrest? An arrest without warrant is a trespass, an unlawful assault upon the person, and how far one thus unlawfully assaulted may go in resistance is to be determined, as in other cases of assault. Life and liberty are regarded as standing substantially on one foundation; life being useless without liberty. 1 Bishop, New Crim. Law, § 868. And the authorities are uniform that where one is about to be unlawfully deprived of his liberty, he may resist the aggressions of the offender, whether of a private citizen or a public officer, to the extent of taking the life of the assailant, if that be necessary to preserve his own life, or prevent infliction upon him of some great bodily harm. 1 Bishop, New Crim. Law, § 868; State v. Clark, 64 W. Va. 642, 63 S. E. 402, and cases cited. But just to what extent one may so resist, where the acts and conduct of the officer or aggressor do not threaten his life or any great bodily injury, the authorities are not very clear. The court, in Jackson v. Com. 96 Va. 107, 30 S. E. 452,

uses a knife and inflicts a wound upon one of the officers, he is guilty of no offense. Dorsey v. State, 7 Ga. App. 366, 66 S. E. 1096.

Where an officer, after an offense had been committed for which an immediate arrest might properly have been made, attempted to make the arrest after a delay of such duration that the attempt constituted a fresh pursuit, it was held that the attempted arrest was unjustifiable, and that the offender could not, therefore, be convicted for wounding the officer while resisting. Reg. v. Marsden, 37 L. J. Mag. Cas. N. S. 80, L. R. I. C. C. 131, 18 L. T. N. S. 298, 16 Week. Rep. 711, 11 Cox, C. C. 90.

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but, as we thought in *Teel v. Coal & Coke R. Co.* 66 W. Va. 315, 319, 66 S. E. 470, 472, inadvertently, approved an instruction which told the jury that defendant had the right to repel an assault "by all the force he deemed necessary." "At any rate," we said, "we do not think one who is assaulted may use such force, in repelling the attack, as he deems necessary, if he should deem it necessary to use more force than a jury would say is reasonable under the circumstances, viewing the situation from the standpoint of the assailant." And in the same case we criticized *Montgomery v. Com.* 98 Va. 840, 36 S. E. 371, 13 Am. Crim. Rep. 156, where we thought the court had gone to the other extreme in saying that a man may rightfully use as much force as is necessary for the protection of his person or property, provided he does not endanger human life or do great bodily harm. Another pertinent case is *State v. Gravely*, 66 W. Va. 375, 378, 379, 66 S. E. 503. "The reason," says Bishop, *supra*, "why a man may not oppose an attempt on his liberty by the same extreme measures permissible in an attempt on his life, appears to be because liberty can be secured by a resort to the laws."

But what is meant by saying, as *Teel v. Coal & Coke R. Co.* and other authorities do, that one may not use more force than a jury would say is reasonable under the circumstances? May one under this rule use a club or a cane, or, as in the case we have here, a knife, if he do not go to the extent of killing his assailant or endangering his life, if in his judgment, viewing the situation from his standpoint, it be necessary to do so to preserve his liberty, and successfully ward off the assault upon him? We think the authorities justify answering this question in the negative. In 21 Cyc. Law & Proc. p. 804, it is stated that one thus situated "is justified in using or offering to use a deadly weapon only where he has reason to apprehend an injury greater than the mere unlawful arrest, as danger of death or great bodily harm." Numerous decisions are cited for this proposition in the footnotes. In *Coleman v. State*, 121 Ga. 594, 600, 49 S. E. 716, 718, it is held that if the accused meets the unlawful assault with force proportionate to the attack, he is in the right; but if he resists with disproportionate, and therefore unlawful, violence, without being put in real or apparent danger of life or serious bodily harm, he becomes the wrongdoer. Says the court in this case: "The unlawful arrest justified a certain amount of resistance. But it did not justify shooting." In *Roberson v. State*, 43 Fla. 157, 52 L.R.A. 751, 29 So. 539, the court says: "If 33 L.R.A.(N.S.)

the attempt to arrest be unlawful, the party sought to be arrested may use such reasonable force, proportioned to the injury attempted upon him, as is necessary to effect his escape, but no more; and he cannot do this by using or offering to use a deadly weapon, if he has no reason to apprehend a greater injury than a mere unlawful arrest." In *Miller v. State*, 31 Tex. Crim. Rep. 609, 638, 37 Am. St. Rep. 836, 21 S. W. 925, 927, that court says: "He is not required to submit to illegal arrest, but may demand the warrant or proper authority, and, in its absence, repel force by force, provided the force does not exceed prevention and defense. Such force, however, cannot be disproportionate to the injury. The right to repel force by force continues until the person attempting the illegal arrest presses forward with such violence that the person defending is obliged to choose between three things; to retreat, to surrender, or the death of his adversary. If the force used be disproportionate to the injury about to be inflicted, self-defense is eliminated; and if it be attributed to any other cause than resistance to the illegal arrest, such arrest cannot be looked to as a mitigating circumstance." In *State v. Row*, 81 Iowa, 138, 46 N. W. 875, a case involving the killing of an officer while attempting to make an unlawful arrest, one of the instructions propounded by the state, in modification of the general proposition stated, said: "One may, however, rightfully resist, by reasonable and moderate force, an unlawful and unauthorized attempt to arrest him, or restrain him of his liberty; but is not justified or excused in carrying such resistance to an immoderate extent, or in using such extreme force or violence as to imperil life, unless the circumstances and manner of the attempted arrest be such that, as an ordinarily reasonable and prudent man, he fairly and honestly believes that he was in imminent peril of death or of great bodily harm, and there was no other reasonable way of escaping the danger except by killing his assailant." The criticism of this instruction by defendant's counsel was that it only justified in self-defense the use of "reasonable and moderate force," whereas, it was argued, "the only limit which the law places upon a man thus wrongfully sought to be deprived of his liberty is just that force which will prevent the doing of the unlawful purpose." "That," says the court, "is the clear import of the instruction given. It enjoins moderate force only where moderate force will be effective, and it justifies sufficient force, even to the extent of taking life. The difficulty lies in giving effect to only a part of the language used." We do not think

the court rightfully interpreted this instruction. As interpreted, it implies that one thus about to be deprived of his liberty would be justified, if that extreme measure was necessary to make his resistance effective, in taking the life of his assailant, whether or not his own life was in danger or he was in danger of great bodily harm. We do not understand the authorities to go that far. In *People v. Denby*, 108 Cal. 54, 40 Pac. 1051, a case involving an unlawful arrest, defendant had made use of a knife in resistance; and though he had threatened to do so, he had inflicted no wound upon the officer. The court held that the trial court erroneously refused to instruct the jury as requested by the defendant that "the witness Strait, not being a peace officer, had no right to arrest or attempt to arrest the defendant for begging, and the defendant was justified in resisting such arrest, or attempting to free himself from the hold of said witness after he had arrested him, upon ascertaining that the person so arresting him was not an officer authorized to make arrest." As applicable to the facts in that case, the instruction was proper and should have been given.

It is unnecessary, we think, to multiply authorities. Upon reason, as well as upon authority, we think the general rule, affirmed in *Roberson v. State*, supra, may be properly adduced, namely, that "if the attempt to arrest be unlawful, the party sought to be arrested may use such reasonable force, proportioned to the injury attempted upon him, as is necessary to effect his escape, but no more; and he cannot do this by using or offering to use a deadly weapon, if he has no reason to apprehend a greater injury than a mere unlawful arrest."

Such being the law applicable to this case, the court below committed no error in rejecting defendant's instructions three and four. While the general proposition stated therein, that one may lawfully resist an unlawful arrest is true as stated, as applied to this case, they would in effect have told the jury that, if necessary to successfully resist the arrest, the defendant might lawfully use the deadly weapon he did use in inflicting the wound upon the officer. This we do not understand to be the law.

The fact that the assault was committed in defendant's residence, under the circumstances of this case, makes no difference. The officer had been invited there by the wife of defendant, who desired his protection. The officer did wrong in attempting to make the arrest without a warrant, and his act was wholly unjustifiable; but this does not excuse the defendant in the use

of the deadly weapon, endangering the life of the officer, and the unlawful cutting of which the jury found him guilty was an unjustifiable act.

The judgment of imprisonment for three years, however, under all the circumstances, we think was quite too severe; but we could not say, if we had been called upon to do so, that the court below exceeded its reasonable discretion. The judgment will therefore be affirmed.

MICHIGAN SUPREME COURT.

LAURA L. SHEPARD

v.

GERMANIA FIRE INSURANCE COMPANY,
Plff. in Err.

(— Mich. —, 130 N. W. 626.)

Insurance — adjacent buildings — including in one policy.

A policy written by a state agent upon a brick building "and its additions adjoining and communicating," after notice from the owner that he wanted the policy to cover not only the brick building, but a wooden one which had been moved back to make way for it, and, although separated from it by a few feet, was connected by passageway and used with it, will cover the wooden structure.

(March 31, 1911.)

Note. — Import of word "additions" in policy of fire insurance.

I. Where policy covers "building and additions."

- a. In general, 156.
- b. Necessity of physical connection, 157.
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II. Where policy permits additions, alterations, and repairs, 162.

I. Where policy covers "building and additions."

a. In general.

Like other contracts, an insurance policy is interpreted to give effect to the intention of the parties, ascertained from the language used in the instrument as a whole, aided by extrinsic evidence of the situation

ERROR to the Circuit Court for Clinton County to review a judgment in plaintiff's favor in an action brought to recover the amount alleged to be due under a fire insurance policy. Affirmed.

The facts are stated in the opinion.

Messrs. Wilkinson & Younglove and Walbridge & Kelley for plaintiff in error.

Messrs. Lyon & Molnet, for defendant in error:

Plaintiff was entitled to a direction of a verdict in her favor, for her loss on both the brick and the wooden building.

Wolverine Lumber Co. v. Palatine Ins. Co. 139 Mich. 432, 102 N. W. 991; Phenix Ins. Co. v. Martin, — Miss. —, 16 So. 417; Marsh v. Concord Mut. F. Ins. Co. 71 N. H. 253, 51 Atl. 898; Marsh v. New Hamp-

shire F. Ins. Co. 70 N. H. 590, 49 Atl. 88; Cargill v. Millers' & Mfrs.' Mut. Ins. Co. 33 Minn. 90, 22 N. W. 6; Pettit v. State Ins. Co. 41 Minn. 299, 43 N. W. 378; Gross v. Milwaukee Mechanics' Ins. Co. 92 Wis. 656, 66 N. W. 712; Home Mut. Ins. Co. v. Roe, 71 Wis. 33, 36 N. W. 594; Ferguson v. Lumbermen's Ins. Co. 45 Wash. 209, 88 Pac. 128; Guthrie Laundry Co. v. Northern Assur. Co. 17 Okla. 571, 87 Pac. 649, 10 A. & E. Ann. Cas. 936; Lehmer v. Horton, 67 Neb. 574, 93 N. W. 964, 2 A. & E. Ann. Cas. 683.

Bird, J., delivered the opinion of the court:

Plaintiff instituted this suit to recover for a loss which she suffered by fire to

of the parties at the time of executing the contract, the purpose and intent of the contract, and other surrounding facts and circumstances having a legitimate bearing or tendency to disclose such intention. Particularly applicable to the question under consideration is the cardinal rule that a contract will be construed in a manner to give effect to every material word used therein, if such a construction is not inconsistent with other portions of the contract, or incompatible with the surrounding facts and circumstances. Applying this general rule to the question under consideration, it is obvious that the technical definition of the word "addition," or language generally used in connection therewith, "adjoining and communicating," is of little, if any, value in determining the sense in which these words were used in a policy. The intention of the parties is the real question, and where the policy purports to cover some building other than the main building, by employing "addition" or "additions," it will be construed to cover a structure physically or by use connected with the main building insured, especially if there is no other building to which the term "addition" can be applied. Bickford v. Aetna Ins. Co. 101 Me. 124, 63 Atl. 552, 8 A. & E. Ann. Cas. 92; SHEPARD v. GERMANIA F. INS. CO.; Cargill v. Millers' & Mfrs.' Mut. Ins. Co. 33 Minn. 90, 22 N. W. 6; Tate v. Jasper County Farmers' Mut. Ins. Co. 133 Mo. App. 584, 113 S. W. 659; Phenix Ins. Co. v. Martin, — Miss. —, 16 So. 417; Marsh v. New Hampshire F. Ins. Co. 70 N. H. 590, 49 Atl. 88; Marsh v. Concord Mut. F. Ins. Co. 71 N. H. 253, 51 Atl. 898; Arlington Co. v. Colonial Assur. Co. 190 N. Y. 337, 73 N. E. 34; Ferguson v. Lumbermen's Ins. Co. 45 Wash. 209, 88 Pac. 128; Rickerson v. Hartford F. Ins. Co. 149 N. Y. 307, 43 N. E. 856; Maisel v. Fire Asso. of Philadelphia, 59 App. Div. 461, 69 N. Y. Supp. 181; Cummins v. German American Ins. Co. 197 Pa. 61, 46 Atl. 902; Home Mut. Ins. Co. v. Roe, 71 Wis. 33, 36 N. W. 594.

As aptly stated in Bickford v. Aetna Ins. Co., the definition of the word "addi-

tion" given in the dictionaries affords very little assistance in determining its application to a particular structure. "The meaning of the term must be extended or limited by reference to other words of description, and by the use and purpose contemplated by the parties to the contract not inconsistent with the language of the policy, and by judicial definitions given in similar cases."

On the same subject, in Marsh v. Concord Mut. F. Ins. Co. 71 N. H. 253, 51 Atl. 898, the court said that whether, in the strictest sense of the term, certain buildings could be said to be "additions" to the principal building, and if so, whether they were "adjoining or communicating" additions to that building, may suggest discussions of the technically correct use of language, in which it is not often useful for the court to indulge. "The question of the grammatical propriety of the language is not before the court. The question for decision is: What is the meaning of the language employed, in view of the apparent purposes of the parties, the situation and uses of the property, and the nature of the contract evidenced by the policy?" Answering this query the court continued: "In view of the dependent uses of all the buildings, . . . the word 'additions' was not an inappropriate designation of the two smaller ones; and for the same reason the qualifying words 'adjoining and communicating,' though perhaps unnecessary, were evidently intended to designate such additional buildings as were necessary appurtenances to the main building in the manufacture of pails."

b. Necessity of physical connection.

In the great majority of cases wherein the question has been presented, there has been some physical connection between the principal building and the structure sought to be brought within the terms of the policy as an "addition." These cases, however, do not hold that such a connection is necessary, and, in the cases wherein the question has arisen or been discussed, the con-

certain business property which she owned in the village of Ovid. She had judgment in the trial court, and the defendant brings the case to this court by writ of error.

The plaintiff was the owner of two brick stores facing the east, on Main street, in the village of Ovid. The north one was occupied as the postoffice, and the south one as a restaurant. At the rear of the stores, and from 5 to 8 feet distant, was a two-story wooden structure extending nearly the entire width of the stores. The wooden building was connected with the store occupied as a restaurant by an inclosed passageway, and was used in connection with it. The brick oven used by the bakery was situate in the rear part of the wooden building. A short time prior to the issuance of

the policy, the wooden structure occupied the place where the postoffice now stands. It was moved to the rear, and the brick stores were erected in the summer of 1906. In the autumn of that year, when the improvements were nearing completion, plaintiff, being desirous of obtaining some insurance thereon, applied to her husband, who was the local agent for the defendant. He wrote and delivered to her a Michigan Standard policy, describing the property as "the one-story brick building located on the west side of Main street," etc. Plaintiff, upon learning that the policy did not cover the wooden building, informed her husband that a local agent had agreed to insure the buildings as an entirety, and that she preferred to have it done in that

clusion has been reached that, in order that a building be an addition within the terms of an insurance policy purporting to insure a building and its additions, it is not absolutely necessary that the buildings be physically connected.

Thus, in *Phenix Ins. Co. v. Martin*, it is held that a policy on a two-story brick building and additions thereto, occupied as a dwelling, includes as an addition an entirely separate and distinct building within the curtilage, which is used as part of the residence insured, being in part occupied by the domestic servants of the assured and in part used as a laundry room.

And to the same effect is *Tate v. Jasper County Farmers' Mut. Ins. Co.*, which holds that a detached building, used as a part of the main dwelling, is an addition within the description of a policy purporting to cover a dwelling and additions.

And see also *Arlington Co. v. Colonial Assur. Co.*, which holds a new building constructed subsequently to the issuance of the insurance policy in suit, to be an addition, within a provision thereof authorizing additions, alterations, and repairs, although it was a distinct building, separated by a considerable distance from the other buildings insured, and only connected with one of them, the boiler house, by a tunnel or conduit 5 feet in diameter, through which passed electric wires, steam pipes, water pipes, etc.

Compare with *North British & M. Ins. Co. v. Tye*, 1 Ga. App. 380, 58 S. E. 110, which holds that a servants' house is not an addition to a two-story frame dwelling house from which it is entirely separate, being distant about 150 feet, and with which it has no communication except by call bells, and hence it is not covered by a policy purporting to insure a two-story frame building and its additions.

In *Bickford v. Aetna Ins. Co.*, the court remarked that generally a building entirely distinct from a larger one will not be covered by a policy insuring a "building and addition."

An entirely separate and distinct building will not be treated as an addition to

a brick building, within the terms of a policy of insurance covering a brick building, including a frame addition, where there is a connected frame addition not otherwise insured. *Franklin F. Ins. Co. v. Hellerick*, 20 Ky. L. Rep. 1703, 49 S. W. 1066.

So, a new building not physically attached to or connected with any building specifically covered by a policy of insurance, and which contains no machinery connected with any of that used in the buildings insured, is not an addition within the terms of the policy permitting additions, alterations, and repairs, it also appearing that such building was under construction at the time of the issuance of the policy. *Arlington Mfg. Co. v. Norwich Union F. Ins. Co.* 48 C. C. A. 542, 107 Fed. 662.

c. Effect of fact that no other building answers description of "addition."

In determining whether in a given case a building is an addition within the terms and meaning of an insurance policy purporting to insure a building and addition, the court will not treat the word "addition" as mere surplusage, but will give effect to it by applying the term to any building reasonably answering the description, if such application is not inconsistent with other provisions of the policy, or clearly opposed to the surrounding facts and circumstances existing at the time of the execution of the contract. *Bickford v. Aetna Ins. Co.* 101 Me. 124, 63 Atl. 552, 8 A. & E. Ann. Cas. 92; *SHEPARD v. GERMANIA F. INS. CO.*; *Phenix Ins. Co. v. Martin*, — Miss. —, 16 So. 417; *Marsh v. Concord Mut. F. Ins. Co.* 71 N. H. 253, 51 Atl. 898; *Maisel v. Fire Asso. of Philadelphia*, 59 App. Div. 461, 69 N. Y. Supp. 181.

Thus, in *Marsh v. Concord Mut. F. Ins. Co.* 71 N. H. 253, 51 Atl. 898, the court remarked that any doubt that might remain as to whether the buildings in question are the "adjoining and communicating" additions intended to be covered by the policy is removed by the fact that, unless so construed, this language can be given no force or significance, as there were no other

way. The husband expressed some doubt of his authority to make the policy cover both buildings, and suggested that the matter rest until he could communicate with the state agent. Subsequently, Mr. Spice, the state agent, came and inspected the property, and, after doing so, he canceled the policy which had been written by the husband, and drew up the policy in question, describing the property as "the one-story brick, metal ^{and}/_{or} composition roof building, and its additions adjoining and communicating with their foundations." The policy gave "permission to make ordinary alterations, additions, and repairs, without notice, until required." Later a fire occurred, which damaged both the brick and wooden buildings. Defendant refused

to pay the loss on the wooden building, on the ground that it was not included in the description of the property insured. Suit was brought on the policy, and plaintiff recovered a judgment for the damage to both buildings.

The trial court admitted parol proof of the conversations between the plaintiff and her husband, and her husband and the state agent, with reference to the issuing of the policies, and instructed the jury that if plaintiff was misled by these conversations and the acts of defendant, into believing that the policy in question covered the wooden building, and she relied upon it, the defendant would be estopped to deny that it was so covered. The defendant assigns

buildings or additions to which it could refer, and added: "It is unreasonable to assume, except from necessity, that language used by parties in a written contract was not intended to express an intelligible idea, or that they employed language having no application or reference to the subject-matter of the contract. No such necessity exists in this case, and the language referred to cannot be rejected as surplusage. It is susceptible of a reasonable construction, based upon all the competent evidence in the case."

So, in *Bickford v. Aetna Ins. Co.* 101 Me. 124, 63 Atl. 552, 8 A. & E. Ann. Cas. 92. the court said that upon the facts which appeared in evidence, the use which the insurer made of the building destroyed, in connection with the principal building insured, and the fact that no other structure by its location or use can be intended by the terms of the policy, under the rule of construction, which in cases of doubt favors the insured, the building destroyed was the addition designated in the contract.

So, in *Phenix Ins. Co. v. Martin*. — Miss. —, 16 So. 417, the court remarked that since the language of the policy was broad enough to include the building injured, and as there were no other houses or structures which might possibly be claimed as additions to the main building, the building in question must have been the building meant in the policy.

And in *Maisel v. Fire Asso. of Philadelphia*, the court remarked: "It is a fact not to be overlooked that the only building to which the term 'additions attached' can relate is this frame building. The language is therefore surplusage, unless it embraces that building, and we must give effect to every part of the policy, if we can do so without obvious violence to the intention of the parties to it."

d. Character of the building.

1. Manufacturing plant.

It has been sometimes asserted that a court, as a matter of law, would hold to be an addition a separate independent building

connected with a manufacturing plant insured as a plant and additions, because of the blanket form of the policy, in cases where the ordinary policy covering a building and additions would not be construed to cover an independent separate building as the addition; in other words, that the interpretation of the former class of insurance contracts is more favorable to the insured than the latter. An examination of the cases, however, does not support this claim. A comparison of the following cases will serve to illustrate the uniformity with which the general rule is applied without reference to the character of the property insured:

A dry house about 12 feet from a frame mill building, and an engine house about 4 feet from the dry house, and both connected with the main building by a movable bridge, and all used in the manufacture of pails, are additions to the frame mill building, within the terms of the policy, "frame mill building and all additions thereto adjoining and communicating, . . . occupied by the assured as a pail shop." *Marsh v. New Hampshire F. Ins. Co.* 70 N. H. 590, 49 Atl. 88; *Marsh v. Concord F. Ins. Co.* 71 N. H. 253, 51 Atl. 898.

An engine room 22 feet from a planing mill, and connected therewith by a 3½-inch iron shaft furnishing the motor power for propelling the machinery in the planing mill, and also connected by a spout or box 2½ feet square and 10 feet above the ground or roadway, between the two buildings, is an addition to the planing mill, within the terms of a policy covering a planing mill and additions. *Home Mut. Ins. Co. v. Roe*, 71 Wis. 33, 36 N. W. 594. This was not a blanket form policy.

A two-story planing mill building 40 by 60 is an addition to a sawmill building 220 feet long by 50 feet wide, within the terms of a policy covering a sawmill and addition thereto, although the two buildings are 18 inches apart, but are connected by means of a belt extending from the main shaft in the sawmill to the machinery in the planing mill, the machinery in the planing mill being run by this belt. *Ferguson v. Lum-*

error upon the admission of this testimony and also on this charge of the trial court.

The plaintiff contended in the trial court and in this court, that the jury ought to have been instructed, as a matter of law, that the wooden building was covered by the terms of the policy. If plaintiff is right in this contention, it disposes of the defendant's assignments of error. Therefore we will first consider that question.

When the words of description contained in the policy are read in connection with the undisputed testimony, with reference to the location, the surroundings, the ownership, and the use made of the property, we have no hesitancy in holding, as a matter of law, that the wooden building was included within the terms of the policy.

The record shows that both brick and wooden buildings were owned by plaintiff; that the wooden building was not to exceed 8 feet distant from the brick building; that it was used in connection with the restaurant in the brick building; and that it was connected by a walk, and before the fire it was made into an inclosed passageway. The words of the description contained in the first policy made it very clear that it applied only to the brick building. Soon after its issue, Mr. Spice, the state agent of defendant, came and inspected the property, and, after so inspecting and conferring with the local agent, he canceled the first policy, and wrote the one sued upon, in which the words of description are substantially in the language

berman's Ins. Co. 45 Wash. 209, 88 Pac. 128.

2. Building used for mercantile purposes.

A two-story frame building situated on the rear of an adjacent lot, but extending over and against the rear of a brick store building used for retail mercantile purposes, in connection with which the frame building is used as a storehouse, is an addition thereto, within a policy covering all furniture contained in the brick building and additions attached. *Maisel v. Fire Asso. of Philadelphia, 59 App. Div. 461, 69 N. Y. Supp. 181.*

A frame building 6 to 8 feet from a brick building used for mercantile purposes, in connection with which business the frame building is also used, the two being connected by a covered platform, is an addition within the terms of a policy covering a brick building and its additions. *SHEPARD V. GERMANIA F. INS. CO.*

3. Dwelling houses.

A building not connected with a two-story brick dwelling, but in the same yard, and used in connection therewith in part as a laundry and in part for domestic servants, is an addition to the brick dwelling, within the terms of a policy covering a two-story brick building and additions thereto, occupied by assured as a dwelling. *Phenix Ins. Co. v. Martin, — Miss. —, 16 So. 417.*

An insurance policy upon a dwelling and addition covers a building used in connection with it as a storage for family stores and other things used for family purposes, although such structure is not attached to the main building. *Tate v. Jasper County Farmers' Mut. Ins. Co. 133 Mo. App. 584, 113 S. W. 659.*

A policy covering a two-story frame building and additions thereto, occupied by assured as a dwelling, covers as an addition a carriage house and stable under the same roof. *Hannan v. Williamsburgh City F. Ins. Co. 81 Mich. 556, 9 L.R.A. 127, 45 N. 33 L.R.A. (N.S.)*

W. 1120; Hannan v. Westchester F. Ins. Co. 81 Mich. 561, 45 N. W. 1122.

Compare with *North British & M. Ins. Co. v. Tye, 1 Ga. App. 380, 58 S. E. 110*, which holds that an insurance policy covering a two-story frame building and its additions, used as a dwelling house, does not cover a servants' house used in connection with the dwelling house, but 150 feet distant and connected only by call bell.

A frame building used as a cigar factory, adjoining and communicating with a brick dwelling, is an addition thereto, within the terms of a policy insuring a two-story brick dwelling house and its additions adjoining and communicating. *Carpenter v. Allemannia F. Ins. Co. 156 Pa. 37, 26 Atl. 781.*

4. Miscellaneous.

A policy covering a two-story basement and brick building and its additions adjoining and communicating, occupied as a steam laundry, covers as an addition a boiler room 4 feet from the main building, and connected therewith by a 2½-inch steam pipe, and also by a framework of 2 by 6 beams for an overhead archway, and a partially completed platform and sidewalk at the bottom. *Guthrie Laundry Co. v. Northern Assur. Co. 17 Okla. 571, 87 Pac. 649, 10 A. & E. Ann. Cas. 936.*

A building 47 feet long, 37 feet wide, connected with the main building, 86½ feet long by 54½ feet wide, by a platform 24 feet wide and 26 feet by the sides of the buildings, which is supported by posts, is an addition to the main building, within the terms of a policy insuring "the frame building and addition, . . . occupied as a livery and sale stable," where the second floor of the addition is used for storing carriages and generally as a permanent storage in connection with the main stable. *Bickford v. Aetna Ins. Co. 101 Me. 124, 63 Atl. 552, 8 A. & E. Ann. Cas. 92.*

A warehouse about 2½ feet from the elevator building, and about the same size as the elevator, and connected therewith by

of the first policy, with the addition of the words, "and its additions adjoining and communicating with the foundations." The evident intent in changing and adding to the description was to include something which was omitted in the first policy. The word "additions" was intended to have some significance, and there was no other building to which it could apply save the wooden building. Unless we say it applied to the wooden building, we are obliged to say that it meant nothing. If we are to adopt defendant's view, we would be obliged to say that both descriptions should be given the same construction, notwithstanding they read differently. If the change in description had been made by an inexperienced local agent, we might have more misgiving

about the intent in making the change; but when the state agent, with nearly thirty years of experience behind him in the insurance world, comes and looks this property over, and changes the description so as to include the word "additions," we are in duty bound to say that it was done to include something that was not included in the first policy, and that that something was the wooden building.

The case of *Guthrie Laundry Co. v. Northern Assur. Co.* 17 Okla. 571, 87 Pac. 649, 10 A. & E. Ann. Cas. 936, is very similar to the one under consideration. The insured property was described as a two-story basement and brick building, with metal roof, and its additions adjoining and communicating, including foundations, oc-

strips of board nailed upon each building, and also two spouts used to transfer grain from one building to the other, is an addition within the terms of a policy covering an elevator and additions. *Cargill v. Millers' & Mfrs.' Mut. Ins. Co.* 33 Minn. 90, 22 N. W. 6.

e. Admissibility of parol evidence to aid in construction.

The rule that parol evidence of extrinsic facts is admissible to enable a court or jury to apply the descriptive portion of a contract to the subject-matter applies to contracts of insurance, and evidence of the situation of the property and the parties, as well as the other surrounding facts and circumstances, at the time of the issuance of the policy, is admissible to aid the court in construing the word "addition" as used in an insurance policy in describing the property intended to be covered thereby. *Arlington Mfg. Co. v. Norwich Union F. Co.* 46 C. C. A. 542, 107 Fed. 662; *Bickford v. Aetna Ins. Co.* 101 Me. 124, 63 Atl. 552, 8 A. & E. Ann. Cas. 92; *Marsh v. Concord Mut. F. Ins. Co.* 71 N. H. 253, 51 Atl. 898; *Rickerson v. Hartford F. Ins. Co.* 149 N. Y. 307, 43 N. E. 856; *Cummins v. German American Ins. Co.* 197 Pa. 61, 46 Atl. 902; *Home Mut. Ins. Co. v. Roe*, 71 Wis. 33, 36 N. W. 594.

It is said by the court in *Arlington Mfg. Co. v. Norwich Union F. Ins. Co.*: "Where the question is whether the property destroyed by fire is embraced within the terms of the policy, it is always competent in contracts of doubtful interpretation, to give evidence of extraneous facts which will place the court in the situation of the parties when the contract was made, in order to enable it to read understandingly."

And in *Home Mut. Ins. Co. v. Roe*, the court said that parol evidence was certainly admissible as to the character, nature, and situation of the property insured, in order to place the court in the position of the parties at the time of making the contract of insurance.

So, while evidence is properly received to

place the court in the position of the parties, and enable it to appreciate the force of the words they used in reducing the contract to writing, neither party to the contract is entitled to state how he understood it when he signed it, or testify as to its meaning or as to his intent. What the parties intended should be gathered from the contract, read in the light of the circumstances surrounding them when they used the doubtful words. "Parol evidence was not admissible to show what either party secretly intended, as that would add to or take from the writing, which is presumed to express the intention of both." *Rickerson v. Hartford F. Ins. Co.* 149 N. Y. 307, 43 N. E. 856.

But testimony of the parties to an insurance contract, as to what was said about the property in question at the time the policy was written, is properly received by the court, to enable it to interpret and apply the provision of a policy purporting to cover a barn, including a shed and additions attached. Such testimony is not that anything had been omitted from the contract, but is simply taken to prove that both the insured and the insurer, at the time the insurance was effected, understood that certain pens were embraced in the term "sheds and additions attached." *Cummins v. German American Ins. Co.* 197 Pa. 61, 46 Atl. 902.

f. Construction of policy, whether question for court or jury.

It being the duty of the court in all cases where the question is simply the determination of the meaning of a written document, to declare its legal interpretation, where there is no ambiguity, uncertainty, or conflicting inferences in the language of an insurance policy as applied to the undisputed facts, it is a question of law for the court to say what is embraced within the word "addition" as used in a policy of insurance. *Arlington Mfg. Co. v. Norwich Union F. Ins. Co.* 46 C. C. A. 542, 107 Fed. 662; *Bickford v. Aetna Ins. Co.* 101 Me. 124, 63 Atl. 552, 8 A. & E. Ann.

occupied as a steam laundry. A boiler house, 4 feet distant, was connected with the main building by a steam pipe, and by a partially completed platform and overhead arch between the buildings, and a sidewalk along the side. It was held that the policy included the boiler house. For similar interpretations, see *Marsh v. Concord Mut. F. Ins. Co.* 71 N. H. 253, 51 Atl. 898; *Phenix Ins. Co. v. Martin*, — Miss. —, 16

So. 417; *Marsh v. New Hampshire F. Ins. Co.* 70 N. H. 590, 49 Atl. 88; *Pettit v. State Ins. Co.* 41 Minn. 299, 43 N. W. 378; *Gross v. Western Assur. Co.* 92 Wis. 656, 66 N. W. 712.

We are of the opinion that the plaintiff was entitled to an instruction in accordance with his contention. Under this view of the case, the admission of the testimony complained of, and the submission to the

Cas. 92; *SHEPARD v. GERMANIA F. INS. CO.*; *Hannan v. Williamsburgh City F. Ins. Co.* 81 Mich. 556, 9 L.R.A. 127, 45 N. W. 1120; *Hannan v. Westchester F. Ins. Co.* 81 Mich. 561, 45 N. W. 1122; *Phenix Ins. Co. v. Martin*, — Miss. —, 16 So. 417; *Tate v. Jasper County Farmers' Mut. Ins. Co.* 133 Mo. App. 584, 113 S. W. 659; *Marsh v. New Hampshire F. Ins. Co.* 70 N. H. 590, 49 Atl. 88; *Marsh v. Concord Mut. F. Ins. Co.* 71 N. H. 253, 51 Atl. 898; *Maisel v. Fire Asso. of Philadelphia*, 59 App. Div. 461, 69 N. Y. Supp. 181; *Home Mut. Ins. Co. v. Roe*, 71 Wis. 33, 36 N. W. 594.

Where, however, the evidence permits different inferences as to what facts and circumstances were known and understood by the parties when the policy was issued, the meaning they applied to the word "addition" becomes to some extent a question of fact dependent upon those inferences, which should be submitted to the jury. *Rickerson v. Hartford F. Ins. Co.* 149 N. Y. 307, 43 N. E. 856; *Home Mut. Ins. Co. v. Roe*, 71 Wis. 33, 36 N. W. 594.

In *Cummins v. German American Ins. Co.* 192 Pa. 359, 43 Atl. 1016, and subsequent appeal in 197 Pa. 61, 46 Atl. 902, it was held that the court properly left it to the jury to determine whether certain sheep and hog pens came within the provisions of an insurance policy purporting to cover a barn, including sheds and additions.

II. Where policy permits additions, alterations, and repairs.

A distinction is to be observed in construing policies purporting to insure a building and additions, and a policy containing the permission to make additions, alterations, and repairs. In the former the doctrine already considered applies, that the insured having purported to insure the principal building and some addition thereto, the court will not reject as surplusage the language purporting to insure an addition, if there is some building reasonable answering the description to which this designation may be applied. This doctrine, however, has no application in construing policies containing permission to make additions, alterations, and repairs, and as a consequence the court might refuse to hold a structure to be an addition, so as to be covered by a policy containing language of the latter character, which, under a policy of the former character, would be held to be an addition. Thus, in *Peoria Sugar Ref. Co. v. People's F. Ins. Co.* 24 Fed. 773, it 33 L.R.A. (N.S.)

was held that a building 40 feet distant from the insured building, used in connection therewith, and connected with it by a bridge and underground passage, is not an addition within the terms of a policy permitting the insured to make additions, alterations, and repairs.

And in *Peoria Sugar Ref. Co. v. People's F. Ins. Co.* 52 Conn. 581, a warehouse 41 feet from a factory, used in connection therewith, is held not to be an addition within the terms of a policy similar to the preceding case.

In *Arlington Mfg. Co. v. Norwich Union F. Ins. Co.* 46 C. C. A. 542, 107 Fed. 662, a new building not physically attached to or connected with any building specifically covered by a policy of insurance, and which contains no machinery connected in use with the insured buildings, is not an addition within the terms of such an insurance policy. The court said that the privilege thereby given to make additions, alterations, and repairs refers manifestly to the property which is described in the policy, and cannot be read as intending to permit insurance to extend to additions when made to other property.

Compare with *Arlington Co. v. Colonial Assur. Co.* 180 N. Y. 337, 73 N. E. 34, which holds that a new building constructed after the policy was issued is an addition within the terms of a policy permitting the insured to make additions, alterations, and repairs, although it is a distinct building, separated from the insured buildings by a considerable distance, it, however, being connected with the boiler house by a tunnel or conduit about 5 feet in diameter, through which pass electric wires, steam pipes, water pipes, etc. The court said that if the words "additions, alterations, and repairs" referred solely to existing buildings upon the insured's plant, the new building damaged by fire would not be covered by the policy, citing *Peoria Sugar Ref. Co. v. People's Ins. Co.* 24 Fed. 773; *Arlington Mfg. Co. v. Norwich Union F. Ins. Co.* 46 C. C. A. 542, 107 Fed. 662, being two of the preceding cases, but added: "We entertain the view that a broader and more liberal construction of the provision was contemplated by the parties. . . . The word 'additions' embraced in the policy had reference to the additions to plaintiff's plant, and included new buildings constructed thereon, and when constructed they were included within the provisions of the policy." A. G. S.

jury of the question of estoppel, are of no importance.

The case is affirmed.

Hooker, Moore, and Stone, JJ., concurred with Bird, J.

Ostrander, Ch. J.,:

I think the terms of policy, interpreted in the light of the undisputed testimony concerning the situation of the property at the time the policy was issued, included both the brick and the frame structures. I therefore concur in affirming the judgment.

IOWA SUPREME COURT.

ELIZABETH FORSYTHE

v.

GEORGE KLUCKHOHN, Appt.

(— Iowa, —, 129 N. W. 739.)

Proximate cause — unmuzzled dog — injury to pedestrian.

Permitting a dog to run at large without a muzzle, contrary to law, is not the proximate cause of injury to a pedestrian who is tripped and injured by its running against him.

(February 7, 1911.)

Note. — Liability of owner for injuries caused by dog running against person.

In *Sanders v. Teape*, 51 L. T. N. S. 263, where the defendant's dog, apparently in a spirit of playfulness, jumped over the wall bounding the premises of its owner, and struck upon, and injured, a laborer working on adjoining premises, it was held that there was no liability, in the absence of proof of *scienter*, and the court seemed to regard the trespass as involuntary and of no effect.

A reference to *Fraser v. Bell*, 14 Rettie (Sc. Ct. Sess.) 811, is made on page 397 of *Ingham on Animals*, declaring such case to hold that where a dog leaped upon a porter, and caused him to drop a piece of coal on the plaintiff's foot, an action was maintainable, *scienter* having been alleged.

And it was held in *Crowley v. Groonell*, 73 Vt. 45, 55 L.R.A. 876, 87 Am. St. Rep. 690, 50 Atl. 546, that the fact that an assault committed by a dog in jumping upon a stranger and injuring him resulted merely from its mischievous or playful propensity, rather than from viciousness, would not absolve the owner from liability, if he knew of its disposition to commit such injuries, or knew enough of its habits to convince a man of ordinary prudence of its inclination to commit them.

In *Hathaway v. Tinkham*, 148 Mass. 85, 19 N. E. 18, involving an action for injuries 33 L.R.A. (N.S.)

APPEAL by defendant from a judgment of the District Court for Plymouth County in plaintiff's favor in an action brought to recover damages for injury inflicted on plaintiff by defendant's dog, which was alleged to have been running at large unmuzzled, in violation of an ordinance. Reversed.

The facts are stated in the opinion.

Messrs. Sammis & Bradley, for appellant:

The negligence, if any, of defendant in allowing his dog to run unmuzzled, was not the proximate cause of the injury, because the jury expressly found plaintiff was not injured as a result of an attack from defendant's dog.

Tingle v. Chicago, B. & Q. R. Co. 60 Iowa, 333, 14 N. W. 320; *Walrod v. Webster County*, 110 Iowa, 349, 47 L.R.A. 480, 81 N. W. 598; *Sowles v. Moore*, 65 Vt. 322, 21 L.R.A. 723, 26 Atl. 629; *Stacy v. Knickerbocker Ice Co.* 84 Wis. 614, 54 N. W. 1091.

Messrs. Nelson Miller and Struble & Struble, for appellee:

Appellants misconstrue the meaning of the ordinance, in order to secure a reversal of the case on the question of proximate cause.

Shipley v. Colclough, 81 Mich. 624, 21 Am. St. Rep. 546, 45 N. W. 1106.

to a boy by being thrown down when a dog jumped upon him, it was held that the statute providing that every owner of dogs should forfeit to every person injured thereby double the amount of damages sustained cast responsibility upon such owner, irrespective of whether the act of the dog was committed playfully or viciously.

In *Jones v. Owen*, 24 L. T. N. S. 587, it was held that an owner of greyhounds, who coupled them together with a rope, and permitted them to run upon the highway without being led or otherwise restrained, was properly found guilty of negligence rendering him liable to injuries to a pedestrian who was run into by them and thrown by the rope. It was pointed out that the court was not confronted with the question merely of allowing dogs on the highway without restraint, but of coupling them together, and failing to lead or guide them.

The case, *Brogan v. Worton*, 78 Sc. L. Rev. (Sher. Ct. Rep.) 162, is set out in *Ingham on Animals*, page 379, as holding that where the defendant, seeing a cat running past in a public street, called to a dog beside him to seize it, and the dog accordingly gave chase, and while doing so knocked down and injured a child, the former acted negligently and without due care for passers-by, and was liable in damages. Although it does not appear from the case as so set out that the defendant was the owner of the dog, such fact is of little importance, so far as the purposes of this

The question of proximate cause is a question for the jury.

Ward v. Chicago, B. & Q. R. Co. 97 Iowa, 50, 65 N. W. 999.

Any violation of a city ordinance constitutes negligence *per se*.

Healy v. Johnson, 127 Iowa, 221, 103 N. W. 92; Meier v. Shrunk, 79 Iowa, 17, 44 N. W. 209; Correll v. Burlington, C. R. & M. River R. Co. 38 Iowa, 120, 18 Am. Rep. 22.

Injuries done by animals need not necessarily be the result of their vicious character, to make the owner liable. Any injury committed in playfulness or as an accident, which could have been prevented, will make the owner liable.

Shipley v. Colclough, *supra*; Jewett v. Gage, 55 Me. 538, 92 Am. Dec. 615; Dickson v. McCoy, 39 N. Y. 400; Bott v. Pratt, 33 Minn. 323, 53 Am. Rep. 47, 23 N. W. 237; Card v. Ellsworth, 65 Me. 547, 20 Am. Rep. 722; Lake v. Milliken, 62 Me. 240, 16 Am. Rep. 456; 2 Am. & Eng. Enc. Law, 2d ed. p. 363; Cooley, Torts, 2d ed. 670; State, Evans, Prosecutor, v. McDermott, 49 N. J. L. 163, 60 Am. Rep. 602, 6 Atl. 653.

Ladd, J., delivered the opinion of the court:

In the afternoon of November 4, 1908, the plaintiff while walking along Fifth street in Le Mars, noticed the approach of two dogs from the opposite direction. She stepped aside to avoid them, but, according to her testimony, they seized her clothes, pulled her around, and caused her to fall. Other evidence tended to show that neither dog bit or took hold of her dress but that one of the dogs ran against her, causing her to lose her balance. The smaller of these was a yellow dog, and the other, a brindle, was a pup belonging to defendant. The jury, in answer to special interrogatories, found that the dogs neither attacked nor attempted to bite plaintiff. One seems to have been chasing the other, and the ground of recovery was that defendant had allowed his brindle pup to run at large without being muzzled, in violation of the ordinance of the city of Le Mars. That defendant did this, and therein was at fault, is not questioned, but something more was essential in order to justify the

verdict; i. e., such fault must have been the proximate cause of the injury.

Can it be said that these dogs, in chasing one another or playing in the street, ran against plaintiff because of the omission of either to wear a muzzle? No evidence on the subject was offered, and, in the absence of any showing to that effect, we are not warranted in assuming that muzzling would have interfered with the dog's propensities to run and play with his associates. The omission of the muzzle seems to have been a mere incident or condition, and not in any sense the cause of the injury. But, say counsel, had defendant kept his unmuzzled dog from running at large, the accident would not have happened, and, in support of this position, rely on the language of the ordinance, which declares that "it shall be unlawful for any dog to be allowed to run at large within the limits of said city without being securely muzzled, and any owner of any dog who shall allow the same to run at large, or go beyond his or her immediate control, without being so muzzled, shall be deemed guilty of a misdemeanor, and punished accordingly."

It will be observed that this did not prohibit dogs from running at large, or men from allowing them to do so, but denounced the act of allowing them to be at large "without being securely muzzled." The unlawful act, then, of the brindle pup, was not in being on the street, but in being there without wearing proper apparel, and the defendant's fault was in permitting such freedom. But unless this error of the dog and fault of the man had something to do with causing the injury, there should be no recovery. See Tingle v. Chicago, B. & Q. R. Co. 60 Iowa, 333, 14 N. W. 320; Tackett v. Taylor County, 123 Iowa, 149, 98 N. W. 730; Sowles v. Moore, 65 Vt. 322, 21 L.R.A. 723, 26 Atl. 629.

Plaintiff relies on Jewett v. Gage, 55 Me. 538, 92 Am. Dec. 615, where a hog suddenly arose from a gutter and frightened complainant's horse, and Shipley v. Colclough, 81 Mich. 624, 21 Am. St. Rep. 546, 45 N. W. 1106, where cattle running at large overturned the complainant's buggy, and other like decisions. See 2 Am. & Eng. Enc. Law, 2d ed. p. 363; Hardiman v. Wholley,

note is concerned, for if one can be held responsible in damages for his affirmative act in setting a dog in motion to the injury of another, *a fortiori* the owner would be liable if he committed the same act.

A note upon the question of what *scienter* is necessary to charge an owner with liability for an injury inflicted by a dog, to the person or property of another, is appended to Emmons v. Stevane, 24 L.R.A. 33 L.R.A. (N.S.)

(N.S.) 458, and this note contains references at its close to several other notes upon kindred questions.

See, in addition to those just mentioned, the note to McClain v. Lewiston Interstate Fair & Racing Asso. 25 L.R.A. (N.S.) 691, on the question of *scienter* as a condition of liability for damages by a trespassing dog.

L. A. W.

172 Mass. 411, 70 Am. St. Rep. 292, 52 N. E. 518. But the owners in those cases were prohibited from allowing their animals to be at large unattended, and not as here, from permitting this, unless wearing safety appliances. The omission of the appliance did not contribute to the injury, and for this reason the fault of defendant in allowing his brindle pup on the street without the muzzle was not the proximate cause of the injury. *State, Smith, Prosecutrix, v. Donohue*, 49 N. J. L. 548, 60 Am. Rep. 652, 10 Atl. 150. See *Sanders v. Teape*, 51 L. T. N. S. 263.

A new trial should have been ordered.
Reversed.

KENTUCKY COURT OF APPEALS.

CHESAPEAKE & OHIO RAILWAY COMPANY, Appt.,

v.

M. D. SELSOR.

(142 Ky. 163, 134 S. W. 143.)

Carrier — drunken passenger — right to eject.

1. The conductor of a passenger train may refuse to receive as a passenger a person so far intoxicated as to affect his conduct.

Same — ejection — liability.

2. Train men have the right to remove from the train a person who has boarded it after the conductor has refused, because of his intoxicated condition, to receive him as a passenger, although he has a ticket entitling him to transportation.

(February 10, 1911.)

APPPEAL by defendant from a judgment of the Circuit Court for Lewis County in plaintiff's favor in an action brought to recover damages for alleged wrongful ejection of plaintiff from defendant's train. Reversed.

The facts are stated in the opinion.

Messrs. Worthington, Cochran, & Browning for appellant.

Messrs. A. D. Cole and John E. Littleton for appellee.

Hobson, Ch. J., delivered the opinion of the court:

M. D. Selsor brought this suit against the Chesapeake & Ohio Railway Company, charging that he bought a ticket at Vanceburg, Kentucky, to go to South Ports-

mouth, Kentucky, on April 3, 1910; that he got on board the regular passenger train to go to South Portsmouth, and that the conductor stopped the train and ejected him from it. An answer was filed by the defendant, putting in issue the allegations of the petition, and pleading affirmatively facts to warrant his ejection from the train. On a hearing of the case, there was a verdict and a judgment in his favor for the sum of \$200. The railroad company appeals.

The facts in the case are few and simple, and there is little conflict in the evidence. The plaintiff bought his ticket from the ticket agent, and, when the train came, started to get on the train. The conductor saw him, and told him not to get on the train; that he would not carry him. He then went up to the smoker and got on the car, when the brakeman saw him, stopped the train, and put him off. The conductor testified that he told him not to get on the train, that he could not carry him, because he was in a very drunken condition, and a young man was leading him. Other witnesses say that he was staggering drunk or helplessly intoxicated, while others say that he was drinking, but not boisterous, and was able to walk. On this evidence the court gave the jury these instructions:

"(1) The jury are instructed that if they shall believe from the evidence that the plaintiff, M. D. Selsor, purchased from the agent of defendant at Vanceburg, Kentucky, a ticket over the defendant's railroad from said point to Portsmouth, on April 3, 1910, and offered to become a passenger on defendant's train on the said day on the ticket so purchased, and the defendant refused to accept him as a passenger, and expelled him from the train after he had entered thereon for the purpose of becoming a passenger, then the law is for the plaintiff, and the jury will find for him such a sum of money as will fairly and reasonably compensate plaintiff for humiliation or mortification, if any, to which he may have been subjected by reason of his being removed from the train, not exceeding, however, the sum of \$2,000, the amount claimed in the petition. But if the jury shall believe from the evidence as indicated in instruction No. 2, they will find for defendant, although they may believe the plaintiff was expelled from defendant's train or refused passage thereon as indicated in this instruction.

"(2) The jury are instructed that it is a public offense for any person, while riding on a passenger train in this state, to be drunk thereon, to the annoyance of other passengers on said train, and it is the right

Note. — As to duty of carrier to accept as a passenger one physically or mentally disabled, see note to *Connors v. Cunard S. Co.* 26 L.R.A.(N.S.) 171.
33 L.R.A.(N.S.)

and duty of the conductor in charge of a train upon which such offense is committed, either to put the person so offending off the train, or to give notice of such offense to some peace officer at the first stopping place where any such peace officer may be, and it is the duty of such peace officer, when so notified by such conductor, to arrest such offender, and carry him to the most convenient magistrate of the county in which the arrest is made; and in expelling the offender from the train the conductor has the right to use such force as is reasonably necessary therefor, if the eviction be forcibly resisted. And if the jury shall believe from the evidence that the plaintiff, M. D. Selsor, at the time and upon the occasion when he was expelled from the defendant's passenger train, on April 3, 1910, mentioned in the evidence, if he was so expelled therefrom, was intoxicated to such an extent as to be annoyance or offensive to passengers on the train, then the defendant had the right to refuse to accept the plaintiff as a passenger on its train, and to expel him from the train if he got on same in such condition, and if plaintiff was in the condition aforesaid, and was expelled from defendant's train for that reason, the law is for the defendant, and the jury will so find."

It is undisputed in the evidence that the conductor told the plaintiff not to get on the train, that he could not carry him, and that the plaintiff after he was so told by the conductor, in violation of the conductor's instructions, went upon the car. When he so went upon the car, although he had a ticket, he was a trespasser, if the conductor was right in refusing to carry him, and in this event he cannot recover anything for his ejection from the train. The carrier was not obliged to receive the plaintiff as a passenger on its train if he was drunk, although he had bought a ticket. Persons who are not in a proper condition to be received on the train may be refused admittance by the carrier. Section 806, Ky. Stat. (Russell's Stat. § 5350), applies to passengers who have been received on the train. It has no application to persons who present themselves to be received. The statute was intended for the protection of the carrier, and not to change the common-law rule as to what persons the carrier is bound to receive. The case of Chesapeake & O. R. Co. v. Crank, 128 Ky. 329, 16 L.R.A.(N.S.) 197, 108 S. W. 276 is not like this case. There the passenger was on the train. He had been accepted as a passenger, and was ejected from the train while on his journey. Section 806, Ky. Stat. is as follows: "If any person whilst riding on a passenger or other train shall,

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in the hearing or presence of other passengers, and to their annoyance, use or utter obscene or profane language, or behave in a boisterous or riotous manner, or obtain, or attempt to obtain, money or property from any passenger by any game or device, he shall be fined for each offense not less than twenty-five nor more than one hundred dollars, or imprisoned in the county jail not less than ten or more than fifty days, or both so fined and imprisoned; and it shall be the duty of the conductor in charge of any train upon which there is a person who has violated the provisions of this section, either to put such person off the train, or to give notice of such violation to some peace officer at the first stopping place where any such officer may be." The statute was applicable in the Crank Case, but it has no application here. The question here is simply: Did the conductor have the right to refuse to receive the plaintiff as a passenger on the train? Louisville & E. R. Co. v. McNally, 31 Ky. L. Rep. 1357, 105 S. W. 124, is on all fours with this case. There it was held that the court should instruct the jury that if the plaintiff, when he offered to get on the train, was so far intoxicated as to affect his conduct, the conductor had a right to refuse to receive him on the car, and the jury should find for the defendant. In lieu of the instructions given, the court should have instructed the jury as above indicated.

Judgment reversed, and cause remanded for a new trial.

MICHIGAN SUPREME COURT.

MARY C. PEGG

v.

JOHN PEGG et al., Appts.

(— Mich. —, 130 N. W. 617.)

Entirety — conveyance by husband to wife.

A man cannot convey to his wife a half interest in his estate so as to create a tenancy by entireties in the whole estate, and cause his remaining half to pass to her rather than to his heirs, upon his death.

(March 31, 1911.)

Note. — Creation of tenancy by entireties by conveyance, to one spouse only, of interest in property of which the other already owns the whole or a part.

Aside from any criticism to which the decision reported may be subjected, as permitting a technical objection to override the grantor's expressed intention, its cor-

A PPEAL by defendants from an order of the Circuit Court for Grand Traverse County, in chancery, overruling a demurrer to a bill filed for the construction of a deed. **Reversed.**

The facts are stated in the opinion.

Messrs. Covell & Cross, for appellants:

In construing a deed, the intention in the minds of the parties is not what is sought, but the intent as expressed by the language used.

Cameron v. Sexton, 110 Ill. App. 381; Moran v. Lezotte, 54 Mich. 83, 19 N. W. 757; Schulz v. Brohl, 116 Mich. 603, 74 N. W. 1012.

No estate can pass by deed that is not embraced plainly in the words of grant.

Ryan v. Wilson, 9 Mich. 262; Plummer

v. Gould, 92 Mich. 6, 31 Am. St. Rep. 567, 52 N. W. 146; Munro v. Meech, 94 Mich. 596, 54 N. W. 290.

Where there is an absolute or unlimited conveyance of property, a subsequent clause expressing a wish, desire, or direction for its disposition after the death of the grantee will not defeat the conveyance, nor limit the extent of the interest conveyed.

Hubbard v. Goin, 70 C. C. A. 320, 137 Fed. 828.

The question of the construction of a deed set up in full in the bill of complaint may be raised by demurrer.

Schulz v. Brohl, 116 Mich. 603, 74 N. W. 1012.

Messrs. Pratt & Davis, for appellee:

The object to be arrived at by the court

rectness obviously depends upon the validity of the premises therein, that the unities of time, title, interest, and possession must be observed in creating a tenancy by the entirety. This seems, in view of the authorities cited, to rest upon the assumption that tenancy by entirety is a species of joint estate, and so can be created only as joint estates are created. While it is often loosely spoken of as a sort of joint estate having peculiar characteristics, the fact remains that the two have more points of difference than of resemblance. Besides the familiar distinction, that while joint tenants are seised *per my et per tout*, tenants by the entirety are seised *per tout*, and not *per my*, so that the survivor does not take by accruer, but by virtue of the original title, tenancy by the entirety differs from joint tenancy in that it may not be terminated by alienation by one without the consent of the other, and in that it cannot be partitioned. Authorities differ as to whether it is a joint estate or not. A discussion of the question may be found in Ram, Tenures, § 25, the author of which contends that tenants by the entirety are joint tenants, although he admits that such authorities as Blackstone and Preston are to the contrary.

But if tenancy by the entirety cannot be regarded as a kind of joint tenancy, the authority for the supposition that the four unities must be observed in its creation fails, leaving it simply a matter of conjecture. An investigation of the question has failed to show whether a seisin *per tout* is a requisite to its creation, or is merely an incident of the estate resulting from the legal identity of husband and wife.

Although the relationship of husband and wife is essential to its creation, it is not a necessary sequence of the relation. Thus, it is settled by authority running back to the earliest times that persons holding as cotenants before their marriage will not, by virtue of their marriage, become tenants by the entirety. See Co. Litt. 187; Washburn, Real Prop. § 911; Greenleaf's Cruise, Real Prop. title 18, ¶ 50; Moody v. Moody, 2 Ambl. 649; McDermott v. French, 33 L.R.A. (N.S.)

15 N. J. Eq. 80; Ames v. Norman, 4 Sneed, 683, 70 Am. Dec. 269.

So, tenancy by the entirety is not a necessary consequence of the acquisition by a husband of title after marriage, pursuant to an antenuptial agreement that the husband and wife should hold and own the estate jointly and equally, since the right of the parties originated before marriage. Holt v. Wilson, 75 Ala. 58.

And it is equally well settled that a husband and wife may by express words be made tenants in common by gift to them during coverture. See, *inter alia*, 2 Bl. Com. 182, Sharswood's note; 4 Kent, Com. 363; 1 Preston, Estates, 132.

It has accordingly been held that an estate by the entirety does not result from a conveyance to the wife alone by the husband's cotenant. Banzer v. Banzer, 10 Misc. 24, 30 N. Y. Supp. 803, affirmed on other grounds in 11 Misc. 310, 32 N. Y. Supp. 266, which is affirmed in 156 N. Y. 429, 51 N. E. 291; Isley v. Sellars, 153 N. C. 374, 69 S. E. 279; Tindell v. Tindell, — Tenn. —, 37 S. W. 1105; in the latter of which cases it is said to be essential to a creation of tenancy by the entirety that the title or interest devolve upon the husband and wife at the same time and during coverture.

Another case which lends support to the theory upon which PEGG v. PEGG is decided is American Nat. Bank v. Taylor, — Va. —, 70 S. E. 534. There a father conveyed certain realty to his son, reserving a life use to himself and his wife by a proviso stating that the conveyance was made on the distinct understanding that the grantor and his wife were to remain on the land and enjoy the rents and profits thereof for and during the period of their natural lives. It is said: "If it be held that the wife, although no party to the deed (§ 2415 of the Code [Code 1904, p. 1178]), took an estate for life in one undivided moiety of the land, and the husband excepted from the operation of the deed a life estate for himself in the other moiety, then there would be no survivorship, for the husband and wife would not be either joint tenants or tenants

in construing deeds or other contracts is to ascertain clearly the intention of the parties.

Ford v. Daniells, 71 Mich. 78, 38 N. W. 708; *Wilson v. Terry*, 130 Mich. 73, 89 N. W. 566; *Bassett v. Budlong*, 77 Mich. 338, 18 Am. St. Rep. 404, 43 N. W. 984; *Bodine v. Arthur*, 91 Ky. 53, 34 Am. St. Rep. 162, 14 S. W. 904; *Meacham v. Blaess*, 141 Mich. 261, 104 N. W. 579; *Powers v. Hibbard*, 114 Mich. 533, 72 N. W. 339.

Bird, J., delivered the opinion of the court:

The bill of complaint in this cause calls for the construction of a deed made by Davis Pegg to Mary C. Pegg, the complainant. Davis Pegg was the husband of complainant, and in the year 1897 he conveyed to her, by warranty deed in the usual form, an undivided one-half interest in and to the following described premises: "The west half (W. $\frac{1}{2}$) of the southeast quarter (S. E. $\frac{1}{4}$) of section three (3), and

by entireties, for their estate would be lacking in unity of title, unity of time, and unity of possession. 2 Minor Inst. 4th ed. p. —, and authorities cited; 2 Minor, Real. Prop. § 880. The life estate remaining in the husband was from his vendor, while that of the wife was acquired from him, or from him and his son, both of whom signed the deed creating her estate."

But see *McRoberts v. Copeland*, 85 Tenn. 211, 2 S. W. 33, where the grantor conveyed lands by deed in which his wife joined, the habendum clause of which contained the words, "subject alone to our life estate." It was held that the exception or reservation of the life estate inured, upon the death of the grantor, to his wife in her own right as survivor, by operation of law; and *Tindell v. Tindell*, supra, in which, in commenting upon this case, it is said that, the life estate having been created at the same time in the husband and wife, the unities were observed.

In *Bassett v. Budlong*, 77 Mich. 338, 18 Am. St. Rep. 404, 43 N. W. 984, where the owner in fee of certain premises executed a quitclaim deed thereof to his wife, containing a proviso subjecting it to the express conditions and reservations that the grantee should not at any time during the lifetime of the grantor convey or encumber any part of the premises without the written assent or joinder of the grantor, and that, in case of the decease of the grantee at any time before the decease of the grantor, then the premises should forthwith revert to the grantor, it was held that the instrument would be construed so as to carry out the intent of the parties making it, that the survivor should take the fee; although it was suggested that the object might better have been accomplished by a conveyance to a third party, and a reconveyance to the husband and wife jointly.

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the west half (W. $\frac{1}{2}$) of the northeast quarter (N. E. $\frac{1}{4}$) of section 10 (10), in Grand Traverse county." In the deed, between the granting and the habendum clauses, is inserted the following clause: "The object and purpose of this deed is to convey to said second party such an interest in said land that the parties hereto will have an estate in entirety, and that the same shall survive and vest in the survivor as a full and complete estate." The deed was recorded in 1901, and in 1902 Davis Pegg died. Complainant is in possession of the premises, and claims title thereto on the theory that she and her husband owned the premises as tenants by entirety, and, she being the survivor, she takes the whole. It is claimed by the defendants, who are children and grandchildren of Davis Pegg, that Davis Pegg and complainant were the owners of the premises as tenants in common, and that upon his decease an undivided one half of the premises descended to them. The defendants demurred to the

In *Saxon v. Saxon*, 46 Misc. 202, 93 N. Y. Supp. 191, it was held that tenancy by the entireties was not created by a conveyance made by a husband to himself and his wife, under a statute enabling husband and wife to convey to each other without the intervention of a third person, since such statute abrogates in respect of such conveyance the rule of unity which at common law gave to a conveyance to husband and wife the effect of vesting the estate by the entireties in them.

The language of the first clause of a deed, describing the grantees as "John F. Saxon and Mary B. Saxon, his wife, for their joint lives, and upon the death of either, the survivor to be absolute owner of the second part," is ineffectual to create an estate by the entireties where the subsequent words of conveyance are not apt or operative for that purpose, but only for a simple conveyance; since, although it is true that the whole deed must be read for the intention, nevertheless no effect can be given to any intention in a conveyance or will which does not contain words adequate to express and carry it out; and since, even if the words quoted should be given the same effect as they would receive if in the premises or conveying clause, or in the habendum, they do not create an estate by the entireties, but only a joint tenancy. *Ibid.*

As to the effect upon the character of an estate as one by entireties under a conveyance to both spouses, of the fact that one of them already had an estate in the land, see note to *Sprinkle v. Spainhour*, 25 L.R.A. (N.S.) 167.

As to tenancy by entireties generally, see note to *Hiles v. Fisher*, 30 L.R.A. 305.

E. S. O.

bill, and the trial court made an order overruling it, and they have appealed from that order.

Davis Pegg conveyed an undivided one-half interest in said premises to complainant. He retained an undivided one half interest therein. After this was done, they had distinct titles, and were therefore tenants in common. The title remained that way until Davis Pegg died. The question is, then: What became of his undivided half? Ordinarily, it would descend to his heirs, the defendants; and it did so descend, unless the clause which was inserted carried it in a different direction. Complainant contends that it did not so descend, because she and her husband owned the premises as tenants by the entirety, and were made such by said deed, and that now, as survivor of her husband, she is entitled to the whole of said premises. In order to own the whole, as survivor, she would have to be seised of the whole before his death. Whatever vested in her as survivor must have been owned by both her and her husband before his death, and each must have been seised of the whole. As neither one was seised of the whole, but both held by distinct titles, they could not have been tenants by the entirety. Neither were they tenants by entirety of the undivided half conveyed to her, because Davis Pegg reserved no interest in the undivided half he conveyed to complainant. The deed as a whole cannot be construed as creating a tenancy by entirety, because the law was not followed in creating it. At the common law, the unities of time, title, interest, and possession had to be observed in creating such an estate. Bl. Com. bk. 2, p. 182; 1 Washb. Real Prop. 6th ed. p. 529. See suggestion in *Bassett v. Budlong*, 77 Mich. 338, 18 Am. St. Rep. 404, 43 N. W. 984.

The common law has remained unchanged in this respect, and is now in force. In the attempt to create an estate by entirety, in the case under consideration, neither the unity of time nor title was observed. The estate was not created by one and the same act; neither did it vest in them at one and the same time. If the clause inserted can be said to be a part of the habendum of the deed, as is argued, then that part of the habendum must fail, on the ground that it seeks to enlarge an estate in common, which is granted, into an estate of entirety, without complying with the rules of law for the creation of such an estate. By reason of these considerations, the deed must be read as though the "clause" had been omitted. The deed created a tenancy in common between complainant and her husband, and upon his

decease his undivided one half of the premises descended to his heirs.

The order of the trial court overruling defendants' demurrer will be vacated and set aside, and an order entered sustaining the demurrer.

Ostrander, Ch. J., and Hooker, Moore, and McAlvay, JJ., concurred in the result.

NORTH CAROLINA SUPREME COURT.

JAMES EXUM, Admr., etc., of Paul Exum, Deceased, Appt.,

v.

ATLANTIC COAST LINE RAILROAD COMPANY.

(154 N. C. 408, 70 S. E. 845.)

Railroad — killing person on track — last clear chance.

A railroad company is not liable for the death of an employee killed while walking along its track to his work, even though he bears to it the relation of licensee, if he was in full possession of his faculties and there is no reason why he could not have stepped off the track up to the last moment, although the engineer was negligent in failing to keep a lookout and to see signals which attempted to warn him of the employee's danger, since his negligence is not the proximate cause of the injury.

(Clark, Ch. J., dissents.)

(March 29, 1911.)

Note. — The decision in this case denying the applicability of the doctrine of last clear chance upon the ground that the negligence of the deceased, he being in full possession of his faculties, continued until the instant of the impact, and was, therefore, at least, concurrent with, if not subsequent to, the negligence of the engineer, assuming that the latter was negligent at all, is, as shown in the note to *Southern R. Co. v. Bailey*, 27 L.R.A. (N.S.) 379, and numerous other notes in this series therein referred to, in accord with the trend of the cases where the negligence chargeable against the defendant consists of the failure to discover the danger, and not in the omission of any precautions after the discovery thereof.

And see to the same effect the later case of *Hammers v. Colorado Southern, N. O. & P. R. Co.* — La. —, — L.R.A. (N.S.) —, 55 So. 4. This limitation of the doctrine is also recognized in the later case of *Wilson v. Illinois C. R. Co.* — Iowa —, — L.R.A. (N.S.) —, 129 N. W. 340, but was held not to defeat the application of the doctrine in that case because there was sufficient evidence to show that the engineer,

APPPEAL by plaintiff from a judgment of the Superior Court for Edgecombe County sustaining a motion for nonsuit in an action brought to recover damages for the alleged negligent killing of plaintiff's intestate. Affirmed.

The facts are stated in the opinion.

Messrs. Gilliam & Bassett for appellant.

Messrs. John L. Bridgers and F. S. Spruill, for appellee:

Plaintiff carelessly and negligently took the route which was beset with manifest danger, and the defendant was thereby absolved from liability for the resulting injury.

McAdoo v. Richmond & D. R. Co. 105 N. C. 153, 11 S. E. 316; Neal v. Carolina C. R. Co. 126 N. C. 638, 49 L.R.A. 684, 36 S. E. 117; Bessent v. Southern R. Co. 132 N. C. 934, 44 S. E. 648; Pharr v. Southern R. Co. 133 N. C. 615, 45 S. E. 1021; Allen v. Atlanta & C. Air Line R. Co. 141 N. C. 340, 53 S. E. 866; Crenshaw v. Asheville & B. Street R. & Transp. Co. 144 N. C. 325, 56 S. E. 945; Royster v. Southern R. Co. 147 N. C. 347, 61 S. E. 179; Parker v. Wilmington & W. R. Co. 86 N. C. 222.

Brown, J., delivered the opinion of the court:

The evidence in this case was all introduced by the plaintiff, and in its most favorable aspect for him tends to prove these facts: The intestate, Paul Exum, was an employee of defendant in its shops at South Rocky Mount, a man of sound mind, about thirty four years old, and with no bodily infirmity. On the morning of February 1, 1907, the intestate was walking south on main line track of defendant, going from North Rocky Mount about a mile to South Rocky Mount to his work. The regular "shop train" of defendant, used to carry

employees at the same hour every morning, had left North Rocky Mount on its regular run for South Rocky Mount and was using the main line track, going in same direction at from 12 to 15 miles per hour. It ran over the intestate and killed him. At the time of the casualty, the intestate was in the full possession of his faculties, walking briskly on main line track. There was nothing unusual about his appearance, except that he appeared to plaintiff's witness Thorp to be looking down on the track. There are half a dozen tracks between North and South Rocky Mount, with spaces of 6 feet between them, which spaces are used by pedestrians and bicyclists. The tracks are in constant use by all kinds of trains and engines. The evidence discloses nothing about the intestate to indicate to the engineer of the shop train other than that he would step off the track at any moment and let him pass. The intestate was an employee of defendant at its South Rocky Mount shops, and must have been familiar with the constant passage of trains over these tracks, and especially with the schedule of the shop train.

It must be admitted that the intestate was entirely out of his place walking on a main line track under the circumstances and conditions disclosed by the evidence. He should have used the established walk ways between the tracks, as witness Thorp was doing, or else he should have taken the shop train provided by defendant for its employees, who resided in North Rocky Mount. That the intestate was guilty of great carelessness and negligence in failing to use his faculties and keep a vigilant lookout for engines while on the railroad track is established by a multitude of decisions of this court, over thirty five in number. Coleman v. Atlantic Coast Line R. Co. 153 N. C. 325, 69 S. E. 251. In referring to this

by the exercise of proper care after he discovered the decedent's danger, could have prevented the accident. This is in accordance with the distinction suggested in the note to Dyerson v. Union P. R. Co. 7 L.R.A. (N.S.) 132.

In this view the question under what circumstances the negligence of the person injured will be deemed to have culminated and ceased prior to the injury becomes important. The effect of voluntary intoxication on that question is the subject of a note to Little Rock R. & Electric Co. v. Billings, 31 L.R.A. (N.S.) 1031.

It should be observed that this limitation of the doctrine of last clear chance if accepted will defeat a recovery even upon the assumption that the defendant owed the person injured a duty the performance of which would have revealed his presence and danger in time to have enabled the defend-

ant by the exercise of proper care to have averted the accident, though according to the trend of authority it will not defeat a recovery if the negligence on the part of the defendant consisted in the failure to exercise due care after the presence and danger of the person were actually discovered. Of course, if for any reason the defendant can be acquitted of negligence altogether,—for example, if it be assumed that the defendant owed no duty to keep a lookout for the person injured, or if his presence had been discovered the defendant could properly have assumed that he would leave the place of danger in time to avoid the accident,—there is no foundation whatever for the defendant's liability, and no occasion on its part to invoke the doctrine of contributory negligence, and therefore no opportunity on the plaintiff's part to invoke the doctrine of last clear chance. G. H. P.

rule of law in the case of *Cooper v. North Carolina R. Co.* 140 N. C. 212, 3 L.R.A. (N.S.) 391, 52 S. E. 932, 6 A. & E. Ann. Cas. 71. Mr. Justice Hoke well says: "This rule is so just in itself and so generally enforced as controlling, that citation of authority is hardly required." The rule applies to those who cross the railroad tracks, and with equal, if not greater, force to those who walk up and down them. It is immaterial whether we consider the intestate in the light of a trespasser or licensee; the same obligation to look, listen, and to exercise vigilance rested upon him.

This court has held uniformly that "even where it is conceded that one is not a trespasser . . . in using the track as a foot-way from a foundry to his house, it behooves him to be still more watchful. The license to use does not carry with it the right to obstruct the road and impede the passage of trains. A railroad company has the right to the use of its track, and its servants are justified in assuming that a human being who has the use of all his senses will step off the track before a train reaches him." *McAdoo v. Richmond & D. R. Co.* 105 N. C. 153, 11 S. E. 320; *Parker v. Wilmington & W. R. Co.* 86 N. C. 221; *Meredith v. Richmond & D. R. Co.* 108 N. C. 616, 13 S. E. 137; *Norwood v. Raleigh & G. R. Co.* 111 N. C. 236, 16 S. E. 4; *High v. Carolina C. R. Co.* 112 N. C. 385, 17 S. E. 79. In *Neal v. Carolina C. R. Co.* 126 N. C. 638, 49 L.R.A. 684, 36 S. E. 118, this court said: "If plaintiff's intestate was walking upon defendant's road, in open daylight, on a straight piece of road, where he could have seen defendant's train for 150 yards, and was run over and injured, he was guilty of negligence; and, although the defendant may have also been guilty of negligence in running its train at a greater rate of speed than was allowed by the town ordinance, or in not ringing its bell as required by said ordinance, and in not keeping a lookout by its engineer, as it should have done, yet the injury would be attributed to the negligence of the plaintiff's intestate."

Speaking of the principle involved in the case determining the injured party's negligence, the court says: "According to the principle declared in all of them, the question of liability is not to be solved by any reference to what the defendant may have done or omitted to do, but by the conduct of the plaintiff; and if the latter would not see when he could see, or would not hear when he could hear, and remained on the track, in reckless disregard of his own safety, the law adjudges any injuries he may have received to be the result of his own carelessness." *Bessent v. Southern R. Co.* 132 N. C. 940, 44 S. E. 650; *Pharr v.*

Southern R. Co. 133 N. C. 615, 45 S. E. 1021, approving *Neal's Case* and *Bessent's*; *Allen v. Atlanta & C. Air Line R. Co.* 141 N. C. 340, 53 S. E. 867; *Crenshaw v. Asheville & B. Street R. & Transp. Co.* 144 N. C. 325, 56 S. E. 945; *Royster v. Southern R. Co.* 147 N. C. 347, 61 S. E. 179. In *Syme v. Richmond & D. R. Co.* 113 N. C. 558, 18 S. E. 114, it is held that "when a person is injured while walking on a railroad track by an engine that he might have seen by looking, the law . . . imputes the injury to his own negligence," and that "the engineer was justified in assuming that intestate had looked, had notice of his approach, and would clear the track in ample time to save himself from harm."

In the recent case of *Beach v. Southern R. Co.* 148 N. C. 153, 61 S. E. 664, this subject is discussed elaborately by Mr. Justice Walker, and all the cases cited and reviewed.

The plaintiff seeks to take this case out of the established rule by attempting to prove that the engineer of the shop train could have avoided killing the intestate by exercising reasonable care, and failed to do so. This condition is based upon the testimony of Thorp, who says: "I was between the last western track and the eastern track when I saw Exum, and he was walking along with his head down, walking very brisk, with a tin bucket on his arm." Thorp says he saw the shop train approaching the intestate, and, when it was 150 feet from Exum, "I commenced to wave at him and shout. Ran 20 or 25 feet towards him, waving my hat at him and hallooing to him. He seemed to be walking right along and did not notice me. Then I commenced waving train down and pointing at the track. I did not succeed in attracting anybody's attention." Thorp further states that there was nothing between him and Exum, or between him and the train, to obstruct the view.

We fail to see anything in this evidence to take this case out of the rule laid down in the cases cited. It is not even suggested, much less contended, that the engineer purposely and wilfully ran down and killed his coemployee. There is no evidence whatever that the engineer actually saw Thorp's signals in time to stop, or that he saw them at all. But plaintiff contends that it was the engineer's duty to see them. The engineer's duty was to keep a vigilant lookout in front of him and especially along the track over which he was running. It was no more the duty of the engineer to see Thorp's signals than it was the duty of the intestate. It was as much incumbent upon him to keep a sharp lookout as upon the engineer. In fact, had the engineer seen Thorp's signals, he had a right to as-

sume up to the last moment that the intestate also saw them, and that he would step off the track out of harm's way. The intestate was a sound man, with no apparent infirmity, walking briskly along ahead of a train with the uses and schedule of which he was necessarily familiar. The engineer had every reason to believe that such a man was exercising vigilance and would get out of the way and let him pass.

In this class of cases it will be found generally that, where the company has been held liable, it is in cases where the party injured was not upon equal chances with the engineer to avoid the injury, where there was something suggesting the injured party's disadvantage or disability, as where the party injured is lying on a railroad track apparently drunk or asleep, or is on a bridge or trestle where he cannot escape, or cannot do so without great danger. In such cases, if the engineer saw the party injured, or by proper diligence could have seen him, the company is held liable for the engineer's negligence. *Neal v. Carolina C. R. Co.* 126 N. C. 639, 49 L.R.A. 684, 36 S. E. 117. See also *Norwood v. Raleigh & G. R. Co.* 111 N. C. 236, 16 S. E. 4; *High v. Carolina C. R. Co.* 112 N. C. 385, 17 S. E. 79; *McAdoo v. Richmond & D. R. Co.* 105 N. C. 153, 11 S. E. 320.

Assuming, however, that the engineer was negligent as well as the intestate, the negligence of both is concurrent, and, as said by Mr. Justice Allen in *Harvell v. Weldon Lumber Co.* — N. C. —, 70 S. E. 389: "It is well settled that, when the plaintiff and defendant are both negligent, and the negligence of both concur and continue to the time of the injury, that the negligence of the defendant is not in the legal sense proximate."

As lately held by a unanimous court in *Beach's Case*, *supra*, when a person is injured upon a railroad track, which injury could have been avoided by him by looking and exercising proper vigilance, the negligence of such person in this respect is concurrent, and damages are not by him recoverable on that account.

Upon an unbroken line of authorities, we are of opinion his Honor properly sustained the motion to nonsuit.

Affirmed.

Hoke, J., concurring:

If it be conceded that the defendant in this case was negligent, I concur in the decision, for the reason that, accepting all of plaintiff's evidence as true, and taking every permissible inference arising from the entire testimony and which makes for his claim as established, it appears that, when he was killed, the intestate was voluntarily walking along the main line of defendant's

track, at a time and place where a train might be expected any moment, in broad daylight, in the full possession of his faculties, and with nothing to restrain or hinder his movements, without paying the slightest attention either to his placing or surroundings. There is nothing, therefore, to qualify the obligation that was upon him to be careful of his own safety, and to my mind it presents a typical case of contributory negligence, negligence concurring at the very time of the impact, and recovery by plaintiff is therefore properly denied.

Clark, Ch. J., dissenting:

The plaintiff's intestate was killed by the defendant's engine. The bare fact that the intestate was walking on the track did not, as a matter of law, give the defendant the right to kill him. The court ought not to hold as a matter of law that a killing under such circumstances is necessarily rightful. Whether it is excusable or not is a matter which depends upon the circumstances of the case and is an inference to be drawn by the jury, for, notwithstanding the intestate's negligence (if he was negligent under the circumstances of this case in walking upon the track), if the defendant's engineer with a due regard to human life and by keeping a proper lookout could have avoided killing the deceased, it was incumbent upon the defendant to have done so, and his failure to do so was the proximate cause of the death of plaintiff's intestate.

There are many circumstances in this case which require that the question of proximate cause should have been left to the jury, and that the judge should not by a nonsuit have adjudged that the defendant had a right as a matter of law to kill the deceased. The deceased, an employee of the defendant, on his way from his work, was walking, according to the custom of employees at that place, along the track on his way home. He was walking along with his head down, his back to the engine, and evidently oblivious to its approach. The track was straight, and where the deceased was walking was within the town limits of Rocky Mount. The evidence is that the track was "customarily" used by the employees of the defendant corporation, and by the general public as well, without objection, as a walk way between Rocky Mount and South Rocky Mount, to the same extent as if it were a public street. The defendant's engine was running at from 12 to 15 miles per hour, an excessive speed within town limits, and, though it had passed over many crossing places where street after street crossed the track, it blew no signal at any of them. The train was a shop train, and was not running on its

regular track. The deceased was walking on the main track on which no train was scheduled to pass at that hour. There was evidence tending to show that a passing freight train on another track prevented the intestate from hearing the approaching train behind him. It was the duty of the engineer to have kept an efficient lookout in front of him, and with proper care he could have seen that the deceased was pre-occupied, with his back turned to the approaching engine, and looking down on the track. The engineer knew that this track was customarily used by the public, that the deceased was walking on a track on which no engine was scheduled to pass at that hour, that he himself was running on an unusual track for his engine, and, more than this, his attention was specially called to the fact that the deceased was inadvertent to the approach of his train by the gestures and signal of the witness Thorp, who was walking by the side of that track some 200 feet in front of the engine and facing it, who saw the danger of the deceased was in, and who ran forward waving his arms and making signals to the engineer. The engineer should have seen the oblivious condition of the deceased as quickly as Thorp, even if the latter had made no signals. While ordinarily an engineer seeing a man walking on the track may expect him to get off when he blows his whistle, here the engineer neither blew his whistle nor rang his bell.

All the above facts combined, together with the excessive speed of the engine, certainly required some action on the part of the engineer. It was not necessary for him to stop his engine, but he should at least have blown his whistle or rung his bell. *Stanley v. Durham & N. R. Co.* 120 N. C. 514, 27 S. E. 27, in which it was held that "a person walking on a railroad track . . . has a right to suppose that the railroad company would take care to provide against injuring pedestrians by the use of proper lights and signals," "and to feel secure in acting upon that supposition." Had the engineer blown his whistle after he saw Thorp's signals,—and he should have seen them with a proper lookout when 150 feet from the deceased,—the deceased would have been awakened from his reverie and been given notice to step off the track. A human life should be at least worth the trouble of the engineer raising his hand to pull the cord that sounds the whistle. It ought not to be held as a matter of law that in all cases whatever a man forfeits his life by the mere fact that he walks on a railroad track, and that in such cases that railroad company may rightfully kill him, like a rat caught in a box.

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It is not contended by the plaintiff that his intestate was entirely without negligence in walking on the track, though to do so at that point was permissive and customary. But notwithstanding that negligence, if the engineer could have prevented killing the deceased by the exercise of proper care on his part, then the proximate cause was the negligence of the defendant, and the killing of the deceased was not rightful as a matter of law, but was wrongful as a matter both of fact and of law. If the engine had not been running at an excessive speed, if the whistle had been blown at each crossing, if the train had been running on its rightful track, and if the engineer had kept a proper lookout so that he would have seen that the deceased was oblivious to the approach of the engine from the rear, which he could not hear on account of the noise made by the freight train passing on another track, and if he had taken notice of the frantic gestures of the witness Thorp immediately in his front calling attention to the jeopardy of the deceased, and if under these circumstances a blast of the whistle would have given the deceased notice in time of the approach of the fatal train, then the proximate cause of the death on the actual facts was the negligence of the defendant's engineer. At least these facts should have been submitted to the jury.

In *Arrowwood v. South Carolina & G. Extension R. Co.* 126 N. C. 630, 36 S. E. 152, the court held that, where the public are in the habit of using the railroad track as a pass way, then the defendant should exercise greater care, move its trains at a lower speed, and keep a keener lookout in front, than in going along a straight track in an open country, and that "the amount of care depends upon the circumstance in each case," and sustained the finding that, "notwithstanding the negligence of the plaintiff's intestate, could the defendant by the exercise of ordinary care have avoided the killing of the intestate."

In *Edwards v. Atlantic Coast Line R. Co.* 129 N. C. 81, 39 S. E. 730, it was held that where the train was passing, as here, through a town at an excessive speed, this was evidence of negligence on the part of the defendant, and should be submitted to the jury on the issue of proximate cause. In *Fulp v. Roanoke & S. R. Co.* 120 N. C. 525, 27 S. E. 74, the court held that the failure to sound a whistle at a crossing was evidence of proximate cause where the deceased was killed along the track beyond the crossing. In that case *Furches, J.*, said: "Though the intestate may have been guilty of negligence by going on the defendant's road, whether drunk or sober, it was

still the duty of the defendant's engineer to be in his place, on the lookout, and if he saw the intestate, or could by due diligence have seen him, in time to stop the train and save the life of the intestate, it was his duty to do so, and if he did not he was guilty of negligence, . . . and the defendant would be liable." He further said that it was error for the judge to charge: "If the intestate's failure to note approaching trains was in whole or in part because he was drunk, and was run over and killed in consequence, this would be contributory negligence, and the jury should answer the second issue, 'Yes.' This puts the whole case upon the intestate's being drunk, and, if this charge were sustained, it would be a free license to every railroad company in the state to run over and kill every drunken man that got on its road, whether the conductor saw him or not,—a doctrine it seems to us too shocking to be insisted upon."

In *Powell v. Southern R. Co.* 125 N. C. 374, 34 S. E. 530, it was held, citing *Fulp v. Roanoke & S. R. Co.* supra, and many other cases, that it was negligence not to sound the whistle at a public crossing when the person killed was on the track and the whistle might have given him notice to get off. That case has been cited by many others since. See annotated ed. In *Morrow v. Southern R. Co.* 147 N. C. 623, 16 L.R.A.(N.S.) 642, 61 S. E. 621, Mr. Justice Walker held: "The failure of the employees of a railroad company to give crossing signals at a public crossing does not constitute negligence *per se*, when the injury complained of occurred to a pedestrian while using the track at a different place, but it is only evidence of negligence under certain conditions." If evidence of negligence, it should have been submitted to the jury to say whether it was sufficient under the conditions of this case. This last quotation was cited by Mr. Justice Hoke in *Norris v. Atlantic Coast Line R. Co.* 152 N. C. 510, 27 L.R.A.(N.S.) 1069, 67 S. E. 1020, who said: "Where a person is on the track, at a place where travelers are habitually accustomed to use the same for a walkway, they have a right to rely to some extent and under some conditions upon the signals and warnings to be given by trains at public crossings and other points where such signals are usually and ordinarily required, and that a failure on the part of the company's agents and employees operating its train to give proper signals at such points is ordinarily evidence of negligence, and, where such failure is the proximate cause of an injury, it is, under some circumstances, evidence from which actionable negligence may be inferred,—citing *Randall v.* 33 L.R.A.(N.S.)

Richmond & D. R. Co. 104 N. C. 410, 10 S. E. 691, where the plaintiff was driving his oxen along the road near the track, and by reason of the whistle not being sounded at the crossing he did not turn out, and the train so frightened his oxen that they got upon the track and were killed.

Upon the authorities, it is clear beyond controversy that the intestate was a licensee, and not a trespasser, and, though he was guilty of negligence, if those in charge of the train could with proper care have prevented the injury by blowing the signals or by running the train at a moderate speed, the defendant is liable. The matter is fully discussed in *Teakle v. San Pedro, L. A. & S. L. R. Co.* 32 Utah at page 288, 90 Pac. at page 407 10 L.R.A.(N.S.) 486, at page 491, with full citation of authorities, which are thus summed up: "While trainmen are not usually bound to foresee or watch for the wrongful presence of any person upon the track, even where it is open to an adjoining highway, . . . yet, if experience has shown that at certain points persons are constantly thus entering upon the track . . . such persons, if injured as the proximate result of the trainmen's failure to use ordinary care to keep watch for them, may recover damages if the trainmen could have seen them without difficulty, had they kept a reasonable watch, even though in fact they did not see them. Especially should this rule be applied where the railroad company has acquiesced in the use thus made of its property." It is further said that in such cases the duty is "imposed upon the train operatives with respect to observing a reasonable lookout in the direction of the moving train, the extent of which it is not for us to say, but is to be determined by the triers of fact under all the circumstances of the case." The citations of authority in this case are full, and the reasoning is convincing and just.

In *Williamson v. Southern R. Co.* 104 Va. 146, 70 L.R.A. 1007, 113 Am. St. Rep. 1032, 51 S. E. 195, it is held: "If the right of way of a railroad corporation at a particular point has long been in use as a walk way, and this is well known to the company, it is under the duty of using reasonable care to discover, and not to injure, persons whom it might reasonably expect to be on its tracks at that point," citing *Blankenship v. Chesapeake & O. R. Co.* 94 Va. 449, 27 S. E. 20; *Chesapeake & O. R. Co. v. Rodgers*, 100 Va. 324, 41 S. E. 732.

In *Troy v. Cape Fear & Y. Valley R. Co.* 99 N. C. 298, 6 Am. St. Rep. 521, 6 S. E. 77, it is held that walking on the track is not in itself such contributory negligence as will bar a recovery of damages for injuries

sustained if the company by reasonable care could have prevented them.

To the same effect, *Guilford v. Wolcott*, — N. C. —, 70 S. E. 393; *Louisville, N. A. & C. R. Co. v. Phillips*, 2 Am. St. Rep. 155, and note (112 Ind. 59, 13 N. E. 132; *Ohio & M. R. Co. v. Walker*, 113 Ind. 196, 3 Am. St. Rep. 638, 15 N. E. 234; *Hurt v. St. Louis, I. M. & S. R. Co.* 94 Mo. 255, 4 Am. St. Rep. 374, 7 S. W. 1; *Indianapolis & St. L. R. Co. v. Watson*, 5 Am. St. Rep. 578, and note (114 Ind. 20, 14 N. E. 721, 15 N. E. 824). In *Schmidt v. Missouri P. R. Co.* 191 Mo. 215, 3 L.R.A.(N.S.) 196, 90 S. W. 336, it is said, citing *Harlan v. St. Louis, K. C. & N. R. Co.* 65 Mo. 22, that, notwithstanding the contributory negligence of the intestate, "the company is liable if by the exercise of ordinary care it could have prevented the accident . . . after a discovery by defendant of the danger in which the injured party stood, . . . or if the company failed to discover the danger through the recklessness or carelessness of its employees when the exercise of proper care would have discovered the danger [of the intestate] and averted the calamity."

In *Virginia Midland R. Co. v. White*, 84 Va. 498, 10 Am. St. Rep. 874, 5 S. E. 573, it is held that a railroad company owes to a licensee on its track ordinary care and prudence, and that the intestate, who was killed while walking on the track, is not barred of recovery if the engineer might by the exercise of care on his part have avoided the consequences of the negligence and carelessness on the part of the intestate. To the same effect, *Thomas v. Chicago, M. & St. P. R. Co.* 103 Iowa, 649, 39 L.R.A. 399, 72 N. W. 783; *Bogan v. Carolina C. R. Co.* 55 L.R.A. 418, and notes (129 N. C. 154, 39 S. E. 808). In *Raines v. Chesapeake & O. R. Co.* 39 W. Va. 50, 24 L.R.A. 226, 19 S. E. 565, it is held that, if one is walking along the track apparently in possession of his faculties, the engineer may presume that he will get off the track provided due signals are given. To same effect, *Atchison, T. & S. F. R. Co. v. Baker*, 21 L.R.A.(N.S.) 427, and notes (79 Kan. 183, 93 Pac. 804).

In 2 Thomp. Neg. § 1596, it is said that the rule which requires the railroad to keep a lookout ahead of its trains at crossings and at places where the track is much used by the public "is reduced to meaningless verbiage, unless it is followed up by the corresponding rule that, where a person negligently exposes himself to injuries upon the crossing, the railroad company will be liable if, by the maintenance of a lookout, it might have discovered the traveler in his exposed situation in time by the exercise of reasonable care to have avoided killing or

injuring him." For this proposition numerous cases are cited, and the author adds: "The cases which told the contrary seem to have no counterpart in the jurisprudence of any other English speaking country, and form a disgraceful chapter in American jurisprudence." The same point is elaborated in §§ 1724, 1725, 1726, 1836, 1837.

There were numerous street crossings of this track, and the track itself was with the permission of the defendant customarily used by its employees and the public as a street, according to the evidence. Yet the evidence of Thorp is that no whistle was blown or bell was rung that he heard, and this is the evidence, under our authorities, to go to the jury that there was none, in the absence of evidence to the contrary. Authorities might be multiplied; but it has never yet been held law in this state or elsewhere, and cannot now be held with my assent, that the mere fact that one walks upon the railroad track is conclusive evidence that his negligence is the cause of his death, regardless of the surrounding circumstances; and yet such is practically the rule if, under all the circumstances in this case, it is held that the defendant, as a matter of law, had a right to kill the deceased, and that by a nonsuit a jury can be deprived of any right to determine whose negligence was the proximate cause of the death.

ARKANSAS SUPREME COURT.

E. B. PETTY, Impleaded, etc., Appt.,

v.
HENRY GACKING.

(—Ark. —, 133 S. W. 832.)

Equity — jurisdiction — suit on incomplete note.

1. Equity has jurisdiction of a suit by the payee of a note against a bank and its cashier, who had lent the payee's money on the note before a specified indorsement had been secured, contrary to instructions, and the maker and designated surety, who

Note. — Effect of extrinsic promise to sign or indorse a note or bill.

No case aside from *PETTY v. GACKING*, appears to discuss the effect of the giving of a written or oral extrinsic promise to sign a specified note with another, but the decision therein reached, to the effect that a person so promising is to be held a joint maker of the note, certainly seems in accord with the nicest equitable principles. But when it comes to the question of the effect of such a promise to indorse a note, then the books are more prolific of authority. And while two of the cases seem

had promised in writing to sign the note, to adjust the rights of the parties and affix the liability for the amount due.

Note — promise to sign — liability.

2. One signing a promise to sign a specified note with another will be held liable in equity as though he had in fact affixed his signature to the note.

Same — accommodation maker — delay — effect.

3. Delay in enforcing a note against one maker has no effect to release a comaker, although he signed out of accommodation to the principal debtor.

Agent — lending money — disobedience of orders — liability.

4. Neither a cashier nor the bank which he represents can be held liable for his disobedience of instructions to lend a customer's money on a certain note, when a certain indorser had been secured, if his promise in writing had been obtained to sign the note before the transaction was closed.

(January 9, 1911.)

to hold those who promise to indorse liable as indorsers, the weight of authority is the other way.

Thus, in *Sachs v. Fuller*, 69 Ark. 270, 62 S. W. 902, where a company agreed to indorse an overdue note, and failed to do so, the court disposed of the question of its liability just as if it had actually indorsed. It was said that the company, in failing to indorse the note, incurred no greater liability than would have been its, had it done so; that by agreeing to indorse the note, it undertook to pay the amount due on the same, provided payment was demanded of the maker within a reasonable time after the indorsement, and, upon his refusal to pay, due notice of such refusal was given to the company; and that, since these conditions never were performed, it was not liable in damages, either on the instrument or the agreement to indorse. But see *Boardman v. Steele*, *infra*, where the action was based on the original consideration, and not upon the agreement to indorse.

On signing a promise to indorse a specified note of another, given as part of the purchase money of land which is sold on credit on the faith of the promised indorsement, is liable where he refuses to indorse, and is sued both as an indorser and upon his agreement to indorse, just as he would be liable had he indorsed the note. *Levy v. Wagner*, 29 Tex. Civ. App. 98, 69 S. W. 112.

"The indorsement must," it is written so in 1 Daniel on Negotiable Instruments, 5th ed § 689a, "as a general rule, be somewhere on the paper itself, or attached thereto, and unless it is, the party cannot be held liable as an indorser; but a promise made on a sufficient consideration will sustain an action upon its breach."

So, in *French v. Turner*, 15 Ind. 59, it was held that in order to hold one as an 33 L.R.A. (N.S.)

A PPEAL by defendant Petty from a decree of the Chancery Court for Sebastian County in plaintiff's favor in a suit to recover money lent on a promissory note which the appealing defendant had promised in writing to indorse. Affirmed.

Statement by Wood, J.:

This is an action brought by appellee, Henry Gacking, against E. B. Petty, John Shaw, American National Bank, and P. A. Ball, for the purpose of recovering judgment for an amount of money loaned by Gacking to Shaw and Petty. The facts briefly stated are as follows: During and prior to 1902, Gacking was a customer of the American National Bank, and had been in the habit of calling upon his friend, P. A. Ball, the cashier of that bank, to attend to many of his little business matters. The bank was furnishing Gacking with a box in its safety deposit vault free of rent, and Ball had to some extent looked after

indorser of certain notes, the indorsement must have been made "thereon," or on another paper annexed to the notes when there are many successive indorsements to be made.

In *Bank of Wilmington & Brandywine v. Houston*, 1 Harr. (Del.) 225, it was held that in order to charge one as an indorser of a note, he must personally sign the same, or properly authorize another to sign it for him, and that where one agreed to be bound as an indorser of certain renewal notes, he was bound not as an indorser, but merely upon his agreement. Clayton, Ch. J., said: "This is an undertaking to indorse, or an agreement to hold himself responsible as an indorser; in either case he is liable, but liable on the agreement. The action should have been on this agreement, specially setting it out; it might have been done in this case by adding a count to that effect. It has been contended that this was an authority given to the bank to indorse these notes for the debt. [*sic*.] We admit that this authority may be made out by inference, by the course of trade, as where a wife was accustomed to indorse for her husband, but here is a written agreement, and we cannot go beyond it. It gives no such authority. The party agrees to be bound as much as if he had indorsed the notes, but he does not indorse them nor authorize another to indorse for him. He is not then an indorser, though liable as much as an indorser; but how liable? Not on the notes, for this would make him an actual indorser, but on the agreement."

So, it was held in *Birdsell Mfg. Co. v. Brown*, 96 Mich. 213, 55 N. W. 801, that an agent who promises to indorse a note cannot be held as an indorser, but only in an action for the breach, provided the promise was based upon sufficient consideration.

In *Boardman v. Steele*, 13 Conn. 547,

a few of Gacking's financial affairs, acting merely as his friend and receiving no compensation therefor. During the year 1901, Gacking loaned to Shaw and Petty \$125, and took their joint note for that amount. In November, 1902, Shaw desired to increase the amount of this loan to \$250, and requested Gacking to loan him \$125 more, which amount would be added to the old note of \$125, making the total \$250, for which amount Shaw and Petty would give their new note to Gacking. Gacking called Mr. Ball on the phone and asked him if Petty was good for \$250. Mr. Ball responded that he was, and Gacking then notified Ball to let Shaw have \$125 of his money, and surrender to Shaw the old Petty and Shaw note when Shaw brought to the bank a new note for \$250 and signed by Shaw and indorsed by Petty. Some time later during the same day, Shaw came to the bank and presented to Mr. Ball the following writing:

Mr. P. A. Ball:

I will sign Mr. John Shaw's note for \$250 all right.
11-19-1902.

Signed E. B. Petty:

In accordance with instructions, Mr. Ball then made out a note to Gacking for \$250, which was signed by Shaw, and the above agreement of Petty to sign the note was attached to the note itself, and Shaw given \$125 of Gacking's money. At the time Shaw brought the above writing to the bank, he told Mr. Ball that Petty was engaged in work and would come to the bank later in the day, or within a short time thereafter, and sign the note. A few days later Gacking came to the bank, and Mr. Ball advised him what had been done, showed him the note signed by Shaw with Petty's agreement attached thereto, and told Gacking it would be advisable to have this note actually signed by Petty, but

where a purchaser of land promised in writing to indorse certain purchase money notes, and failed to do so, and was sued in an action of assumpsit for the price of the land, it was held that the purchaser was not in the position of an indorser, and thus entitled to take advantage of any lack of diligence, if any there was, on the part of the vendor as an indorsee, in taking the steps necessary to fix his liability as an indorser.

Parties who agree to indorse a bill of exchange to be subsequently drawn, without actually doing it, and without properly authorizing anyone else to indorse for them, are not liable as indorsers, where their indorsement is forged. Lord Ellenborough said that while they might be liable for a breach of promise, they could not be sued as indorsers of the bill. *Moxon v. Pulling*, 4 Campb. 50.

Other cases dispose of the question upon the ground that the promise to indorse was void because not in compliance with the statute of frauds, and therefore creative of no liability, or else the effect of the promise has been avoided on the ground that it was made without consideration.

In *Smith v. Easton*, 54 Md. 138, 39 Am. Rep. 355, it was held, in an action against one for the breach of a promise to guarantee the debt of another already due, by indorsing his promissory note, that not only must the promise have been in writing in order to satisfy the requirements of the statute of frauds, but the promise must have been based upon sufficient consideration, and that in the case at bar, since the consideration for the promise to indorse the note was the forbearance of a creditor to sue out process of attachment against the goods of their debtor, and there was no legal ground for the attachment, there was an utter failure of consideration for the promise, and consequently no liability.

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In *Carville v. Crane*, 5 Hill, 483, 40 Am. Dec. 364, where one requested another to sell goods to a third person, promising by parol to indorse the note of the latter party for the price, it was held that the promise was one to answer for the debt of another, and for that reason was void by the statute of frauds.

The above decision was in accordance with the view of the question taken by Mr. Justice Woodworth in *Gallager v. Brunel*, 6 Cow. 346, wherein he comments upon this promise to a creditor, that the defendant would indorse the note of the debtor. In this case, the defendant, refusing to indorse the note, the creditor treated the refusal as a fraud, and, having sold goods on the faith of the promise, brought an action as for a deceit. Such action, however, was considered a mere experiment for getting round the statute, and the declaration in the action was held to be bad on demurrer.

Westcott v. Keeler, 4 Bosw. 564, distinguishes the two preceding cases upon the ground that in them there was no original debt between the parties to the promise, while in the case at bar the complaint alleged that money was loaned to the defendant on the security of the note of a third party, payable to his own order, and indorsed by him and the defendant; that when the note matured the lender surrendered it to the maker for a new note of the same amount, payable on demand, and made and indorsed by the third party,—the note being surrendered at the request of the defendant, and on his promise to indorse the new note,—and that the defendant refused either to indorse the note or pay the money loaned him. The dismissal of the complaint in this action was held to be error, although the surrender note had been destroyed. E. M. S.

that his agreement to sign the note was binding and would hold him; but for business purposes the note should be signed by Petty. Gacking agreed to have this attended to, took the note, placed it in his safety vault, and had exclusive control over the note from that time to the present. Petty never signed the note. After the maturity of the note, the interest was paid on it by Shaw to maturity, and indulgence was granted at Shaw's request, but for no fixed period. On the 12th of March, 1906, Shaw paid \$20 on the interest then due on the note. The above are substantially the facts as they were found by the court. The court found that the bank and Ball "had not been guilty of any negligence resulting in damage to Gacking." The decree was a dismissal of the complaint as to the bank and Ball, and a judgment in favor of appellee against appellant Petty, in the sum of \$250, with interest, etc.

Mr. Edwin Hiner for appellant.

Messrs. Winchester & Martin, for appellee:

An agreement to indorse a note before delivery to the payee, in order to induce the payee to lend the money on the note, is, in effect, an agreement to become a joint maker of the note.

Lake v. Little Rock Trust Co. 77 Ark. 53, 3 L.R.A.(N.S.) 1199, 90 S. W. 847, 7 A. & E. Ann. Cas. 394; Heise v. Bumpass, 40 Ark. 545; Nash v. Skinner, 12 Vt. 219, 36 Am. Dec. 338; Scanland v. Porter, 64 Ark. 470, 42 S. W. 897; Braddock v. Wertheimer, 68 Ark. 423, 59 S. W. 761; Good v. Martin, 95 U. S. 95, 24 L. ed. 343.

Equity regards as done that which ought to be done, "and a court of equity will, under those circumstances, require a performance of the agreement."

Spaulding Mfg. Co. v. Godbold, 92 Ark. 66, 29 L.R.A.(N.S.) 282, 135 Am. St. Rep. 168, 121 S. W. 1063, 19 A. & E. Ann. Cas. 947; Lowe v. Walker, 77 Ark. 107, 91 S. W. 22; 16 Cyc. Law & Proc. p. 134; Stiewel v. Webb Press Co. 79 Ark. 52, 116 Am. St. Rep. 62, 94 S. W. 915; Rogers v. Galoway Female College, 64 Ark. 639, 39 L.R.A. 636, 44 S. W. 454; Story, Eq. Pl. 313; Black v. Bowman, 9 Ark. 503; Terry v. Rosell, 32 Ark. 489.

Wood, J., delivered the opinion of the court:

The chancery court had jurisdiction. The facts were set forth in detail in the complaint, and the prayer was "for such other relief, general and special, against all of said defendants, or either of them, or against them jointly or severally, as the 33 L.R.A.(N.S.)

facts may justify, and as to the court may seem fit."

Petty had not in fact signed the note, though the evidence clearly shows that he intended to sign it. His communication to Ball saying: "I will sign John Shaw's note for \$250 all right," shows beyond controversy that he intended to sign the note. Ball, acting for Gacking, upon the faith of this communication, turned over to Shaw the sum of \$125, and Shaw and Petty also obtained a note for \$125, which had been previously executed to Gacking. The note was obviously surrendered upon the theory that the subsequent note for \$250 signed by Shaw, and which Petty promised to sign, covered the amount of the prior note. There was therefore a valuable consideration for the note sued on, and the communication or written promise of Petty to sign the note should be treated in equity as a part of the note. The court properly considered the case, under the facts, as if it were a suit to reform the note, so as to make it the note of Petty, as well as of Shaw, who had actually signed it. A court of equity having all the parties before it could mold the remedy to conform to the rights of the party entitled to relief. Equity "varies its adjustments and proportions so as to meet the very form and pressure of each particular case in all its complex habitudes." Black v. Bowman, 9 Ark. 501, 503, 504.

Petty wrote the communication to Ball for the purpose of giving Shaw, the maker of the note, credit with the payee, whoever he might be. It was the same in legal effect as if Petty had signed the note jointly with Shaw, or as if Petty at the time the note was executed by Shaw had put his name in blank upon the back of the note. Treating that as done which should have been done, Petty must be considered as the joint maker of the note, and not as a mere guarantor. Heise v. Bumpass, 40 Ark. 545. See also Lake v. Little Rock Trust Co. 77 Ark. 53, 3 L.R.A.(N.S.) 1199, 90 S. W. 847, 7 A. & E. Ann. Cas. 394; Scanland v. Parker, 64 Ark. 470, 42 S. W. 897; Braddock v. Wertheimer, 68 Ark. 423, 59 S. W. 761; Good v. Martin, 95 U. S. 95, 24 L. ed. 341.

"It is only by looking at the intent, rather than at the form," says Mr. Pomeroy, "that equity is able to treat that as done which in good conscience ought to be done." [Eq. Jur. 3d ed. vol. 1, § 378.] The maxim has been applied in innumerable instances to work out justice, and the facts of this record call for its application again. See Spaulding Mfg. Co. v. Godbold, 92 Ark. 66, 29 L.R.A.(N.S.) 282, 135 Am. St. Rep. 168, 121 S. W. 1063, 19 A. & E.

Ann. Cas. 947, and other cases cited in appellee's brief. The note was kept alive by payments of interest after maturity, and the statute of limitations does not apply. Treating appellant as a joint maker of the note, as he should be, the less said about laches the better for appellant. Neither Ball nor the bank is liable, for Ball was only acting at the request of appellee without compensation, and practically carried out his instructions and obtained for him what he desired, namely, an instrument that rendered Shaw and Petty liable for the money loaned them by appellee.

The decree is in all respects correct.
Affirmed.

MISSOURI SUPREME COURT.
(Division 2.)

STATE OF MISSOURI, Respt.,
v.

GEORGE SMITH, Appt.

(— Mo. —, 135 S. W. 465.)

Indictment — practising medicine without license — negating exception.

1. An indictment for practising medicine without a license need not state that accused was not within the classes not included in the law, where these classes were merely persons rendering gratuitous services and surgeons in the service of the Federal government, since the exception is not descriptive of the offense.

Statute — subject — practice of medicine and treatment of sick.

2 The practice of medicine and surgery

Note. — Application of statutes regulating the practice of medicine, to persons giving special kinds of treatment.

This annotation is supplementary to earlier notes on the same point, appended to the cases of O'Neil v. State, 3 L.R.A. (N.S.) 763; State v. Bresee, 24 L.R.A. (N.S.) 103; and Witty v. State, 25 L.R.A. (N.S.) 1297.

The question whether the system of treatment known as chiropractic, described in STATE v. SMITH, might be considered as within the provisions of a statute regulating "the practice of medicine, surgery, and osteopathy," was also presented in State v. Johnson, 84 Kan. 411, 114 Pac. 390. It was there held that, as it may be said that one whose vertebræ are partially displaced, causing the impairment of nerve function, is one afflicted with bodily infirmity, and that one who restores the functional activity of the nerve on which the maladjusted vertebræ had formerly pressed is treating, or attempting to treat, such afflicted person, such treatment constitutes the practice of

and the treatment of the sick are so far germane that they may be regulated by one statute, under a Constitution forbidding statutes to contain more than one subject.

Same — ejusdem generis — medicine and surgery — treating sick.

3. The addition by amendment of the words, "treat the sick," to a statute requiring one desiring to practise medicine and surgery to have a license, does not bring the case within the rule of *ejusdem generis*, when general words follow special ones so as to make them mean treat the sick by medicine and surgery.

Physician — license — chiropractic.

4. Removing the cause of disease by adjustment of the spinal column under the system termed "chiropractic" is within a statute requiring those who wish to treat the sick to secure a license.

Same — police power — interference with right to choose calling — manner of treatment.

5. A statute requiring a license as a condition to treating the sick has sufficient relation to the protection of the public health to be within the police power of the legislature, which cannot be controlled by the courts, and is not so unreasonable or capricious that it can be declared not to be an honest exercise of such power, although it may interfere with the right of the patient to choose his own method of treatment, and of the practitioner to pursue a calling of his choice.

(March 7, 1911.)

APPEAL by defendant from a judgment of the Circuit court for Webster County convicting him of practising medicine without a license. Affirmed.

medicine, within chap. 24 of Kansas Laws of 1901, as amended by chap. 63 of Special Session Laws of 1908, which provides that it should be applicable to "any person attempting to treat the sick or others afflicted with bodily or mental infirmities, or any person representing or advertising himself by any means or through any medium whatsoever, or in any manner whatsoever, so as to indicate that he is authorized to or does practise medicine or surgery in this state, or that he is authorized to or does treat the sick or others afflicted with bodily infirmities;" and that as the manifest object and intent of the legislature was to protect the public from ignorance and imposition in the healing art, the rule of *noscitur a sociis* should not be so applied to the title of the act as to restrict the words found therein to their associates, medicine, surgery, and osteopathy.

In State v. Miller, 146 Iowa, 521, 124 N. W. 167, it was held that evidence showing that defendant treated patients for a consideration, and that he professed to heal and cure divers diseases by the use of the system and treatment known as chiroprac-

Statement by Ferriss, J.:

This is an appeal from Webster county, where the defendant was convicted of the offense of treating and attempting to treat the sick and afflicted without first having obtained a license from the state board of health. His punishment was assessed at a fine of \$50. The case reaches this court by transfer from the Springfield court of appeals upon a constitutional question. The information upon which the defendant was tried reads as follows: "J. E. Haynes, prosecuting attorney, duly elected, commissioned, sworn, qualified, installed, and acting as such, in and for said county of Webster, in the state of Missouri, upon his oath and upon his hereto appended oath, informs the court, and upon his said oath and upon his hereto appended oath, does depose, present, aver, and charge, that said defendant, George Smith, on or about the 1st day of July, 1908, and from said date until November 6, 1908, at the said county of Webster, did then and there unlawfully, wrongfully, wilfully practise medicine and surgery, and did attempt to treat the sick or others afflicted with bodily and mental infirmities, and did then and there repre-

sent and advertise himself by means of certain printed matter, the exact nature of which is to this informant unknown, so as to indicate that he was authorized to practise medicine and surgery, and that he was authorized to treat the sick and afflicted with bodily and mental infirmities, without then and there having a license from the state board of health, contrary to the form of the statute in such cases made and provided, against the peace and dignity of the state of Missouri." The information is based upon §§ 1 and 5 of an act regulating the practice of medicine and surgery, approved March 12, 1901 (Sess. Acts of 1901, p. 207), reading as follows:

"Section 1. It shall be unlawful for any person not now a registered physician within the meaning of the law, to practise medicine or surgery in any of its departments, or to profess to cure and attempt to treat the sick and others afflicted with bodily or mental infirmities, or engage in the practice of midwifery, in the state of Missouri, except as hereinafter provided."

"Sec. 5. Any person, except physicians now registered, practising medicine or surgery in this state, and any person attempt-

ing, no medicine being given or prescribed, showed the defendant to be guilty of violating the Iowa statute which forbids the practice of medicine without a license, and declares that any person shall be deemed to be practising medicine who shall publicly profess to be a physician, or shall make a practice of prescribing, or prescribing and furnishing, medicine for the sick.

The practice of "suggestive therapeutics," consisting of the laying on of hands and manipulation, breathing, and rubbing, together of the practitioner's hands, by one having an office where he received patients and treated them for physical ailments, for which he received compensation, is the practice of medicine, within chapter 344, New York Laws 1907, which provides: "A person practises medicine within the meaning of this act . . . who holds himself out as being able to diagnose, treat, operate, or prescribe for any human disease, pain, injury, deformity, or physical condition, and who shall either offer, or to undertake by any means or method, to diagnose, treat, operate, or prescribe for any human disease, pain, injury, deformity, or physical condition." *People v. Mulford*, 140 App. Div. 716, 125 N. Y. Supp. 680.

The treatment, for a compensation, of a patient with electricity, for the purpose either of alleviating or curing disease, is the practice of medicine, within the meaning of § 62 of Manitoba Rev. Stat. 1902, chap. 111, which declares that "it shall not be lawful for any person not registered to practise medicine, surgery, or midwifery for hire, gain, or hope of reward." *Bergman v. Bond*, 14 Manitoba L. Rep. 503.

But treatment by massage, although a 33 L.R.A. (N.S.)

branch of therapeutics, is not a practising of medicine, within the meaning of the above statute. *Ibid*.

A person who occasionally treats persons resorting to her for treatment, by making passes with her hands and by stimulating them, and who, being called upon to treat a child nine or ten years of age suffering from some malady which would appear to any ordinarily intelligent person to be serious or deep-seated, and who is too young and helpless even to tell her symptoms, or decide whether she will submit to particular agencies of treatment or not, complying with the request, does treat or pretend to treat the child by the method described, and repeats the treatment from time to time, and receives remuneration for so doing, "practises medicine," within the meaning of Revised Statutes of Quebec, § 3998, which prohibits the practising of medicine by unauthorized persons, but which contains no definition of the expression "practising medicine." *Rex v. Couture*, 15 Can. Crim. Cas. 147.

An oculist, in examining the eyes of his customers, and giving them glasses to remedy any defect in vision discovered by him, is not engaged in practising medicine, within the meaning of Ontario Medical Act, R. S. O. 1897, chap. 176, § 49, which provides that it shall not be lawful for any person not registered to practise medicine, surgery, or midwifery for hire, gain, or hope of reward. *Rex v. Harvey*, 16 Ont. Week. Rep. 433.

Nor is such statute violated by the giving of osteopathic treatment. *Rex v. Henderson*, 16 Ont. Week. Rep. 1021. E. S. O.

ing to treat the sick or others afflicted with bodily or mental infirmities, without first obtaining a license from the state board of health, as provided in this act, shall be deemed guilty of a misdemeanor, and punished by a fine of not less than \$50 nor more than \$500, or by imprisonment in the county jail for a period of not less than thirty days nor more than one year, or by both such fine and imprisonment, for each and every offense; and treating each patient shall be regarded as a separate offense. Any person filing, or attempting to file, as his own, a license of another or a forged affidavit of identification, shall be guilty of a felony, and, upon conviction thereof, shall be subject to such fine and imprisonment as are made and provided by statutes of this state for the crime of forgery in the second degree. Said fines to be turned into the state treasury when collected."

Said § 1 appears without change, as § 8311 of the Revision of 1909, and § 5, with some amendments not material to the case at bar, appears as § 8315 of said Revision.

The evidence shows that the defendant practised what he called the "science of chiropractic," which science is thus defined in defendant's brief: "The theory of this science is that the center and seat of all intelligence and body-controlling force is in the brain; that all function depends upon this nerve force, universal intelligence, or whatever it may be, that is seated in the brain; that it is transmitted from the brain to the muscles and organs through, first, the spinal cord, and, then, thence through the nerves radiating from the spinal column; that, while it is not impeded, all bodily function is normal and the body is well; that, when it is impeded, function is not normal, and the organ or muscle cut off from, or not in free communication with, the brain, becomes diseased; that it can be impeded only by pressure or pinching of the nerves. known to chiropractic as 'impingement'; that nerves are impinged only where passing between bones; that they pass between bones in going through the intervertebral foramina, and are impinged when the vertebrae are from a blow, contraction of muscles, as by a draught of cold air or other cause, more or less displaced, or 'subluxated,' as the chiropractor terms it. The slightly misplaced bones pinch or impinge the nerves, impeding the flow of mental impulse. The effect is the same as the introduction of a rheostat or other resistance on the circuit between an electric dynamo at a power station and an electric motor supplying power for a factory. The motor represent-

ing a vital organ, not receiving the required amount of electricity, is hindered in its work just as a vital organ becomes diseased by not being in free communication with the brain. When all mental impulse is cut off, for example, by what the layment term a 'broken back,' the portion of the body and the organs beyond the point where the impulse is cut off become paralyzed, just as the motors of a huge shop, beyond a break in a wire leading from a dynamo, stop when the break is so complete as to cut off all or nearly all electricity coming to it. The experienced chiropractor, by passing his hand up and down the spinal column, is able to detect these subluxations or slight dislocations, and by a swift downward movement places the vertebra back in its normal position, removing the pressure on the impinged nerve, and again opening up free communication between the brain and the organs controlled by the nerve so impinged." In actual practice the chiropractor makes no physical examination outside of the spinal column. He does not feel the pulse, take the temperature, prescribe any diet, or use any instruments. He simply examines the spinal column, determines whether or not a subluxation, as he calls it, exists, and, if he finds it, adjusts the same. Defendant practised according to this system. Testimony was given by one of his patients, by defendant himself, and by an expert brother chiropractor.

The evidence for the state tended to show that the defendant maintained an office in the town of Seymour, Webster county, Missouri, over the door of which was a sign reading, "Chiropractor." He circulated through the community certain printed matter in which he advertised and held himself out as "Dr. George F. Smith." His office was equipped with some charts showing the different parts of the human body, and a table which the witness says was split in the middle, and upon which defendant placed his patient for examination and treatment. The witness called at defendant's office, received and paid for a chiropractic treatment, was placed on the table by defendant, who examined his spine, told him it was in bad shape, and then manipulated and rubbed his spine with his hands and fingers. Defendant was formerly a watchmaker by trade. He testified that he did not practise medicine; that he did not treat his patients, but adjusted them; that he did not consider the nature of the disease, but dealt only with the cause; and that this system of removing the cause by relieving the nerve impinged between the vertebrae of the back applied to all diseases,—smallpox, measles; tubercu-

losis, etc. Further reference will be made to the facts in evidence in the course of the opinion.

Messrs. Samuel Dickey, Wright Brothers, and Morris & Hartwell for appellant.

Messrs. Elliott W. Major, Attorney General, and Charles G. Revelle, for the State:

No person has a vested right to pursue any particular occupation or profession, where the protection of lives or health and the general welfare of the people require that those engaging in such pursuits shall possess skill, knowledge, or other particular qualifications and personal attributes.

State v. Davis, 194 Mo. 498, 4 L.R.A. (N.S.) 1023, 92 S. W. 484, 5 A. & E. Ann. Cas. 1000; Ex parte Lucas, 160 Mo. 232, 61 S. W. 218; State ex rel. Brown v. McIntosh, 205 Mo. 637, 107 S. W. 1071; State v. Hamlett, 212 Mo. 86, 110 S. W. 1082; State v. Hathaway, 115 Mo. 47, 21 S. W. 1081; State v. Bixman, 102 Mo. 1, 62 S. W. 828.

The act treats of but one subject, and that is the regulation of the practice of treating the sick and afflicted.

State v. Miller, 45 Mo. 497; Hannibal v. Marion County, 69 Mo. 575; Lynch v. Murphy, 119 Mo. 169, 24 S. W. 774; State v. Doerring, 194 Mo. 408, 92 S. W. 489; Cox v. Hannibal & St. J. R. Co. 174 Mo. 603, 74 S. W. 854; O'Connor v. St. Louis Transit Co. 198 Mo. 637, 115 Am. St. Rep. 495, 97 S. W. 150, 8 A. & E. Ann. Cas. 703; State ex rel. Atty. Gen. v. Mead, 71 Mo. 268; State v. Price, 229 Mo. 670, 129 S. W. 650; State v. Martin, 230 Mo. 1, 129 S. W. 931.

Whether the treatment administered was technically the practice of medicine, as applied by regular physicians, is immaterial. It was within the prohibition of the statute, and that is sufficient.

State v. Addington, 77 Mo. 117; State v. Brown, 181 Mo. 192, 79 S. W. 1111; Keyes-Marshall Bros. Livery Co. v. St. Louis & H. R. Co. 105 Mo. App. 556, 80 S. W. 53.

Where the exception in the act is not contained in the section creating the offense, and is not descriptive thereof, it is a matter of defense, and need not be negatived.

State v. Doerring, 194 Mo. 415, 92 S. W. 489; State v. Price, 220 Mo. 670, 129 S. W. 655; State v. Bockstruck, 136 Mo. 335, 38 S. W. 317; State v. Jenkins, 139 Mo. 535, 41 S. W. 220; State v. Meek, 70 Mo. 355, 35 Am. Rep. 427; State v. Cox, 32 Mo. 566; State v. Buford, 10 Mo. 704. 33 L.R.A. (N.S.)

Ferriss, J., delivered the opinion of the court:

1. It is claimed that the information is fatally defective, in that it does not state that defendant, Smith, does not belong to one of the classes not included in the law. Section 8319, Rev. Stat. 1909, the same being the last section of the article entitled "Medicine and Surgery," provides: "It is not intended by this article to prohibit gratuitous service to and treatment of the afflicted, and this article shall not apply to commissioned surgeons of the United States Army, Navy, public health, and marine hospital service." This objection is evidently based upon the rule that where an exception is contained in the act creating the offense, and constitutes a part of the description of the offense, such exception must be negatived in the information. The rule does not apply to this case. The exception referred to, viz., treating the sick gratuitously, is not a part of the description of the offense. It simply exempts certain classes from the operation of the law, which is completely defined in the previous sections. In State v. Doerring, 194 Mo., loc. cit. 398, 92 S. W. 489, the court, in discussing an objection to an indictment which charged the defendant with practicing dentistry without a license, which objection was that the indictment failed to negative the exception which was incorporated in a separate section, quoted from State v. O'Brien, 74 Mo. 549, as follows: "When an exception is contained in a statute defining an offense, and constitutes a part of the offense, an indictment for such offense must negative the exception; but when the statute contains a proviso exempting a class therein referred to from the operation of the statute, an indictment need not negative the proviso. The accused must make the exemption a ground of defense." In State v. Connor, 142 N. C. 700, 55 S. E. 787 (cited by defendant), the rule is thus stated: "When a statute creates a substantive criminal offense, the description of the same being complete and definite, and by a subsequent clause, either in the same or some other section, or by another statute, a certain case, or class of cases, is withdrawn or excepted from its provisions, these excepted cases need not be negatived in the indictment." So, in State v. Carmody, 50 Or. 1, 12 L.R.A. (N.S.) 828, 91 Pac. 446, 1081, it is said: "Exceptions and provisos in a criminal statute need not be negatived in indictments unless they be descriptive of the offense, or a necessary ingredient in its definition." This court has held it to be the sound rule in this state that, where the exception is contained in a subsequent section to the one which defines

the offense, such exception need not be negatived in the information. *State v. Bockstruck*, 136 Mo., loc. cit. 352, 38 S. W. 317. In the case at bar the exception, even if it were contained as a proviso in the section defining the offense, would not be descriptive of the offense; and hence would not require a negation in the information. The sufficiency otherwise of the information is not questioned.

2. The statute in question does not violate § 28, art. 4, of the Constitution. The act contains one subject, which is clearly expressed in the title. The title to the act is not "Medicine and Surgery," as defendant asserts it to be in his brief. The words "Medicine and Surgery" are merely the caption. The title to the act is as follows: "An Act to Regulate the Practice of Medicine, Surgery, and Midwifery, and to Prohibit Treating the Sick and Afflicted Without a License, and to Provide Penalties for the Violation Thereof." Sess. Acts 1901, p. 207. The one "subject" of this act, within the meaning of the Constitution, is, broadly speaking, public health. *State v. Marble*, 72 Ohio St., loc. cit. 36, 70 L.R.A. 835, 106 Am. St. Rep. 570, 73 N. E. 1063. 2 A. & E. Ann. Cas. 898. Treating the sick is well within this subject, and is specifically covered by the title. It is unnecessary to cite the cases in this state on this proposition. This court has again and again, with patient repetition, expounded the law upon this constitutional provision, and the law so expounded is this: "Where all the provisions of a statute fairly relate to the same subject, have a natural connection with it, are the incidents or means of accomplishing it, then the subject is single, and if it is sufficiently expressed in the title, the statute is valid." *State v. Doering*, supra, and cases therein cited. The practice of medicine or surgery, and the treatment of the sick by whatever means employed, are certainly germane to each other, and are germane to the general subject of health. "This section of the Constitution is to be reasonably and liberally construed and applied; due regard being had to its object and purpose. . . . If all the provisions of the bill have a natural relation and connection, then the subject is single, and this, too, though the bill contains many provisions." *State ex rel. Wolfe v. Bronson*, 115 Mo., loc. cit. 276, 21 S. W. 1126. If the treatment of the sick and the practice of medicine and surgery are not in natural relation, then it will be difficult to conceive of a case where two or more provisions in a bill relate to each other.

3. Defendant claims that the general words in the statute, "attempting to treat the sick," should, by the application of the

rule of *ejusdem generis*, be limited to attempts to treat by medicine or surgery, which are the special words preceding. As early as 1877 the legislature of this state enacted a law "to regulate the practice of medicine and surgery," and made it a misdemeanor for any person "to practise or attempt to practise medicine or surgery" without complying with the provisions of the act. This provision was carried through the various revisions up to and including § 8517, Rev. Stat. 1899, excepting only that the words "attempt to practise" were dropped, so that the Revision of 1899 reads: "Any person practising medicine or surgery in this state, without complying with the provisions of this article," etc. The Revisions of 1889 and 1899 also provided that "every person practising medicine and surgery in any of their departments" should possess the qualifications therein specified. In 1901 chapter 128 of 1899 Revision, relating to medicine and surgery, was repealed, and a new act passed covering the subject. Section 3 of the act provided that "all persons desiring to practise medicine or surgery in this state, or to treat the sick or afflicted, as provided in § 1," should apply to the state board of health for examination. This review of the history of the law affords a complete answer to the claim that the doctrine of *ejusdem generis* applies to this case. It is not a case of general words following a specific designation. There might be some ground for the claim if the general words, "treat the sick," were in the original act. As shown above, until 1901 the only designation was "medicine and surgery." No one will claim that the general words, "and any person attempting to treat the sick," added by amendment, are *ejusdem generis* with the specific words of the original act. Furthermore, this rule of *ejusdem generis* is, after all, resorted to merely as an aid in construction. If, upon consideration of the whole law upon the subject, and the purposes sought to be effected, it is apparent that the legislature intended the general words to go beyond the class specially designated, the rule does not apply. If the particular words exhaust the class, then the general words must have a meaning beyond the class, or be discarded altogether. *National Bank v. Ripley*, 161 Mo., loc. cit. 132, 61 S. W. 587; *Lewis's Sutherland*, Stat. Constr. § 437. Certainly, the words "medicine or surgery in any of its departments" exhaust the genus or class. It is obvious that the legislature, by this amendment, intended to include those who practise neither medicine nor surgery in any of its departments, but who profess to cure, and who treat or attempt to treat, the sick by means other than medi-

cine or surgery. Evidently, the legislature, in order to guard the overcredulous against injury that might result from yielding to the solicitations and professions of men who ignorantly undertake to diagnose and treat human ailments, deemed it proper, in the exercise of its police power, to require all persons who undertake to so treat the sick, to show that they possess the qualifications which the law makers prescribe as essential.

4. Defendant argues that the record shows that he did not "treat" his patients. He calls what he did not "treatment," but "adjustment." He says that he does not treat disease; he "adjusts the cause." Call it what you will, the fact remains that the system of practice called in this case "chiropractic," as explained by defendant's witnesses and his counsel, involves both diagnosis and physical treatment. The patient testified: "He laid me down on a cot, and he felt up and down on my spine, and he said my spine was in bad condition." The defendant testified: "I examined the spine with my fingers and adjusted the subluxated vertebræ and relieved the impinged nerves.

Q. How did you make the adjustment?

A. By putting the fingers on the point of subluxation, and giving a quick downward movement.

Q. What did you do that for?

A. To adjust the nerves.

Q. What did you want to find the impinged nerves for?

A. To remove the cause of the disease.

Q. What do you mean by removing the cause of the disease?

A. Well, simply this: The motory nerves begin in the brain and run through the spinal column, the spinal canal, and pass from there out to the different organs. There is another nerve passing back to the brain. We find the impingement of the motory nerve, which we call the cause of all trouble, and the real trouble. We simply find the impinged nerves and adjust them.

Q. What do you mean by an impingement of the nerves?

A. An impingement of a nerve is caused by what we know in chiropractic as a subluxation of the vertebræ; an impingement of the nerve carrying the impulse to the muscle or muscles from the brain to the organ using the nerve.

Q. According to that, then all force is from the brain?

A. Yes, sir; it all comes from the brain. Everything will be normal unless there is an impingement of some nerve.

Q. By impingement, do you mean pressure?

A. Yes, sir.

The foregoing practice clearly involves

diagnosis,—at least to a limited extent,—knowledge of anatomy, and physical treatment.

An expert witness for the defense, one educated as a regular physician, and who had abandoned his practice and become a professional "chiropractor," testified as follows:

Q. Now, why does the chiropractor call upon a patient,—you do call upon patients, although you may call it by a different name,—why do you call upon an individual professionally?

A. Because they want us to do so.

Q. Now, when you go, you request them not to tell you what is the matter?

A. Yes, sir.

Q. When you are called, you expect to find something the matter?

A. Indeed we do.

Q. You make an examination of some kind, but you may call it by a different name?

A. Yes, sir; p—— of the spine.

Q. A physician who is in the regular practice makes an examination in addition to taking statements. He may go through a different process, but you are both trying to find out how the person is afflicted?

A. Yes, sir.

Q. If the person is not afflicted, you do not offer any treatment?

A. No, sir.

Q. Now, then, if you find he is afflicted, you do give some kind of treatment. You may not call it treatment, but you go through some process?

A. We go through a process.

Q. The purpose of that process is to restore the man to a normal condition?

A. Yes, sir.

Q. In other words, you cure him or attempt to cure him?

A. No, sir; we do not do any curing.

Q. Before you had studied chiropractic, you would have called it a cure?

A. If I had accomplished it.

Q. When a physician treats a man whom he finds out of normal condition, and restores him to a normal condition, he calls it a cure?

A. Yes, sir.

Q. When a chiropractor finds a man out of his normal condition what does he do?

A. He removes the cause; we would remove the cause.

The defendant and his witness testify that they make no diagnosis; take no temperature; do not examine the tongue of the patient, nor any part of the body except the spinal column; that they do not treat the disease, but remove the cause, which is invariably found—no matter what the disease, whether consumption, smallpox, or

any other ill that flesh is heir to—located in the spine, and in every case consists in an impingement of the nerves caused by a "subluxation"—whatever that may be—of the vertebrae. Yet, notwithstanding all this, the practice does involve skill, knowledge of anatomy, diagnosis, and physical treatment.

5. It is a serious question whether defendant would not come within the original statute as one practising medicine or surgery. The practice of medicine is not confined to the administration of drugs; nor is surgery limited to the knife. When a physician advises his patient to travel for his health, he is practising medicine. Broadly speaking, one is practising medicine when he visits his patient, examines him, determines the nature of the disease, and prescribes the remedies he deems appropriate. Bibber v. Simpson, 59 Me. 181. Tested by this rule, the defendant was practising medicine when he examined the patient's back, determined the trouble to be that a vertebra was subluxated, thereby impinging a nerve, and proceeded to employ what he considered an appropriate remedy, viz., a sudden downward pressure with the fingers, thereby adjusting the vertebra and relieving the impingement. When the defendant says that he does not "treat," but "adjusts," and that he deals not with the "disease," but with the "cause," he is merely juggling with words. Changing the name does not change the thing.

The defendant cites several cases to support his contention that the Missouri statute does not include a practice which eliminates drugs and surgical instruments. We will examine them.

Two cases from North Carolina hold under a statute which prohibits practising medicine or surgery without a license, that an osteopath, and also one who treats by "massage, baths, and physical culture, manipulates the muscles, bones, spine, and solar plexus, and kneads the muscles with the fingers of the hand, . . . writes no prescriptions as to diet, but advises his patients what to eat and what not to eat; all the above treatment is administered to the exclusion of drugs," are not included. State v. Biggs, 133 N. C. 730, 64 L.R.A. 139, 98 Am. St. Rep. 731, 46 S. E. 401; State v. McKnight, 131 N. C. 717, 59 L.R.A. 197, 42 S. E. 580. These cases proceed upon the doctrine that the legislature exceeds its power when it prohibits treatment of disease by any except a licensed doctor, and they are therefore not in point under the immediate discussion. People v. Allcut, 117 App. Div. 546, 102 N. Y. Supp. 878.

The next case cited is State v. Liffing, 61 Ohio St. 39, 46 L.R.A. 334, 76 Am. St. Rep. 358, 55 N. E. 168, 15 Am. Crim. Rep. 33 L.R.A. (N.S.)

516, which holds that an osteopath is not within a statute which provides that any person shall be regarded as practising medicine who shall for a fee prescribe or direct any "drug, medicine, or other agency for the treatment," etc.; that the doctrine of *ejusdem generis* limits the word "agency" to drugs or medicines; and that osteopathy is not such an agency. This statute was subsequently amended so as to read: "Who shall prescribe . . . any drug, medicine, appliance, application, operation, or treatment of whatever nature." In State v. Gravett, 65 Ohio St. 289, 307, 55 L.R.A. 791, 87 Am. St. Rep. 605, 62 N. E. 325, 326, it was held by the same judge who rendered the opinion in the Liffing Case to include osteopathy. The court said that the legislature in this amendment had "attempted a comprehensive regulation of the practice of the healing art." This same statute was held in State v. Marble, 72 Ohio St. 21, 70 L.R.A. 835, 106 Am. St. Rep. 570, 73 N. E. 1063, 2 A. & E. Ann. Cas. 898, to include Christian Science.

The next case cited is Bennett v. Ware, 4 Ga. App. 293, 61 S. E. 546. That case involved a healing solely by supernatural or divine agency,—by a "magic power direct from the Lord;" and is therefore not in point.

So, also, is the case of State v. Mylod, 20 R. I. 632, 41 L.R.A. 428, 40 Atl. 753, 11 Am. Crim. Rep. 238, not in point, where it was held that Christian Science was not within a statute forbidding the "practice of medicine and surgery" without a certificate from the board of health.

Smith v. Lane, 24 Hun, 632, holds that a system of practice consisting of "rubbing, kneading, and pressure" performed with the hand was not within a statute which penalized the "practice of medicine or surgery" without a license. This case is expressly overruled by the case of People v. Allcut, supra, which latter case states that the doctrine of Smith v. Lane, and of cases that follow it, is opposed by Massachusetts, Maine, Michigan, Iowa, Missouri, Colorado, Nebraska, Illinois, Ohio, Alabama, Indiana, New Mexico, South Dakota, and Tennessee, which "refuse to restrict the 'practice of medicine' to the administration of drugs or the use of surgical instruments." 117 App. Div. loc. cit. 552, 102 N. Y. Supp. 682. In the Allcut Case the defendant described his system as "mechano neural therapy," which meant "mechanical nerve treatment, a gentle pressure on all parts of the body; that the whole theory of this science is that disease comes from lack of blood circulation, and that the treatment proceeds upon the theory of assisting the circulation back into normal condition." The analogy here to the "science" practised by the defendant at bar is obvious.

Hayden v. State, 81 Miss. 291, 95 Am. St. Rep. 471, 33 So. 653, 15 Am. Crim. Rep. 522, rested upon a statute similar to the original Ohio statute. The court followed the Liffing and Mylod Cases, supra, but said that its own views would point to a different conclusion if followed. The holding was that osteopathy was not an "agency" within the meaning of the statute.

Nelson v. State Bd. of Health, 108 Ky. 769, 50 L.R.A. 383, 57 S. W. 501, holds that a statute which forbids one to "practise medicine, or attempt to practise medicine, in any of its branches, or who shall treat or attempt to treat any sick or afflicted person by any system or method whatsoever," does not include an osteopath. This ruling, however, is put upon the ground, as was said in the Allcut Case, supra, that it would be beyond the power of the state to prevent the practice of osteopathy, and therefore it would be presumed that the legislature did not intend to include it within the statute, a doctrine which does not prevail in this state, as we shall show later on.

We do not desire to extend this opinion by citing on this point numerous cases which hold contrary to the defendant's contention. Some of them are Parks v. State, 159 Ind. 211, 59 L.R.A. 190, 64 N. E. 862; State v. Yegge, 19 S. D. 234, 69 L.R.A. 504, 103 N. W. 17, 9 A. & W. Ann. Cas. 202; Bragg v. State, 134 Ala. 165, 58 L.R.A. 925, 32 So. 767; State v. Buswell, 40 Neb. 158, 24 L.R.A. 68, 58 N. W. 728.

In the case of Davidson v. Bohlman, 37 Mo. App. 576, Davidson was seeking to recover for services rendered in giving electrical treatment. The defense was that Davidson was practising medicine without a license. Statute of 1879. It was urged in his behalf that the services rendered were not medical. He held a diploma from an electric medical college. Judge Thompson, speaking for the court, in denying Davidson's contention, said: "The obvious intention of the statute was to embrace any person who habitually holds himself out as a professor of the art of healing diseases."

In the main, the cases regard diagnosis as the test to determine whether a practice or treatment is included in the terms "medicine" and "surgery." This is a practical test. A doctor who advises his patient to sleep in the open air is treating him. Such advice, however, is based upon a knowledge of the patient's condition obtained by diagnosis. The defendant professed to be able to ascertain by examination of the patient the cause of his trouble,—a result rather beyond that which ordinarily attends the diagnosis of the regular practitioner. The method or extent of the examination is not 33 L.R.A. (N.S.)

the controlling feature. When the practitioner makes such examination of the patient as he regards as sufficient to indicate to him the cause of the trouble, and to indicate its proper treatment, he has diagnosed the case.

6. This brings us to defendant's last contention, which is thus expressed in his brief: "If it includes other sciences of healing besides medicine and surgery, the statute is unconstitutional and void, because it is an abuse of the police power of the state of Missouri. It is unreasonable and void because, under guise of protecting the public's interest, it imposes unusual and unnecessary restrictions upon the useful occupations. It is class legislation, in that it compels all persons desiring to practise medicine or surgery in this state, to furnish satisfactory evidence of having received a diploma from some reputable medical college of four years' requirements of the time of graduation, regardless of the applicant's knowledge of medicine and surgery, thereby making the receipt of said diploma, and not the applicant's knowledge, the standard from which to judge his qualifications." In discussing this proposition we are to deal with one question only—the power of the legislature to pass this law. We are not concerned about its wisdom or propriety. Whether the law is wise, necessary, or proper is a question for the makers of the law. It is contended that to so construe this statute as to forbid anyone to treat the sick, without possessing the technical knowledge required to pass an examination before the state board, where such treatment does not involve such technical knowledge, would result in denying to the people a constitutional right to determine how they shall be treated, and also in denying to citizens the constitutional right to pursue a lawful calling for a livelihood: in short, that such a construction amounts to a deprivation of both liberty and property. This contention begs two questions: (1) Have the people an unrestricted right to determine how they shall be treated? (2) Has a man an unrestricted right to pursue any lawful calling? The legislature has the power under the Constitution to pass all necessary laws to guard the morals, safety, and health of the people, even if such laws in some degree operate as a restraint upon recognized constitutional rights. An absolute right to liberty or property, or even life itself, does not exist. The state may and does deprive its citizens of either of these so-called constitutional rights. When the lawmaking power forbids the manufacture of liquor, an absolute destruction of property results. Yet this may be done in the exercise of the police

power. Our jails and penitentiary are filled with inmates who have been deprived of their liberty for the public good. The power of the state to deprive its citizens of their lives for the public good has never been questioned. In other and various ways citizens, for the public good, may be deprived of liberty and property. True, these rights of the citizen are to be impaired only when necessary for the public good. But who is to judge whether the necessity exists? The authorities agree that this power of judgment lies with the legislature. If, under the guise of the police power, the legislature unreasonably and capriciously restrains one's liberty or property, the court may interpose the Constitution, and declare the law void. This court in *State v. Fisher*, 52 Mo. 174, said: "A law which unnecessarily and oppressively restrains a citizen from engaging in any traffic, or disposing of his property as he may see fit, though passed under the specious pretext of a preservative of the health of the inhabitants, would be void." Yet in that case the court sustained a law which gave certain persons an exclusive privilege to render dead animals, and prohibiting all others on the ground of public health. So, in *State v. Addington*, 77 Mo. 110, this court approved a ruling by Judge Thompson of the court of appeals, that "the police power is a power to be exercised within wide limits of legislative discretion; and, if a statute appears to be within the apparent scope of this power, it would be a usurpation of jurisdiction for the judicial courts to inquire into its wisdom and policy, or to undertake to substitute their discretion for that of the legislature." *State v. Addington*, 12 Mo. App., loc. cit. 221. The *Addington* Case involved the validity of a statute which prohibited the manufacture of oleomargarine. This court sustained an objection to evidence offered by the defendant to prove that oleomargarine was a healthful and useful article of food. In the case of *Booth v. Illinois*, 184 U. S. 425, 428, 46 L. ed. 623, 625, 22 Sup. Ct. Rep. 425, 426, the United States Supreme Court had under consideration a statute of Illinois declaring option contracts illegal. It was contended that the legislature did not intend to prohibit bona fide options, but only those that were gambling contracts; that, if it did intend to prohibit lawful option contracts, such act was beyond the scope of its police power. The supreme court of Illinois had construed the act to "declare that unlawful which had theretofore been lawful," and to include

lawful options. The question before the United States Supreme Court was: "Taking the statute to mean what the highest court of the state says it means, is it unconstitutional?" Judge Harlan, speaking for the court, says: "The argument, then, is that the statute directly forbids the citizen from pursuing a calling which in itself involves no element of immorality, and therefore, by such prohibition, it invades his liberty as guaranteed by the supreme law of the land. Does this conclusion follow from the premise stated? Is it true that the legislature is without power to forbid or suppress a particular kind of business, where such business properly and honestly conducted may not in itself be immoral? We think not. A calling may not in itself be immoral, and yet the tendency of what is generally or ordinarily or often done in pursuing that calling may be towards that which is admittedly immoral or pernicious. If, looking at all the circumstances that attend, or which may ordinarily attend, the pursuit of a particular calling, the state thinks that certain admitted evils cannot be successfully reached unless that calling be actually prohibited, the courts cannot interfere, unless, looking through mere forms and at the substance of the matter, they can say that the statute enacted professedly to protect the public morals has no real or substantial relation to that object, but is a clear, unmistakable infringement of right secured by the fundamental law. *Mugler v. Kansas*, 123 U. S. 623, 661, 31 L. ed. 205, 210, 8 Sup. Ct. Rep. 273; *Minnesota v. Barber*, 136 U. S. 313, 320, 34 L. ed. 455, 458, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; *Brimmer v. Rebman*, 138 U. S. 78, 34 L. ed. 862, 3 Inters. Com. Rep. 485, 11 Sup. Ct. Rep. 213; *Voight v. Wright*, 141 U. S. 62, 35 L. ed. 638, 11 Sup. Ct. Rep. 855. In *Ex parte Lucas*, 160 Mo., loc. cit. 232, 61 S. W. 218, this court approved the following ruling by the supreme court of Minnesota: "Laws enacted for the purpose of regulating or throwing restrictions around a trade, calling, or occupation, in the interests of the public health and morals, are everywhere upheld and sustained. Such laws are within the police power of the state, and are universally sustained where enacted in the interests of the public welfare. The question presented in cases where the validity of such laws is called in question is no longer the power or authority of the legislature to enact them, but whether the occupation, calling, or business sought to be regulated is one involving the public

health and interests. A person engaged in such an occupation is not alone interested therein. The public served by him is also interested. He is interested to the extent that it provides and furnishes him with employment and a means of livelihood. The public is interested in his competency and qualifications, and it is eminently proper that there be thrown around the calling protection from intrusion by incompetents and other inimical to the public good." It is unnecessary to refer further to the repeated declarations of this court to the effect that the legislature has the power to regulate, in such manner as it may think proper and wise, callings that are related to the public health.

Applying the principles announced to the case at bar, we cannot say that an act which forbids treatment of the sick by one not possessing certain technical knowledge evidenced by a license bears no reasonable relation to the purpose sought to be accomplished by the legislature, namely, the protection of the public health. The legislature thought, perhaps, that this act was necessary to protect credulous sick people from injury at the hands of charlatans and quacks, with their specious promises of a sure cure without drugs; or it may have been thought necessary to forbid harmless practices in order to insure protection against those that are dangerous and hurtful. Sick people sometimes grow desperate in their search for a cure, or their judgment becomes weakened, so that they fall an easy prey to the ingenious and varied devices of the pretended healer. We know that some people are prone to give more weight to a skillfully worded advertisement than to the advice of a competent physician. The legislature, no doubt, thought that, in view of all these considerations, the welfare of the people required the sweeping law of 1901. The method of practice disclosed by this record may be harmless and useful, but it is a treatment for the sick, related, to say the least, to the practice of medicine or surgery, and so is within the terms of the statute. The legislature may have been mistaken in thinking it necessary to forbid such a method of practice, but the act was passed in the exercise of its police power, and we are not prepared to say judicially that such exercise of the power was either unreasonable or capricious, or that it bears no relation to the public health.

The judgment is affirmed.

Kennish, P. J., and Brown, J., concur.
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OKLAHOMA SUPREME COURT.

AMERICAN EXPRESS COMPANY, Plff.
in Err.,
v.
STATE NATIONAL BANK.

(27 Okla. 824, 113 Pac. 711.)

Check — forgery — payment — retention of proceeds.

A payee receiving money from a bank upon a check purporting to be drawn upon it by one of its depositors, but the signature of which was in fact forged, is not entitled to retain the same, except upon the following combination of facts: First, that the payee was not negligent in receiving the check; second, that the payer was lacking in due care in paying the same; and, third, that upon the payer's action the payee has changed his position or would be in a worse condition if the mistake was corrected than if the payer had refused to pay the check at the time of its presentment.

(January 10, 1911.)

ERROR to the District Court for Oklahoma County to review a judgment in plaintiff's favor in an action brought to recover a certain amount paid by plaintiff to defendant on a forged check. Affirmed.

The facts are stated in the opinion.

Messrs. Flynn, Ames, & Chambers, for plaintiff in error:

When money has been paid on a check properly drawn on a bank wherein the purported maker of the check has money deposited subject to check, and the bank pays the check to an innocent holder thereof for value, the bank cannot recover the amount so paid from such holder if it afterward develops that the maker's name is forged to the check.

Neal v. Coburn, 92 Me. 139, 69 Am. St. Rep. 495, 42 Atl. 348; Germania Bank v. Boutell, 60 Minn. 189, 27 L.R.A. 635, 51 Am. St. Rep. 519, 62 N. W. 327; National Park Bank v. Ninth Nat. Bank, 46 N. Y. 80, 7 Am. Rep. 310; Bank of St. Albans v. Farmers' & M. Bank, 10 Vt. 141, 33 Am. Dec. 188; Star F. Ins. Co. v. New Hampshire Nat. Bank, 60 N. H. 442; Deposit Bank v. Fayette Nat. Bank, 90 Ky. 22, 7 L.R.A. 849, 13 S. W. 339; First Nat. Bank v. Marshalltown State Bank, 107 Iowa, 327, 44 L.R.A. 131, 77 N. W. 1045;

Headnote by KANE, J.

Note. — As to right of drawee of forged check or draft to recover money paid thereon, see notes to First Nat. Bank v. Wyndmere, 10 L.R.A.(N.S.) 49; Title Guarantee & T. Co. v. Haven, 25 L.R.A.(N.S.) 1308.

Farmers' & M. Bank v. Bank of Rutherford, 115 Tenn. 64, 112 Am. St. Rep. 817, 53 S. W. 939; **Bank of United States v. Bank of Georgia**, 10 Wheat. 333, 6 L. ed. 34; **Morse, Banks & Bkg.** §§ 462-466.

Messrs. Harris & Wilson and Whit M. Grant, for defendant in error:

One cannot retain funds received on a forged check.

First Nat. Bank v. Bank of Wyndmere, 15 N. D. 299, 10 L.R.A.(N.S.) 49, 125 Am. St. Rep. 588, 108 N. W. 546; **Ford v. People's Bank**, 74 S. C. 180, 10 L.R.A.(N.S.) 63, 114 Am. St. Rep. 986, 54 S. E. 204, 7 A. & E. Ann. Cas. 744; **Rouvant v. San Antonio Nat. Bank**, 63 Tex. 610; **People's Bank v. Franklin Bank**, 88 Tenn. 299, 6 L.R.A. 724, 17 Am. St. Rep. 884, 12 S. W. 726; **First Nat. Bank v. First Nat. Bank**, 151 Mass. 280, 21 Am. St. Rep. 450, 24 N. E. 44; **Third Nat. Bank v. Allen**, 59 Mo. 310; **Dan. Neg. Inst.** 684; **Morse, Banks & Bkg.** 3d ed. § 464; **Canadian Bank v. Bingham**, 30 Wash. 484, 60 L.R.A. 955, 71 Pac. 43; **People's Nat. Bank v. Wheeler**, 21 Okla. 387, 21 L.R.A.(N.S.) 816, 96 Pac. 619.

Kane, J., delivered the opinion of the court:

This was an action commenced by the defendant in error, plaintiff below, against the plaintiff in error, defendant below, to recover back the sum of \$852.55 paid by said bank to the express company on a forged check. Upon trial to a jury there was a verdict for the plaintiff upon which judgment was duly entered, to reverse which this proceeding in error was commenced.

The facts upon which the main proposition of law presented by counsel is based are undisputed, and are substantially as follows: On the 24th day of August, 1904, **Weaver & Seaver** were subagents of the **American Express Company** in **Oklahoma City**, and had authority to issue money orders for and on behalf of the express company to parties applying therefor. On this date **Mr. Weaver** of the firm received a telephone call from a person claiming to be **A. C. Weiker**, president of the **O. K. Transfer & Storage Company**, asking him if he would issue money orders to the amount of \$850, and take the check of the company in payment thereof. **Weaver** said he would, and the person talking over the phone said he would send the check for the amount of the money orders right away. Shortly afterwards one **R. W. Twombly**, the bookkeeper and cashier of the company, came to **Mr. Weaver**, and presented the check signed, "**O. K. Transfer & Storage Company**, by **A. C. Weiker**," 33 L.R.A.(N.S.)

president," for \$852.55, upon receipt of which **Mr. Weaver** issued the money orders for \$850, and delivered the same to **Twombly**. The next day **Weaver** indorsed the check and turned same over to the express company, and on the following day the express company presented the check to the **State National Bank**, and the bank accepted the same and paid the money to the express company. Twenty days thereafter it was discovered that the name of **A. C. Weiker** had been forged to the check, and the bank immediately demanded of the express company the repayment of \$852.55, which the express company refused, whereupon said action was commenced. The check was made payable to **Weaver & Seaver**. The **O. K. Transfer & Storage Company** were depositors with the **State National Bank**, and the custom of the **O. K. Transfer & Storage Company** was to sign checks as this one was signed. Counsel for plaintiff in error contend that the law applicable to the foregoing facts is that when a bank pays to an innocent holder who came into the possession thereof without any fault on his part the amount of a check purporting to be drawn upon it by one of its depositors, but the signature of which was in fact forged, the bank cannot recover back the amount from such holder. The court below submitted the case to the jury upon the theory that, although the express company may not have been negligent in accepting the check, still, if the payment thereof by the bank did not put the payee in a worse position than if payment had been refused, the bank was entitled to recover.

The old doctrine was that a bank was bound to know its correspondents' signatures, and could not recover money paid upon a forgery of the drawers' name, because it was said the drawee was negligent not to know the forgery, and having parted with his money by reason of his own negligence, he cannot be permitted to recover it back when he afterward discovers his error. The leading case sustaining this proposition is **Price v. Neal**, 3 Burr, 1354, 1 W. Bl. 390, decided in 1762. A great many of the courts that continue to follow the old rule criticize it, but follow it upon the ground that it has been established by decisions which have been so long acted upon that it is not proper to disturb them. All the text-book writers on **Banks and Banking** that we have access to disapprove the old rule as unsound and unjust. **Mr. Morse** says of it: "This doctrine is fast fading into the misty past, where it belongs. It is almost dead, the funeral notices are ready, and no tears will be shed, for it was founded in misconception of the fundament-

al principles of law and common sense." 2 Morse, Banks & Bkg. § 464. Mr. Bolles says it is a hard rule. "It runs against the great rule that money paid by mistake may be recovered back, which is constantly growing in judicial favor." 2 Bolles, Modern Law of Bkg. 721. Magee and Zane say that the rule formerly prevailing has been modified by the courts with a view to doing equity between the parties. Cyc. Law & Proc. states the modern rule to be that when payment is made to the holder of forged paper who has come into possession of it without any fault on his part, and his situation would be rendered worse if compelled to refund than it was before receiving payment, the money cannot be recovered from him. If, however, he has been negligent in any regard, he cannot retain the money. To justify him in doing so the bank alone must have been negligent. If neither party has been negligent, or both have been, then the bank can recover the money. A great many authorities are compiled in a note purporting to sustain the text, and all do so, we think, to a greater or less extent. That the old rule is unsound and illogical is unquestionably true. It is based upon the theory that the mere fact that B was negligent gives A a right to B's property, which A did not have before the negligence, without regard to the question whether A has sustained any loss by the negligence or not. In any other case involving the question of negligence, it is not enough to create legal liability, or to give A a right to acquire or retain the property of B, to show merely that A has not been negligent. One more element is necessary, namely, that damage to A, being himself innocent in the matter, should naturally and proximately result from B's negligence. 2 Morse, Banks & Bkg. supra. No good reason occurs to us for the foregoing rule should not be applied to forgery cases in this state. If there was a reason for the exception originally, it does not exist at the present time in this new state. We have not the same reasons for following an unsound precedent that exists in the older states. The old rule has not become a part of our common law by general usage or custom, nor has it been expressly or impliedly made part of our law by statute. Moreover, we are not the first to tread the path that leads away from the old rule. We find it explored by the text-writers and blazed by the decisions of courts of high authority. Without any actual change in the abstract doctrine as stated by the old rule, the gradual but sure tendency of the modern decisions is to put as heavy a burden of responsibility upon the payee as upon the drawee until the 33 L.R.A.(N.S.)

interesting question has come to be whether or not the payee has done his full duty, or, if he has and the negligence is with the bank, whether the payee will be worse off by correcting the error than if payment had been refused. In *Ellis v. Ohio L. Ins. & T. Co.* 4 Ohio St. 628, 64 Am. Dec. 610, it was held that to enable a holder to retain money paid to him on forged paper, he must put the bank alone in the negligence, and be able to say that the mistake of the bank cannot now be corrected without placing the holder in a worse position than though payment had been refused. If he cannot say this, and especially if the failure to detect the forgery can be traced to his disregard of duty in negligently omitting some precaution he had undertaken to perform, he fails to establish a superior equity of the money, and cannot with good conscience retain it.

Other cases that modify the old rule are *Canadian Bank of Commerce Case*, 30 Wash. 484, 60 L.R.A. 955, 71 Pac. 43; *First Nat. Bank v. First Nat. Bank*, 151 Mass. 280, 21 Am. St. Rep. 450, 24 N. E. 44; *First Nat. Bank v. Ricker*, 71 Ill. 439, 22 Am. Rep. 104; *First Nat. Bank v. State Bank*, 22 Neb. 769, 3 Am. St. Rep. 294, 36 N. W. 289. In *First Nat. Bank v. Bank of Wyndmere*, 15 N. D. 299, 10 L.R.A.(N.S.) 49, 125 Am. St. Rep. 588, 108 N. W. 546, the old doctrine is specifically disapproved, the court holding that "the drawee of a forged check who has paid the same without detecting the forgery may, upon discovery of the forgery, recover the money paid from the party who received the money, even though the latter was a good-faith holder, provided the latter has not been misled or prejudiced by the drawee's failure to detect the forgery;" and that "the burden of showing that he has been misled or prejudiced by the drawee's mistake in such a case rests upon him who claims the right to retain the money for that reason." *Jones v. Miners' & M. Bank*, 144 Mo. App. 428, 128 S. W. 829, is also published in 71 Cent. L. J. 137, where, in a note, the editor of that publication, among other cases, calls attention to *First Nat. Bank v. Bank of Wyndmere*, supra. Speaking of that case, the editor continues: "The rule this last case opposes certainly seems unsound. It has its basis solely upon a mistake of fact, arising possibly out of mere lapse of attention, while the taking of the forged paper is through deliberate act. To say slips of attention may not be cured when they cause no substantial change in the situation certainly has no basis in justice, and any commercial rules whose efficiency necessitate disregard of justice ought to be amended." We agree with the learn-

editor, and, as this is the first case wherein the question has arisen in this jurisdiction, we commit this court to the doctrine that a payee receiving money from a bank upon a check purporting to be drawn upon it by one of its depositors, but the signature of which was in fact forged, is not entitled to retain the same, except upon the following combination of facts: First, that the payee was not negligent in receiving the check; second, that the payer was lacking in due care in paying the same; and, third, that upon the payer's action the payee has changed his position or would be in a worse condition if the mistake was corrected than if the payer had refused to pay the check at the time of its presentment.

As the court below submitted the case at bar to the jury upon instructions which substantially conform to this view of the law, its judgment is affirmed.

Dunn, Ch. J., and Williams, Hayes, and Turner, JJ., concur.

VERMONT SUPREME COURT.

MARTHA M. HALL, Appt.,

v.

GEORGE W. HALL'S ESTATE.

(— Vt. —, 78 Atl. 971.)

Will — limitation of heirs — life estate.

A devise to one, "his heirs, viz., his children, grandchildren, and assigns," limits the word "heirs" to the class named, and therefore passes only a life estate to the first taker.

(January 27, 1911.)

Note. — Effect of *videlicet* following word "heirs" in a grant or devise of real property to restrict estate given to the first taker.

Few cases have been found where the word "heirs" in a deed or will is followed by a *videlicet*. The question of restrictions or qualifications upon the use or meaning of the word "heirs" generally arises in phrases of a different character, as, for example, in such expressions as "heirs of the body," "heirs by" a certain person, or like phrases applying to particular classes of heirs, or in explanatory phrases relating to certain contingencies.

This note is intended to be limited to cases in which the *videlicet* occurs; for while there are cases in which the phrase is nearly if not entirely the same in meaning as if a *videlicet* had been employed, any other rule broadens imperceptibly into the general subjects of the effect of the use of

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EXCEPTIONS by the widow of George W. Hall, deceased, to an order of the Windham County Court affirming a decree of the Probate Court for the District of Westminster, distributing the estate of deceased to her for life only. Affirmed.

The facts are stated in the opinion.

Messrs. Davis & Davis, for appellant:

Martha M. Hall took an estate in fee simple.

Johnson v. Whiton, 159 Mass. 424, 34 N. E. 542; Smith v. Rice, 183 Mass. 251, 66 N. E. 806.

There are no previous or subsequent words indicating life estate in Martha M. Hall, as in the following cases:

McCloskey v. Gleason, 56 Vt. 264, 48 Am. Rep. 770; Richardson v. Paige, 54 Vt. 373; Shepard v. Shepard, 60 Vt. 109, 14 Atl. 536; Smith v. Hastings, 29 Vt. 240; Blake v. Stone, 27 Vt. 475.

The words "her children and grandchildren" are void for repugnancy, if by those words they meant to alter the meaning of "heirs."

Stowell v. Hastings, 59 Vt. 495, 59 Am. Rep. 748, 8 Atl. 738, 4 Kent, Com. 9th ed. *536.

Messrs. Stickney, Sargent, & Skeels for appellee.

Haselton, J., delivered the opinion of the court:

This is an appeal from the decree of the probate court for the district of Westminster distributing the estate of George W. Hall, deceased. Under the will of George W. Hall, certain pieces of his real estate were decreed to his widow, Martha M. Hall, for life, and in the county court, on the construction of the will, judgment was rendered affirming the decree of the probate court. The only question made in the coun-

words qualifying or restricting the meaning of the word "heirs," and of the effect of subsequent words in restriction of or repugnance to a grant or devise.

As to "children" as a word of purchase or limitation, see the note to Wills v. Foltz, 12 L.R.A. (N.S.) 283.

As to the effect of qualifying or explanatory words upon limitations to heirs after a grant or devise of a freehold estate, see the note on the rule in Shelley's Case, 29 L.R.A. (N.S.) 1077 et seq.

The reader is reminded that where a grant or devise is "to A and his heirs," "heirs" is a word of limitation; so, where the grant or devise is "to A for life, remainder to his heirs," "heirs" is a word of limitation under the rule in Shelley's Case, unless that rule is abolished in the jurisdiction. His attention is further directed to the statement in Tallman v. Wood, 26 Wend. 9, where it was said that coeval with the rule in Shelley's Case "it

ty court was whether the real estate in question should have been decreed to the widow in fee simple, instead of for life. That is the question brought before us by an exception taken to the judgment of the county court, and is the sole question here considered.

The parcels of real estate with which this case is concerned were devised "to said Martha M., her heirs, viz., her children and grandchildren and assigns." The cardinal rule in the construction of wills is that effect is to be given to the intention of the testator, so far as it can be gathered from the whole instrument and can be legally carried out. So true is this that, according to an observation of Lord Mansfield, it has often been said to be "a sort of paradox" to

cite cases upon the construction of wills. But in the context Mansfield further said that the intent cannot be gathered by conjecture, and that established rules of construction are to be adhered to, unless they are manifestly inconsistent with the intent of the testator. *Pistol ex dem. Riccardson v. Riccardson*, 3 Dougl. K. B. 361. And again, while laying down the duty of the court to construe a will according to the intent of the testator, he emphasized the truth that a court must not in that matter act upon mere conjecture. *Chapman v. Brown*, 3 Burr. 1626. These rules were declared for the sake of certainty, which, as was said by Sir James Burrow in the preface to his Reports, is "the mother of security and peace." The principles thus ex-

has been held that where there are any superadded words in the deed or devise,—words of explanation, which plainly show that the grantor or devisor did not mean to use the term 'heirs' in a technical sense, but merely as a description of persons to whom he intends the estate shall go after the death of the first taker,—the court will effectuate such intent, and restrain the grant or devise to an estate for life. . . . The heirs then are regarded as purchasers, constituting a new stock with reference to whom the future succession shall be regulated."

The nature of a *videlicet* or *scilicet* is explained with lucidity in *Stukeley v. Butler*, Hobart, 168, where a general grant of woods upon a manor was followed by "viz." with particular mention of parts of the manor, and it was held that the grant was not restricted to the parts specially mentioned, and that if what follows the "viz." is repugnant to the grant, the *viz.* and what is so repugnant is void. Lord Hobart there said *inter alia*: "Now I come to the use of a (*viz.*) or (*sc.*) or in English (that is to say) and the nature and force of it. It is neither a direct several clause, nor a direct entire clause, but it is *intermedia*. First, it is clear, that it is not a substantive clause of itself, and therefore you can neither begin a sentence with it, nor make a sentence of it by itself; but it is (as I may say) *clausula ancillaris*, a kind of handmaid to another clause, and to deliver her mind, not her own. And therefore it is a kind of interpreter; her natural and proper use of it is to particularize that that is before general, or distribute that that is in gross, or to explain that that is doubtful and obscure. First, it must not be contrary to the premises. . . . Next, it must neither increase nor diminish, for it is not the nature of it, to give of itself: as if I have in D Black-Acre, White-Acre, and Green-Acre; and I grant unto you all my lands in D, that is to say, Black-Acre and White-Acre, yet Green-Acre shall pass too; but if I add under the *viz.* land lying out of the town of D it shall not pass. . . . But now I grant, on the other side,

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that a *viz.* may work a restriction where the former words were not express and special, but so indifferent, as they may receive such a restriction without apparent injury; though those former words by construction of law would have had a larger sense, if the *viz.* had not been. . . . One gave land to A and B habendum to A for life, and after his decease to B, this was holden good. So, Littleton, 66, if a man give land to two habendum to them, *sc.*, the one moiety to the one, and the other moiety to the other, it is good. For note, that the substance of the premises is not altered, for both of them have the whole in use, in common as they should have had it by the premises jointly, which is but a point of quality, or accident altered. But if it were 20 acres to two, *sc.*, 10 to one and 10 to another, it were void. So, upon the cases 21 H. 6. 7. and 13 H. 7. 24, I hold, if I grant land to one, and his heirs, *viz.*, the heirs of his body, it is an estate tail."

Where the conveyance was "to the said Hannah Hollister, and her heirs or children, to wit, the children begotten by her present husband, Isaac Hollister, to the exclusion of any others and her assigns forever," it was held that this was an estate tail in Hannah as donee in tail. *Hollister v. Ramsey*, 30 Ohio L. J. 38.

It will be seen that the decision in *HALL v. HALL* is in accord with that in *Hollister v. Ramsey*, but that the Vermont court is careful to limit the case to the precise question arising under the peculiar clause in Hall's will, which was "to said Martha M., her heirs," etc., and not "to said Martha M., and her heirs," etc. The omission of the word "and" may perhaps suffice to distinguish *HALL v. HALL* from *Brasington v. Hanson*, *infra*, to which, however, the Vermont court does not refer, nor does it allude to the possibility that a tenancy in common was created in which the taker first named took in common with those secondly mentioned, considering that the only question involved was whether the first taker took a fee or a life estate.

In a deed, Sally Brasington was named

pressed have uniformly governed the construction of wills in this court. *Harris v. Harris*, 82 Vt. 199, 205, 72 Atl. 912; *Shepard v. Shepard*, 60 Vt. 109, 116, 14 Atl. 536; *McCloskey v. Gleason*, 56 Vt. 264, 267, 48 Am. Rep. 770; *Richardson v. Paige*, 54 Vt. 373; *Giddings v. Smith*, 15 Vt. 344; *Chaplin v. Doty*, 60 Vt. 712, 15 Atl. 362; *Conant v. Palmer*, 63 Vt. 310, 21 Atl. 1101.

Thus much has been said because the will in question contains several clauses, and because both sides to this controversy refer to other parts of the will as supporting their respective claims as to the construction of the provision immediately under consideration, and because from a careful reading of the entire will we find nothing elsewhere than in the clause to be construed to give

as the party of the second part, and the grant was to "the said party of the second part, her heirs," and immediately after the description were the words, "for the only use and behoof of the said Sally Brasington and her heirs, viz., Samuel, Milton, Oscar, and Albert H. Brasington;" the habendum was "to have and to hold the premises hereby granted, with the appurtenances, unto the said party of the second part, her heirs, to the use of the said party of the second part her heirs forever," and the warranty was "to the said party of the second part, her heirs." The four names following the *videlicet* were those of four of Sally's fourteen children. The court said: "The grant to the said Sally is to her and her heirs. The word 'assigns' is stricken out wherever it occurs in the deed. This, however, is not important, as a grant to a man and his heirs carries with it the estate to his assigns by operation of law. It was contended by the appellants that Sally Brasington took but a life estate and that no title vested in the designated heirs until her death. We do not think the word 'heirs' in this deed was intended to be used in its ordinary sense. On the contrary, we think it means children. Had the conveyance been to her, and to children as a class, the contention of the appellants would have had more force. But it was not to a class, but to certain designated children, and we think the learned judge below was right in holding that the title was vested in Sally Brasington and her four children named, as tenants in common. The language of the deed is unusual, and we know of no case that is upon all fours with it." *Brasington v. Hanson*, 149 Pa. 289, 24 Atl. 344.

Where a deed did "grant, bargain, and sell unto the said Nathaniel Allen and Hannah, his wife, for and during their lives or the life of the longest liver or survivor of them in trust to and for their children, their lawful heirs, namely: William Allen, now begotten, and to their children and heirs to be begotten, being the issue of her, the said Hannah Doctor, by her said husband, Nathaniel Allen" 33 L.R.A. (N.S.)

rise to more than the merest conjectures as to the intention of the testator in drawing this clause, and because such mere conjectures are conflicting. We have, then, to determine whether, as is claimed, Martha M. Hall took an estate in fee simple by virtue of the phrase, "to said Martha M., her heirs, viz., her children and grandchildren and assigns." It is claimed by the appellant that the words, "viz. her children and grandchildren," are void on the ground that they are repugnant to what precedes them. If they are so, the appellant took an estate in fee simple. It is claimed in behalf of the defendant estate, and the court below held, that those words are not repugnant, but explanatory and restrictive, and that the result of the whole clause, so far as it con-

(here follows description of the land), "to have and to hold the said messuage, tenement, or tract of land containing 45 acres, hereditaments, hereby granted, mentioned, or intended so to be, with the appurtenances, unto the said Nathaniel Allen and Hannah, his wife, in trust to the only proper use and behoof of the said Nathaniel Allen and Hannah, his wife, in trust for their heirs forever." It was held that the word "heirs" was used for children, that the parents took nothing except a naked trust for their issue. *Warn v. Brown*, 102 Pa. 347.

Reference may be here made to *Doe ex dem. Williams v. Beasley*, 60 N. C. (1 Winat. L.) 102, although the deed there considered contained no *videlicet*. It appeared that Jesse Potts, by deed, in consideration of natural love and affection for his daughter, Nancy C. Potts, granted and confirmed "unto the said Nancy C. Potts" a certain tract, "Provided, my daughter, Nancy C. Potts, should have an heir or heirs of her body to live and survive; then, and in that case, all the property above given is to belong to the said heirs, to them and their heirs forever. But if it should so happen that my daughter should die, and not leave any surviving heir or heirs of her body, in that case, all the property is to descend back to the said Jesse and his heirs, the same as if the said land and other property had never been given to the said Nancy C. Potts. . . . But if the said Nancy C. Potts should die and leave an heir or heirs of her body, in that case, said heirs, being her children or child, is to hold, occupy, and possess all the property herein given to them and their heirs forever." It was held that the words "an heir or heirs of her body" were used in the sense of child or children, and that Nancy took a life estate with remainder to her children or their heirs, but if she died leaving no children at her death, then over.

While not strictly within the scope of this note, the case of *Blake v. Stone*, 27 Vt. 475, is of interest here as to the effect of excluding a particular heir. In that case the habendum of the deed in ques-

cerns the appellant, is that she takes a life estate only.

The appellant claims that a note of Sergeant Williams, appended to Dakin's Case, 2 Wms' Saund. 290, 291, has been the cause of much error, and that this alleged error governed the court below in this case. The note in question is this: "So a *videlicet* may sometimes restrain the generality of the former words, where they are not express and special, but stand indifferent, so as to be capable of being restrained without apparent injury to them; as if lands be granted to a man and his heirs, that is to say, the heirs of his body, it is an estate tail." Hobart, 175, Stukeley v. Butler, is cited by the annotator; but the appellant says that the passage is a mere *dictum* of the annotator. If this were correct, it would be high authority; for the notes of Sergeant Williams to the cases in Saunders have received frequent, uniform, and almost unqualified praise from the bench in England and in America. To cite a conspicuous instance, Lord Eldon referred to these notes in the House of Lords, and said that while Sergeant Williams held no judicial position, it would be sufficiently flattering to anyone in such a position to have it said of him that he was as good a common lawyer as the sergeant; "for," said Eldon, "no man ever lived to whom the character of a great com-

mon lawyer more perfectly applied." *Johnes v. Johnes*, 3 Dow, P. C. 15.

But the passage from the note of Sergeant Williams is not a *dictum* of his, but is made up of two propositions of Lord Hobart in the case of Stukeley v. Butler, to which the note refers. For there in one place, Lord Hobart says, that "a *viz.* may work a restriction where the former words were not express and special, but so indifferent as they may receive such a restriction without apparent injury; though those former words by construction of law would have had a larger sense if the *viz.* had not been." And in another place in the opinion he says: "If I grant land to one and his heirs, *viz.*, the heirs of his body, it is an estate tail." It is true that the case did not require all this to be said; but it did require a construction of a *videlicet* as used in an instrument to be construed, and the conclusion was reached through an exhaustive and luminous discussion of the office of a *videlicet* pertinent throughout to the point decided. If the doctrine laid down by Lord Hobart is to be treated as a *dictum*, it was not "*obiter*," but judicial, and of high authority. *Derosia v. Firland*, 83 Vt. 372, 381, 28 L.R.A.(N.S.) 577, 76 Atl. 153. It was, indeed, like many of the "resolutions" or "rules" to be found in Coke's Reports, not necessary to the decision of the particular

tion was, "To have and to hold the same to the said Leonard Burt for and during the term of his, the said Leonard Burt's, natural life, and no longer, and in remainder to the heirs of his, the said Leonard Burt's body (Charles Burt, son of the said Leonard, excepted), forever;" and it was held that Leonard took but a life estate, and that the remainder was in fee.

While without the scope of this note, reference may be here made to cases where a gift in fee is made to "heirs" followed by a *videlicet*.

Thus, where a testatrix provided in her will, "I bequeath and devise one half of the remainder of my estate, whether it be real, personal, or mixed, to my heirs Zephaniah P. Proctor and Rebecca P. Swallow, and the remaining half to the heirs of Isaac O. Taylor, my late husband, namely, Mary T. Bennett, Samuel S. Taylor, and Don G. Taylor, the son of Alpheus Taylor, deceased," and Proctor, Bennett, and Don G. Taylor predeceased her, it was held that the gifts of the halves were to classes, and that Samuel S. Taylor took the entire one half given to the husband's heirs, the court considering the case a very close one. *Swallow v. Swallow*, 166 Mass. 241, 44 N. E. 132.

The residuary clause of a will was as follows: "After the death of my wife, Harriet Evans, my will is that the balance of my estate, real and personal, after paying all former bequeaths, shall be sold and

equally divided among my legal heirs, including Frances E. Evans and Laura Nichols and David E. Wyncoop, which is to have their equal share of the residue over and above what has already been given to them. True meaning of above bequeaths is that said balance or residue shall be divided equally among my nephews and nieces; that is to say, John Evans' heirs, five; Thomas Evans' heirs, two; C. G. Evans' heirs, two; Nancy Camp's heirs, two; Mary Carr's heirs, four. So, the above residue will be divided into fifteen shares in all." When the testator made his will there were five of John Evans' children living, two of Thomas Evans', two of C. G. Evans', two of Nancy Camp's, and four of Mary Evans'. One of John Evans' children, Nettie Fonner, died prior to the testator, leaving five children who survived him. One of C. G. Evans' children, David H. Evans, died after the will was made and prior to the testator, without issue. Mrs. Mary Carr, sister of the testator, survived him. David E. Wyncoop was not the nephew of the testator, but of his wife. It was held that the residuary estate was to be divided equally among the surviving nephews and nieces, Wyncoop sharing with them,—the children of the deceased nieces saving her share, under the Pennsylvania statute preventing the lapse of legacies to the children of deceased brothers and sisters. *Re Evans*, 23 Pittsb. L. J. N. S. 140. B. B. B.

case in which they respectively are found, but which, nevertheless, constitute in considerable measure the wealth of the common law.

The doctrine stated by Lord Hobart, and restated by Sergeant Williams, has been reiterated by many text writers, and has been the basis of numerous decisions, and we entertain no doubt of its soundness. Very clearly, too, it applies here; and, since the words "children and grandchildren" designate a class of heirs, they operate to limit the estate of the appellant to an estate for life, unless they are prevented from having that effect by the words "and assigns," which follow them. The effect of the words "and assigns" was not referred to in argument; but we have given those words due consideration. In respect to them the case of *Thompson v. Carl*, 51 Vt. 408, is much in point. There the question was as to the construction of a deed of land to "Betsey Thompson, and her legal heirs by Samuel Thompson, Jr., and assigns forever." The habendum was "to have and to hold to the said Betsey, her heirs, and assigns," and the covenant was with the said Betsey, her heirs, and assigns. It was held that the granting part of the deed created what would have been an estate tail at common law, and that so under our statute Betsey Thompson took only a life estate. It was there held that the use of the words "and assigns" might as well mean the assigns of the designated heirs as of the first taker, or that the words "and assigns" might properly mean the assigns of the first taker or of her specified heirs of such estate as each took and so could assign. It is true that the rules governing the construction of deeds are in some respects more technical than the rules applicable in the construction of wills. But in the case referred to the words "and assigns" are considered for their bearing upon the question of what grant was actually intended to be made, and we think that here, as there, they do not modify the meaning of the associated words, and that counsel were justified in basing no argument upon their use.

Johnson v. Whiton, 159 Mass. 424, 34 N. E. 542, is a case somewhat relied on by the appellant. There a testator devised and bequeathed an estate to a granddaughter "and her heirs on her father's side." It was considered that the testator had attempted to create a new kind of inheritance, and the qualifying words were treated as of no force, 33 L.R.A. (N.S.)

and were rejected, in accordance with what is said by Littleton: "If a man give lands or tenements to another to have and to hold to him and to his heirs males, or to his heirs females, he to whom such a gift is made hath a fee simple, because it is not limited by the gift of what body the issue male or female shall be, and so it cannot in any wise be taken by the equity of the said statute, and therefore he hath a fee simple." Littleton, *Tenures*, § 31. By "the said statute" Littleton refers to the Statute of Westminster, 13 Edw. I, chap. 1 (1285).

We are also referred to *Smith v. Rice*, 183 Mass. 251, 66 N. E. 806. In that case an estate was devised to a son, "to have and to hold the same to him, his heirs, assigns, executors, and administrators, to his and their use and behoof forever." The words quoted were apt to convey a fee simple, and the court so held, and found no foundation for the claim made that they showed an intention to convey an estate tail, or that at common law they could have had that effect. The conclusion of the court was an obvious one.

Several Kentucky cases are cited by the appellant, and more from that state might be referred to; for this subject has many times been forced upon the attention of the supreme court of Kentucky, and the individual cases there arising have been dealt with in accordance with sound and sensible doctrine. We note that there, when a devise is to a wife and her children, whatever the form of the expression used, it is, with that court, to use its own language, "the constant and uniform tendency . . . to hold that the wife takes a life estate only, and that the children take in remainder." In the absence of anything in the instrument to indicate a different intention that court infers that, where a wife and children are named, such a holding is more consonant than any other with the wishes of the testator. *Hood v. Dawson*, 98 Ky. 285, 33 S. W. 75.

We do not go outside of the very question raised and argued, the question of what estate the widow, Martha M. Hall, took under the clause considered. That question was decided by the probate court, and by the county court, in accordance with the sound principles governing our own cases, those herein cited and others; and accordingly:

Judgment is affirmed. Let the result be certified to the Probate Court.

ARIZONA SUPREME COURT.

L. J. BOURDREAUX, Admr., etc., of Clifford E. Youmans, Deceased, Appt.,

v.

TUCSON GAS, ELECTRIC LIGHT, & POWER COMPANY.

(— Ariz. —, 114 Pac. 547).

Limitation of actions — amendment of demurrable complaint — supplying defects — permissibility.

An amendment after the completion of the limitation period, of a complaint demurrable for failure to state facts sufficient

Note. — Relation of new pleadings to statute of limitations.

This note is supplementary to the note to Missouri, K. & T. R. Co. v. Bagley, 3 L.R.A.(N.S.) 259.

As to amendment of pleading after limitation period, by changing from common law to statute, or *vice versa*, or from statute of one jurisdiction to statute of another, see note to Allen v. Tuscarora Valley R. Co. 30 L.R.A.(N.S.) 1096.

An amendment to a declaration, which sets up no new cause of action, and makes no new demand, relates back to the commencement of the action, and the running of the statute against the claim so pleaded is arrested at that point. Martin v. Gregory, 86 Ark. 280, 110 S. W. 1046; Sexton Rice & Irrig. Co. v. Sexton, 48 Tex. Civ. App. 190, 106 S. W. 728; Benson v. Ottumwa, 143 Iowa, 349, 121 N. W. 1065; Clark v. Oregon Short Line R. Co. 38 Mont. 177, 99 Pac. 298; McAuley v. Casualty Co. 39 Mont. 185, 102 Pac. 586; Parlin & O. Co. v. Glover, 45 Tex. Civ. App. 93, 99 S. W. 592; Johnson v. American Smelting & Ref. Co. 80 Neb. 250, 114 N. W. 144, 116 N. W. 517; Yazoo & M. Valley R. Co. v. Rivers, 93 Miss. 557, 46 So. 705; Dallas Mfg. Co. v. Townes, 162 Ala. 630, 50 So. 157; Regan v. Keyes, 204 Mass. 294, 90 N. E. 847; Central R. Co. v. Williams, 163 Ala. 119, 50 So. 328; Dittgen v. Racine Paper Goods Co. 164 Fed. 85, affirmed in 96 C. C. A. 433, 171 Fed. 631; Woodstock Iron Works v. Kline, 149 Ala. 391, 43 So. 362; Mobile Light & R. Co. v. Bell, 153 Ala. 90, 45 So. 56; Townes v. Dallas Mfg. Co. 154 Ala. 612, 45 So. 696; Alabama Consol. Coal & I. Co. v. Heald, 154 Ala. 580, 45 So. 686; Gaines v. Birmingham R. Light & P. Co. 164 Ala. 6, 51 So. 238; St. Louis & S. F. R. Co. v. Hooker, 161 Ala. 312, 50 So. 56; Mitchellree School Twp. v. Carnahan, 42 Ind. App. 473, 84 N. E. 520; Sanders v. Allen, 135 Ga. 173, 68 S. E. 1102; Texas & N. O. R. Co. v. McDonald, — Tex. Civ. App. —, 120 S. W. 494; Columbia Heights Realty Co. v. Macfarland, 31 App. D. C. 112; El Paso & S. W. R. Co. v. Harris, — Tex. Civ. App. —, 110 S. W. 145; Harrod 33 L.R.A.(N.S.)

to constitute a cause of action, is permissible, if the facts stated in the original complaint are sufficient when read in the light of the amendment, to disclose that the amendment is but the perfection of the imperfect statement of the cause of action attempted to be pleaded, and not the statement of a new or different cause of action.

(Doan, J., dissents.)

(March 27, 1911.)

APPEAL by plaintiff from a judgment of the District Court for Pima County dismissing the complaint in an action brought to recover damages for the wrongful death of plaintiff's intestate, alleged

v. Bisson, — Ind. App. —, 93 N. E. 1093; Tomson v. Iowa State Traveling Men's Asso. — Neb. —, 129 N. W. 529; Gatta v. Philadelphia, B. & W. R. Co. — Del. —, 76 Atl. 56; Oolitic Stone Co. v. Ridge — Ind. —, 91 N. E. 944; Nashville, C. & St. L. R. Co. v. Hill, 146 Ala. 240, 40 So. 612; Z. J. Fort Produce Co. v. Southwestern Grain & Produce Co. — Okla. —, 108 Pac. 386.

And so, amendments which only amplify or make more specific the averments in the original petition, or which state the wrong suffered or right relied on in a different form, are ordinarily permissible, and will relate back to the beginning of the action. Union P. R. Co. v. Sweet, 78 Kan. 243, 96 Pac. 657; Crotty v. Chicago G. W. R. Co. 95 C. C. A. 91, 169 Fed. 593; Wise Terminal Co. v. McCormick, 107 Va. 376, 58 S. E. 584; Georgia B. Swift Co. v. Gaylord, 229 Ill. 330, 82 N. E. 299; Beasley v. Baltimore & P. R. Co. 27 App. D. C. 595, 6 L.R.A.(N.S.) 1048; Oolitic Stone Co. v. Ridge, — Ind. —, 91 N. E. 944; Joerg v. Atchison, T. & S. F. R. Co. 152 Ill. App. 229; Western Coal & Min. Co. v. Corkille, — Ark. —, 131 S. W. 963; Green v. Loftus, — Tex. Civ. App. —, 132 S. W. 502; Stanley v. Anderson, 107 Mich. 384, 65 N. W. 247; Curry v. Southern R. Co. 148 Ala. 57, 42 So. 447; Gilliland v. Ellison, — Tex. Civ. App. —, 137 S. W. 168.

So, of amendments introduced merely to cure the description of the cause of action already alleged. Southern R. Co. v. Cunningham, 162 Ala. 147, 44 So. 658; Hess v. Birmingham R. Light & P. Co. 149 Ala. 499, 42 So. 595.

And an amendment adding other grounds for damages in an action for interference with bodies in a burial lot does not state a new cause of action. Anderson v. Acheson, 132 Iowa, 744, 9 L.R.A.(N.S.) 217, 110 N. W. 335.

An amendment which introduces a new or different cause of action, and makes a new or different demand, does not relate back to the beginning of the action, so as to stop the running of the statute of limitations, but is the equivalent of a fresh suit upon a new cause of action, and the

to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Messrs. S. W. Purcell, Edwin F. Jones, and Lewis C. O'Connor, for appellant:

The complaint is only a defective statement of a good cause of action, and the amendment made introduces no new cause of action, and is in no sense a departure from the cause of action set up in the original complaint.

Tiffany, Death by Wrongful Act, § 187; Ellison v. Georgia R. & Bkg. Co. 87 Ga. 691, 13 S. E. 809; Klemm v. New York C. & H. R. R. Co. 78 Hun, 277, 28 N. Y. Supp. 861; 31 Cyc. Law & Proc. p. 440; Pullen

statute continues to run until the amendment is filed. Maegerlein v. Chicago, 141 Ill. App. 414, affirmed in 237 Ill. 159, 86 N. E. 670; Wasson v. Boland, 136 Mo. App. 622, 118 S. W. 663; Van Cleve v. Radford, 149 Mich. 106, 112 N. W. 754; Raley v. Evansville Gas & Electric Light Co. — Ind. App. —, 90 N. E. 783; Dobbs v. Pearl, 118 N. Y. Supp. 485; Texas & N. O. R. Co. v. Clippenger, 47 Tex. Civ. App. 510, 106 S. W. 155; Rauer's Law & Collection Co. v. Lefingwell, 11 Cal. App. 494, 105 Pac. 427; Melvin v. Hagadorn, 87 Neb. 398, 127 N. W. 139; Hall v. Louisville & N. R. Co. 157 Fed. 464; Klugman v. Sanitary Laundry Co. 141 Ill. App. 422; Mitchell Coal & Coke Co. v. Pennsylvania R. Co. 181 Fed. 403; Henderson v. Moweaqua Coal Min. & Mfg. Co. 145 Ill. App. 637; Van Cleve v. Radford, 149 Mich. 106, 112 N. W. 754; Lane v. Sayre Water Co. 220 Pa. 599, 69 Atl. 1126; Mahoney v. Park Steel Co. 217 Pa. 20, 66 Atl. 90; Texas & N. O. R. Co. v. McDonald, — Tex. Civ. App. —, 120 S. W. 494.

Where the original declaration fails to state a cause of action, and by amendment a new cause of action is introduced after the time fixed by the statute for bringing suit has expired, a plea of the statute of limitations is good. Lake Shore & M. S. R. Co. v. Enright, 227 Ill. 403, 81 N. E. 374; Powers v. Badger Lumber Co. 75 Kan. 687, 90 Pac. 254; Bahr v. National Safe Deposit Co. 234 Ill. 101, 84 N. E. 717; Walters v. Ottawa, 240 Ill. 259, 88 N. E. 651.

Where the original complaint states no cause of action whatever, it will not arrest the running of the statute, and an amendment made after the bar of the statute is complete will be regarded as the beginning of the action in reckoning the statutory period of limitations. Clark v. Oregon Short Line R. Co. 38 Mont. 177, 99 Pac. 298.

But if the original declaration states a cause of action, but states it defectively, an amended declaration restating the same cause of action with more particularity is not subject to such defense. Lee v. Re- 33 L.R.A. (N.S.)

v. Hutchinson, 25 Me. 249; Taylor v. Monroe, 43 Conn. 36; Cooke v. Cooke, 43 Md. 522; State use of Zier v. Chesapeake Beach R. Co. 98 Md. 35, 56 Atl. 385; Lassiter v. Norfolk & C. R. Co. 136 N. C. 89, 48 S. E. 644, 1 A. & E. Ann. Cas. 456; Webb v. Hicks, 125 N. C. 201, 34 S. E. 395; Savannah, F. & W. R. Co. v. Smith, 93 Ga. 742, 21 S. E. 157; Love v. Southern R. Co. 108 Tenn. 104, 55 L.R.A. 472, 65 S. W. 475; Ladd v. Ladd, 121 N. C. 121, 28 S. E. 190.

A missing allegation, without the presence of which in pleading and proof there can be no recovery, relates back, and is unaffected by the statute of limitations expiring after suit was begun, and before the amendment was made.

public Iron & Steel Co. 241 Ill. 372, 89 N. E. 655.

Illustrative cases—identity maintained.

The following amendments have been held not to change the cause of action originally pleaded, and therefore not to admit the bar of the statute, although the limitation period expired in the interval between the original and amended pleading:

—an amendment to a complaint for personal injuries, that made no change in the allegations, except that when the train ran on the switch, it was wrecked by being derailed, instead of colliding with another train, as alleged in the original petition. Texas & N. O. R. Co. v. Clippenger, 47 Tex. Civ. App. 510, 106 S. W. 155;

—an amendment in an action for personal injuries, stating an additional ground of defendant's negligence. Johnson v. Texas C. R. Co. 42 Tex. Civ. App. 604, 93 S. W. 433;

—an amendment of a complaint for commissions for selling land, which merely sets out more fully the transaction on which plaintiff's demand is based. Newsom v. Sharman, — Tex. Civ. App. —, 119 S. W. 912;

—an amendment supplying the omission of an explicit averment in the original declaration in action for death, that the parents and sisters, mentioned in that declaration as surviving the deceased, and alleged to have been deprived of their support, were deceased's next of kin. Byrne v. Marshall Field & Co. 237 Ill. 384, 86 N. E. 748, affirming 142 Ill. App. 72;

—an amendment showing that the original note, and not a "copy" thereof, as originally alleged, was attached to the petition. Bradley v. Pinney, 77 Kan. 763, 93 Pac. 585;

—an amendment alleging that the contract was made with the wife alone, it having been originally pleaded as the joint and several obligation of the husband and wife. Calloway v. Oro Min. Co. 5 Cal. App. 191, 89 Pac. 1070;

Smith v. Georgia R. & Bkg. Co. 87 Ga. 784, 13 S. E. 904; Louisville & N. R. Co. v. Pointer, 113 Ky. 952, 69 S. W. 1108; Chicago City R. Co. v. Hackendahl, 188 Ill. 300, 58 N. E. 930; Eshelman v. People, 52 Ill. App. 621; Chicago City R. Co. v. Cooney, 196 Ill. 466, 63 N. E. 1029; Springfield Engine & Thresher Co. v. Michener, 23 Ind. App. 130, 55 N. E. 32; Detroit v. Wayne Circuit Judge, 125 Mich. 634, 85 N. W. 1; Chicago, R. I. & P. R. Co. v. Young, 67 Neb. 568, 93 N. W. 922; Crotty v. Chicago G. W. R. Co. 95 C. C. A. 91, 169 Fed. 598; Whalen v. Gordon, 37 C. C. A. 70, 95 Fed. 305; Thayer v. Smoky Hollow Coal Co. 129 Iowa, 550, 105 N. W. 1024; Walker v. Wabash R. Co. 193 Mo. 453, 92 S. W. 83; Texas Midland R. Co. v.

Cardwell, — Tex. Civ. App. —, 67 S. W. 157; Missouri, K. & T. R. Co. v. Bagley, 3 L.R.A.(N.S.) 259, and note, 65 Kan. 188, 69 Pac. 189; Terre Haute & I. R. Co. v. Zehner, 166 Ind. 149, 3 L.R.A.(N.S.) 277, 76 N. E. 169.

Mr. S. L. Kingan for appellee.

Lewis, J., delivered the opinion of the court:

On the 21st day of March, 1908, one Clifford E. Youmans, a lineman of the Consolidated Telephone, Telegraph, & Electric Company, was killed while engaged in repair work. In November, 1908, the appellant brought this action against the appellee, seeking a money judgment for the death of Youmans, which was alleged to have

—where the original petition charged that the accident was caused by defective condition of switch and dangerous speed of car, and the amendment charged that it was caused by operation of car at dangerous rate of speed, negligence in allowing switch to become defective, and in failing to repair it, with additional charge that defendant's servants at the time of the accident were acting in the line of their duty. Indianapolis Street R. Co. v. Fearnaught, 40 Ind. App. 233, 82 N. E. 102;

—an amendment changing a suit on an insurance policy from covenant to assumption. Monahan v. Fidelity Mut. L. Ins. Co. 242 Ill. 488, 134 Am. St. Rep. 337, 90 N. E. 213;

—an amendment which states more elaborately the circumstances of the conversion of the property in question, the original petition having alleged merely plaintiff's rightful possession of the property, and the wrongful taking thereof by defendant. Parlin & O. Co. v. Glover, 45 Tex. Civ. App. 93, 99 S. W. 592;

—an amendment introducing new parties, the cause of action being the same throughout the pleadings. El Paso & S. W. R. Co. v. Harris, — Tex. Civ. App. —, 110 S. W. 145;

—an amendment merely changing the negligence to meet different phases of the evidence, the form of action remaining the same. Wise Terminal Co. v. McCormick, 107 Va. 375, 58 S. E. 584;

—an amendment averring an additional stipulation in the agreement alleged in the original petition, being merely an enlargement, and not a contradiction, of the allegations contained in the original petition. Goodwin v. Simpson, — Tex. Civ. App. —, 136 S. W. 1190;

—an amendment asserting plaintiff's right as a putative wife to recover for personal injuries to her deceased putative husband, she having supposed at the time of the original petition that she was his lawful wife. Ft. Worth & R. G. R. Co. v. Robertson, — Tex. Civ. App. —, 121 S. W. 202;

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for treble damages for carrying away stone, which supplied the clerical omission in the original petition to designate defendant in connection with the trespass, and explicitly avers the statutory requisites that defendant had no right or interest in the stone, and did not own the land, both being clearly implied, though not explicitly averred, in the original petition. Fox v. Turner, — Kan. —, 116 Pac. 233;

—an amendment bringing in the mother, where an action for the negligent killing of a child was begun by the father alone. Cytron v. St. Louis Transit Co. 205 Mo. 692, 104 S. W. 109;

—an amendment inserting names of children, omitted from averment of claim in an action by husband for negligent killing of wife. McArdle v. Pittsburg R. Co. 41 Pa. Super. Ct. 162;

—an amendment eliminating one of two causes of action which were improperly joined in the original petition. McCague Sav. Bank v. Croft, 87 Neb. 770, 128 N. W. 504;

—an amended count charging that the defendant street railway company so carelessly "conducted and managed" its car as to cause a collision, the original declaration charging that the defendant so carelessly "propelled" its car that a collision occurred. Ratner v. Chicago City R. Co. 233 Ill. 169, 84 N. E. 201;

—An amendment in trespass for cutting timber, alleging that greater part of such timber "was cut in 1902 and 1903," whereas the original complaint alleged that the timber was cut "on or about June 27, 1901, and on diverse days and times since then." Price v. Greer, 89 Ark. 300, 116 S. W. 676, 118 S. W. 1009;

—an amendment to a complaint in ejectment, which conforms the allegations in the complaint to the facts shown by the chain of title set out by plaintiffs. Gannon v. Moore, 83 Ark. 196, 104 S. W. 139;

—an amendment alleging a negligent failure to keep cattle guards in repair, thereby allowing hogs to pass over the stock gap into plaintiff's lands, the original com-

been caused by appellee negligently permitting a highly charged wire to come in contact with the telephone line which decedent was repairing. The cause of action attempted to be stated was one for wrongful death, under paragraphs 2764 to 2766 of the Revised Statutes of Arizona 1901. The complaint, tested by a general demurrer, unquestionably failed to state facts sufficient to constitute a cause of action. In May, 1909, the appellant filed an amended complaint, to which appellee answered, demurring upon the ground that plaintiff's cause of action was barred by the statute of limitations, in that it appeared upon the face of the complaint and the records of the court, that the original complaint filed did not state facts sufficient to constitute

a cause of action, and that the first amended complaint was not filed until more than a year after the cause of action had accrued. This demurrer was sustained. Appellant thereafter filed a second amended complaint, to which appellee answered, demurring upon the same ground, which demurrer was also sustained. Judgment was entered dismissing the complaint. This appeal was thereupon taken from the judgment.

The rulings and judgment of the trial court were correct upon the authority of *Keppler v. Becker*, 9 Ariz. 234, 80 Pac. 334. The appellant asks a review of that decision. This court in the *Keppler Case* thus stated the law: "It is a rule of general application that, where the original complaint

plaint alleging that the company negligently allowed a stock gap to remain out of repair, as a consequence of which hogs entered plaintiff's farm and destroyed his crop. *Central R. Co. v. Sturgis*, 159 Ala. 22, 48 So. 810;

—when the original complaint alleged that the defendant wilfully and negligently ran its locomotive on and over certain horses, and the amendments thereto alleged that the injuries were caused by the horses running onto a trestle on account of being frightened by the locomotive, both original and amended counts being in case. *Nashville, C. & St. L. R. Co. v. Garth*, 115 Ala. 311, 46 So. 583;

—an amended petition alleging that the railroad employees negligently ran a car with knowledge of plaintiff's peril, where the gravamen of the charge in the petition was that railroad employees negligently ran a car over plaintiff, an employee of a third person, while unloading cars. *Texas & N. O. R. Co. v. McDonald*, — Tex. Civ. App. —, 120 S. W. 494;

—an amendment striking the word "owned" from the averment that the defendant "owned, controlled, and carried on" the store in question. *Steiskal v. Marshall Field & Co.* 142 Ill. App. 154, affirmed in 238 Ill. 92, 87 N. E. 117;

—amendment averring different causes contributing to the unsafeness of the place to alight, where both complaint and amendment alleged defendant's failure to provide plaintiff with a safe place to alight. *Atlanta & B. Air Line R. Co. v. Wheeler*, 154 Ala. 530, 46 So. 262;

—an amended petition which set forth substantially the same cause of action as the original, except that it added the allegation that defendant promised to pay for the property that both petitions charged he had converted. *Hitson v. Hurt*, 45 Tex. Civ. App. 360, 101 S. W. 292;

—an amendment setting up a claim for damages resulting from the cutting of timber on land where the original petition, in trespass to try title, claimed damages resulting only from the unlawful ejectment of plaintiff and the withholding of posses-

sion by defendant. *Kirby v. Hayden*, — Tex. Civ. App. —, 125 S. W. 993;

—an amendment merely correcting a mistake in the number of pounds of oats, the amount charged not being changed. *Borden v. Le Tulle Mercantile Co.* — Tex. Civ. App. —, 99 S. W. 128;

—an amendment of a complaint in ejectment, eliminating certain lands and parties originally named therein. *Smith v. Scott*, 92 Ark. 143, 122 S. W. 501;

—an amendment to the effect that the work and labor was performed by a certain machine, where the original complaint was for work and labor. *Lemon v. Hubbard*, 10 Cal. App. 471, 102 Pac. 554;

—where the original petition for personal injuries stated that plaintiff was a widow, and the amendment that she had been deserted by her husband. *Gulf, C. & S. F. Co. v. Overton*, — Tex. Civ. App. —, 107 S. W. 71, reversed in 101 Tex. 583, 19 L.R.A.(N.S.) 500, 110 S. W. 736;

—an amendment in an action by a widow for the death of her husband, striking the descriptive word "administratrix" from the declaration, and leaving the suit to proceed in the individual name of the widow. *Atlanta, K. & N. R. Co. v. Smith*, 1 Ga. App. 162, 50 S. E. 106;

—an amendment merely seeking to cure a defective averment in the original complaint upon an assigned note. *Rauer's Law & Collection Co. v. Leffingwell*, 11 Cal. App. 494, 105 Pac. 427.

—identity changed.

The following amendments have been held to change the cause of action originally pleaded, and therefore to admit the bar of the statute, the limitation period having expired in the interval between the original and amended pleading:

—an amended declaration which alleges that the sidewalk was out of repair at a different place than was averred in the original declaration. *Gilmore v. Chicago*, 224 Ill. 490, 79 N. E. 596;

—an amendment in an action to recover back money unlawfully paid to public of-

states no cause of action, it will not arrest the running of the statute of limitations, and an amendment made after the bar of the statute is complete must be treated as filed at the time the amendment is made." In order to ascertain the origin and reasoning in support of this statement of the law, it becomes necessary to re-examine the authorities relied upon, inasmuch as this court has adopted a rule formulated by the supreme court of Illinois and followed by the supreme court of Kansas. They are Illinois C. R. Co. v. Campbell, 170 Ill. 163, 49 N. E. 314; Lasater v. Fant, — Tex. Civ. App. —, 43 S. W. 321; Missouri, K. & T. R. Co. v

Bagley, 65 Kan. 188, 3 L.R.A.(N.S.) 259, 69 Pac. 189. The supreme court of Kansas in the Bagley Case, last cited, said, speaking by Johnston, J.: "The petition on which the first trial was had was filed in good time, but that pleading was held bad, in that it did not state a cause of action." Missouri, K. & T. R. Co. v. Bagley, 60 Kan. 424, 56 Pac. 759. "The amended petition, on which the second trial was had, was filed May 15, 1899, more than six years after the causes of action pleaded had accrued. The statute of limitations barred such causes in three years after they had accrued, and, if the original petition did not arrest the statute, the causes

ficer, introducing a new item. Clark v. Logan County, 138 Ky. 676, 128 S. W. 1079;

—an amendment charging negligence in directing work to be done in a dangerous and unsafe method and in a dangerous and unsafe place, while the original declaration charged merely negligence in ordering the work to be done in an unsafe method. Keenan v. Wells Bros. Co. 142 Ill. App. 1;

—an amendment charging that damages were caused by wilful, wanton, or reckless conduct of defendant's servant, the complaint setting up simple negligence or wilful, wanton, or reckless conduct on the defendant's part. Freeman v. Central R. Co. 154 Ala. 619, 45 So. 898;

—an amendment seeking to recover on *quantum meruit* without performance, in action upon express contract for contract price of apparatus sold and set up in defendant's plant. Meinshausen v. A. Gettelman Brewing Co. 133 Wis. 95, 13 L.R.A.(N.S.) 250, 113 N. W. 408;

—an amendment supplying the averment omitted from the original declaration in an action against a municipality for personal injuries, that notice was given to the municipality as required by statute. Prouty v. Chicago, 250 Ill. 222, 95 N. E. 147;

—an amended declaration pleading specifically a contract of insurance, where the original complaint was based upon an account stated. Heffron v. Concordia F. Ins. Co. 138 Ill. App. 483;

—an amendment setting up an action on an express contract, where the original action was based on an implied contract. Booth v. Houston Packing Co. — Tex. Civ. App. —, 105 S. W. 46;

—an amendment substituting a cause of action based upon the injuries act, where the original action was based upon the mines and miners' act. Chicago-Virden Coal Co. v. Bradley, 134 Ill. App. 234, affirmed in 231 Ill. 622, 83 N. E. 424;

—an amendment averring an abuse of civil process by an excessive seizure of goods, where the original complaint for trespass charged a malicious seizure of goods by unlawful process. Sayre Water Co. 220 Pa. 599, 69 Atl. 1126; 33 L.R.A.(N.S.)

—an amendment declaring upon a cause of action conferred by statute, the original declaration declaring upon a common-law right of action. McCray v. Moweaqua Coal Min. & Mfg. Co. 149 Ill. App. 565;

—an amendment averring that damages resulted from another and different fire, which was started 5 miles distant from the one relied on in the original petition. Union P. R. Co. v. Sweet, 78 Kan. 243, 96 Pac. 657;

—an amendment alleging the killing of an intending passenger by the negligent starting of the car before he was safely aboard, where the original declaration set up the killing of a pedestrian attempting to cross the street by the negligent running of a street car. Martin v. Pittsburgh R. Co. 227 Pa. 18, 26 L.R.A.(N.S.) 1221, 75 Atl. 837, 19 A. & E. Ann. Cas. 818.

It is held in Paris & G. N. R. Co. v. Robinson, — Tex. Civ. App. —, 127 S. W. 294, that where an action for the death of the decedent was begun by his wife and children within six months after his death, and an amended petition filed more than two years after his death, alleging for the first time the existence of his mother, and demanding a recovery for her benefit, limitations barred the right of the mother, but did not bar the right of the wife and children.

The filing of an amendment setting up an entirely separate and distinct cause of action, and the answer to it, are equivalent to the bringing of a new action as respects the statute of limitations. Warmack v. Askew, — Ark. —, 132 S. W. 1013.

In Cotulla v. Urbahn, — Tex. —, 126 S. W. 1108, it was held that the attempt to avoid the plea of the statute of limitations to a petition declaring upon a note, by setting up a new promise by a supplemental petition, instead of by an amendment of the original, was a mere irregularity, and that the expiration of the limitation period on the new promise, in the interval between the filing of the supplemental petition and the filing of the amended petition, did not bar the action. ¹ D. C.

were all barred." After stating the general rule that a new and distinct cause of action barred by the statute could not be ingrafted on a petition by way of amendment, so as to deprive the defendant of the defense of the statute of limitations, and citing cases, the court, continuing, said: "Those cases differ somewhat from the case in hand, as in them the new causes were added by amendment to other and distinct causes that had been previously pleaded, while here the amendment sets up a cause of action where none whatever had been previously alleged. The principle which ruled the cited cases, however, applies. A cause of action pleaded by way of amendment for the first time is new, and the departure is as great as the ingrafting of a distinct cause of action which is barred, upon an original one that is not barred. . . . The supreme court of Illinois had this identical question before it for consideration, and while holding that, if the action was originally brought within the statutory period, and an amendment is afterward filed which simply restates the right of recovery originally pleaded, the amendment is treated as filed at the time the action was brought, and the statute of limitations will not operate as a bar. Yet it was also held: 'Where an original declaration fails to state any cause of action whatever, and an amended declaration does, upon an issue of the statute of limitations, the amended declaration will be deemed to have been filed, and the action to have been instituted, at the time of the making of such amendment, although such amendment is confined to a more complete statement of the same cause or right attempted to be stated in the original.' See also Illinois C. R. Co. v. Campbell, 170 Ill. 163, 49 N. E. 314; Eysenfeldt v. Illinois Steel Co. 165 Ill. 185, 46 N. E. 266; Selma, R. & D. R. Co. v. Lacey, 49 Ga. 106; Phelps v. Illinois C. R. Co. 94 Ill. 548; Lasater v. Fant, — Tex. Civ. App. —, 43 S. W. 321; Sicard v. Davis, 6 Pet. 124, 8 L. ed. 342." Doster, Ch. J., dissenting, says: "I dissent from the judgment in this case, and from so much of the opinion as applies the statute of limitations to the case of defendant in error, the plaintiff below, and am authorized to say for Justice Ellis that he also dissents. The majority opinion is entirely too technical. The original petition was defective because incomplete in its formal allegations. It simply omitted the statement of the consideration for the promise sued on. The amendment merely supplied the allegation of that element of the contract. Now, in such cases, we understand the rule to be that petitions are amendable even after the running of the stat-

ute of limitations; that is, the incomplete allegations may be helped out by amendment. However, one may not introduce a new cause of action into a case by way of amendment of his petition after the period of limitation has run against it. He may not, under the guise of amendment, change his cause of action from one sued on during its life to one against which the bar of the statute has run; nor may he, by way of amendment, tack a barred cause of action onto one against which the statute has not run. The decisions cited in the majority opinion are instances of changes from one cause of action to another, and do not constitute precedents for the ruling made in this case." The validity of the conclusion reached in the opinion of the majority of the court in that case is dependent upon the soundness of the assumption that "a cause of action pleaded by way of amendment for the first time is new," within the meaning of the generally accepted rule that an amendment introducing a new cause of action cannot be made after the bar of the statute of limitations has become complete.

Passing the Illinois cases for later consideration, we will now examine the remaining cases cited by the supreme court of Kansas in support of this doctrine. The first case is Selma, R. & D. R. Co. v. Lacey, 49 Ga. 106. The law was thus stated: "A cause of action defectively set forth may be amended, but, when there is no cause of action set forth, there is nothing to amend." This has been retracted by the supreme court of Georgia in Ellison v. Georgia R. & Bkg. Co. 87 Ga. 691, 13 S. E. 809, wherein the court elaborately discusses the topic of amending declarations, and expressly overrules their former decisions. The court of civil appeals of Texas in Lasater v. Fant, — Tex. Civ. App. —, 43 S. W. 321, a case not involving the statute of limitations, said: "The complaint [in the justice court] is so defective that it states no cause of action whatever, and an amendment of it in the county court would be equivalent to the bringing of a new action, which cannot be done in that court." This lends but little support to the rule, inasmuch as the same court in Texas & P. R. Co. v. Johnson, — Tex. Civ. App. —, 34 S. W. 186, in a carefully considered opinion collecting the Texas authorities, said that an amendment filed after the bar of the statute of limitations had become complete did not present a new or different cause of action from one imperfectly alleged in the original petition, which had been held on demurrer not to state a cause of action. The last case—Sicard v. Davis, 6 Pet. 124, 8 L. ed. 342—is one of an

amendment to a good declaration by the addition of a count asserting a different title from that originally declared upon, concerning which the court said: "The second count in the declaration, being on a demise from a different party, asserting a different title, is not distinguishable, so far as respects the bar of the act of limitations, from a new action."

Turning to the Illinois cases, we find Illinois C. R. Co. v. Campbell, 170 Ill. 163, 49 N. E. 314, cited in both the Bagley case and Keppler v. Becker. The supreme court of Illinois there said, speaking by Phillips, Ch. J.: "Where a declaration fails entirely to set forth a cause of action, and where the negligence of the defendant is not such as would entitle the plaintiff to recover, and is not sufficient on which to base a judgment for the plaintiff, the statute of limitations will interpose, and deny him the right, after the limitation of such statute, to set up and allege new and different grounds, or other and different acts of negligence, on which to base his claim for damages. Eysenfeldt v. Illinois Steel Co. 165 Ill. 185, 46 N. E. 286." The point of the case is as to whether the amended complaint set up a new cause of action, and it falls within the general rule that an amendment setting up a new cause of action cannot be made after the bar is complete. But, assuming that the rule stated is necessary to the decision, the facts were completely set forth in the original complaint. The law, however, afforded no remedy upon the facts stated; the court holding that the act of negligence alleged was one the risk of which plaintiff had assumed. The act alleged in the amended count was held to be a statement of a new cause of action, in that it alleged a negligent act the risk of which was not assumed. The court itself distinguishes the case from those wherein the action is begun, and, the cause of action being insufficiently alleged, amendments are permitted to perfect the statement. The leading Illinois case announcing the "cause of action for the first time stated" rule is the Eysenfeldt Case. In that decision, as will be observed by reading the facts stated by the court, the plaintiff was injured on January 17, 1892, and suit was brought on the 29th day of the following March. What purported to be a declaration was filed, but it should be noted no cause of action whatever was stated or attempted to be stated. No declaration was filed stating a cause of action until January 31, 1895, more than three years after the accident, and more than one year after the statute of limitations had run. After stating the record substantially thus, the court said: "The 33 L.R.A. (N.S.)

question, then, presented by the record before us, is whether the counts filed by the plaintiff in January, 1895, after the two years provided by the statute for bringing an action had expired, set up a new cause of action, or whether they were a mere restatement of the cause of action already stated in the declaration. Upon an inspection of the declaration first filed by the plaintiff, it will be found that the commencement of the declaration is in proper form in an action of trespass on the case, and no fault is found with the conclusion of the declaration, wherein damages are claimed, but, when the body of the declaration is examined, where the cause of action should be set up, no cause of action whatever is averred in the declaration. The amended count does, however, set up a cause of action; but, inasmuch as the original declaration stated no cause of action, it seems to follow that the amended declaration stated a new cause of action,—one which had never been stated before,—and hence the statute of limitations was a good defense. There could be no restatement of a cause of action by the amended declaration, unless the cause of action had been stated before. If the plaintiff had stated his cause of action in a defective manner, omitting some feature which should have been incorporated in it, then an amendment restating the cause of action would not fall within the statute; but such was not this case." In Foster v. St. Luke's Hospital, 191 Ill. 94, 60 N. E. 803, the court said: "If the original declaration failed to state a cause of action, and by the amendment thereto a new cause of action was sought to be introduced, the same was barred, and the plea of the statute of limitations thereto should have been sustained. . . . The controlling question therefore is: Did the original declaration state a cause of action? . . . We are of the opinion the declaration as originally filed stated no cause of action, and that the cause of action stated in the amended declaration was barred by the statute of limitations." Varying applications of the rule of the Eysenfeldt Case are to be found in Mackey v. Northern Mill Co. 210 Ill. 115, 71 N. E. 448; Klawiter v. Jones, 219 Ill. 626, 76 N. E. 673; Bahr v. National Safe Deposit Co. 234 Ill. 101, 84 N. E. 717 (which collects the cases in support of the rule); Walters v. Ottawa, 240 Ill. 259, 88 N. E. 651. In Doyle v. Sycamore, 193 Ill. 501, 61 N. E. 1117, a different statement of the rule is made, namely: If the original complaint be one to be held good after a verdict, it will toll the bar of the statute, otherwise not. The leading case in Illinois stating the "new

cause of action" rule is that of Illinois C. R. Co. v. Cobb, 64 Ill. 128. At page 140 of 64 Ill. the court said: "In the particular case now under consideration, the plaintiffs, by leave of court, filed two amended declarations, setting up shipments of corn by different persons from different places, and at different times, from those described in the original declaration. Defendant pleaded the statute of limitations to these additional counts, to the effect that the cause of action did not accrue within five years before they were filed, or before leave was given to file them, with an averment that they set up new causes of action. The court sustained a demurrer to this plea. We are of opinion the plea was good. The new counts set up entirely new causes of action. Counsel for appellees cite various authorities for the purpose of showing that courts should be liberal in allowing amendments for the purpose of avoiding the running of the statute. These authorities, however, are cases where the amendment was for the purpose of restating the cause of action in the pending suit, and not for the purpose of introducing a wholly new and different cause of action. The rule contended for by appellees would substantially break down the protection intended to be given by the statute. If A has two notes against B, one of which is barred by the statute and the other not, he could not enforce payment of the first note by joining it in a suit upon the second. If, however, he commences suit on the second before the statute has run against either, and afterwards, the statute having run in the meantime against the first note, seeks to recover upon it by adding a new count to his declaration in the pending suit, it is claimed he may do so. Why should this be permitted any more than to unite in the first instance a note barred with one not barred? The two cases are the same in principle. When a new count is added, a distinct suit could not be brought on the outlawed note, and it has not been included in the pending suit. How, then, can its payment be enforced by adding a new count in the pending suit? How can a note which the law pronounces dead be vitalized by amending the declaration in a suit brought upon another cause of action. This seems plain upon principle, but we cite the following authorities: King v. Avery, 37 Ala. 173; Holmes v. Trout, 1 McLean, 1, Fed. Cas. No. 6,645, affirmed in 7 Pet. 171, 8 L. ed. 647; Woodward v. Ware, 37 Me. 564; Skowhegan Bank v. Cutler, 49 Me. 315." The rules which we would deduce from the foregoing Illinois cases are well summarized in Heffron v. Rochester German Ins. Co. 220 Ill. 514, 77 33 L.R.A. (N.S.)

N. E. 262, thus: "Certain propositions of law thoroughly established by the decisions of this court should be borne in mind in the consideration of this question. If the original declaration fails to state any cause of action whatever, the cause of action set up by amendment after the statute of limitations has run is barred. Mackey v. Northern Mill. Co. 210 Ill. 115, 71 N. E. 448; Doyle v. Sycamore, 193 Ill. 501, 60 N. E. 1117; Foster v. St. Luke's Hospital, 191 Ill. 94, 60 N. E. 803. If an amendment to a declaration restates in different form the same cause of action set up in the original declaration, the filing of the amendment relates back to the commencement of the suit, and the statute of limitations is not a bar. Chicago City R. Co. v. McMeen, 206 Ill. 108, 68 N. E. 1093; Chicago & E. I. R. Co. v. Wallace, 202 Ill. 129, 66 N. E. 1096. If an amendment introduces a new cause of action, it is regarded as a new suit commenced when the amendment is filed, and the statute of limitations may be pleaded accordingly. Chicago City R. Co. v. McMeen, supra; Fish v. Farwell, 160 Ill. 236, 43 N. E. 367."

Examining the opinions of other courts, we find that the court of appeals of Maryland, reversing the circuit court, in State use of Zier v. Chesapeake Beach R. Co. 98 Md. 35, 56 Atl. 385, after holding the first count bad on demurrer as not stating a cause of action, said: "Did the amendment change the cause of action? As we have said, the suit was brought under article 67 of the Code, which permits an action to be maintained to recover damages whenever the death of a person shall be caused by wrongful act, neglect, or default, if the act, neglect, or default (had death not ensued) would have entitled the injured party to recover damages in respect thereof. Now, the original declaration, though defective, was founded on the alleged negligence of the defendant. The fact that the narr. was insufficient in law—that it did not accurately and formally set forth the real cause of action—did not prevent the suit itself from being a pending suit wherein the gravamen was the negligence of the defendant. When the amendment was made, precisely the same cause of action was declared on. It is true it was imperfectly stated in the first count, but in the second it was correctly set forth. The negligence alleged in the first count was the negligence of the defendant through its agents, but was none the less the negligence of the master, though, as respects a servant of the master, it was not actionable. In the second count the negligence alleged was again the negligence of the

master in failing to exercise due care in the selection of the fellow servants by whom the injury was inflicted. But the suit to recover for the defendant's negligence was precisely the same after the amendment had been made that it was antecedently. The statement of the cause of action was different, but the cause of action itself was identical. Injury resulting in death is what occasioned the suit. The imperfect statement of the case did not cause the correct statement of it to be a different cause of action. Being the same cause of action, the accurate statement of it in the amended declaration did not convert the original suit into a new and different suit, and therefore did not warrant the filing of any other plea of the statute of limitations than such as could have been interposed to the original narr. The action for the negligence was, in fact, commenced within twelve calendar months from the death of Zier, and hence the plea which averred that the cause of action did not accrue within twelve months before the filing of the amended declaration ought to have been stricken down on demurrer, and there was consequently error in overruling the demurrer thereto. Because of the error just named, the judgment must be reversed, and a new trial will be awarded." The court of appeal, first district, of California, in *Rauer Law & Collection Co. v. Leffingwell*, 11 Cal. App. 494, 105 Pac. 427, refused to follow the *Eylenfeldt* rule, and denied the soundness of the contention that where the original complaint stated no cause of action, while the amended complaint stated a perfect cause of action, the latter necessarily stated a new and different cause of action. A rehearing was denied by the supreme court. The supreme court of Montana in *Clark v. Oregon Short Line R. Co.* 38 Mont. 177, 90 Pac. 298, reversed the ruling of the district court, sustaining a plea that the amended complaint, for the first time stating a cause of action, was barred by the statute of limitations. The question is discussed at length; the court saying it is a new one in the state. The supreme court of Georgia in the case of *Savannah, F. & W. R. Co. v. Smith*, 93 Ga. 742, 21 S. E. 157, though not directly in point, approves the practice of permitting amendments after the bar of the statute became complete, where the original declaration failed to state a cause of action. The supreme court of South Carolina in *Lilly v. Charlotte, C. & A. R. Co.* 32 S. C. 142, 10 S. E. 932, is in accord with the *Illinois* rule expressed in the *Eylenfeldt* Case, although perhaps 33 L.R.A. (N.S.)

affected by a local practice making amendments discretionary with the trial court; this being an affirmance. This South Carolina case is criticized in *Love v. Southern R. Co.* 108 Tenn. 104, 55 L.R.A. 471, 65 S. W. 475, which reviews the authorities, and holds that where a cause of action for wrongful death is properly brought by the personal representative in right of the deceased, by the filing of a valid summons, but the declaration is a nullity because the statutory beneficiaries are not named, a new declaration may be filed for the purpose of naming them, even after the limitation period has elapsed, since the declaration relates back to the filing of the summons. In speaking of the case of *Lilly v. Charlotte C. & A. R. Co.* supra, it is said: "The case is an extreme one, and somewhat technical, as we think, in its holding." In North Carolina in the litigation of *Webb v. Hicks*, reported in 116 N. C. 598, 21 S. E. 672, 123 N. C. 244, 31 S. E. 479, and 125 N. C. 201, 34 S. E. 395, and again in *Woodcock v. Bostic*, 128 N. C. 243, 38 S. E. 881, the supreme court indicates its view that a pleading defective, in that it fails to state a cause of action, may nevertheless be sufficient to prevent the bar of the statute of limitations attaching. The supreme Court of Nebraska in the case of *Merrill v. Wright* reversed a judgment in favor of Merrill, because in the petition there was neither averment nor proof of the existence of a levy of assessment of taxes for the amount for which Merrill had obtained judgment. After the case was remanded, the petition was amended, and to it as amended the plea of the statute of limitations was interposed and sustained. The court said (54 Neb. 517, 74 N. W. 955); "The action [original], however, was for the same relief prayed in the amended petition, but in the original petition sufficient facts to entitle plaintiff to that relief were not stated. The argument of the appellees is, however, that, because of this failure, the petition must be treated as though it were an absolute nullity. In other words, as though no petition had ever been filed. From this principle, and its attempted application, it would of necessity result that no amendment could be made upon a general demurrer being sustained to a petition. The rules of the Code of Civil Procedure are not thus inflexible. . . . We therefore conclude that the bar of the statute of limitations was not well pleaded, and the judgment of the district court dismissing the action of said appellant is accordingly reversed." This ruling is adhered to in *Chicago, R. I. & P. R. Co. v. Young*, 67 Neb. 568, 93 N. W. 922. The supreme

court of Michigan in *Stanley v. Anderson*, 107 Mich. 384, 65 N. W. 247, a case involving the statute of limitations, dismisses the matter thus: "Counsel's contention must rest upon the somewhat technical proposition that, because the first declaration was defective in alleging the cause of action, to the extent that it did not contain a sufficient allegation of a breach, no cause of action was set up, and of necessity the amended declaration, which did set up a cause of action, must state a new and different one. We think this contention is too technical, and that the cases cited are so readily distinguishable in this respect as not to call for a discussion of them." See also *Detroit v. Wayne Circuit Judge*, 125 Mich. 634, 85 N. W. 1. The question has been before the circuit court of appeals for the eighth circuit in the case of *Patillo v. Allen-West Commission Co.* 65 C. C. A. 508, 131 Fed. 680. A demurrer had been sustained to the original complaint. An amendment was filed after the statute had run. The court held that no new or independent cause of action was thus presented, and that it "related back to the commencement of the action, where the running of the statute of limitations against the cause of action upon the account stated ceased."

The following cases touch closely related phases of the subject of the amendments of pleadings after the bar of the statute of limitations has become complete; *Louisville & N. R. Co. v. Pointer*, 113 Ky. 952, 69 S. W. 1108; *Myers v. Kirt*, 68 Iowa, 124, 26 N. W. 22; *Texas & P. R. Co. v. Johnson*; — *Tex. Civ. App.* —, 34 S. W. 186 (collecting Texas cases); *Alabama Consol. Coal & I. Co. v. Heald*, 154 Ala. 580, 45 So. 686 (opinions by divided court elaborately discussing general question, with the majority favoring liberality in allowing amendments); *Powers v. Badger Lumber Co.* 75 Kan. 687, 90 Pac. 254 (following the *Bagley* Case). See also note, "The relation of new pleadings to statutes of limitations," in 3 L.R.A.(N.S.) 259. We believe that the cases here cited fairly present the variant views touching the question we are endeavoring to solve, namely, is the conclusion of the *Bagley* class of cases sound, that where the original complaint is defective, in that it fails to state a cause of action, formal or informal, the statement for the first time of a cause of action by amendment necessarily is the statement of a "new" cause of action, within the meaning of the generally accepted rule that an amendment which introduces a new or different cause of action does not relate back to the beginning of the action so as to arrest the running of the

statute of limitations? From these authorities we deduce the conclusion that the failure of the original complaint to state facts sufficient in form or substance to constitute a cause of action is not of itself the conclusive test. Confusion has arisen from a lack of an exact definition and common understanding of the term "new," as used in this rule. The supreme court of Illinois, in the *Eylenfeldt* Case, was the first, so far as we have discovered, to say: "Inasmuch as the original declaration stated no cause of action, it seems to follow that the amended declaration stated a new cause of action,—one which had never been stated before,—and hence the statute of limitations was a good defense." (Italics ours.) Unquestionably, in one sense in which "new" is in common usage, it means "other than" or "different from," and it is irresistible that in such sense a pleading which for the first time states a cause of action states a new cause of action. So, equally, in one meaning of the words "different" or "distinct," such perfect pleading states a "different" or "distinct" cause of action. But the expression, "new or different cause of action," has had a technical meaning in the law of pleading. It is legitimate to assume that it was so used by those who formulated the "new cause of action" rule. That such technical meaning was theirs is amply illustrated in the early cases cited above. The test as to what is meant by "new cause of action," within the law of pleading, is furnished by the Supreme Court of the United States in a case involving the question of amendment after the bar of the statute of limitations had become complete. "The decision as to the application of the Missouri law involves, first, the ascertainment of whether the amended petition presented a new cause of action. The legal principles by which this question must be solved are those which belong to the law of departure, since the rules which govern this subject afford the true criterion by which to determine the question whether there is a new cause of action in case of an amendment." *Union P. R. Co. v. Wyler*, 158 U. S. 285, 289, 39 L. ed. 983, 987, 15 Sup. Ct. Rep. 877, 879. It may further be said that the question of amendment of a defective complaint is a question of pleading. The question of the addition of a new cause of action to a pleading by amendment is one of the law of limitations. The law of limitations requires that an action shall be commenced within a definite period from the accrual of the cause of action. An action is commenced in this territory by the filing of a complaint. We have not here in mind the question as to whether such action must be prosecuted.

The law of limitations is thereby satisfied. The complaint, under the law of pleading, is bad, even though it indicates, if it does not state, a cause of action. The question as to its being good or bad, as to its being amendable or nonamendable, is purely one of the law of pleading. So long as amended to plead the same action, it is not obnoxious to the law of limitations. But, immediately upon there being an amendment which states a new action, the law of limitations must be looked to to determine whether such new action is barred; for, as to such new action, whether brought in by way of amendment or pleaded as an original action, the law of limitations governs. The decision is in reality that such new cause of action is barred, though in form the statement frequently is that the amendment will not be permitted.

Considering the question again from a standpoint of policy, it is too common matter of observation to be doubted that the most careful and experienced of practitioners fail at times in the statement of their clients' cause of action through no fault, but because of the unsettled condition of the law. So failing, even in essentials, there is no cogent reason for denying the right of amendment to perfect the cause of action attempted to be pleaded, after the bar of the statute of limitations is complete. The law of limitations, it is true, is one of repose. It is not, however, the purpose of the law to prevent trials where litigants have moved diligently, though erroneously. One great reason for such laws is to compel promptness of action, while events are still in mind and evidence available, that cases may be determined on their merits. That object of the statute is accomplished when the action is commenced. To permit the use of the technical law of pleading, formulated to facilitate trials, and to render more certain the administration of justice, to defeat a hearing and determination of what is justice, is wholly inconsistent with the spirit and policy of our law, which seeks a determination of every case upon a trial of the merits. The statement of the rule of the *Kepler Case*, "that, where the original complaint states no cause of action, it will not arrest the running of the statute of limitations, and an amendment made after the bar of the statute is complete must be treated as filed at the time the amendment is made," finds support in the cases considered, and is itself supported by reason if construed as applicable to the class of complaints before the supreme court of Illinois in the *Eylenfeldt Case*, where there was no attempt to state a cause of action in the orig-

inal complaint. The *Kepler Case*, however, makes the test of the applicability of the rule the failure of the original complaint to state a cause of action, when attacked by general demurrer. That test is sound in theory, and is the logical line of demarcation between the statement and no statement of a cause of action. But experience in so applying the rule has demonstrated that the test is too rigorous. Even in Illinois, where the rule is most frequently enforced, the court has not adhered to the letter of the law. *Doyle v. Sycamore*, supra. There are many cases which fall between the extremes of the *Eylenfeldt Case*, where there was no attempt to state a cause of action, and the *Patillo Case*, supra, where the defect was the failure to expressly aver the legal conclusion, the promise to pay the balance of an account stated. The propriety of amendments in all cases where the statute of limitations has intervened may be tested by the new cause of action rule, stated by this court in *Motes v. Gila Valley, G. & N. R. Co.* 8 Ariz. 50, 54, 68 Pac. 532. Inasmuch as the case at bar must be remanded for further proceedings, and the question may arise as to the amendment stating a new cause of action, we deem it proper to indicate when amendments to complaints which fail to state a cause of action, as tested by general demurrer, are to be permitted after the statute of limitations has run. Where the original complaint fails to state facts sufficient to constitute a cause of action, tested by a general demurrer, an amendment filed after the bar of the statute of limitation is complete is not subject thereto, provided the facts stated in the original complaint are sufficient when read in the light of the amendment, to disclose that such amendment is but the perfection of the imperfect statement of the cause of action originally attempted to be pleaded, and not the statement of a new or different cause of action. The opinion expressed in *Kepler v. Becker* is modified accordingly.

As there is no contention under the demurrer sustained by the trial court, that the amended complaint in this action states a new or different cause of action from that attempted to be set forth in the original complaint, the judgment is reversed, and the cause remanded, with direction to overrule the demurrer to the amended complaint.

Kent, Ch. J., and Doe, J., concur.

Doan, J., dissents.

MISSISSIPPI SUPREME COURT.

J. C. OAKES, Appt.,

v.

STATE OF MISSISSIPPI.

(— Miss. —, 54 So. 79.)

Libel — determination of law — charge of court.

1. The court may require the jury to consider only the law given in its charge in a libel suit, notwithstanding the Constitution provides that in such suits the jury shall determine the law and the facts, under the direction of the court.

Same — reading law to jury.

2. Counsel may be forbidden to read to the jury from law books in arguing a libel cause to them, notwithstanding the Con-

stitution provides that in such suits the the jury shall determine the law and the facts, under the direction of the court.

Same — imputing crime to officer.

3. A communication false in fact, addressed to the general public, imputing the commission of a criminal offense or of a moral delinquency to a public officer in the discharge of his official duties, is not privileged, although made in good faith and on probable cause.

Evidence — libel — motive.

4. One on trial for libeling a public officer may state to the jury what his motive was in making the publication, if there is evidence which would justify the jury in finding that the alleged libelous matter was true.

(November 28, 1910.)

Note. — Effect of provision that jury shall determine the law and the facts in libel cases.**Reason for the provision.**

To understand the language of these constitutional or statutory provisions and the controversy that has arisen in interpreting them, it is necessary to go into their history and see what the conditions were that led to their enactment. This has been so well done in *OAKES v. STATE* that any extended discussion of that phase of the question would be largely a matter of unnecessary repetition. Briefly stated, there had grown up in the courts of England a practice of denying to juries the right to render a general verdict upon the whole question of guilt in prosecutions for libel, it being held that the function of the jury in such cases was merely to determine whether or not the article had been published by defendant, and whether or not the innuendoes, if any were alleged, were true; a verdict of guilty amounting merely to a special verdict upon the facts as to these matters. If the jury found a verdict of not guilty, that, of course, ended the matter; but when a verdict of guilty was rendered, it became the duty of the court to apply the law to the facts found, and to pronounce defendant guilty or not guilty, according to its view as to the libelous nature of the writing. Thus it will be seen that libel prosecutions were placed upon a different footing from others in which, while the jury is supposed to take the law from the court, they really pass upon the whole question of defendant's guilt, and have the power, if not the right, to pass upon the law as well as the fact. It was feared that this extra power which the judges had assumed in prosecutions for libel had, or at least might, become a serious menace to the freedom of the press, because of the natural bias of the judges in favor of the Crown, by which authority they were appointed. To remedy this evil, Parliament passed, in 1792, a statute which became 33 L.R.A. (N.S.)

known as the "Fox act," declaring that, in prosecutions for libel, the jury might give a general verdict of guilty or not guilty upon the whole matter put in issue, and providing that the court should, according to its discretion, give its opinion and direction to the jury in like manner as in other criminal cases.

The construction generally placed upon this statute by the English courts was in accordance with the object of the statute as set forth above,—i. e., to restore to juries the same, but no greater, power in prosecutions for libel than they had in other criminal prosecutions. See *Rex v. Burdett*, *Reeves v. Templar*, and *Parmiter v. Coupland*, which are set out in *OAKES v. STATE*.

The principle of the Fox act was later applied by the courts to civil actions for libel, though in terms it referred only to criminal cases, and *Hakewell v. Ingram*, 28 Eng. L. & Eq. 413, holds that the statute did not take from the court or impose upon the jury the duty of deciding the point of law as to what is or is not a libel.

Statutes or constitutional provisions having similar import to the Fox act, some of which apply to civil as well as criminal cases, have been adopted in many of the United States, and have been variously interpreted by the courts.

In *State v. Jay*, 34 N. J. L. 368, the court said that the evil to be remedied was that, by the course of judicial decisions, the jury had been deprived of their right to deal in the ordinary mode with this class of prosecutions.

In *Harris v. State*, 7 Lea, 538, which was a trial for murder, the court had occasion to discuss the effect of the provision concerning libel, and said: "It is one of the things hard to be accounted for, how the language we have quoted was ever seen to have made any alteration whatever in the recognized, traditional, and long-settled rules of the common law as to the function and rights of a jury in all criminal cases."

The ultimate object to be attained by these provisions is the safeguarding of the

APPEAL by defendant from a judgment of the Circuit Court for Lawrence County, convicting him of libel. Reversed.

The facts are stated in the opinion.

Messrs. Mounger & Mounger, for appellant:

The defendant had a right to read from the books as to the law, and the jury did not have to look solely to the instructions given by the court.

State v. Armstrong, 106 Mo. 395, 13 L.R.A. 419, 27 Am. St. Rep. 361, 16 S. W. 604; State v. Whitmore, 53 Kan. 343, 42 Am. St. Rep. 288, 36 Pac. 748; State v. Verry, 30 Kan. 416, 13 Pac. 838.

It is permissible to publish the truth upon a lawful occasion, even though it reflect upon the government or its magis-

trates. When a matter is of a public and general interest, this constitutes lawful occasion.

State v. Burnham, 9 N. H. 34, 31 Am. Dec. 217; *Respublica v. Dennie*, 4 Yeates, 267, 2 Am. Dec. 402; *Castle v. Houston*, 19 Kan. 417, 27 Am. Rep. 127; *State v. Bush*, 122 Ind. 42, 23 N. E. 677; *Com. v. Clap*, 4 Mass. 163, 3 Am. Dec. 212; *Com. v. Blanding*, 3 Pick. 304, 15 Am. Dec. 214; *Com. v. Damon*, 136 Mass. 441; *Com. v. Reed*, 30 Phila. Leg. Int. 424; *Coleman v. MacLennan*, 78 Kan. 711, 20 L.R.A.(N.S.) 361, 130 Am. St. Rep. 390, 98 Pac. 281; *Palmer v. Concord*, 48 N. H. 211, 97 Am. Dec. 611.

The jury in a libel case must pass on the defendant's motives in making the publication.

freedom of the press. *Castle v. Houston*, 19 Kan. 417, 27 Am. Rep. 127; *Sands v. G. W. Marquardt & Sons*, 113 Mo. App. 490, 87 S. W. 1011.

And the preferable interpretation as to the extent to which these provisions go, both from the standpoint of their history and of the desirability of having a definite and uniform body of law upon the question of libel, would seem to be that these provisions merely secure to the jury the right to render a general verdict of guilty or not guilty, as in other criminal cases. *Drake v. State*, 53 N. J. L. 23, 20 Atl. 747; *Com. v. McManus*, 143 Pa. 64, 14 L.R.A. 89, 21 Atl. 1018, 22 Atl. 761; *State v. Syphrett*, 27 S. C. 29, 13 Am. St. Rep. 617, 2 S. E. 624.

Such, however, has not been the uniform interpretation placed upon these provisions, in this country, at least, and various questions have been raised as to the relative powers of the judge and jury where they are in force. While some of this difference of interpretation may be due to variations in the wording of the statutes, some providing merely that the jury shall be judges of the law and the facts, while others add, "under the direction of the court, as in other criminal cases," or similar limitations, it would be difficult, if not impossible, to distinguish the cases on this ground, for the reason that some courts construe the former expression as merely restoring or insuring to juries the same power in libel cases which they have in other criminal cases, while others interpret provisions of the latter kind as giving the jury a greater power.

Power of court—to grant a nonsuit.

In *Hazy v. Woitke*, 23 Colo. 556, 48 Pac. 1048, and *Ukman v. Daily Record Co.* 189 Mo. 378, 88 S. W. 60, it was held that, notwithstanding the constitutional provisions which apply to all suits and prosecutions for libel, of whatever nature, a judgment of nonsuit in civil actions for libel may be directed by the court in like manner as in other cases.
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And in *Cox v. Lee*, L.R. 4 Exch. 284, 38 L. J. Exch. N. S. 219, 21 L. T. N. S. 178, applying the principle of the Fox act to a civil case, and holding that libel actions are on the same footing as other cases, it is said by Kelly, C. B., that unless the judge is satisfied that the publication cannot be libel, and that, if found by the jury to be such, their verdict will be set aside, he is not justified in withdrawing the question from their consideration.

—demurrer or motion to quash, etc.

In *Reeves v. Templar*, 2 Jur. 137, it was held that the Fox act was not intended to take from the court the power to decide whether or not certain words were libelous *per se*, but that it might do so if the libel appeared plainly from the matter stated, and that this question may be decided on demurrer.

In *State v. Norton*, 89 Me. 290, 36 Atl. 394, it is said that whether or not the article published constitutes a criminal libel is wholly for the jury; but that this provision is for the benefit of the accused, and may be waived by him, which is done by demurring to the indictment.

And carrying out the idea that these provisions are for the benefit of the accused, it was held in *Heller v. Pulitzer Pub. Co.* 153 Mo. 205, 54 S. W. 457, that while the court could sustain a demurrer to plaintiff's petition, or grant a nonsuit, or sustain a motion in arrest of judgment against the defendant it could not direct a verdict for the plaintiff in a libel case.

In *Diener v. Star-Chronicle Pub. Co.* 230 Mo. 613, 132 S. W. 1143, it was held that the court may determine on demurrer that the matter alleged is not libelous *per se*. And to the same effect is *Morris v. Sailer*, — Mo. App. —, 134 S. W. 98.

And in *St. James Military Academy v. Gaiser*, 125 Mo. 517, 28 L.R.A. 667, 46 Am. St. Rep. 502, 28 S. W. 851, it was held that it is not the duty or province of the jury to pass upon the pleadings, and it is for the court to say whether the petition states a good cause of action.

State v. Allen, 1 M'Cord, L. 525, 10 Am. Dec. 690; *Johnson v. St. Louis Dispatch* Co. 65 Mo. 539, 27 Am. Rep. 293; *Hetherington v. Sterry*, 28 Kan. 426, 42 Am. Rep. 169; *Palmer v. Concord*, 48 N. H. 211, 97 Am. Dec. 612; *Upton v. Hume*, 24 Or. 420, 21 L.R.A. 493, 41 Am. St. Rep. 863, 33 Pac. 810; *Coleman v. MacLennan*, 78 Kan. 711, 10 L.R.A. (N.S.) 361, 130 Am. St. Rep. 413, 98 Pac. 281; *Com. v. Damon*, 136 Mass. 441.

Mr. Carl Fox, for appellee:

Under § 13 of the Constitution, in prosecutions for libel, the jury shall construe the paper or writing which is charged to be a libel, and say whether it is in fact a libel, and whether it was published with

malicious intent. In that sense, and that sense only, shall the jury "determine the law."

State v. Armstrong, 106 Mo. 395, 13 L.R.A. 419, 27 Am. St. Rep. 361, 16 S. W. 604; *Odgers, Libel & Slander*, 4th ed. 680, 681; *Reg. v. Sullivan*, 11 Cox, C. C. 52; *State v. Burpee*, 65 Vt. 1, 19 L.R.A. 145, 36 Am. St. Rep. 775, 25 Atl. 964, 9 Am. Crim. Rep. 536; *Com. v. Anthes*, 5 Gray, 185; *People v. Crosswell*, 3 Johns. Cas. 336; *Com. v. McManus*, 143 Pa. 64, 14 L.R.A. 89, 21 Atl. 1018, 22 Atl. 761.

The publication of the circular was in no sense, and under no view of the law, privileged. If Mr. Oakes had honestly believed the statements made by him in the circular to be true, if he had had reason-

Extent of jury's power.

In *Benton v. State*, 59 N. J. L. 551, 36 Atl. 1041, it was held that the court could not grant a motion to quash or in arrest of judgment, on the ground that the publication was not libelous, as long as the language thereof was such that an inference might reasonably be drawn by the jury that the words were within the definition of libel, as laid down by the court.

In *Banner Pub. Co. v. State*, 16 Lea, 176, 57 Am. Rep. 216, under a provision that the jury shall have the right to determine the law and the facts under the direction of the court, as in other criminal cases, it was held to be the province of the court to tell the jury whether the publication is *prima facie* libelous, and to determine whether, on its face, it is indictable *per se*.

And in *Squires v. State*, 39 Tex. Crim. Rep. 96, 73 Am. St. Rep. 904, 45 S. W. 147, it was held that the court is authorized to determine whether the particular matter charged comes within the definition of libel, but that it is the function of the jury to determine the intent with which the libel was published.

—to set aside verdict.

In *Hakewell v. Ingram*, 20 Eng. L. & Eq. 413, it was held that the court might set aside a verdict for defendant in a case where the fact of publication and its application to plaintiff was not in question.

In *State v. Zimmerman*, 31 Kan. 85, 1 Pac. 257, under a provision that in all prosecutions for libel the jury have the right to determine at their discretion the law and the fact, it was held that the court has no power to set aside a verdict, and therefore no power to set aside a part of the verdict finding that the prosecution was instituted without probable cause and from malicious motives, which threw the costs on the prosecutor, and to adjudge that the costs should be paid by the county.

And in *Re Lowe*, 46 Kan. 255, 26 Pac. 749, the court approves *State v. Zimmerman*, and says that the court has no power to interfere with the verdict in any prejudicial respect.

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Instructions—right of court to instruct the jury.

Where provisions of the kind under discussion are in force, a question is sometimes raised as to the right of the judge to instruct the jury upon the law.

In *Parmiter v. Coupland*, 4 Jur. 701, 9 L. J. Exch. N. S. 202, 6 Mees. & W. 105, the court says that the proper course for the judge is to declare the meaning of the term "libel," and to assist the jury in drawing their conclusion from the facts; and that he might in a particular case tell them

able grounds for his honest belief, and if he had published the circular only to the governor of the state, who alone has the power to appoint circuit judges, then it might be urged that it was privileged.

2 Wharton, *Crim. Law*, 10th ed. §§ 1630, 1635, 1636; Cooley, *Const. Lim.* 7th ed. 619; Odgers, *Libel & Slander*, 4th ed. 281-289; Newell, *Defamation*, 2d ed. 504, 505; 29 *Cyc. Law & Proc.* pp. 388; 399; 25 *Cyc. Law & Proc.* p. 405; *Hunt v. Bennett*, 19 N. Y. 173; *Knapp v. Campbell*, 14 Tex. App. 199, 36 S. W. 765.

Whether the occasion is "privileged" or not is a question for the court when the facts are undisputed.

Warner v. Press Pub. Co. 132 N. Y. 181, 30 N. E. 393; *Ramsey v. Cheek*, 109 N. C.

that if the words were used in the ordinary sense, they would be libelous, but failure to do so is no ground for a new trial.

And in *Baylis v. Lawrence*, 11 Ad. & El. 920, 4 Jur. 652, 9 L. J. Q. B. N. S. 196, 3 Perry & D. 526, it is held that the court is not bound to instruct the jury as to whether the publication is libelous as a matter of law.

And in *State v. Jeandell*, 5 Harr. (Del.) 475, under a provision that the jury may determine the facts and the law, as in other cases, it was held that whether a publication is libelous or not is a question of law; that all questions of law are for the court to instruct the jury upon; and it is the duty of the jury to take the law from the court, as they take the facts from witnesses, and make their verdict accordingly.

In *Walston v. Com.* 32 Ky. L. Rep. 535, 106 S. W. 224, in denying a rehearing of the case as reported in 31 Ky. L. Rep. 378, 102 S. W. 275, it was held that a provision giving a jury the right to determine the law and the facts under an instruction of the court, as in other cases, does not prevent the court, in a prosecution on an indictment for libel, from instructing the jury on the law of the case.

In *State v. Simpson*, 136 Mo. App. 664, 118 S. W. 1187, under a provision that the jury shall determine the law and the fact under the direction of the court, it was held to be error to instruct that certain words constitute a charge of a certain offense, which would be slanderous, as it is the jury's province to determine whether the words were slanderous.

In *Drake v. State*, 53 N. J. L. 23, 20 Atl. 747, a provision that the jury shall have the right to determine the law and the fact was held not to be intended to affect the duty of the court to instruct the jury with regard to the general principles of criminal law and of the law of libel, but that, on these points, the instructions retained the same force which they previously possessed.

In *People v. Sherlock*, 56 App. Div. 422, 15 N. Y. Crim. Rep. 297, 68 N. Y. Supp. 33 L.R.A. (N.S.)

270, 13 S. E. 775; *Newell, Defamation*, 2d ed. 391, 392; *Odgers, Libel & Slander*, 4th ed. 217, 236, 320, 324.

Smith, J., delivered the opinion of the court:

Appellant was indicted and convicted in the court below of libel, and appeals to this court. The indictment alleged that he had published and circulated a handbill, charging the circuit judge of the district with having committed several high crimes and misdemeanors, setting out the particulars thereof, while in the discharge of his official duties. Appellant's defense was that the statements made by him were true, and were published with good motives and for justifiable ends. One of the instructions

74, affirmed in 166 N. Y. 180, 59 N. E. 830, under a provision that the jury may determine the law and the facts under the direction of the court, it was held to be the right and duty of the court to tell the jury what the law is, as long as he does not arrogate to himself the right belonging to them to determine the law and the fact.

In *State v. Syphrett*, 27 S. C. 29, 13 Am. St. Rep. 616, 2 S. E. 624, under a provision that the jury shall be the judge of the law and the fact, it is held to be the right and duty of the judge to declare the law to the jury, and that, if he errs, the error may be reviewed upon appeal, unless defendant is acquitted.

—effect of instruction.

A question more frequently raised, however, is the force and effect which the instruction of the court is to have upon the jury.

In *People v. Seeley*, 139 Cal. 118, 72 Pac. 834, it was held that the judge has a right to instruct the jury, but these instructions are advisory only. The jury can disregard the instructions and bring in a verdict even contrary to the evidence; but that it is proper for the court to instruct the jury that "under the constitutional law, if the jury can say on their oaths that they know the law better than the court does, they have the right to do so; but before assuming so solemn a responsibility they should be sure that they are not acting from caprice or prejudice, that they are not controlled by their will or wishes, but from a deep and confident conviction that the court is wrong and that they are right. Before saying this on their oaths, it is their duty to reflect whether, from their habits of thought, their duty and experience, they are better qualified to judge of the law than the court. If, under all those circumstances, they are prepared to say that the court is wrong in its exposition of the law, the Constitution has given them that right."

And an instruction almost identical was approved in *State v. Heacock*, 106 Iowa,

given by the court to the jury, at the request of the state, was as follows: "The court charges the jury that all the law to be considered by them in reaching a verdict in the case is contained in the written instructions given by the court, and upon these instructions and the evidence alone should their verdict be made." During the argument of the case appellant's counsel attempted to read to the jury from certain law books dealing with the law of libel, but, on objection by the state, was by the court prevented from doing so. These two actions of the court are assigned for error, and this assignment necessitates a construction by us of that portion of § 13 of our state Constitution of 1890 which provides that "the jury shall determine the law and

the facts, under the direction of the court."

Section 13, in full, is as follows: "The freedom of speech and of the press shall be held sacred; and in all prosecutions for libel the truth may be given in evidence; and the jury shall determine the law and the facts under the direction of the court; and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be acquitted." The contention of appellant is that by this section of the Constitution the jury have the right to determine both the law and the facts; that they not only have the right to apply their own knowledge of the law, but may receive information relative thereto from sources other than the instructions

191, 76 N. W. 654, where it was held that the jury has not only the power, but the right, to decide in conflict with instructions, and is not required to follow the charge of the court, which must be regarded as advisory, and not conclusive as to the duty of the jury.

In *State v. Rice*, 56 Iowa, 431, 9 N. W. 343, however, it was held that the court has the right to instruct, and it is conclusively presumed that the jury will follow the instruction; and therefore it cannot be said that an erroneous instruction is not prejudicial simply because the jury has the right to determine both the law and the fact.

In *State v. Zimmerman*, 31 Kan. 85, 1 Pac. 257, and *State v. Verry*, 36 Kan. 416, 13 Pac. 838, it is held that the instructions of the court are not to bind the consciences of the jury, but only to inform their judgments.

In *Tresca v. Maddox*, 11 La. Ann. 206, 66 Am. Dec. 198, where the statute provides that the jury shall be the judge of the law and the facts in all prosecutions for libel, the court expresses doubt as to whether it applies to civil actions, but says if it does, it does not relieve the judge from the duty of instructing on the law, though the jury may disregard his instructions if they see fit.

In *State v. Goold*, 62 Me. 509, under a provision that the jury may determine at their discretion both the law and the fact, it was held error to instruct the jury that it was the duty of the court to direct them whether the publication was or was not libelous, and that it was their duty to be governed thereby, and the court points out the difference between the powers of the jury in prosecutions for libel and other criminal cases, as follows: "In fact, in all criminal trials, a general verdict of guilty affirms not only that the defendant committed the act in question, but also that the act was one prohibited by law; and to this extent such a verdict does in every case determine the law as well as the fact. But the difference between indictments for li-

bels and other criminal prosecutions is this: that in the former the jury may rightfully pass upon the criminality of the act, although their judgment in that respect is contrary to the opinion of the court; while in the latter they have no such right. In the latter, as in the former, they do in fact pass upon the law as well as the facts involved in the issue; but in the former the Constitution secures to them the right to determine the law for themselves, while in the latter it is their duty to follow the instructions of the court."

In *State v. Powell*, 66 Mo. App. 598, it was held to be error to instruct the jury that they are to be guided by the instructions of the court, as all the court can do is to advise the jury as to the law, and let them follow that direction or not, as they see fit.

In *Paxton v. Woodward*, 31 Mont. 195, 107 Am. St. Rep. 416, 78 Pac. 215, 3 A. & E. Ann. Cas. 546, under a provision that in all suits and prosecutions for libel the jury, under the direction of the court, shall determine the law and the facts, it was held that though the jury is judge of the law as to the libel, it is the duty of the judge to instruct them, and an erroneous instruction is ground for reversal.

State v. Patterson, 2 N. J. L. J. 218, holds that the provision merely puts libel cases on the same footing as others; and the jury is to apply the law as explained by the court to the facts, but not to decide what the law is.

Ross v. Ward, 14 S. D. 240, 86 Am. St. Rep. 746, 85 N. W. 182, holds that under a provision that the jury shall determine the facts and the law under the direction of the court, the court may direct the jury by stating to them what constitutes a privileged communication; but whether or not the particular communication is privileged is for the jury to determine.

And under a similar provision it is held in *McArthur v. State*, 41 Tex. Crim. Rep. 635, 57 S. W. 847, that the jury are judges of the law under the direction of the court, as in other cases, and that they are to take

of the court; that, consequently, the court erred in granting instruction No. 1 for the state, and also in not permitting appellant's counsel to read to the jury from law books dealing with the law of libel.

In all criminal cases the guilt or innocence of the defendant is a mixed question of law and fact, and the verdict of guilty or not guilty is a compound of, and determines, both. In rendering such a verdict, juries must act upon the law as given them by the court. The facts they find themselves, then apply the one to the other, and from both determine the guilt or innocence of the defendant on trial. To this extent, they, in all criminal cases, determine both the law and the facts. This results, of necessity, from their right to return a general verdict. This right of juries to render a verdict in criminal cases, as broad as the issue involved, was never doubted after the common law became fully developed, except in cases of trial for criminal libel, and it was to remove this doubt that this provision of our Constitution was adopted. This doubt arose by reason of the decision of Lord Mansfield in Woodfall's Case, 20 How. St. Tr. 895, followed later, by the full court, in the celebrated case of Dean of St. Asaph, 3 T. R. 428, note, and by the disagreement of the judges of the supreme court of New York in the equally

celebrated case of *People v. Crosswell*, 3 Johns. Cas. 365. In these cases, in both of which the defendants were being prosecuted for criminal libel, the juries were not permitted to pass upon the whole matter in issue. The only questions submitted to them were: First, whether the defendant was guilty of publishing; second, whether the innuendoes were justly stated and applied. If both of these questions were answered in the affirmative, then the jury were required to return a verdict of guilty, leaving the construction of the words charged to be libelous and the motive of the defendant in publishing same to be afterwards determined by the court, as a matter of law, upon a motion in arrest of judgment.

The ground of the decision in the case of the Dean of St. Asaph was that all written instruments must be construed, and the meaning and effect of the words used therein settled, as matter of law, by the court; and that consequently, when the words of the alleged libel were copied in the indictment, and the fact of the publication and the truth of the innuendoes was by the verdict of the jury established and placed on the record, the legal character of the words used could then be determined by an inspection of the record, and would be open, after the verdict, to be decided as a question of

the law from the court, and are required to be governed thereby, and should not construe the law for themselves.

—propriety of instructing jury as to their power to determine the law.

In *People v. McDowell*, 71 Cal. 194, 11 Pac. 868, it was held to be error to instruct, in effect, that the jury might, if they thought proper, ignore the law defining libel, for while they are to determine the law as well as the facts, they are not at liberty to determine that which the statute declares to be criminal libel to be otherwise.

But in *McCloskey v. Pulitzer Pub. Co.* 152 Mo. 339, 53 S. W. 1087; *Benton v. State*, 59 N. J. L. 551, 36 Atl. 1041; and *Duncan v. Williams*, 107 Mo. App. 539, 81 S. W. 1175, it was held to be proper to instruct the jury that they are the sole judges of the law.

In *State v. Armstrong*, 106 Mo. 395, 13 L.R.A. 419, 27 Am. St. Rep. 361, 16 S. W. 604, expressly overruling *State v. Hosmer*, 85 Mo. 553, under a provision that the jury, under the direction of the court, shall determine the law and the fact, it was held proper, after instructing the jury fully, further to instruct them that they were judges of the law and the fact in libel, and were not required to accept the court's instruction as conclusive of the law. And similar instructions were approved in *Arn-33 L.R.A. (N.S.)*

old v. Jewett, 125 Mo. 241, 28 S. W. 614, and case of *Reg. v. Sullivan*, 11 Cox, C. C. 51.

But in civil cases it is not error for the court to fail to instruct that the jury is the judge of both the law and the fact, when such instructions are not requested. *Mitchell v. Bradstreet Co.* 116 Mo. 226, 20 L.R.A. 138, 38 Am. St. Rep. 592, 22 S. W. 358, 724; *Minter v. Bradstreet Co.* 174 Mo. 444, 73 S. W. 668.

Right of counsel to argue law to jury.

In *State v. Verry*, 36 Kan. 416, 13 Pac. 838, it was held that counsel for defendant has the right to discuss his theory of the law before the jury, though it differs from that expounded by the court.

In *State v. Whitmore*, 53 Kan. 343, 42 Am. St. Rep. 288, 36 Pac. 748, it was held that, in discussing the law before the jury in libel cases, counsel for defendant may read from legal authorities; and while the court may restrict the arguments by preventing the reading of matters wholly foreign to the issue, it may not strictly confine counsel to authorities in line with the court's instructions.

But in *Heller v. Pulitzer Pub. Co.* 153 Mo. 205, 54 S. W. 457, it was held that reading to the jury from law books should not be allowed; and this is the rule adopted in *OAKES v. STATE*. R. L. S.

law by the court. In 1792, after the decision in this case, an act known as "Fox's libel act," and being chapter 60 of 32 George III., was passed by the English Parliament. This act was entitled, "An Act to Remove Doubts Respecting the Functions of Juries in Cases of Libel;" and declared that in all such cases the jury might render a general verdict of guilty or not guilty upon the whole matter in issue, and should not be required to render a verdict of guilty merely on proof of publication and of truth of the innuendoes.

The passage of this act was largely the result of the argument of Lord Erskine "in support of the rights of juries" on the motion for a new trial in the case of Dean of St. Asaph. In the course of that argument, among other things, he said: "I may affirm with equal certainty that the general verdict, *ex vi termini* is universally as comprehensive as the issue, and that consequently such a verdict on an indictment, upon the general issue, not guilty, universally and unavoidably involves a judgment of law, as well as fact, because the charge comprehends both; and the verdict, as has been said, is coextensive with it. Both Coke and Littleton give this precise definition of a general verdict, for they both say that, if the jury will find the law, they may do it by a general verdict, which is ever as large as the issue. If this be so, it follows by necessary consequence that, if the judge means to direct the jury to find generally against a defendant, he must leave to their consideration everything which goes to the constitution of such a general verdict, and is therefore bound to permit them to come to, and to direct them how to form, that general conclusion from the law and the fact, which is involved in the term 'guilty.' For it is ridiculous to say that guilty is a fact. It is a conclusion in law from a fact, and therefore can have no place in a special verdict, where the legal conclusion is left to the court." 1 Erskine's Speeches, High's ed. p. 329.

In the course of the debates on the bill, while under consideration by Parliament, it is said by Mr. Fox, the author thereof, that "there was a power vested in the jury to judge the law and fact as often as they were united; and if the jury were not to be understood to have a right to exercise that power, the Constitution would never have intrusted them with it;" that this was the case, not of murder only, but of every other criminal indictment; and it was said by Mr. Pitt that he "saw no reason why, in the trial of a libel, the whole consideration of the case might not go precisely to the unfettered judgment of twelve men, sworn to give their verdict honestly and conscien-

tiously, as matters of . . . [they] did in felony and other crimes of a high nature." Lord Camden, to whom much of the credit for the passage of the bill was due, said that "he did not apprehend that the bill had a tendency to alter the law, but merely to remove doubts that ought never to have been entertained." All of these extracts can be found set out in the opinion of Mr. Justice Gray, in *Sparf v. United States*, 156 U. S. 130, 39 L. ed. 373, 15 Sup. Ct. Rep. 273, 10 Am. Crim. Rep. 168, together with citations for the authority therefor.

In *Rex v. Burdett*, 4 Barn. & Ald. 131, 1 How. St. Tr. N. S. 1, it was said by Best, J.: "It must not be supposed that the statute of George III. made the question of libel a question of fact. If it had, instead of removing an anomaly, it would have created one. Libel is a question of law, and the judge is the judge of the law in libel as in all other cases; the jury having the power of acting agreeably to his statement of the law or not. All that the statute does is to prevent the question from being left to the jury in the narrow way in which it was left before that time. The jury were then only to find the fact of the publication, and the truth of the imputation; the intent was an inference of law, to be done; for the judges used to tell them that drawn from the paper, with which the jury had nothing to do. The legislature has said that that is not so, but that the whole case is to be left to the jury."

In *Reeves v. Templar*, 2 Jur. 137, it was said by Lord Abinger, referring to Fox's libel act: "Before that statute a practice had arisen of considering that the question, libel or no libel, was always for the court, independent of the intention and meaning of the party publishing. That statute corrected the error, and now, if the intention does not appear in the body of the libel, a variety of circumstances are to be left to the jury from which to infer it; but it was never intended to take from the court the power of deciding whether certain words are *per se* libelous or not.

In the case of *Parmiter v. Coupland*, 6 Mees. & W. 105, Parke, B., said to counsel, during the course of the argument: "In criminal cases the judge is to define the crime and the jury are to find whether the party has committed that offense. Mr. Fox's act made it the same in cases of libel, the practice having been otherwise before." And in the opinion rendered by him in the case, he further said: "Mr. Fox's libel bill was a declaratory act, and put prosecutions for libel on the same footing as other criminal cases."

It is, therefore, in the language of Mr.

Justice Harlan, in *Sparf v. United States*, 156 U. S. 98, 39 L. ed. 360, 15 Sup. Ct. Rep. 273, 10 Am. Crim. Rep. 168, "a mistake to suppose that the English libel act changed in any degree the general common-law rule in criminal cases as to the right of the court to decide the law, and the duty of the jury to apply the law thus given to the facts, subject to the condition, inseparable from the jury system, that the jury, by a general verdict, of necessity determined in the particular case both law and fact as compounded in the issue submitted to them. That act provides that 'the court or judge before whom such indictment or information shall be tried shall, according to their or his discretion, give their or his opinion and directions to the jury on the matter in issue between the King and the defendant, in like manner as in other criminal cases.'"

'This seems' Mr. Justice Curtis well said, 'to carry the clearest implication that, in this and all other criminal cases, the jury may be directed by the judge; and that, while the object of the statute was to declare that there was no other matter of fact besides publication and the innuendoes to be decided by the jury, it was not intended to interfere with the proper province of the judge to decide all matters of law.' *United States v. Morris*, 1 Curt. C. C. 55, Fed. Cas. No. 15,815."

In 23 Am. & Eng. Enc. Law, 2d ed. p. 549, it is stated that this act "did not change in any degree the general common-law rule in criminal cases as to the right of the court to decide the law, and the duty of the jury to apply the law thus given to the facts, subject to the condition, inseparable from the jury system, that the jury by general verdict of necessity determine in the particular case both the law and the fact, as compounded in the issue submitted to them."

The first constitutional provision of this character adopted in America seems to have been that contained in the Constitution of Pennsylvania, which was adopted in 1790, and is substantially the same as the provision of our Constitution. This occurred while the controversy over the rights of juries was at its height in England, after the trial of the case of the Dean of St. Asaph, and Fox's libel bill was still pending in Parliament.

After the disagreement of the judges in the case of *People v. Crosswell*, 3 Johns. Cas. 365, supra, in 1804, and while that case was still pending, the legislature of the state of New York enacted a statute declaring that "whereas, doubts exist whether, on the trial of an indictment or information for a libel, the jury have a

right to give their verdict on the whole matter in issue 1. Be it therefore declared and enacted, etc.: That on every such indictment or information, the jury who shall try the same shall have a right to determine the law and the fact, under the direction of the court, in like manner as in other criminal cases, and shall not be directed or required by the court or judge, before whom such indictment or information shall be tried, to find the defendant guilty, merely on the proof of the publication by the defendant of the matter charged to be libelous, and of the sense ascribed thereto in such indictment or information: Provided, nevertheless, that nothing herein contained shall be held or taken to impair or destroy the right and privilege of the defendant to apply to the court to have the judgment arrested, as hath heretofore been practised. 2. . . That in every prosecution for writing or publishing any libel, it shall be lawful for the defendant, upon the trial of the cause, to give in evidence, in his defense, the truth of the matter contained in the publication charged as libelous: Provided, always, that such evidence shall not be a justification, unless, on the trial, it shall be further made satisfactorily to appear that the matter charged as libelous was published with good motives and for justifiable ends." "We are thus introduced," in the language of the supreme court of New Jersey, in *Drake v. State*, 53 N. J. L. 23, 20 Atl. 747, "to the very language of that part of our constitutional provision which affords a complete defense to one prosecuted for libel, when he makes it appear to the jury that he published the truth with good motives, and for justifiable ends, and which establishes the right of the jury, in such prosecutions, to determine the law and the fact. Its sources, I [we] think, render its meaning evident."

The enactment of this statute was largely influenced by the argument of Alexander Hamilton in the case of *People v. Crosswell*, supra, and by the opinion of Chancellor Kent, rendered in the case. Hamilton only contended for the right of juries in libel cases to render a verdict as broad as the issue involved, and this contention was upheld by Chancellor Kent in the opinion rendered by him in the case. This provision was incorporated into our first Constitution, adopted in 1817, while this controversy over the rights of juries in libel cases was fresh in the minds of all men conversant with the then recent history of this country and of England. Had this controversy never arisen, there would have been no necessity for the adoption of this

provision. Since the controversy centered around the rights of juries to render a general verdict in libel cases, as broad and comprehensive as such a verdict is in all other criminal cases, the conclusion is irresistible that its adoption was for the purpose of settling the right of juries so to do, and not to confer upon them the right to determine the law for themselves without the assistance, or against the direction, of the court. Indeed, any doubt on this point ought to be removed by the language of the Constitution itself, for it does not simply provide that the jury shall determine the law and the facts, but provides that it shall do this "under the direction of the court." *State v. Burpee*, 65 Vt. 1, 19 L.R.A. 145, 36 Am. St. Rep. 775, 790, 25 Atl. 964, 9 Am. Crim. Rep. 536; *Com. v. Anthes*, 5 Gray, 185; *Drake v. State*, 53 N. J. L. 23, 20 Atl. 747; 2 McClain, Crim. Law, § 1070; 3 Greenl. Ev. § 179; *Com. v. McManus*, 143 Pa. 64, 14 L.R.A. 89, 21 Atl. 1018, 22 Atl. 761; *State v. Syphrett*, 27 S. C. 29, 13 Am. St. Rep. 617, 2 S. E. 624; *Brown v. State*, 40 Ga. 689; *Edwards v. State*, 53 Ga. 428; *Sparf v. United States*, 156 U. S. 51, 39 L. ed. 343, 15 Sup. Ct. Rep. 273, 10 Am. Crim. Rep. 168; *Cooley Const. Lim.* 7th ed. 665; *Franklin v. State*, 12 Md. 236; *Harris v. State*, 7 Lea, 538.

If juries have the right to determine the law of libel for themselves, free from the control of the court, the result would be not only that the law would be uncertain, because of the different views which different juries might take of it, but their judgment of the law, however erroneous, would be final; for in that event neither the trial court nor this court would have any right to review same, and could grant no relief to a defendant, however erroneously he may have been convicted. The court would have no right to decide any question of law which might arise on the trial, by demurrer or otherwise. Should a citizen, under this construction of the Constitution, be indicted for libel, and the matter charged to be such be never so harmless or lawful, the court would be powerless to prevent his conviction and punishment, should the jury decide that, in its judgment, the matter charged was libelous. The jury would be the judge of the meaning of the Constitution and statutes, whether statutes were valid, what the common law is, what the law of privilege is,—in short, of all questions of law which could arise on the trial. We are aware that those courts which have construed similar constitutional provisions in accordance with appellant's contention deny that this result follows therefrom; but in doing so they have involved themselves in all sorts of absurdities by at-

tempting to limit the right of juries to determine the law for themselves, when, if the Constitution confers such a right, it confers it without limit. Our view of the result of such an interpretation of this provision of the Constitution is sanctioned by the great name of Story in *United States v. Battiste*, 2 Sumn. 240, Fed. Cas. No. 14,545, and by the Supreme Court of the United States in *Sparf v. United States*, 156 U. S. 51, 39 L. ed. 343, 15 Sup. Ct. Rep. 273, 10 Am. Crim. Rep. 168. It is true these were not libel cases; but it will not be questioned that the principles therein announced apply to such cases. It follows, from the foregoing views, that the court committed no error in granting the instruction now under consideration; neither did the court err in refusing to permit counsel to read law books to the jury. *Ayers v. State*, 60 Miss. 709; *Bangs v. State*, 61 Miss. 363.

Complaint is made of the action of the court below in granting the sixth and seventh instructions requested by the state, and in refusing the seventh instruction requested by appellant. The instructions granted by the court on behalf of the state are as follows: (6) "The law implies a malicious intent from the deliberate publication of any matter which imputes to another the commission of any criminal offense, and it is not necessary that any express malice or evil intent should be shown." (7) "If, therefore, the jury believe from the evidence, beyond a reasonable doubt, that the defendant, J. C. Oakes, falsely published a handbill or circular in evidence, charging that Robt. L. Bullard violated the law in his official capacity, then the defendant is guilty as charged, and the jury should so find; and this is true without reference to whether the defendant's motives were good or bad, and without reference to whether he believed them to be true or untrue." By the seventh instruction requested by the defense and refused by the court, the court was requested to charge the jury, among other things, that, if they "believed from the evidence that the matters contained in the circular and alleged in the indictment to be libelous were published of and concerning a public officer, and were matters of public interest, and that the defendant proceeded with good motives, upon probable grounds, upon reasons which were apparently good, but upon a supposition which afterwards turned out to be unfounded, then the defendant was excusable, and the jury should acquit him, although they may believe that the charges were in fact untrue."

The exact question we are called upon by this assignment of error to answer, and the

one to which our response shall be limited, is this: Is a communication, false in fact, addressed to the general public, imputing the commission of a criminal offense or of moral delinquency to a public officer in the discharge of his official duties, privileged, when same is made in good faith and on probable cause? If the defendant is limited to the defense provided by the Constitution and statute, he is entitled to an acquittal only in the event the statements made by him are true, or do not appear beyond a reasonable doubt to be false. Appellant claims, however, that he is not limited to the language of the Constitution and statute, but is entitled to invoke, and that the requested instruction announces, the law of privilege. The law of privilege relating to communications addressed to the general public concerning public officers is thus stated in 18 Am. & Eng. Enc. of Law, 2d ed. p. 1041: "The official acts of public officers may lawfully be made the subject of fair comment and criticism, not only by the press, but by the members of the public. But the prevailing rule is that charges imputing a criminal offense or moral delinquency to a public officer cannot, if false, be privileged, though made in good faith; and this though the charge relates to an act of the officer in the discharge of his official duties." In 25 Cyc. Law & Proc. p. 402, the rule is stated as follows: "Comment on and criticism of the acts and conduct of public men are privileged, if fair and reasonable and made in good faith. But the right to criticize does not embrace the right to make false statements of fact, to attack the private character of a public officer, or to falsely impute to him malfeasance or misconduct in office." The rule as stated by these texts is fully supported by the legion of authorities there cited. A communication imputing the commission of a criminal offense or of moral delinquency to a public officer, even in the discharge of his official duties, is therefore not privileged, and the only defense for so doing is that same is true, and, in addition, was published from good motives and for justifiable ends. If the communication is in fact untrue, the motive with which it is published is wholly immaterial. The court, therefore, committed no error in granting and refusing the instructions now under consideration.

Appellant testified in his own behalf on the trial in the court below, and while on the stand was asked by his counsel what his motive in publishing the circular was, and what was the end he expected thereby to accomplish. To those questions objections were interposed by the state and sustained by the court. Should the jury have

believed that the matter charged to be libelous was true, then, but, of course, not until then, appellant's motive in publishing same became very material; for it must still appear that the publication was made "with good motives and for justifiable ends." There was no direct evidence of motive, and the jury were left to ascertain same from circumstances. On the evidence it is difficult to determine what the defendant's motive was. It may have been one of several, which we will not, for obvious reasons, set out or comment upon. Some of them would have been good; others, bad. This evidence, therefore, was aimed at what may have been one of the most material points in the case. We are not advised upon what ground same was excluded by the trial court. It may be, as indicated in the brief of counsel for appellant, that it was excluded upon the theory that a witness is disqualified from testifying to his own intent or motive, where that intent or motive is material to be investigated; but the rule is otherwise. Such a witness is not disqualified from so testifying. 1 Wigmore, Ev. § 581. The defendant was entitled to tell the jury what his motive was, so that the jury might consider his statement thereof, along with all the other evidence in the case, in arriving at the truth of the matter under investigation.

This action of the court was fatal error; and, since the judgment of the court below must be reversed therefor, it becomes unnecessary for us to notice the many other assignments of error.

MISSOURI SUPREME COURT.

JOSEPH DIENER, Appt.,

v.

STAR-CHRONICLE PUBLISHING COMPANY, Respt.

(230 Mo. 613, 132 S. W. 1143.)

Appeal — rulings on pleadings — bill of exceptions.

1. Rulings on pleadings cannot be presented to the appellate court by bill of exceptions, if the pleadings appear only in such bill.

Libel — power to decide on demurrer.

2. The court may determine as matter of law on demurrer that a publication relied on without innuendo to be libelous *per se* is not so, or that an innuendo seeking to give words of hidden meaning a libelous intent

Note. — For a discussion of the effect of provisions that the injury shall determine the law and the facts in libel cases, see *Oakes v. State* and the note appended thereto, ante, 207.

is forced and unnatural, or that an attempt to put a libelous edge on ambiguous words is an unnatural and forced construction, and that therefore no libel is alleged, although the Constitution provides that in libel suits the jury shall, under the direction of the court, determine the law and the facts.

Evidence — judicial notice — general elections.

3. The court takes judicial notice of the dates of general elections provided for by general statutes of the state.

Libel — reciting killing by chauffeur — effect.

4. An article inquiring into the eligibility for re-election to office of a coroner if he was the one who failed to hold for inquiry a chauffeur who, with his automobile, ran down and killed a child in the street, is not libelous on the chauffeur, although it uses with reference to him such words as "killed a little child" and "mangled little tots," and this is, by innuendo, alleged to have charged him with a crime involving moral turpitude, since the words do not import a felonious intent.

Same — privilege.

5. A newspaper article animadverting upon the conduct of a coroner in letting go a chauffeur without inquiry, after he had run down and killed a child, which simply states the facts, without any indication of malice, is privileged so far as the chauffeur is concerned, since it is a matter of interest to the public.

(November 12, 1910.)

APPEAL by plaintiff from a judgment of the Circuit Court for the City of St. Louis, sustaining a demurrer to the petition in an action brought to recover damages for the alleged publication of a libel. **Affirmed.**

The facts are stated in the opinion.

Messrs. Robert & Robert, for appellant:

The amended petition states a cause of action for libel *per se*, as the publication charged the plaintiff with the commission of a crime, and held him up to public scorn.

Mo. Rev. Stat. 1899, §§ 1815-1817, 1835, 2259, 2375; Meriwether v. Publishers: Geo. Knapp & Co. 224 Mo. 617, 123 S. W. 1100; Julian v. Kansas City Star Co. 209 Mo. 35, 107 S. W. 496; Minter v. Bradstreet Co. 174 Mo. 485, 73 S. W. 668; Noeninger v. Vogt, 88 Mo. 589; Ferguson v. Evening Chronicle Pub. Co. 72 Mo. App. 462; Hermann v. Bradstreet Co. 19 Mo. App. 229; Commercial Pub. Co. v. Smith, 79 C. C. A. 410, 149 Fed. 704; O'Shaughnessy v. New York Recorder Co. 58 Fed. 653; Holt v. State, 89 Ga. 316, 15 S. E. 316; Pool v. State, 87 Ga. 526, 13 S. E. 556; Brown v. 33 L.R.A. (N.S.)

Com. 13 Ky. L. Rep. 372, 17 S. W. 220; Clark, Crim. Law, 2d ed. 186, 187; 1 Wharton, Crim. Law, 329.

The word "killed" imputed to the plaintiff the crime of murder, and is actionable *per se*.

Jones v. Murray, 167 Mo. 25, 66 S. W. 981; Noeninger v. Vogt, 88 Mo. 589; Button v. Heyward, 8 Mod. 24; Cooper & Smith, 1 Rolle, Abr. 77; Doan v. Kelley, 121 Ind. 413, 23 N. E. 266; O'Conner v. O'Conner, 24 Ind. 218; Thomas v. Blasdale, 147 Mass. 438, 18 N. E. 214; McLaughlin v. Cowley, 131 Mass. 70, 127 Mass. 316; Democrat Pub. Co. v. Jones, 83 Tex. 302, 18 S. W. 652; Curley v. Feeney, 62 N. J. L. 70, 40 Atl. 678; Carroll v. White, 33 Barb. 615; Hays v. Hays, 1 Humph. 402; Cady v. Minneapolis Times Co. 58 Minn. 329, 59 N. W. 1040; Palmer v. Smith, 21 Minn. 419.

Messrs. Nathan Frank and Richard A. Jones, for respondent:

If the sufficiency of the matter charged in the petition to constitute a cause of action is challenged, it is properly within the scope of the functions of the court to determine this, even though it may involve an inquiry as to the quality of the publication, whether defamatory or otherwise.

Heller v. Pulitzer Pub. Co. 153 Mo. 205, 54 S. W. 457; Duncan v. Williams, 107 Mo. App. 539, 81 S. W. 1175; Hall v. Adkins, 59 Mo. 144; Trimble v. Foster, 87 Mo. 49, 56 Am. Rep. 440.

The publication is not libelous.

Spurlock v. Lombard Invest. Co. 59 Mo. App. 225; Baldwin v. Walser, 41 Mo. App. 243; Legg v. Dunleavy, 80 Mo. 558, 50 Am. Rep. 512, affirming 10 Mo. App. 461; Branch v. Publishers: George Knapp & Co. 222 Mo. 598, 121 S. W. 93; Blackwell v. Smith, 8 Mo. App. 43; Christal v. Craig, 80 Mo. 367; Salvatelli v. Ghio, 9 Mo. App. 155; Wood v. Hilbish, 23 Mo. App. 389; Klos v. Zahorik, 113 Iowa, 161, 53 L.R.A. 235, 84 N. W. 1046; Barr v. Providence Telegram Pub. Co. 27 R. I. 101, 60 Atl. 835; Curry v. Collins, 37 Mo. 324; Brown v. Tribune Asso. 74 App. Div. 359, 77 N. Y. Supp. 461; Foot v. Pitt, 83 App. Div. 76, 82 N. Y. Supp. 464; Ramscar v. Gerry, 16 N. Y. S. R. 789, 1 N. Y. Supp. 635; Kilgour v. Evening Star Newspaper Co. 96 Md. 16, 53 Atl. 716; Hollenbeck v. Hall, 103 Iowa, 214, 39 L.R.A. 734, 64 Am. St. Rep. 175, 72 N. W. 518; Homer v. Engelhardt, 117 Mass. 539; Hanaw v. Jackson Patriot Co. 98 Mich. 506, 57 N. W. 734; Edwards v. Chandler, 14 Mich. 471, 90 Am. Dec. 249; Bearce v. Bass, 88 Me. 521, 51 Am. St. Rep. 446, 34 Atl. 411; Dunneback v. Tribune Printing Co. 108 Mich. 75, 65 N. W. 583; Brown v. Boynton, 122 Mich.

251, 80 N. W. 1099; Keyer v. Rives, 21 Ky. L. Rep. 1706, 56 S. W. 4.

Lamm, J., delivered the opinion of the court:

Tort for libel. Cast on demurrer to his original petition, plaintiff pleaded over. Cast on demurrer to his amended petition, he stood, refused to plead over, suffered judgment, filed a motion for a new trial, excepted to the order overruling the same, had his bill of exceptions settled, allowed, and filed, and came up on appeal. The amended petition reads: "Now comes Joseph Diener, plaintiff in the above-entitled cause, files this amended petition, and for his cause of action states: That the defendant, Star-Chronicle Publishing Company, is and was at all times hereinafter mentioned a corporation duly organized and existing under the laws of the state of Missouri. That at the time hereinafter mentioned said defendant was the publisher, proprietor, and printer of a certain daily newspaper of large circulation in and about the city of St. Louis, which said newspaper is published in the city of St. Louis, state of Missouri, and is known as the 'St. Louis Star-Chronicle.' That on, to wit, the 1st day of November, 1906, there was printed and published in said newspaper the following false, defamatory, and libelous article or language, of and concerning the plaintiff, to wit: 'Is He the Same Coroner? Isn't Coroner Jules C. Baron, present incumbent and candidate for re-election, the public official who joined with the police in letting Health Commissioner Bond's chauffeur go free, without bond or charge or investigation, after the latter had run down and killed a little child in the street? and if he is, would this be a good reason for continuing his term of service? Voters with or without children, who think there should always be an inquiry into the mangling of such little tots, please answer at the polls.' That at all times referred to in said publication, the plaintiff was the chauffeur of Health Commissioner Bond, which fact the defendant well knew, and that this plaintiff was the chauffeur to whom the defendant referred in said publication, and that by said publication defendant thereby meant to charge this plaintiff with a crime involving moral turpitude, and with having wilfully and wantonly taken the life of a human being. Plaintiff further states that said publication was wilful and malicious, and that he has been damaged thereby in the sum of \$10,000. Wherefore plaintiff prays judgment in the sum of \$10,000, together with his costs." The demurrer reads: "Comes defendant, Star-Chronicle Publishing Company, and demurs to the

amended petition of plaintiff, filed in the above-entitled cause, for that: The matter and things stated and charged therein are not sufficient to constitute a cause of action against this defendant."

1. Plaintiff assumed to preserve his petition, the demurrer, the ruling sustaining it, his exception thereto, a motion for a new trial, and his exception to overruling the latter, in a bill of exceptions. Fortunately, it happens in this instance that no harm came to him by that course. This for the reason that the record proper, brought up in his abstract, also preserved such matter and his point. But inadvertence in the use of rules of practice results in cases riding off on appeal without a disposition of the merits. In this view, caution is better than cure, as the precept puts it. Therefore, it is wise, to stamp out heresies, to put up signs at the point of divergence from the beaten path. *Via tria est tutissima*. Re Isle of Ely, 10 Coke, 142. To illustrate, if the ruling on the demurrer, the demurrer itself, and the trial petition had been preserved nowhere else than in a bill of exceptions, this appellant would have nothing here to review; for if anything is settled, it is that such matter has no place in a bill of exceptions. It is part of the record proper, and if it appear only in such bill, it is the same as if it did not appear at all. The rules to go by are:

(a) A demurrer is part of the record proper. It must appear there. It needs no bill of exceptions to preserve it. The ruling on it is likewise a part of the record proper, and no exceptions are necessary to have that ruling reviewed, provided error on the demurrer is not waived by pleading over. *Spears v. Bond*, 79 Mo., loc. cit. 469; *Tarkio v. Clark*, 186 Mo., loc. cit. 293, 294, 85 S. W. 329; *Mallinckrodt Chemical Works v. Nemnich*, 169 Mo., loc. cit. 395, 69 S. W. 355.

(b) It results, as a sequence, that a motion for a new trial is not necessary in order to review the ruling on a demurrer, since that motion is directed to matters of mere exception. And so we have ruled over and over. *Hannah v. Hannah*, 109 Mo. 236, 19 S. W. 87; *Dysart v. Crow*, 170 Mo. 280, 70 S. W. 689; *McKenzie v. Donnell*, 151 Mo., loc. cit. 448, 52 S. W. 214; *Thorp v. Miller*, 137 Mo., loc. cit. 238, 239, 38 S. W. 929. Vide, *Houtz v. Hellman*, 228 Mo. 655, 128 S. W. 1001.

So much to show disapproval of the plan of plaintiff to keep life in his point by a motion for a new trial, and by a bill of exceptions.

This brings us to the real question in the case, which is:

2. Does the amended petition state a cause of action? We think not, because:

(a) A demurrer lies to a petition sounding in tort for libel the same as to any other petition, if certain conditions are present, this, in spite of the constitutional provision (art. 2, § 14, of the Bill of Rights [Anno. Stat. 1906, p. 135]), that, in libel, "the jury, under the direction of the court, shall determine the law and the facts." To illustrate: If A sue B for libel without matter of innuendo or inducement, on the theory that the words published are libelous *per se*, and they are not libelous *per se*, the sufficiency of A's petition may be challenged by demurrer, and is for the court. Again, if A sue B for libel for words not actionable *per se*, and the pleader, claiming they bear a hidden or latent libelous meaning because of certain extrinsic circumstances, sets such extrinsic circumstances forth by prefatory allegations by way of inducement, and follows up the libelous words by an innuendo applying the words to the matter so pleaded by way of inducement, in such cases, such innuendo should not be a forced and unnatural construction and application of the words, but a reasonable and natural construction and application of them. A vice of that sort can be reached by demurrer, and is for the court. Again, if the words of the libel are ambiguous, and the pleader can only put a libelous tang or edge upon them by a wholly unnatural and forced construction, and tries to do so by an innuendo, that vice can be reached by demurrer, and is for the court. So, if the petition be not challenged by way of demurrer, *in limine*, and the case be fully developed on trial, and if, under the pleadings and evidence, no case is made, the court may take the case from the jury by a peremptory instruction in the nature of a demurrer. So far as above indicated, libel suits, though *sui generis* (in a sense), are subject to those rules of practice found wise and useful in administering justice generally in the courts.

The propositions just ruled lie well within the holding and reasoning of *Heller v. Pulitzer Pub. Co.* 153 Mo. 295, 54 S. W. 457; *Ukman v. Daily Record Co.* 189 Mo. loc. cit. 390, 88 S. W. 60; and the fourth proposition discussed in the *Ukman Case*, 189 Mo. loc. cit. 393, et seq., 88 S. W. 60, and cases and text-books cited; *Branch v. Publishers: George Knapp & Co.* 222 Mo. loc. cit. 587, 588, 121 S. W. 93; *Capitol & Counties Bank v. Henty* (H. L.) L. R. 7 App. Cas. 741, 52 L. J. Q. B. N. S. 232, 47 L. T. N. S. 662, 31 Week. Rep. 157, 47 J. P. 214. And the student in jurisprudence, curious in that behalf, may find in those

cases and authorities the reasoning supporting those propositions.

It may not be amiss, in passing, to borrow and quote a bit of wisdom ancient demurrers in libel and slander from a very good authority. Henry, Lord Cromwell, brought suit for slander against Denny, a vicar, in the King's bench, during the time of Queen Elizabeth. *Cromwell v. Denny*, 4 Coke, 14a. In commenting on that case, Sir Edward Coke quaintly says: "In this case, reader, you may observe an excellent point of learning in actions of slander, to observe the occasion and cause of speaking of them, and how it may be pleaded in the defendant's excuse. When the matter in fact will clearly serve for your client, although your opinion is that the plaintiff has no cause of action, yet take heed you do not hazard the matter upon a demurrer; in which, upon the pleading, and otherwise, more perhaps will arise than you thought of; but first take advantage of the matters of fact, and leave matters in law, which always arise upon the matters in fact *ad ultimum*, and never at first demur in law, when, after the trial of the matters in fact, the matters in law (as in this case it was) will be saved to you." But having regard to the dangers of a demurrer suggested by that profound lawyer, and the precept that abundant caution does no injury, we think the propositions heretofore announced are accepted modern doctrine; and they may be taken as not a little fortified by another settled proposition, *viz.*, that it is for the court, and not the jury or the pleader, to determine by judicial construction the legal effect and force of the terms of a written instrument, provided those terms are unambiguous, and are set forth in the petition as the foundation of the cause of action. *Donovan v. Boeck*, 217 Mo. 70, 116 S. W. 543. It follows that a demurrer which admits the fact of publication and the words used does not admit an unfair and forced construction put upon the words by the pleader. We are not saying that a court, as a matter of law, can by instruction declare a given publication libelous. Such power is denied by our Constitution. But we are saying that a court, in a given case, may declare it not libelous as a matter of law. In libel a defendant has two strings to his bow,—the court and the jury; plaintiff but one,—the jury. Such is the doctrine of the *Heller*, *Ukman*, and *Branch Cases*, *supra*.

In so far forth, then, as learned counsel apparently argue that it was for the jury by their verdict, and not for the court, by its ruling on a demurrer, to dispose of the questions discussed on the demurrer, we disallow the argument.

(b) It will be observed that enough appears in the alleged libelous article to show that a political campaign was in progress. Indeed, from the date of the article, November 1, 1906, we judicially know that under our statutes a general election was pending, and that a candidate for coroner must have been theretofore nominated, if at all. The article deals primarily and broadly with that election, and with the candidacy of Dr. Baron for re-election to that office. It is addressed to the body of the voters of the city of St. Louis in a matter of public concern. It is couched in the form of argumentation by interrogation,—a method of persuading and convincing respectably vouched for by no less authority than Socrates himself, as we are told by his pupil, Plato., viz., that of asking questions adroitly framed to suggest the answer, and to put those who sensibly answer them in the attitude of establishing the propositions the questioner hopes to maintain and establish.

This case was argued at our bar with another where the same plaintiff sues the same defendant on another alleged libel relating to the same casualty. We are referred by briefs to the record in that case. Going there, we find that an article appeared in defendant's newspaper in May, 1906, complaining of Dr. Baron, as coroner, for his conduct in and about the investigation of the death of a little girl, Gertrude Copeland, who, the article says, was torn to pieces by the automobile of Health Commissioner Bond, driven by plaintiff as chauffeur. We stand informed then, by express consent of counsel, that the article in hand refers to that tragedy and the conduct of the coroner at the time. It wants to know if Dr. Baron is the same coroner who let the chauffeur "go free, without bond or charge or investigation, after the latter had run down and killed a little child in the street." It asks the voters of St. Louis whether, if Dr. Baron be the same coroner, this would be a good reason for re-electing him. It proceeds on the assumption that all voters, those having children and those having none, who think there should always be an official inquiry (before the coroner plants himself as in favor of a chauffeur) when little children are mangled by automobiles, should answer a certain question at the polls, viz., whether a coroner who does not live up to such rule of official conduct should be continued in office? The libelous poison, as to plaintiff, is said to lurk in the phrase, "run down and killed a little child in the street," and the other, "the mangling of such little tots." It is charged by way of innuendo that "defendant thereby meant to charge this plaintiff

with a crime involving moral turpitude, and with wilfully and wantonly taking the life of a human being." The question, then, narrows itself and comes to be: Whether the article is libelous *per se* as to the chauffeur, or will reasonably bear the innuendo and construction put upon it by the pleader. In expounding the matter, certain settled propositions of the law of libel must be reckoned with, viz.:

First. A party cannot support a charge of libel by showing that the same publication libeled another. To make a case, the publication must be libelous as to the plaintiff, not another. The malice supporting the charge must flow from defendant to plaintiff, and be personal to him alone, and not another. Speaking to the point, Foster, J., in *Bearce v. Bass*, 88 Me., loc. cit. 542, 51 Am. St. Rep. 446, 34 Atl. 413, said: "If, therefore, the defendants' criticism of the plaintiffs' work was fair and reasonable, and had no reference to their private or business character, and there was no proof of actual malice on the part of the defendants towards the plaintiffs, then, however much malice may have existed between the defendants and Mr. Beal [another party criticized] cannot make the defendants' criticism libelous. If the criticism of the defendants was fair and reasonable, and in reference to a matter of public concern, and the plaintiffs are not attacked either in their private or business reputation, then it constitutes no libel, because not defamatory; and it cannot be made libelous by any attack upon the private or business reputation of some person other than the plaintiffs, no matter to what extent such malice may exist. *Odgers, Libel & Slander*, 39, 268. *Newell, Defamation*, 324." So, in this case, we are not concerned with a libel on Baron that may or may not lurk in the comments made on his official acts, as bearing on his worthiness as a candidate for re-election. Baron is not suing here, and the plaintiff cannot recover because the article is censorious of him. In libel every tub stands on its own bottom.

Second. Since one part of a publication may explain another part, and since the intent and the meaning must be gathered not only from the words singled out as libelous, but from the context, the maxim, *Noscitur a sociis*, applies; and (broader yet) all parts of the publication must be read together to collect the true meaning. Phrases and words must not be singled out and wrenched from a context explanatory or indicative of the meaning. The whole article is its own best interpreter. So, words take color from the occasion of speaking them. In *Kilgour v. Evening Star Newspaper Co.* 96 Md., loc. cit. 27, 53 Atl.

718. it was said: "In the opening sentences of the publication, it is stated that many prominent citizens were greatly agitated, 'on account of the alleged stifling by the state's attorney of an investigation of the mysterious death, etc.,' and it is insisted that the word 'stifling' was used in its offensive sense, and implied that the state's attorney acted from corrupt motives. But we cannot accept this view if the whole article be considered, as must be done if we are to arrive at the true meaning and force of particular words or phrases. It is not proper to separate words or phrases from the context. All parts of the paper should be read in connection, to collect their true meaning." *Gaither v. Advertiser Co.* 102 Ala. 458, 14 So. 788; *Donaghue v. Gaffy*, 53 Conn. 43, 2 Atl. 397. It is from such rules that the related one is deduced, viz., that, if the omission of any part of the libelous publication from the pleading makes a material alteration in the sense, the omission is fatal. *Meriwether v. Publishers: Knapp & Co.* 211 Mo., loc. cit. 209, 16 L.R.A. (N.S.) 953, 109 S.W. 750. Therefore in this case the word "killed" and the word "mangled" must be considered in the light of the context. Attending to the context, we find the word "chauffeur" used and the phrase "run down." Now, a chauffeur is the driver of a heavy self-propelled vehicle plying on the public streets and capable of great speed,—a vehicle propelled by internal combustion engines, steam engines, or electric motors,—one well calculated to give joy and comfort to its occupants, but abounding in danger and terror to pedestrians. But an automobile is not a lethal weapon like a gun, a pistol, a dagger, or a billy. Hence no evil intent to kill or harm is presumed by its mere use. It does not fill the malignant office of poison in taking life. If it take the life of, or mangle, a child or adult, it is by means of a collision, through negligence or accident. In other words, it runs them down. Appellant's counsel cite us to cases of doctors suing for libel because of publications accusing them of killing their patients,—a tender point. To others, where the libel consists in a charge of killing a pupil by corporal punishment, or a slave in like manner. To other old cases where the bald charge was made of killing, without any explanation of instrument, means, or occasion. *Cooper & Smith*, 1 Rolle, Abr. 77. But none of those cases are in point. At any rate, we shall not follow them here, where a form of the verb "to kill" is not used in a connection showing it means to charge a crime.

Third. Libel may lurk in ironical words. (Witness the funeral oration of one Marcus Antonius on a notable occasion.) It may

lurk in a *double entente*, as in the case put by Rabelais:

"The devil was sick, the devil a monk would be;
The devil was well, the devil a monk was he."

It may lurk in questions so framed as to indicate the affirmance of a fact, though that affirmance be adroitly veiled. The law may well be as astute to reach and cure as is the libeler to hide and do harm. Courts no longer construe words in their most favorable and mild sense when an offensive and libelous sense may be fairly deduced from the trend of the publication, indirectly, by sarcasm, invective, and abuse, or by direct statement. Otherwise, as put by Lord Chief Justice De Grey in *Rex v. Horne* (a case of profound interest to our Revolutionary fathers and students of history) Cowp. pt. 2, loc. cit. p. 687: "A man might defame in one sense and defend in another." "Words are now construed by courts, as they always ought to have been, in the plain and popular sense in which the rest of the world naturally understand them." Per *Ellenborough, Ch. J.*, in *Roberts v. Camden*, 9 East, loc. cit. 96. But while courts will not bother themselves to hunt for the mildest sense to be put upon his words, to find a loophole of escape for a libeler by construction, neither will they hunt for a forced and strained construction to put upon them, but they will be construed fairly by their natural import, according to the ideas they were calculated and intended to convey to those to whom they were addressed, and pinned down to some one commonly accepted meaning, one generally understood,—mindful always that language is as significant in suggestion as in expression, that a libelous charge may be sprung by insinuation, and that defamation begins where honest criticism leaves off.

Bringing the alleged libelous publication to book, is there any sarcasm or abuse or irony in a bad sense? None whatever. The force of the publication is leveled and spent at the coroner and his dereliction of duty,—not at the chauffeur. The aim and purpose of the writer is entirely fair and honest, without any badge of malice. It is to inculcate and accent the idea and duty of an immediate and drastic investigation when a child is killed by an automobile. The chauffeur is brought in merely as an incidental factor to identify the transaction concerning which the coroner is criticized. The writer could not have said much less about the chauffeur than he did if the point he was making against the coroner and the moral he sought to draw were to be

comprehended by the reader. To be sure, he might have used daintier language, and put his screed into a softer or more round-about form. He might have said the child was overtaken by an automobile and came to its death thereby, or its death was caused thereby, or that its death ensued, or that it gave up the ghost, etc. But those forms of expression would have lacked nervous force and pith. Instead he used the word "killed." Is there anythink fairly ambiguous in that word—any sign that the writer was paltering in a double sense? Or meant anything more than it was deprived of life? None that we can see. The kernel of the thing is, after all, that, if the child died as the result of the collision, it was killed thereby. Such is the long and short of it, and the only fair import of the word, taken with its context.

Under such circumstances, the court would not allow the testimony of any witness to the effect that the word conveyed to him as a reader, the idea of the felonious taking of a human life. A construction of that sort would be forced and strained, not natural and reasonable. Neither was there anything for a jury to pass on by way of putting a libelous meaning or edge on the word "killed." This conclusion is within the doctrine of the Heller, Ukman, and Branch Cases, supra; nor does the Julian Case, 209 Mo. 35, 107 S. W. 496, aid plaintiff. The language in judgment in that case, "did well in a legislative way," was construed to be ambiguous; one natural sense of it being libelous. In such case the doctrine applies that the apprehension of the reader is the touchstone of interpretation. It was happily said by Goode, J., in a case on which I cannot put my finger, that in this aspect a libel or slander is like unto a jest,—i. e., the prosperity of each lies in the ear of the hearer,—thus hitching the gravity of the law to the car of the light philosophy of Rosalind.

"A jest's prosperity lies in the ear
Of him who hears it, never in the tongue
Of him that makes it."

—Love's Labour Lost, Act V., Sc. 2.

Fourth. Finally, freedom of speech is guaranteed to the individual and newspaper by the Constitution. Courts are charged with the duty they may not premit, to see to it that it is not abridged. It is however, the use, and not the abuse, of free speech and free press that is guarded by the fundamental law as sacred. So long as a publication is not directed to a public officer by charging criminal misfeasance or nonfeasance, so long as it is not directed to the defamation of an individual in his

private character or business, but is directed to a matter of live public concern, and is for an honest, and not a defamatory, purpose, it is qualifiedly privileged. Within lines suggested, it would be intolerable to hold that a newspaper or individual—the one the same as the other—might not comment fairly, freely, with vigor and severity. "Everyone has a right to comment on matters of public interest and general concern, provided he does so fairly and with an honest purpose, . . . however severe in their terms, unless they are written intemperately and maliciously. Every citizen has full freedom of speech on such subjects, but he must not abuse it. . . . The right to comment upon the public acts of public men is the right of every citizen, and is not the peculiar privilege of the press. . . . Every one of the public is entitled to pass an opinion on everything which in any way invites public attention." Odgers, Libel & Slander, 34-36. Such is the universal rule in this vital matter. Bearce v. Bass, 88 Me., loc. cit. 542, 51 Am. St. Rep. 446, 34 Atl. 413, supra; Branch v. Publishers; George Knapp & Co. 222 Mo., loc. cit. 587, 588, 121 S. W. 93, supra; Triggs v. Sun Printing & Pub. Assn. 179 N. Y. 144, 66 L.R.A. 612, 103 Am. St. Rep. 841, 71 N. E. 739, 1 A. & E. Ann. Cas. 326. And see an illuminating article by Van Vechten Veeder in Harvard Law Review, vol. 23, p. 413.

The right of freedom of speech, of fair comment with an honest purpose in matters of public concern is on the foot of *pro bono publico* and founded on public policy. Free discussion is the foundation on which free government itself is builded. That lost, all is lost; the two exist or perish together. They mean the same thing. It is only in despotisms that one must speak *sub rosa*, or in whispers, with bated breath, around the corner, or in the dark, on a subject touching the common welfare. It is the brightest jewel in the crown of the law to seek and maintain the golden mean between defamation, on one hand, and a healthy and robust right of free public discussion, on the other.

The office of coroner is of great antiquity and dignity. The power of that office at common law involves the duty of investigating the causes of sudden, violent, and unnatural deaths. 7 Am. & Eng. Enc. Law, 2d ed. p. 602. "The most important function of the office of coroner is that of holding inquests as to the causes of violent and extraordinary deaths." Id. p. 603. His common-law powers are also declared by statute. "A coroner . . . shall take inquests of violent and casual deaths happening . . . [in his county] or where

the body of any person coming to his death shall be discovered in his county. . . ." Rev. Stat. 1899, § 6629, Anno. Stat. 1906, p. 3297. Another section (6633 [page 3298]) refers to his duty to investigate when he is notified of the dead body of any person "supposed to have come to his death by violence or casualty."

We shall not hold that the death of a child on the public street, killed by an automobile, is not a matter of intense interest to the public. The injury of one, in that behalf, is truly the concern of all. We shall not hold that the act of a coroner in releasing the chauffeur, or in refusing an inquest at the outset, to locate the blame, if any, for such a casualty, is not the proper subject for animadversion by any public print in an article couched in the terms of that complained of when the chauffeur who drove the machine is referred to as having run down and killed the child.

The article being fair and with an honest purpose, in no wise earmarked with abuse and vituperative indications of malice, it was privileged as a matter of law. We hold it was not libelous *per se*, and that the innuendo pleaded was a forced and strained one.

The ruling on the demurrer was well enough.

Let the judgment be affirmed.

It is so ordered.

This case came into banc on a dissent from the foregoing divisional opinion. In banc, on a rehearing, it was adopted by a majority of the judges; Valliant, J., concurring in the result; Gantt, Graves, and Kennish, JJ., concurring in full; Woodson, J., dissenting; Burgess, Ch. J., absent.

WISCONSIN SUPREME COURT.

MATHILDA KNUDSEN, Admrx., etc., of
Olaus Knudsen, Deceased, Appt.,
v.

LA CROSSE STONE COMPANY, Respt.
(145 Wis. 394, 130 N. W. 519.)

Master — duty to servant.

1. The master should furnish his servants

Headnotes by MARSHALL, J.

Note. — The applicability of the safe place rule where the conditions of the work are changing is treated in the notes to *Citron v. O'Rourke Engineering Constr. Co.* 19 L.R.A. (N.S.) 340, and *Smith v. North Jellico Coal Co.* 28 L.R.A. (N.S.) 1267.

As to the applicability of that rule where servants are engaged in the work of removing dangerous conditions, see note to *Neagle v. Syracuse, B. & N. Y. R. Co.* 25 L.R.A. (N.S.) 321.

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with a reasonably safe place to work, reasonably safe instrumentalities with which to do the work, and fellow servants provided should be reasonably safe as such; the standard of care as to each duty being such as is exercised by the great mass of mankind under the same or similar circumstances.

Evidence — presumption — care of master.

2. The presumption of fact is in favor of the master having performed the duties mentioned, till overcome by evidence establishing the contrary to a reasonable certainty.

Master — changing conditions — duty.

3. The safe place rule having been satisfied at the start, and the conditions being such that hereafter the servants necessarily are expected to make their own working places, which must, necessarily, change from time to time and at short intervals as the work proceeds, dangers created are not attributable to the master.

Same — acts of fellow servant.

4. In the circumstances last mentioned, negligence of one or more of several servants, not excepting the foreman of the crew, rendering the working place of some other servant or servants unsafe, is negligence of a fellow servant.

Same — changing conditions — safe place rule.

5. In operations where the servants necessarily make their own working place, the safe place to work rule has little or no application.

Same — foreman as fellow servant.

6. The foreman of a crew erecting a water tank, or removing heavy machinery from a car to a factory, or moving a pile driver, or in charge of a train crew or the crew of a vessel or a dock crew, in regard to all the details of the general employment as regards the safe place rule, is a fellow servant of the men under him.

Same — stone quarry crew — foreman and blaster.

7. A blaster working with others under a foreman, all constituting a stone quarry crew, is a fellow servant of such foreman in respect to duties of the latter as to guarding against the working place of those under him being made unsafe by the rolling down from one level to another of earth or rock, in the course of quarry work.

(Siebecker, Kerwin, and Timlin, JJ., dissent.)

(March 14, 1911.)

A PPEAL by plaintiff from a judgment of the Circuit Court for La Crosse County in favor of defendant notwithstanding a verdict in her own favor, in an action brought to recover damages for the alleged negligent killing of her intestate. Affirmed.

Statement by Marshall, J.:

Action to recover damages for the death of plaintiff's intestate. The deceased, while employed by defendant as a blaster, was killed, and, as alleged, under the following circumstances.

The intestate and others under a foreman were put to work for defendant in its stone quarry. There was a shelf of rock some 10 feet wide, 50 to 70 feet long, and about 50 feet above the surface below, composed of rock. From the back side of the shelf a bank of rock and earth rose upwards, at a sharp angle backward, 15 to 20 feet, to the top of a hill or bluff. Plaintiff on the day in question, by direction of the foreman, was at work on the shelf drilling blast holes. Other employees had partially loosened portions of rock and earth from the edge of the bank above. A large mass at the edge had been loosened so as only to be retained from rolling down by the frozen condition and roots. While the situation was such that the partly loosened mass was liable to fall at any time, that was not apparent to a person on the shelf below. The rule of the quarry was that the foreman should personally see that no chunks of earth or rock were allowed to be so circumstanced as to be liable to unexpectedly roll down and injure employees, and to see that no such dangers existed before putting employees at work, as in the case in question, and, further, to have due warning given to employees within the zone of danger, before allowing chunks of earth and rock to be loosened and rolled down the side of the bluff. The situation in the particular case should have been known to the foreman before sending deceased to work on the shelf. The latter was entirely ignorant of such situation, and was not guilty of any want of ordinary care in respect thereto. As directed he commenced operations on the shelf in the forenoon of December 31, 1909. He was not warned of the danger as before indicated. He was assured that the place was safe, and relied thereon. While engaged in his work a large chunk of earth and rock suddenly became detached from the side of the bluff above and rolled down upon and killed him.

There were other allegations requisite to make out a cause of action, if defendant was actionably negligent in respect to the cause of the death aforesaid.

Defendant answered putting in issue all allegations making out a breach of duty on its part, and pleaded contributory negligence.

The evidence showed, or tended to show, this: The physical conditions were as alleged in the complaint. In the progress of the work, from time to time, it was necessary to uncover rock further back on the

bluff than the shelf where deceased was directed to work, and above that point. The work of uncovering at the particular time of year, because of the earth being frozen, required employees to go to the proper place at the crest of the bluff above the shelf, and by the use of wedges, crack off the frozen earth by strips and allow the same to roll down. In the forenoon of the day in question, the foreman directed one of the crew to do work of that sort, and marked off the particular strip of earth to be thrown down. By noon such strip had been sufficiently loosened to open up a seam back of it about 6 inches wide on the surface, and about 10 feet long. The employee was then directed to help deceased on the shelf, which was in the pathway of the partly loosened strip. The two commenced work on the shelf about 2 o'clock in the afternoon. They worked together a short time before noon. The foreman did not make any effort to discover the condition of things above the shelf. It was not observable to one circumstanced as the deceased was on the shelf, and he did not know of it. While he was busily engaged, and the foreman and one or two others were near by the strip of frozen earth came wholly loose, rolled down and swept him from the shelf, causing him to fall on the rocks below with fatal effect. The foreman was under instructions to guard employees against such dangers. It was the custom for the foreman of a quarry to see that overhanging earth or rock was not left so as to be liable to roll down where employees were required to work, and endanger their personal safety. The foreman in this case could have seen by casual observation before he sent the men to work in the afternoon, that the strip of earth he had directed to be loosened had not been thrown down. Defendant relied upon such dangers as the one in question being prevented by the foresight of its foreman. He had full charge of the workmen and working conditions in the quarry. He directed operations as was necessary, and himself took a hand in doing the work, sometimes at one place and sometimes at another.

The jury found thus: The working place where deceased was stationed was not reasonably safe. The frozen strip of earth was loosened by directions of the foreman. He directed deceased to work where he was located when swept from the cliff. The foreman did not know of the conditions respecting the strip of earth which had been partly loosened prior to the accident. In the exercise of ordinary care he ought to have known thereof. He did not warn deceased of the danger. The latter did not know of the strip of earth having been loosened. He was not guilty of any want of ordinary care in that regard. He did not have facilities

equal to the foreman for knowing of the danger. Such danger was the proximate cause of the disaster complained of. The direction given to the deceased to work where he did, under the circumstances, was a proximate cause of his death. The failure of the foreman to warn deceased of the danger was a proximate cause of his death. The deceased was not guilty of contributory negligence. If on the facts plaintiff is entitled to recover, the measure thereof should be \$7,900.

Judgment was rendered notwithstanding the verdict, in favor of the defendant.

Messrs. Jesse E. Higbee and Frank Winter, for appellant:

A risk which the employer, by the exercise of reasonable care, can obviate, is an extraordinary risk not assumed by the servant, and the master is responsible for injury resulting therefrom.

1 Labatt, Mast. & S. § 270; Hough v. Texas & P. R. Co. 100 U. S. 213, 25 L. ed. 612; Hill v. Winston, 73 Minn. 80, 75 N. W. 1030; Streicher v. Davenport Brick & Tile Co. — Iowa, —, 124 N. W. 327; Kaukola v. Oliver Iron Min. Co. 159 Mich. 689, 124 N. W. 591.

The negligent act is not the creation of the danger by the employer, but the failure of the employer to notify the ignorant employee of the dangerous condition, when he directs the latter to work in a place subject to danger.

2 Labatt, Mast. & S. § 479; 1 Labatt, Mast. & S. §§ 240-242; Salem Stone & Lime Co. v. Griffin, 139 Ind. 141, 38 N. E. 411; Ryan v. Tarbox, 135 Mass. 207; Consolidated Coal Co. v. Wombacher, 134 Ill. 57, 24 N. E. 627; Colorado City v. Laife, 28 Colo. 468, 65 Pac. 630; Baxter v. Roberts, 44 Cal. 187, 13 Am. Rep. 160; Hill v. Winston, 73 Minn. 80, 75 N. W. 1030; Streicher v. Davenport Brick & Tile Co. — Iowa, —, 124 N. W. 327; Bell v. Northern P. R. Co. — Minn. —, 128 N. W. 829; Strahlendorf v. Rosenthal, 30 Wis. 674, 10 Mor. Min. Rep. 676; Gussart v. Greenleaf Stone Co. 134 Wis. 425, 114 N. W. 799; Behm v. Armour, 58 Wis. 1, 15 N. W. 806; Jones v. Florence Min. Co. 66 Wis. 268, 57 Am. Rep. 269, 28 N. W. 207; McDougall v. Ashland Sulphite Fibre Co. 97 Wis. 382, 73 N. W. 327; Yess v. Chicago Brass Co. 124 Wis. 406, 102 N. W. 932; Fleming v. Northern Tissue Paper Mill, 135 Wis. 157, 15 L.R.A. (N.S.) 701, 114 N. W. 841; Wedgwood v. Chicago & N. W. R. Co. 41 Wis. 482; Naylor v. Chicago & N. W. R. Co. 53 Wis. 665, 11 N. W. 24; Hobbs v. Stauer, 62 Wis. 110, 22 N. W. 153; Steffen v. Chicago & N. W. R. Co. 46 Wis. 265, 50 N. W. 348; Nadau v. White River Lumber Co. 76 Wis. 129, 20 Am. St. Rep. 29, 43 N. W. 1135.
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Deceased and McBride were not coemployees when the foreman directed the deceased to work in a dangerous place without instructing him as to the danger which he knew was impending in the fall of frozen earth.

Klochinski v. Shores Lumber Co. 93 Wis. 417, 67 N. W. 934; Horn v. La Crosse Box Co. 123 Wis. 399, 101 N. W. 935; Gussart v. Greenleaf Stone Co. 134 Wis. 418, 114 N. W. 799; McMahon v. Ida Min. Co. 95 Wis. 308, 60 Am. St. Rep. 117, 70 N. W. 478.

Messrs. Quarles, Spence, & Quarles, with **Messrs. McConnell & Schweizer**, for respondent:

Where the place where the work is being done and the attendant perils from hour to hour are practically created by the servants in the prosecution of their work, and the conditions are constantly shifting by reason of their own acts, of which, as well as their probable consequences, they must be held to have had notice, the rule that the master must furnish the servant a reasonably safe place to work in does not apply.

Larsson v. McClure, 95 Wis. 539, 70 N. W. 662; Mielke v. Chicago & N. W. R. Co. 103 Wis. 1, 74 Am. St. Rep. 834, 79 N. W. 22; Russell v. Lehigh Valley R. Co. 19 L.R.A. 340; and note 188 N. Y. 344, 81 N. E. 122; Labatt, Mast. & S. § 269; King v. Ford, 121 App. Div. 404, 106 N. Y. Supp. 50; Hencke v. Ellis, 110 Wis. 532, 86 N. W. 171.

Whether employees are fellow servants does not depend upon the rank or grade of the negligent servant, but "upon the nature of the service being performed by them in which the negligence occurs."

Wiskie v. Montello Granite Co. 111 Wis. 443, 87 Am. St. Rep. 885, 87 N. W. 461; Gereg v. Wilwaukee Gaslight Co. 128 Wis. 35, 7 L.R.A. (N.S.) 367, 107 N. W. 289; Okonski v. Pennsylvania & O. Fuel Co. 114 Wis. 448, 90 N. W. 429; McKillop v. Superior Shipbuilding Co. 143 Wis. 454, 127 N. W. 1053.

Deceased was charged with knowledge of what took place, and of what other men were doing. He owed it to himself for his own safety, and to his fellow workman, to know where they were and what they were doing. He could not close his eyes to what was going on about him, without assuming the consequences.

Dahlke v. Illinois Steel Co. 100 Wis. 431, 76 N. W. 362.

If Stiglitz knew that he had left the piece of earth in a dangerous condition, and failed to warn deceased, his working partner, such failure was the negligence of a fellow servant, which precludes a recovery.

McMahon v. Ida Min. Co. 101 Wis. 102, 76 N. W. 1098; Dahlke v. Illinois Steel Co.

100 Wis. 431, 76 N. W. 362; 26 Cyc. Law & Proc. pp. 1165, 1166.

There was no express or implied assurance of safety, and no liability on the part of the master.

Hencke v. Ellis, 110 Wis. 532, 86 N. W. 171; Larsson v. McClure, 95 Wis. 539, 70 N. W. 662.

Messrs. Bunge & Bosshard also for respondent.

Marshall, J., delivered the opinion of the court:

So it will be seen the defendant, in the legitimate pursuit of an important industry, a vocation which it was as important to the public and defendant's employees should be carried on as to the defendant itself, sent a crew to its stone quarry property for the purpose of operating the same. The working place was safe as the crew took possession thereof. Thereafter they necessarily made, in great part, their own respective working places. The safety of one was greatly dependable upon the conduct of his fellows. All were employed in the common employment. From day to day the work went on. Proper regulations, so far as any were required, were made. The working place was in proper condition in the morning in question. So far as appeared to respondent up to the instant of the accident, the foreman and all associated with the blaster, Mr. Knudsen, were reasonably careful men, and competent in every way for performance of the duties assigned to them. The instrumentalities furnished for the work were all right. It was left to the crew so organized and equipped to do the work, the foreman being specially charged to look after the safety of the men, and, particularly, as regards dangers from being in the pathway of earth and rock that might roll down the bluff.

The operation which resulted in creating the danger was conducted for considerable length of time, and not more than about 25 feet from Knudsen's working place. While he may have been so circumstanced that he could not see the person at work while creating the danger, the manner and kind of work was such that he must have known what was going on, and known when, later in the day, the workman left the point above on the crest of the cliff and joined him, that the strip of earth and rock the former had been endeavoring to disengage had not been thrown down, though it must be there was no appearance of danger of its falling which he observed, or could well have observed.

As Knudsen was working in supposed security, the very person aiding him who had been the immediate instrumentality in making the working place unsafe, and the fore-

man who had charge of the whole work and aided manually from time to time, near by, no one apparently appreciating the danger, the chunk of frozen earth came loose, rolled down the cliff, and in an instant, as it were, Knudsen was swept over the cliff and his life terminated, with the necessary distressing consequences to those dependent upon him.

Thus passes before us another of those tragedies which are constantly recurring in the drama, so to speak, of our official life. Is there a remedy for the damage caused by the inadvertent taking of Knudsen's life? The question is not whether there ought to be a remedy from the view point of moral standards. It matters not how much we may think such sacrifices should be compensated in some way, and that the loss must inevitably be paid for in the end by the mass of mankind, if not in a way to reimburse appreciably those upon whom the loss first falls. Courts cannot shape their decrees to meet their personal ideas, or merely satisfy human sensibilities to human sorrow and suffering; moreover, at the expense of those neither guilty of a legal or moral wrong.

The world does not appreciate the high order of courage and firmness required to deal with these painful tragedies, and at all times be reasonably sure of judgment reigning supreme, instead of being swayed by sympathy, which we may venture to say is no more keenly felt than by the judges of our courts. However, to execute their functions, they must, the best they can, come up to the high ideal of this picture so truly and so beautifully painted by Chief Justice Ryan, and which is to go down the ages inscribed upon the shaft erected in his honor:

"In other places in life, the light of intelligence, purity of truth, love of right, firmness of integrity, singleness of purpose, candor of judgment, are relatively essential to high beauty of character. On the bench they are the absolute condition of duty. The judge who palters with justice, who is swayed by fear, favor, affection, or hope of reward, by personal influence or public opinion, prostitutes the attribute of God and sells the favor of his Maker. But the light of God's eternal truth and justice shines on the head of the just judge, and makes it visibly glorious."

So, the only question before us for decision is this: On the undisputed facts disclosed by the evidence, has appellant a legal remedy against respondent? It cannot be decided by any system of arbitration. It cannot be decided by bending established principles out of their legitimate sphere, or developing new ones to meet the dire necessities of the particular case. That the time is at hand when a just way will be

found for transferring the loss inflicted by such sacrifices, to so broad a field that all will be compensated, and the participating compensators carry the load and think the burden light, if they appreciate it at all,—the writer has faith.

As we view the case it is governed by a few legal principles. We will endeavor to state them briefly, concisely, and with but little discussion. Their application to the facts will be seen easily from their logical arrangement.

A master owes the duty to his servants of furnishing them a reasonably safe place in which to do their work, of using ordinary care to keep such place reasonably safe, of furnishing them reasonably safe instrumentalities with which to perform their work, and of exercising ordinary care in the selection of servants, whose work would otherwise imperil the personal safety of their fellows.

The presumption of fact, at the start, as to any given situation where liability of the master to the servant or through him is in controversy, is that the duties of the former, indicated, have been performed, and such presumption should prevail wherever the fact is called in question, till overcome by evidence establishing the contrary to a reasonable certainty.

The master having furnished his servant a safe working place, and satisfied the other conditions, or put such servants to work under such conditions that they must necessarily or reasonably make their own working place, or the place originally furnished is changeable naturally by the members of the crew as the work progresses, dangers thus created are not attributable to the master. *Peschel v. Chicago, M. & St. P. R. Co.* 62 Wis. 338, 21 N. W. 269; *Walaszewski v. Schoknecht*, 127 Wis. 376, 106 N. W. 1070; *Miller v. Centralia Pulp & Water Power Co.* 134 Wis. 316, 13 L.R.A. (N.S.) 742, 113 N. W. 954.

The master having complied at the start with the conditions mentioned, negligent conduct of one or more of a working crew proximately causing injury or death of an associate, is negligence of a fellow servant, and not breach of duty of the master. Who is and who is not a fellow servant depends upon the nature of the service. So the foreman of a crew, in exercising his functions as such in the common employment to accomplish a common purpose under one general management, some working at one detail, and some at another, is a fellow servant, and the negligence of one is not attributable to the master, except where, aside from his fellow servant duty, that one performs by direction, express or implied, the work of the master as regards

safe instrumentalities and safe fellow servants or a safe place to work.

To illustrate the rule that where a working crew necessarily makes the working place or places, for the members thereof, or in due course constantly or at brief intervals change the same, we have this:

A crew under a foreman was employed to erect a water tank. The working place in general and particular was under the control of the foreman, and, as to one member of the crew upon a particular occasion was dangerous, causing an injury to him. The negligence was held to be that of a fellow servant. *Peschel v. Chicago, M. & St. P. R. Co.* 62 Wis. 338, 21 N. W. 269.

In situations, in general, where the dangers of a working place are created by the servants themselves, including the foreman, and changed from time to time in the due course of operations, the safe place rule does not apply. *Strehlau v. John Schroeder Lumber Co.* 142 Wis. 215, 125 N. W. 429. That was applied to a quarry crew in *Mielke v. Chicago & N. W. R. Co.* 103 Wis. 1, 74 Am. St. Rep. 834, 79 N. W. 22, where a piece of rock rolled down onto a workman very much as in this case, and again so applied in *Pern v. Wussow*, 144 Wis. 489, 129 N. W. 622, where the fact was that a chunk of frozen dirt was cracked off by a workman, as was the case here, and it rolled down and injured a fellow workman.

The following are illustrations of the rule that the foreman of a working crew carrying out the details of an enterprise is a fellow servant of the men under him: A gang in the erection of a water tank. *Peschel v. Chicago, M. & St. P. R. Co.* supra. That case applies to the safe place rule and this feature of the law as well. A gang engaged in removing a heavy machine out of a car and into a factory. *Hamann v. Milwaukee Bridge Co.* 127 Wis. 550, 106 N. W. 1081, 7 A. & E. Ann. Cas. 458. A crew laying gas mains. *Gereg v. Milwaukee Gaslight Co.* 128 Wis. 35, 7 L. R.A. (N.S.) 367, 107 N. W. 289. The men engaged in removing a pile driver. *McKillop v. Superior Shipbuilding Co.* 143 Wis. 454, 127 N. W. 1053. A conductor is the fellow servant of a train crew under him. *Pease v. Chicago & N. W. R. Co.* 61 Wis. 163, 20 N. W. 908. The master of a vessel of his mate and other members, of the crew. *Mathews v. Case*, 61 Wis. 491, 50 Am. Rep. 151, 21 N. W. 513. The dock foreman and his crew as to all details of their general employment. *Okonski v. Pennsylvania & O. Fuel Co.* 114 Wis. 448, 90 N. W. 429. The foreman of a blasting crew and the men under him. *Wiskie v. Montello Granite Co.* 111 Wis. 443, 87 Am. St. Rep. 885, 87 N. W. 461.

Now, look upon these familiar and thus plainly illustrated principles and then on the picture of this case. Does not the one fit the other perfectly? No complaint about the working place, except as to the change created by Mr. Knudsen's associates after the crew went to work in the morning. No complaint about suitable tools or fellow associates up to the time of the accident. The foreman was very close to the members of the crew, going now here and now there directing operations, taking part from time to time in the physical labor, helping this one and then that one as occasion required or opportunity afforded. But a few hours before the accident, he, with Knudsen and another or others, worked clearing off loose dirt a short distance from where the fatal occurrence took place. The breaking down of earth and removing it from over the rock to be quarried was one of the ordinary and frequent operations in the quarry, particularly in the vicinity of where Knudsen was required to work, and preparatory to such work. It was from every view point one of the plainest of details in producing the general result to be accomplished. If due care on the part of the master required promulgation of rules in respect to preventing such dangers as that in question, it seems that was done, and the difficulty was respecting proper observation thereof.

Would it not be a plain violation of the stated principles to hold that it was the duty of the master to be present in person or by proxy with reference to such details as those mentioned? Such a rule would be utterly impracticable of observation. Here the master took the precaution to admonish the foreman to be alert in preventing just such dangers as the one which proved fatal to Knudsen; but that was plainly one of his ordinary duties as foreman, the proper performance of which Knudsen and all members of the crew took the chances of as ordinary risks of their employment. Such admonishment instead of being regarded as a transference of the master's duty to the foreman, and so fix the negligence of the latter upon the former, should be viewed as an extra and creditable precaution exercised to the end that the foreman, as one of the crew, should see that the particular detail was properly attended to.

So we cannot see any escape from the conclusion that the negligence which terminated the life of Knudsen is that of the man who loosened the bank of earth, leaving it in a dangerous condition, and then went to work with him in the line of danger from it, without informing him thereof; or the negligence of the foreman, or both, in

any event, within the fellow servant rule. Principles of law, which are as binding on this court as written law, command it, furnishing one more in number of illustrations of the necessity for some practicable way of dealing with industrial accidents, minimizing the misfortune thereof, in line with the enlightened spirit of the age which has been responded to in most every civilized country but our own, and which only the lawmaking power can furnish.

The judgment is affirmed.

Timlin, J., dissenting (Filed March 20, 1911):

I make no claim to possess that degree of tenderness and sympathy for the laborer expressed in the foregoing opinion and in *Houg v. Girard Lumber Co.* 144 Wis. 337, 129 N. W. 639, and in *Driscoll v. Allis-Chalmers Co.* 144 Wis. 451, 129 N. W. 408. I proceed solely upon my understanding of the law and justice.

The decedent, while engaged in drilling in a quarry with a rock drill, was killed by a piece of frozen earth falling on him from a clay ledge above. This frozen chunk had been loosened by some other workman some hours before, and left hanging in a dangerous position. After verdict in plaintiff's favor, judgment was rendered against her on the sole ground that the deceased was a coemployee with McBride, the foreman in charge. This is the only question in the case.

The defendant was a corporation, and one of its officers testified:

We had delegated to McBride the full charge and supervision of the work in the quarry. He had authority to hire and discharge men, and the direction of the men in the quarry. There was no one above him in the control of the work there. . . . At the time of this accident we had a rule in force for the operation of our quarry, which dealt with the matter of hanging rocks and partially loosened rocks or earth. The rule was to have everything as safe as possible.

Q. What was the rule in regard to dealing with overhanging rocks or loosened or partially loosened rocks or earth in your quarry?

A. Why, the foreman who had charge of the quarry understands what was necessary to make it as safe as possible. He understood this by his own knowledge of everything about a quarry.

Q. Did Mr. McBride understand this?

A. Certainly.

Q. And you had instructed him to keep the quarry as safe as possible?

A. Yes, sir; as safe as possible.

Q. He was the sole person in charge of that duty?

A. Yes, sir.

Q. You had at that time a rule in your quarry that overhanging rocks or loosened or partially loosened masses of earth were to be wholly detached, thrown down, or blasted off?

A. Not any particular rule.

Q. Isn't that a common customary rule in force in quarries at all times?

A. That is customary for the foreman to do that. If he didn't do it, he would not be a competent foreman.

Q. And you expected Mr. McBride to do so?

A. Yes sir.

Q. And that was his duty?

A. Yes, sir; where there was an overhanging rock or dirt cliff near the face of the rock or above a man's head, or some loose rock or dirt partially loosened, it was the duty of the foreman to get this down before the men worked around it.

Q. You required your foreman to do that?

A. Yes; he was to do that.

Q. That is the sole purpose of having a foreman there? That is why you have a foreman, to see if the quarry is safe before the men have to work around it?

A. The foreman has charge of all the work in the quarry. Everything that is done in a quarry is important work. The action of the foreman in taking down loose rock is not the only protection which the men have. If there is any overhanging rock or cliff forms when the men are working, they are expected to take it down.

The foreman, McBride, testified:

I told Knudsen[decedent] to go to the ledge and drill. I didn't make any effort to find out anything about the top of the bluff before I told him to go in there. I know that men had been working up there during the day, but I didn't go up to ascertain whether there was any loose or partially loosened earth up there. There was a path leading up there. It was about 10 or 15 feet above Knudsen's head.

There is a statement that all were expected to take down loose rock, but, on the evidence above quoted, there arises a fair question for the jury whether the corporation master did not assume to take charge of the safety of the place, and attempt to exercise this duty through McBride. To my mind the foregoing evidence is sufficient to support a verdict that the proprietor of the quarry charged McBride, the foreman, with the duty of making and keeping a safe place. On sufficient evidence the jury found McBride negligent. This was a 33 L.R.A. (N.S.)

duty of the master, which he might intrust to the foreman in charge. But in the exercise of that duty the foreman was a vice principal, and not a fellow servant with Knudsen. I think this principle runs through all the cases. It is cited in *Baumann v. C. Reiss Coal Co.* 118 Wis. 330, 335, 95 N. W. 139, 141, as follows: "The evidence is all one way that Roth had full charge of the work upon the dock, that defendant left him the duty of proving [providing?] a safe working place for the men, and that he was not personally engaged with them in removing the coal. That made him in every sense a vice principal in respect to the safety of the trestle and all other matters affecting the character of the working place in which he placed respondent and his associates."

If he was the foreman in charge, and had this duty put upon him by the proprietor or master, in addition to the duty of directing the work, and sole control of the operation, it would make no difference that he occasionally or intermittently helped in some other part of the work. *McMahon v. Ida Min. Co.* 95 Wis. 308, 60 Am. St. Rep. 117, 70 N. W. 478, At a time when it was the settled law of this state that the brakemen and section men on a railroad were fellow servants, it was nevertheless held that, where the section foreman had imposed on him the duty to keep the track clear of obstructions at a point where the brakeman was obliged to run along the track in the discharge of his duty, the section foreman was not a fellow servant with the brakeman so far as regards the duty of making or keeping the place safe. *Hulehan v. Green Bay, W. & St. P. R. Co.* 68 Wis. 520, 32 N. W. 529. To the same effect is *Schultz v. Chicago, M. & St. P. R. Co.* 48 Wis. 375, 4 N. W. 399; *Hill v. Winston*, 73 Minn. 80, 75 N. W. 1030; *Streicher v. Davenport Brick & Tile Co.* — Iowa, —, 124 N. W. 327; *Kaukola v. Oliver Iron Min. Co.* 159 Mich. 689, 124 N. W. 591; *Horn v. La Crosse Box Co.* 123 Wis. 399, 101 N. W. 935.

To recapitulate. The evidence hereinbefore quoted was sufficient in my opinion to warrant the jury in finding that the corporation defendant had, through its officers, assumed the duty, and charged its foreman, McBride, with the duty, of making and keeping the place safe. There is no law that I know of against its assuming this duty, whether the place of operations be a quarry or a railway. Having, as the evidence shows, assumed and undertaken to discharge that duty through the foreman, it should be liable for its negligent failure to carry out the duty. The decedent, with knowledge of such practice, might lawfully

rely upon the foreman to discharge that duty, and thus be misled and lulled into false security. He was negligently killed without fault on his part, as established by the verdict. The plaintiff was therefore entitled to a judgment on the verdict.

I am authorized to say that Mr. Justice Stebecker and Mr. Justice Kerwin concur in this dissent.

ILLINOIS SUPREME COURT.

PEOPLE OF THE STATE OF ILLINOIS,
Appt.,
v.

ESTATE OF MARSHALL FIELD,
Deceased, et al.

(248 Ill. 147, 93 N. E. 721.)

Succession tax — rights under antenuptial contract.

A sum provided by antenuptial agreement to be paid the wife in case of her surviving the husband, in lieu of all claims and rights which she might otherwise have upon her husband's estate as his widow, is subject to succession tax.

(December 21, 1910.)

Note. — Succession tax upon provision in lieu of dower.

It will be noted that the case of *PEOPLE v. FIELD* is based upon the principle of *Billings v. People*, 189 Ill. 472, 59 L.R.A. 807, 59 N. E. 798, that the words "intestate laws," in a statute imposing a transfer tax upon property passing by the intestate laws of the state, refer to the laws which govern the devolution of the estates of persons dying intestate, including applicable rules of the common law which are in force, so that the tax will be applicable to a widow's dower interest and her award under the administration laws. The decision of the *Billings* Case, however, does not come within the scope of the present note, for the reason that, in that case, the widow renounced the provision made for her in the will, and elected to take her dower and legal statutory share of the estate, thus eliminating any question of the liability of a provision in lieu of dower to tax. It may, however, be well to note that the case was affirmed on another point in 188 U. S. 97, 47 L. ed. 400, 23 Sup. Ct. Rep. 272.

As a further illustration of the cases in which the wife renounced the alternative provision, attention is directed to *Connell v. Crosby*, 210 Ill. 380, 71 N. E. 350, holding that a statute exempting a life estate in any property devised or bequeathed to the wife of a testator, from the tax, has no application where the wife renounces the provisions of the will, and takes other interest in the property to which she is entitled by statute.

33 L.R.A. (N.S.)

APPEAL by the People from a judgment of the County Court of Cook County, affirming an order of the County Judge, refusing to subject a certain amount received by the widow of Marshall Field, deceased, pursuant to an antenuptial contract, to an inheritance tax. Reversed.

The facts are stated in the opinion.

Messrs. W. H. Stead, Attorney General, and Walter K. Lincoln, for the People:

The sum of \$1,000,000 described in the antenuptial contract, and received by Delia S. Field, widow, "represented her dower" and other rights of inheritance, and is subject to taxation under the inheritance-tax laws.

Billings v. People, 189 Ill. 472, 59 L.R.A. 807, 59 N. E. 798; *Jordan v. Clark*, 81 Ill. 465; *Adams v. Storey*, 135 Ill. 448, 11 L.R.A. 790, 25 Am. St. Rep. 392, 26 N. E. 582; *Clarke v. Lott*, 11 Ill. 105; *Long v. Barton*, 236 Ill. 551, 19 L.R.A. (N.S.) 384, 86 N. E. 127.

Mr. Roy Wright also for the People.

Messrs. Wilson, Moore, & McIlvaine for appellees.

Farmer, J., delivered the opinion of the court:

This is an appeal by the people from the

In this connection, see also *Commonwealth's Appeal*, 34 Pa. 204, holding that where a testator devised his whole estate to his executors in trust for certain legatees and devisees, and the widow refused to take under the will, but thereafter, by an arrangement with the executors, accepted a sum less than the value of her dower right in the estate, and relinquished her claim to the remainder, she took such sum by virtue of her statutory right as widow of the testator; and therefore, so far as such amount was concerned, the estate of the testator was not taxable under the collateral inheritance tax law, as having passed by the will to the beneficiaries.

The question upon which some of the cases coming within this note are made to depend—whether a succession tax is enforceable upon dower, curtesy, statutory homestead, or allowances—is the subject of the note appended to *Re Kennedy*, 29 L.R.A. (N.S.) 428.

On the liability of community property to succession tax, see the note in 20 L.R.A. (N.S.) 208.

Opposed to the decision in the *FIELD CASE* is *Re Baker*, 83 App. Div. 530, 82 N. Y. Supp. 390, affirmed without opinion in 178 N. Y. 575, 70 N. E. 1094, holding that an antenuptial contract in which the husband agreed to give his prospective wife a certain sum before the marriage, and to make provision for her by will in a certain sum, in consideration of the marriage and of the acceptance by the wife of such provision in lieu of her dower and other rights, was not within the meaning of a statute impos-

judgment of the county court of Cook County in an inheritance tax proceeding in the estate of Marshall Field. The county court held that \$1,000,000 paid to his widow, Delia S. Field, according to the provisions of an antenuptial contract, was not subject to an inheritance tax, and that amount was deducted from the value of the estate before fixing the inheritance tax.

Marshall Field and Delia S. Caton were married September 5, 1905. Prior to their marriage, and in contemplation thereof, they entered into an antenuptial contract, by which it was agreed, among other things, that if Mrs. Field survived her husband, she should receive \$1,000,000 out of the property and estate of Marshall Field, in satisfaction of all claims, demands, and rights which she might otherwise have in and to the property or estate of her husband as his widow. Marshall Field died in January, 1906, leaving Delia S. Field surviving him as his widow. She presented a claim in the probate court for \$1,000,000, based on the antenuptial agreement, which was allowed and paid to her by the executors of the estate of Marshall Field.

Counsel for the appellant contend that "the antenuptial contract was a method of admeasurement of dower, substituted by

the parties for the method provided by law for determining the same, and said \$1,000,000 was paid to and received by Delia S. Field, widow, as the full amount of her dower and other rights of inheritance." Counsel for the appellees contend that the right of Mrs. Field to the \$1,000,000 did not vest in her by virtue of the intestate laws of the state of Illinois, but "was a legal debt due to her under a valid contract, made upon a valuable consideration, and was not an inheritance."

Whatever may have been decided in other jurisdictions, it is settled in this state that dower, less the exemption provided by statute, is subject to the inheritance tax. *Billings v. People*, 189 Ill. 472, 59 L.R.A. 807, 59 N. E. 798. It would seem logically to follow that, if the provision made for Mrs. Field in the antenuptial contract was in lieu of and a substitute for her dower and other rights she would have had in the estate of Marshall Field as his widow, it would also be subject to the inheritance tax. This court said in *Billings v. People*, supra: "It will be noticed that neither dower, nor any provision made in lieu of dower, is exempted."

In *Long v. Barton*, 236 Ill. 551, 19 L.R.A. (N.S.) 384, 86 N. E. 127, the court had un-

ing a tax upon transfers of property by deed, grant, bargain, sale, or gift, made in contemplation of the death of the grantor, or intended to take effect in possession or enjoyment at or after such death, it not appearing that it was entered into in bad faith or with intent to evade the statute. The court said that the contract was founded upon a perfectly good and valuable consideration, and was one which is regarded with favor by the law, and that therefore it represented a claim against the estate in the nature of a debt which should not be subject to taxation any more than if it were a debt represented by a bond or note. In this connection attention is directed to *Re Craig*, 97 App. Div. 289, 89 N. Y. Supp. 971, affirmed without opinion in 181 N. Y. 551, 74 N. E. 1116, holding that where, before the passage of any transfer tax law, one made a deed containing no power of revocation, and reciting that it was made in contemplation of marriage, by which he conveyed all of his property to trustees, to pay the income to him during his life, and upon his death to pay the principal in certain proportions to the widow and the issue of the marriage, the interests of the remaindermen accrued under the trust deed, and could not be subjected to a transfer tax upon the death of the life tenant, the court saying that the deed in this instance was not made in contemplation of death, but of marriage; and was designed to make an effective provision in *presenti* for the prospective wife and possible offspring. While it does not appear in this case that the provision was made in lieu of dower, it

would seem that such must have been its intended effect.

So, no tax can be enforced upon the basis of an annuity to which a widow was entitled under an agreement whereby the husband, in consideration of the wife's release of all her rights against him or in his estate, agreed to pay her a life annuity, provided that, if she should survive him, the trustee might, if the wife so elected, demand payment from the estate of a gross sum in satisfaction of the payments thereafter to fall due, to be ascertained upon the basis of her expectancy as of the date of the husband's death, where her right of election has not been exercised; and a clause in the husband's will, directing the trustee to continue the annuity in case of the widow's failure to elect, and giving directions as to the manner in which the obligation should be provided for, since it confers no additional benefit upon her, does not warrant the imposition of the tax. *Re Daniell*, 40 Misc. 329, 81 N. Y. Supp. 1033.

It has been held that the widow's estate of dower in the lands of the husband becomes, independently and not by virtue of the will, vested as an inchoate interest upon her marriage, and consummated upon the husband's death; and therefore it is not subject to a transfer tax. *Re Weiler*, 122 N. Y. Supp. 608, affirmed in 139 App. Div. 905, 124 N. Y. Supp. 1133.

It seems, however, that where the provision in lieu of dower is of a testamentary character, it is subject to the tax.

Thus, it has been held that a testator cannot avoid the tax upon bequests of per-

der consideration a claim filed by the divorced wife on an antenuptial contract against the estate of her former husband, who died testate. By the antenuptial contract, Philip H. Barton agreed that Tonie Long, with whom he contemplated marriage, should, upon his death, receive out of his estate, in lieu of dower, the sum of \$5,000; and Tonie Long agreed to accept that sum and relinquish all her dower rights in the estate of Barton that might accrue to her by reason of marriage, under the laws of the state of Illinois. The parties married, but afterwards the wife procured a divorce from her husband on the charge of extreme and repeated cruelty. In the divorce case she was awarded \$2,000 in lieu of, and in full satisfaction of, her contingent right of dower and of other rights in the estate of her husband. The \$2,000 was paid to her, and afterwards Barton died testate. The divorced wife filed a claim against his estate for \$5,000 mentioned in the antenuptial contract. This court held she was not entitled to an allowance of the claim, and said (236 Ill.

553): "The antenuptial contract is not an unconditional promise to pay \$5,000, but it is to be paid in lieu of dower. If appellant had died before her husband, all rights under the antenuptial contract would have been extinguished. The effect of the antenuptial contract was to substitute a sum of money for appellant's right of dower in her husband's land. Anything that would extinguish her right of dower would extinguish that which by agreement was substituted in its place."

The antenuptial contract before us was not an unconditional promise to pay Mrs. Field \$1,000,000 in consideration of her marrying Marshall Field. The contract recites that marriage was contemplated between the parties, and they, being desirous of making a settlement of their respective rights in the property of each other, entered into a contract for that purpose. It was agreed that each would retain control of his or her separate property, or property that they should acquire, respectively, after the marriage, and the contract provides that if Mrs. Field should survive

sonal property, by making a bequest of money to his wife, upon condition that it be accepted by her in lieu of dower and other interests, dower being an interest in real estate, not subject to a tax nor to the testator's disposition. *Re DeGraff*, 24 Misc. 147, 53 N. Y. Supp. 591.

So, it is held that where the widow accepts testamentary provisions in lieu of dower, the estate of the testator is not to be diminished for the purposes of taxation by deducting her dower right. *Re Barbey*, 114 N. Y. Supp. 725 (surrogate's decision).

And in *Re Riemann*, 42 Misc. 648, 87 N. Y. Supp. 731, holding taxable a legacy accepted by a widow in lieu of dower, it was contended that the testamentary provision in lieu of dower in lands of which the husband died seised should be the subject of taxation, not in her hands, but in the hands of those receiving the land; at least, to the extent of the value of the dower right in the land from the time of the husband's death; and that the provisions accepted by her must be regarded as a consideration for the sale by her of her dower right; and that the immediate effect of the provision, would be, in case of her acceptance, to free the land from dower, and thus enhance its value; and that therefore, to the extent of such enhancement, at least, the person succeeding to the lands should be subjected to the tax; for to that extent such successors, and not she, had succeeded to the land. The court, while declaring that the dower right is property which exists inchoately during the husband's lifetime, and passes to the widow regardless of the law governing the disposition of property, and that therefore it is not a transfer or succession subject to the tax, held that it makes no difference what the motive of the alternative trans-

fer is,—if the devise or bequest be accepted, then the transfer is made by will; and that therefore, whatever the value of the dower might have been, and although it could not have been taxable under the transfer tax act, since it would not be a transfer by will, the moment she accepted the provision in lieu of such right, a tax under and by virtue of the transfer tax act immediately attached, and by her acceptance of the legacy, she released all claim to the dower and to every right which she would have had under the same.

In *Atty. Gen. v. Henniker*, 7 Exch. 331, it was held that where a power given by father to son by will, to appoint an annuity chargeable upon the estate, to the latter's wife, and the power was exercised by will providing that the annuity should be in satisfaction of dower, the transaction constituted not a purchase of dower, but an appointment of a legacy upon condition, which was subject to legacy duty. The court said that the gift was taken under the will of the first testator, and that, if he had imposed the condition, it might be that the duty would have been payable only upon the excess of the whole annuity over the value of the dower; but that, under the facts of the case, the duty was payable upon the whole annuity. The circumstance suggesting the foregoing query was involved in *Sweeting v. Sweeting*, 1 Drew, 331, 22 L. J. Ch. N. S. 441, 17 Jur. 123, 1 Week. Rep. 122, where the father authorized the son to appoint to his wife a jointure in bar of dower, but the court held that legacy duty was payable, saying that since the legacy was to be regarded as passing under the original will, it was immaterial whether the condition was imposed by the instrument exercising the power, or that creating it. L. A. W.

her husband, she should have and receive out of his property and estate \$1,000,000, "which shall be received by her in lieu of, and in full satisfaction of, any and all claims, rights, and interests and demands which she might have or claim in and to the property and estate of the said party of the first part [Marshall Field], under or by virtue of the laws of the state of Illinois, or of any other state or country; it being agreed between the parties hereto that the said sum so agreed to be paid to the said party of the second part out of the property and estate of the said party of the first part shall satisfy all the claims, demands, and rights which the said party of the second part might otherwise have in and to any of the property or estate of the said party of the first part as his widow." By the plain language of the contract, the \$1,000,000 was to be paid to and accepted by Mrs. Field, if she survived her husband as his widow, as a substitute for and in lieu of dower and all other rights she would be entitled to, as widow, under the law. Its payment to her was conditional upon her surviving her husband as his widow. If she had died before her husband, the liability of his estate upon the antenuptial contract would have been extinguished; or if the marriage had been dissolved by divorce for her fault, her right under the antenuptial contract would have been terminated. *Clarke v. Lott*, 11 Ill. 105; *Jordan v. Clark*, 81 Ill. 465.

In the last-cited case, Clark entered into an antenuptial contract with Mary Jordan, by which she was to receive out of his personal estate \$2,000 in lieu of all dower, distributive share, and allowances of all kinds out of his estate, and she relinquished all right of dower and distributive share in Clark's estate. The marriage was subsequently consummated, and the parties lived together about two years, when the wife left her husband, and he afterwards obtained a divorce from her on the ground of desertion. Upon his death, the divorced wife filed a claim against his estate for the \$2,000 mentioned in the antenuptial contract. The claim was disallowed, and she brought the case to this court by appeal. The judgment of the lower court was affirmed; this court holding that the contract was to be treated as a provision made for the wife as a substitute or equivalent for dower. The court said (81 Ill. 467): "The argument is, the divorce operates only upon those rights and obligations created by law, and given to or cast upon the parties by law, in consequence of the assumption of the relation of husband and wife, and hence has no effect

whatever upon the rights and obligations created by or dependent upon the contract of the parties. The difficulty is not so much in the logic of the argument as in the want of application to this case. The error consists in the assumption the husband, by the contract, took upon himself the relation and obligation of a debtor to his intended wife. The contract will not admit of this construction."

It appears to us that no reasonable construction can be placed upon the language of the antenuptial contract in this case other than that the \$1,000,000 for Mrs. Field, if she survived her husband as his widow, was a substitution for her dower and all other rights she would otherwise have been entitled to in his estate. That it was competent for the parties, by contract, to agree upon an amount the widow should receive in lieu of the right she was entitled to under the law, is not the subject of controversy, and that such an agreement constitutes a liability of the estate cannot be denied; but, when so made as a substitution for and in lieu of dower and other rights, it must, for the purpose of the inheritance tax, be treated the same as dower would be, and is not to be considered as an indebtedness, to be deducted from the market value of the estate. In the *Billings Case* the widow renounced the provisions made for her in the will of her husband, and elected to take under the statute. It was there contended that the inheritance tax act, which is the same act that governs this case, did not apply to property that passed to the widow as dower; but the court held that neither dower, nor any provision made in lieu of it, could be exempted from the market value of the estate in fixing and determining the inheritance tax.

If we are correct in the construction we have placed on the antenuptial agreement, it necessarily follows, then, that the \$1,000,000 received by Mrs. Field is not exempt. Illustration is not necessary to show that any other rule would enable parties desiring to do so to, in a measure, defeat the object and purpose of the statute.

In our opinion the county court erred in deducting the \$1,000,000 provided for in the antenuptial contract from the market value of the estate in fixing and determining the tax. The judgment is therefore reversed, and the cause remanded, with directions to the county court to proceed and render judgment in accordance with the views herein expressed.

Petition for rehearing denied February 9, 1911.

KANSAS SUPREME COURT.

JAMES M. MASON, Appt.,
v.
SKIP D. HARLOW.

(— Kan. —, 114 Pac. 218.)

Injunction — against foreign suit.

1. Equity has power to restrain a party within its jurisdiction from prosecuting a suit in the courts of another state, and in a proper case will not hesitate to exercise the power.

Same — grounds of relief.

2. Courts will not enjoin a suit in another state merely on the ground of convenience of parties, but will do so when such restraint is necessary to prevent one citizen from doing an inequitable thing, as where the action has been brought maliciously in order to vex and harass another citizen, or to interfere with or prevent the free administration of justice in a suit pending in this state.

Pleading — sufficiency.

3. The petition in this case examined, and held to state a cause of action, and that it was error to sustain a demurrer to the petition and to refuse a restraining order.

(March 11, 1911.)

A PPEAL by plaintiff from a judgment of the District Court for Wyandotte County, Second Division, refusing to grant a temporary restraining order, and sustaining a demurrer to the petition, in a suit to enjoin the prosecution of an action by defendant in the courts of Arkansas seeking to recover damages against plaintiff for alleged libelous matter contained in certain letters. Reversed.

The facts are stated in the opinion.

Messrs. J. M. Mason, Lawrence J. Mason, and E. E. Chesney, for appellant:

It is monstrous for a court of equity in the jurisdiction where all of said persons live, to deny an injunction against the prosecution of a malicious, groundless suit in the foreign jurisdiction.

Andrews v. Lembeck, 46 Ohio St. 41, 15 Am. St. Rep. 547, 18 N. E. 483; Powers v. Arkadelphia Lumber Co. 61 Ark. 504, 54 Am. St. Rep. 276, 33 S. W. 842.

The Constitution of the United States, in proper cases, permits equity courts of one state to control persons within their

Headnotes by PORTER, J.

Note. — As to right to enjoin action or proceeding in foreign jurisdiction, generally, see notes to Thorndike v. Thorndike, 21 L.R.A. 71, and O'Haire v. Burns, 25 L.R.A. (N.S.) 267, and other annotation referred to in the latter note.
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jurisdiction from prosecuting suits in another state.

Cole v. Cunningham, 133 U. S. 107, 33 L. ed. 538, 10 Sup. Ct. Rep. 269; Story, Eq. Jur. §§ 890, 899; Cole v. Young, 24 Kan. 435; Pickett v. Ferguson, 45 Ark. 177, 55 Am. Rep. 545; Vail v. Knapp, 49 Barb. 299; Cunningham v. Butler, 142 Mass. 47, 56 Am. Rep. 657, 6 N. E. 782; Butler v. Goreley, 146 U. S. 313, 36 L. ed. 986, 13 Sup. Ct. Rep. 84; Engel v. Scheuerman, 40 Ga. 206, 2 Am. Rep. 573; Dehon v. Foster, 4 Allen, 545; Hawkins v. Ireland, 64 Minn. 339, 58 Am. St. Rep. 534, 67 N. W. 73; Field v. Holbrook, 3 Abb. Pr. 377; Kittle v. Kittle, 8 Daly, 72; Vermont & C. R. Co. v. Vermont, C. T. R. Co. 46 Vt. 792; Gage v. Riverside Trust Co. (C. C.) 86 Fed. 984; Kempson v. Kempson, 63 N. J. Eq. 783, 58 L.R.A. 484, 92 Am. St. Rep. 682, 52 Atl. 360, 625; Hazen v. Lyndonville Nat. Bank, 70 Vt. 543, 67 Am. St. Rep. 680, 41 Atl. 1046; Kendall v. McClure Coke Co. 182 Pa. 1, 61 Am. St. Rep. 688, 37 Atl. 823; Hager v. Adams, 70 Iowa, 746, 30 N. W. 36; Dinsmore v. Neresheimer, 32 Hun. 204; O'Haire v. Burns, 45 Colo. 432, 25 L.R.A. (N.S.) 267, 132 Am. St. Rep. 191, 101 Pac. 755; Wilson v. Joseph, 107 Ind. 490, 8 N. E. 616; Keyser v. Rice, 47 Md. 213, 28 Am. Rep. 448; Sandage v. Studabaker Bros. Mfg. Co. 142 Ind. 148, 34 L.R.A. 363, 51 Am. St. Rep. 165, 41 N. E. 380; 1 High, Inj. 2d ed. § 105.

Mr. Frans E. Lindquist also for appellant.

Messrs. John A. Hale and Richard J. Higgins, for appellee:

There will be no interference by equity where there is an adequate remedy at law.

Jordan v. Updegraff, McCahon (Kan.) 103; Howe Mach. Co. v. Miner, 28 Kan. 441; Laithe v. McDonald, 12 Kan. 340; Cole v. Young, 24 Kan. 435; Hilliard Inj. § 34; Birmingham R. & Electric Co. v. Birmingham Traction Co. 122 Ala. 349, 25 So. 192; Carson v. Dunham, 149 Mass. 52, 3 L.R.A. 203, 14 Am. St. Rep. 397, 20 N. E. 314; Wyeth Hardware & Mfg. Co. v. H. F. Lang & Co. 54 Mo. App. 147; Fletcher v. Rodgers, 27 Week. Rep. 97; Burgess v. Smith, 2 Barb. Ch. 276; Bank of Bellows Falls v. Rutland & B. R. Co. 28 Vt. 470; Wurmser v. Stone, 1 Kan. App. 134, 40 Pac. 993; Marbourg v. Smith, 11 Kan. 554; Willman v. District Court, 4 Idaho, 11, 35 Pac. 692; Mason v. Grubel, 64 Kan. 835, 68 Pac. 660; State ex rel. Ayres v. Stockwell, 7 Kan. 98; State ex rel. Elsbree v. Bridgman, 8 Kan. 458; Beardsley v. Bennett, 1 Day, 107; Whitsell v. Study, 37 Ind. App. 429, 76 N. E. 1010; Brand v. Hinchman, 68 Mich. 590, 13 Am. St. Rep.

362, 36 N. W. 667; Mendenhall v. School Dist. No. 3, 76 Kan. 177, 90 Pac. 773.

Porter, J., delivered the opinion of the court:

James M. Mason brought this suit against Skip D. Harlow to enjoin the prosecution of an action in the courts of Arkansas, in which Harlow sought to recover against him damages for alleged libelous matter contained in certain letters. The court refused to grant a temporary restraining order, and sustained a demurrer to the petition. This court, in order to preserve the status, issued an order restraining the prosecution of the action in Arkansas pending the appeal from the decision of the district court.

The only question to be determined is whether the petition stated a cause of action. If it did, the court erred in refusing the restraining order, and in sustaining the demurrer. The petition is lengthy and contains a great deal of unnecessary verbiage and averments of evidentiary facts which have no place in a pleading. Briefly, the facts stated are that Mason is a regular practising attorney of the Wyandotte county bar. He brought a suit in the district court of that county for his client Maggie A. Hanke, against Harlow, to set aside a deed from her conveying her homestead to J. H. Peterson, on the ground that Harlow had, by fraudulent misrepresentations, induced her to exchange her property for a worthless tract of land in Fulton county, Arkansas. The defendant served Mason with notice to take the depositions of a number of witnesses at Mammoth Springs, Arkansas. Mason corresponded with one Brittain, of Mammoth Springs, who claimed to be a lawyer, and retained him to represent the plaintiff in taking the depositions and in procuring evidence for other depositions on behalf of Mrs. Hanke. Being unable to obtain any information from Brittain with regard to the depositions after they had been taken, and learning that they were being withheld, Mason went to Arkansas for the purpose of investigating the situation. While there he served notice to take other depositions at the same place on August 26, 1909. He was there solely as the attorney of his client, and not for any matter personal to himself, and was engaged in looking after her interests. While there Harlow sued him in the circuit court of Fulton county, Arkansas, for \$25,000 damages for an alleged libel in a letter of instructions which he had written to Brittain, and caused Mason to be served with process on August 24th, two days before the time set for taking depositions. The action was not brought

in good faith, but for the purpose of preventing Mason from properly discharging his duties to his client, and was inspired solely by vindictive and malicious purposes. Mason owned no property in Arkansas, and there were no debts owing to him there. Harlow and Mason both resided in Wyandotte county, Kansas.

The demurrer admits the facts pleaded, and it is difficult to discover on what ground the court sustained the demurrer, and refused the restraining order. The petition alleges that the action in Arkansas was not brought in good faith, but maliciously, and for the purpose of harassing the plaintiff and preventing him from properly attending to the business of his client in an action pending in court. On the same principle that the courts quite generally hold parties, witnesses, and even attorneys privileged from the service of process while in attendance on courts and other judicial proceedings, public policy and the interests of justice alike require that courts shall protect litigants from the malicious prosecution in other jurisdictions of suits the purpose of which is to interfere with or prevent the due administration of justice. Equity has power to restrain a party within its jurisdiction from prosecuting a suit in the courts of another state, and in a proper case will not hesitate to exercise the power. *Cole v. Young*, 24 Kan. 435; *Gordon v. Munn*, 81 Kan. 537, 541, 25 L.R.A. (N.S.) 917, 106 Pac. 286, and cases cited; *Pickett v. Ferguson*, 45 Ark. 177, 55 Am. Rep. 545; *Snook v. Snetzer*, 25 Ohio St. 516; *Vail v. Knapp*, 49 Barb. 299; *Keyser v. Rice*, 47 Md. 203, 28 Am. Rep. 448. Courts will not enjoin a suit in another state merely on the ground of the convenience of parties, but will do so when the ends of justice require it. *Bank of Bellows Falls v. Rutland & B. R. Co.* 28 Vt. 470.

In *Hawkins v. Ireland*, 64 Minn. 339, 58 Am. St. Rep. 534, 67 N. W. 73, it was held that an injunction would lie when necessary to enable justice to be done by the court, and prevent one citizen from obtaining an inequitable advantage of another. In *White, Stokes, & Allen v. Caxton Book Binding Co.* 10 N. Y. Civ. Proc. Rep. 146, it was held that courts will not enjoin the prosecution of an action already commenced in another state, unless it was not brought in good faith, but in order to vex and harass the defendant. To the same effect are *Clafin v. Hamlin*, 62 How. Pr. 284; *Dinsmore v. Neresheimer*, 32 Hun, 204; *Dehon v. Foster*, 4 Allen, 545.

The power of the court in this instance to enjoin the appellee cannot be doubted. 22 Cyc. Law & Proc. p. 813. Both parties

are citizens of this state and subject to the jurisdiction of the court, and equity will enjoin the prosecution of a suit in another state whenever the circumstances make such restraint necessary to prevent one citizen from doing an inequitable thing, and especially when the action in the other state has been brought maliciously and in order to vex and harass another citizen, and to interfere with or prevent the free administration of justice in a suit pending here.

The petition stated a cause of action, and the judgment will be reversed, and the cause remanded, with directions to overrule the demurrer and grant the restraining order.

All the Justices concurring.

MASSACHUSETTS SUPREME JUDICIAL COURT.

LAURENCE MINOT et al., Trustees, etc.,

v.

ELMER A. STEVENS.

(207 Mass. 588, 93 N. E. 973.)

Succession tax — failure to exercise power.

The interest of those who will take under a will or deed upon failure of a donee of a power of appointment therein to exercise it is not so far vested that the imposition of a succession tax upon the passing to them of the estate, in case of such failure, can be considered as a taking of property without due process of law.

(February 13, 1911.)

Note. — Inheritance or succession tax on property covered by power of appointment.

I. Taxability under donee's will.

a. Under statutes not expressly covering powers.

1. Where power is not exercised, 236.

2. Where power is exercised.

(a) Generally, 237.

(b) Statute enacted after creation of power, 238.

(c) In cases of nonresidents, 239.

b. Under statutes expressly covering powers.

1. Powers not exercised, 240.

2. Powers exercised.

(a) Generally, 240.

(b) Statute enacted after creation of power, 243.

(c) In cases of nonresidents, 248.

II. Present taxability under donor's will, 248.

33 L.R.A. (N.S.)

PRESERVATION by the Supreme Judicial Court for Suffolk County for the consideration of the full bench of an appeal by the trustees from a decree of the Probate Court imposing a succession tax upon the trust estate held by them. Affirmed.

The facts are stated in the opinion.

Mr. Frank Brewster, for appellants:

Mrs. Wharton's heirs take exactly the same estate they would have taken, if the power of appointment had been omitted altogether from the deed of trust.

Crawford v. Langmaid, 171 Mass. 309, 50 N. E. 606; Moore v. Weaver, 18 Gray, 305.

The legislature cannot impose a succession tax upon remainders created before the act was passed, because they may be defeated by a power of appointment, which is not in fact exercised.

Re Pell, 171 N. Y. 48, 57 L.R.A. 540, 89 Am. St. Rep. 791, 63 N. E. 789; Re Lansing, 182 N. Y. 238, 74 N. E. 882; Re Chapman, 133 App. Div. 337, 117 N. Y. Supp. 679, 196 N. Y. 561, 90 N. E. 1157; McElroy, Transfer Tax Law, 1st ed. 35; Chandler v. Kelsey, 205 U. S. 472, 51 L. ed. 886, 27 Sup. Ct. Rep. 550.

When a trust provides that the property shall be held for the benefit of a person for life, remainder at his death to his heirs at law, if such heirs at law are children, they acquire upon birth a vested interest which they can transfer, or which can be taken from them by proceedings in bankruptcy or insolvency.

Putnam v. Story, 132 Mass. 205; Whipple v. Fairchild, 139 Mass. 262, 30 N. E. 89; Wainwright v. Sawyer, 150 Mass. 168, 22 N. E. 885; Stocker v. Foster, 178 Mass. 601, 60 N. E. 407; Crawford v. Langmaid, 171

III. Power of appointment reserved by grantor, 250.

IV. Miscellaneous cases, 250.

I. Taxability under donee's will.

a. Under statutes not expressly covering powers.

1. Where power is not exercised.

See also Re Langdon, *infra* I. a, 2 (b).

The New York court has held that the transfer effected by an instrument in which the grantor conveyed property in trust, to pay the income to himself during his life and upon his death to give the remainder to his daughter, if she should be living, or if she should be dead, then to such persons as she should by will appoint, or in default of appointment, then to such persons as would be entitled to the same if she had died intestate and in possession of the property,—is, the power not having been exercised, embraced within the mean-

Mass. 311, 50 N. E. 606; Stevens v. Mulligan, 167 Mass. 87, 44 N. E. 1086; Alexander v. McPeck, 189 Mass. 43, 75 N. E. 88; Butterfield v. Reed, 160 Mass. 361, 35 N. E. 1128; Crocker v. Shaw, 174 Mass. 266, 54 N. E. 549.

Messrs. Dana Malone, Attorney General, and Fred T. Field, for appellee:

The property at Mrs. Wharton's death vested in possession and enjoyment in her heirs at law.

Gardiner v. Fay, 182 Mass. 492, 65 N. E. 825; Putnam v. Story, 132 Mass. 205; Daniels v. Eldredge, 125 Mass. 356; Whipple v. Fairchild, 139 Mass. 262, 30 N. E. 89; Wainwright v. Sawyer, 150 Mass. 168, 22 N. E. 885; Butterfield v. Reed, 160 Mass. 361, 35 N. E. 1128; Alexander v. McPeck,

189 Mass. 34, 75 N. E. 88; Sewall v. Roberts, 115 Mass. 262; Loring v. Thorndike, 5 Allen, 257; Minot v. Winthrop, 162 Mass. 113, 26 L.R.A. 259, 38 N. E. 512.

Statutes similar to that here in question have been generally sustained as constitutional.

Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594; Billings v. Illinois, 188 U. S. 97, 47 L. ed. 400, 23 Sup. Ct. Rep. 272; Brown v. Elder, 32 Colo. 527, 77 Pac. 853; Kochersperger v. Drake, 167 Ill. 122, 41 L.R.A. 446, 47 N. E. 321; Re Fox, 154 Mich. 5, 117 N. W. 558; State ex rel. Foot v. Bazille, 97 Minn. 11, 106 N. W. 93, 7 A. & E. Ann. Cas. 1056; s. c. and note, in 6 L.R.A. (N.S.) 732; State ex rel. Slabaugh County v. Vin-

ing of the act of 1892, enacted before the execution of the instrument by the grantor, and providing that a tax shall be imposed when the transfer is of property by deed, grant, bargain, sale, or gift made in contemplation of death of the grantor, or intended to take effect in possession or enjoyment at or after such death. Re Cruger, 54 App. Div. 405, 66 N. Y. Supp. 636, affirmed without opinion in 166 N. Y. 602, 59 N. E. 1121. The court pointed out that the donee took a vested remainder subject to be defeated by her death before that of the grantor, and that her next of kin took a contingent remainder dependent upon her death within the lifetime of the donor, unmarried, without issue, and without having exercised the power of appointment. The court also said that, although the remainders must be held to have vested, subject to be defeated by certain contingencies, yet the remaindermen could not have had actual possession and enjoyment or right of possession until the death of the grantor.

But a widow who, by her husband's will, is given property during her natural life, "to be retained or disposed of as she may think proper," takes an absolute estate under the New York real property statute, providing that where a power of disposition is given and no remainder is limited on the estate of the grantee of the power, such grantee is entitled to an absolute fee, and therefore the failure of the widow to exercise the power of appointment does not cause the property to descend to the testator's heirs at law, so as to warrant the assessment of a transfer tax against them. Re Lynn, 34 Misc. 681, 70 N. Y. Supp. 730.

2. Where power is exercised.

(a) Generally.

In the absence of a specific statutory provision to the contrary, those who take under a power of appointment derive their titles under the grant of the power, and not under its exercise. Com. v. Williams, 13 Pa. 29.

An application of this rule led to the re-

sult that where a testator gave his daughter a life estate in property, and provided that upon her death it should pass to such persons as she should by will appoint, and she exercised the power by appointing her brothers and sisters, the lineal descendants of the original testator, the interest of such descendants was not taxable under a statute imposing a collateral inheritance tax upon estates passing by will to any person except lineal descendants, for the reason that such persons took lineally under the will of the original testator, and not collaterally under the will of the donee of the power. Ibid.

So, where a power of appointment created by a testator in favor of his daughter was exercised by her in favor of her brother and stepmother, the son and wife of the testator, it was held that their estate was derived from the testator's will, and was not subject to the collateral inheritance tax. Com. v. Sharpless, 2 Chester Co. Rep. 246.

In Lisle's Estate, 22 Pa. Super. Ct. 262, it appeared that a testatrix devised property to her four children in fee, share and share alike, but requested them in making their wills to give the property so received, "unless the strongest reasons should urge them to the contrary," to the direct heirs of the testatrix and her husband; that three of the children died, and their shares became vested in the fourth, under wills complying with the request of the testatrix; and that upon the death of the survivor, after having made a will disposing of all of the property so transferred by the testatrix, to the survivor's nephews and nieces, a collateral inheritance tax was sought to be imposed upon the interest passing to the latter. Applying the doctrine that an absolute estate given by will is reduced to a life estate with remainder in trust, by succeeding words of desire, expectation, or confidence, the court held that the children took life estates with remainder to the "direct heirs," subject to the power of appointment, and that therefore the nieces and nephews took to the extent of the three portions which the donee acquired under the wills of her sisters, by virtue of her absolute

sonhaler, 74 Neb. 675, 105 N. W. 472; Nunemacher v. State, 129 Wis. 190, 9 L.R.A. (N.S.) 121, 108 N. W. 627, 9 A. & E. Ann. Cas. 711; Beals v. State, 139 Wis 544, 121 N. W. 347; Knowlton v. Moore, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747; Beers v. Glynn, 211 U. S. 477, 53 L. ed. 290, 29 Sup. Ct. Rep. 186; State v. Clark, 30 Wash. 439, 71 Pac. 20; Re McKennan, — S. D. —, — L.R.A. (N.S.) —, 126 N. W. 611; State ex rel. Garth v. Switzler, 143 Mo. 287, 40 L.R.A. 280, 65 Am. St. Rep. 653, 45 S. W. 245; Cope's Estate, 191 Pa. 1, 45 L.R.A. 316, 71 Am. St. Rep. 749, 43 Atl. 70.

Knowlton, Ch. J., delivered the opinion of the court:

This case comes before us by reservation on an appeal from a decree of the probate court, instructing the trustees that a suc-

cessation tax is due upon certain property referred to in a deed of trust which conveyed the property to trustees, who were to pay the income of it to Nancy Willing Wharton for her life, and, on her death, to convey it to such person or persons as she by her will, or by any instrument of appointment in the nature of a will, should devise or bequeath it to, or should order and appoint to receive it; and in default of such will or instrument of appointment, to convey it in fee to her heirs at law. Mrs. Wharton has deceased, leaving a will in which she expressly disclaimed any intention to exercise any power of appointment that she might have.

The respondent claims a succession tax upon the property under Stat. 1909, chap. 527, § 8, the first part of which is as follows: "Whenever any person shall exercise a power of appointment derived from

ownership, subject to the payment of the collateral inheritance tax, but that the other portion, passing under her power of appointment to them as lineal descendants of the original testatrix, was not liable to such tax. Of course, so far as the interest which vested absolutely in the donee is concerned, no question of power of appointment was involved, and the case throws little light upon the question here considered. See also *Re Lynn*, supra I. a, 1. So, in *Com. v. Sharpless*, supra, the share of a granddaughter which, under the grandfather's will, was subject to her father's power to appoint such uses in respect thereof for the benefit of herself and "issue" as he should see fit, and which she willed to her brother, was held subject to a collateral inheritance tax as part of her estate, notwithstanding the father's attempt to declare a trust for her life with absolute testamentary power of disposal in her. The decision was upon the ground that the father's power did not extend to conferring an absolute power of disposal upon her; and therefore she took an absolute estate, subject only to the trust declared by the father for her lifetime.

And a somewhat analogous case is *Com. v. Stoll*, 132 Ky. 237, 114 S. W. 279, 116 S. W. 687, holding that where a testator devised property to his wife in fee, with absolute power to dispose of the same by will or otherwise, but attempted to dispose of any remainder that should not be disposed of by the wife, the devise over was void, and therefore persons entitled to the property upon the death of the wife intestate took it from her by descent, and not under the will of the testator, and the property was therefore subject to an inheritance tax, under a statute enacted subsequently to the death of the testator.

As to power to create remainder after life estate, with absolute power, of disposal, see note in 6 L.R.A. (N.S.) 1186, 33 L.R.A. (N.S.)

(b) Statute enacted after creation of power.

Since an estate created by the execution of a power of appointment takes effect in the same manner as if it had been created by the instrument which raised the power, the estate is not taxable where the power is created by will before the enactment of the statute imposing the tax, even though the power is exercised afterwards. *Re Harbeck*, 161 N. Y. 211, 55 N. E. 850.

So, it has been held that, under an act imposing a tax in respect of property or any interest therein or income therefrom passing by will, no tax is enforceable when property passes to a person by virtue of the exercise, even after the passage of the act, of a power of appointment created before the passage of the act, for the appointee does not take from the donee of the power, but takes in the same manner as if his name had been inserted in the power, or as if the power and the instrument executing it had been expressed in that creating it. *Atty. Gen. v. Parker*, 31 N. S. 202.

And it was held in *Emmons v. Shaw*, 171 Mass. 410, 50 N. E. 1033, that the donor, and not the donee, of an absolute power of disposition, was the "decendent," within the meaning of an act imposing a tax upon the property of a decedent which should pass by will or other instrument intended to take effect on his death, to persons who did not sustain to him the relation described in the act, and therefore that a remainder which went to the appointee after the death of the donee was not subject to the tax, where the statute was enacted subsequently to the death of the donor. The court pointed out that the statute did not provide for a tax on all property transmitted by will, but only on the property passing by will to persons who did not sustain to the decedent the relation described in the act, and that

any disposition of property made prior to September 1st, 1907, such appointment, when made, shall be deemed to be a disposition of property by the person exercising such power, taxable under the provisions of chapter 563, of the acts of the year 1907, and of all acts in amendment thereof and in addition thereto, in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power, and had been bequeathed or devised by the donee by will. And whenever any person possessing such a power of appointment, so derived, shall omit or fail to exercise the same within the time provided therefor, in whole or in part, a disposition of property taxable under the provisions of chapter 563 of the acts of the year 1907, and all acts in amendment there-

of and in addition thereto, shall be deemed to take place to the extent of such omission or failure, in the same manner as though the persons or corporations thereby becoming entitled to the possession or enjoyment of the property to which such power related had succeeded thereto by a will of the donee of the power failing to exercise such power, taking effect at the time of such omission or failure." This statute was intended to cover certain cases where property passing into the possession of new owners was not previously subject to a tax upon the succession, and other cases where, with a possible construction of previous statutes, the property might be subject to a tax under them. It provides that the taxation shall be in the same manner as though the property belonged absolutely to

therefore any argument that the tax was in the nature of a duty or excise on the privilege of transmitting property by will was of no assistance in determining whether the donor or the donee was to be regarded as the decedent.

So, where the testator gives the donee a life estate, and the remainder to certain named persons, and the power of appointment in the donee is confined to prescribing the manner and proportion in which the remaindermen shall take, the latter take under the will of the testator, and not under the will of the donee, and are therefore not subject to United States revenue act of 1898, which was enacted before the power of appointment was exercised, but after the death of the donor, and which purports to subject to the tax any person having in charge or trust as administrators, executors, or trustees, any legacies or distributive shares passing after the passage of the act from any person possessed of such property, either by will or by the intestate laws. The court said that the donee was not "the person possessed," within the meaning of the statute, for the reason that the appointees took nothing from the donee, but simply took after her, and that although the corpus of the estate was passed on to them from her after she was through with it, it passed in continuation of its original passage from the testator, who was clearly the person possessed, within the meaning of the statute. The precise ground of this decision, it seems, is that the persons who occupy the position of appointees in this case were really named by the testator himself, the donee of the power being authorized only to specify the proportion which they should take. *Fidelity Trust Co. v. McClain*, 113 Fed. 162, affirmed without additional opinion in 57 C. C. A. 679, 122 Fed. 1020.

A fortiori, no tax is enforceable under a statute enacted subsequently to the testator's death, upon property covered by his will, by which he gave another a life estate with power of disposition, and provided that, if any residue should remain undisposed of, it should pass to two named persons,

where the donee of the life estate and power provided in his will that his executors should distribute the property according to the provisions of the former will, for in such circumstances the property is deemed to have passed directly to the remainderman under the first will. *Re Langdon*, 153 N. Y. 6, 46 N. E. 1034. In this case the court regarded the provision in the donee's will as a failure to exercise, rather than an exercise of, the power.

And where one devises land to another by a will giving the latter a privilege to use therefrom during her life, and simultaneously makes a contract with her that she will always keep on hand a will devising a half of the property to a third person, the latter takes under the will of the original testator, and is therefore not subject to an inheritance tax under a statute passed subsequently to the death of the first testator, but before that of the second. *Winn v. Schenck*, 33 Ky. L. Rep. 615, 110 S. W. 827.

But the New York transfer tax law of 1892, providing that such a tax shall be imposed when any person becomes beneficially entitled, in possession or expectancy, to any property or the income thereof by any transfer, whether made before or after the passage of the act, was held to embrace and render taxable the interest of an appointee who had no previous existence as beneficiary until the exercise, after the enactment of the statute, of a power of appointment created by a will which became effective before the passage of the statute, such appointee being a person who has become beneficially entitled in possession to property after the passage of the act, by a transfer previously made. *Re Brooks*, 65 N. Y. S. R. 255, 32 N. Y. Supp. 176.

(c) In cases of nonresidents.

Upon the theory that an appointee deprives title immediately from the donor of the power, it was held in *Com. v. Duffield*, 12 Pa. 277, that no collateral inheritance tax was enforceable against either the appointee or the executrix of the donee, where the power related to a certain amount of

the donee of the power, and had been bequeathed or devised by the donee by will. In this respect the provision is different from the construction that was given by this court to the previous statute, in its application to the taxation of property passing under the execution of a power. *Emmons v. Shaw*, 171 Mass. 410, 50 N. E. 1033. The statute must be held to cover all cases that come within its terms, and to supersede all previous inconsistent legislation applicable to such cases.

The facts of the case before us are strictly within the language and purpose of the statute, and our decision must be governed by this enactment, if it can be supported as constitutional.

It is contended that it calls for a tak-

ing of property without due process of law, because the persons who would take under a previously existing will or deed containing a power of appointment, if the power is not exercised, have a vested right in the property under the will or deed, such that their subsequent acquisition of it, in possession and enjoyment, is not a succession, and cannot be taxed as such.

It generally has been held that a title derived through a power of appointment in a will or deed is to be taken as coming from the donor of the power, rather than from the donee. But in many particulars the donee is often more directly responsible for the possession and enjoyment of the beneficiary than the donor. This is referred to in some of the cases from the

money, and was created by the foreign will of a nonresident, although the donee's will was probated in Pennsylvania.

So, the doctrine that the title derived from the exercise of the power relates back to the instrument creating it has been applied so as to vest the title in a nonresident appointee prior to her death, and thus subject the property to an inheritance tax as a part of her estate, under the laws of 1887 as amended by the laws of 1891, providing that all property which shall pass by the will of a nonresident shall, if located in New York, be subject to a tax, notwithstanding the property was removed from the state before the appointee's will was administered, and although, if the property were to be regarded as passing under the residuary clause of the donee's will, it would not have been subject to the tax under the appointee's will for the reason that she died before the former will was probated. *Re Lord*, 111 App. Div. 152, 97 N. Y. Supp. 553, affirmed without opinion in 186 N. Y. 549, 79 N. E. 1110.

b. Under statutes expressly covering powers.

1. Powers not exercised.

In this connection note *MINOT v. STEVENS*.

The interest which a child takes after the failure by his mother to exercise a power of appointment created in a deed conveying property to trustees to pay the income to the mother during her life, and remainder to such of her children as she should by will appoint, and in case of her failure to make appointment, to her lawful issue, is taxable under the provision of the New York amendatory act of 1897, providing that when any person possessing a power of appointment derived from any disposition of property made before the passage of the act shall omit or fail to exercise the same within the time provided, a taxable transfer shall be deemed to take place to the extent of such omission or failure, in the same manner as though the person thereby becoming entitled to the possession or enjoyment of the property to which such power related had succeeded thereto by a will

of the donee of the power failing to exercise such power, taking effect at the time of such omission or failure. *Re Bartow*, 30 Misc. 27, 62 N. Y. Supp. 1000.

2. Powers exercised.

(a) Generally.

In the English Case of *Platt v. Routh* (1840) 3 Beav. 257, 10 L. J. Ch. N. S. 131, the testator gave his residuary personal estate upon trust to pay the interest thereof to his daughter for life, and after her death upon trust for such persons, excepting the members of three families, and in such manner, as she should by will appoint, and the testator further provided that if his daughter should intermarry with a certain member of one of the families or his relations, or should reside with or receive visits from him or them, the bequest in her favor with power of appointment given to her should be absolutely void. The daughter exercised the power by appointing the residuary estate among various persons. Three questions were presented in the case: First, whether the daughter or her estate was liable to pay any legacy duty beyond that which was payable on the life interest given to her for her own benefit; second, whether any probable duty was payable on the probate of her will in respect of her father's residuary estate thereby appointed; and third, what, if any, legacy duty was payable upon the sum appointed by her will. The first and third questions were held to be dependent upon whether the power of appointment given to the daughter was general and absolute, and the court having held that, notwithstanding the exception of the members of three families in the grant of a power of appointment otherwise general, and notwithstanding that the daughter was forbidden to intermarry or to have social intercourse with any of the members of one of the families, the power of appointment was general and absolute, and that therefore a legacy duty was payable on the residue under the first will, by virtue of the provision of § 18 of the statute of 36 Geo. III. chap. 52, pro-

English reports that are cited in *Emmons v. Shaw*, 171 Mass. 410-413, 50 N. E. 1033. In England it is expressly provided by statute that, in the case of a general power, the person executing the power shall be deemed to be the one from whom the estate is received. The reasonableness of this doctrine is also shown in the opinion in *Chanler v. Kelsey*, 205, U. S. 466, 51 L. ed. 882, 27 Sup. Ct. Rep. 550.

The condition of property which is subject to a general power of appointment contained in a will or deed, and which, in default of appointment, is to be given over to persons named, is peculiar. The donee of the power has no title to it, but he has an absolute right to dispose of it by the exercise of the power. If the power is to dispose of it by an instrument in the na-

ture of a will, signed by three witnesses, as was the fact in this case, if he exercises the power, the property becomes a part of his estate for administration after his death, and may be used for the payment of his debts. His relation to it is very much like that of an owner. *Clapp v. Ingraham*, 126 Mass. 200; *Olmev v. Balch*, 154 Mass. 318, 28 N. E. 258. Those who would take in default of an appointment have only an interest which is contingent upon the conduct of the donee of the power, who can make it vest in them absolutely in possession, or can defeat it altogether. He can make it vest in possession by an appointment to the persons named as the takers in default of appointment, in which case it will be theirs, subject only to a possible use for the payment of his debts,

viding that where any property should be given for a limited interest, and a general and absolute power of appointment should also be given to any person, to whom the property would not belong in default of such appointment, such property, upon the execution of the power, should be charged with the same duty and in the same manner as if the same property had been immediately given to the person having and executing the power. after allowing any duty before paid in respect thereof. It was also held with respect to the third question, that since the power of appointment was general and absolute, a legacy duty was payable on the same residue as appointed under the will of the daughter, by virtue of the 7th section of the same act, defining legacies which are subject to duty to be any gift by will or testamentary instrument which shall, by virtue of such instrument, have effect or be satisfied out of the personal estate of the person dying, or out of any personal estate which such person shall have power to dispose of as he or she shall think fit. In reaching this conclusion, the court stopped to point out that its opinion was not founded upon the notion that the residue of the original testator's estate had become the property of the daughter, but upon the notion that the property, in the circumstances of this case, was specifically charged by the act. But the court expressly held that the residue over which the daughter had the power of appointment was not her property, and could not be recovered by her executors by virtue of the probate; and that the second question should be answered in the negative, for in such circumstances the property was not "the estate and effects of the deceased, for or in respect of which the probate" should be granted, within the meaning of the statute of 55 Geo. III. chap. 184, imposing probate duties. This decision was affirmed *sub nom. Drake v. Atty. Gen.* 10 Clark & F. 257 (1843).

In *Re Lovelace* (1850) 4 De G. & J. 340. 28 L. J. Ch. N. S. 489, 5 Jur. N. S. 694, 7 Week. Rep. 675, a duty was sought to be 33 L.R.A. (N.S.)

imposed upon appointees in respect of the execution in their favor of a power of appointment by the will of one who died subsequently to the passage of the succession duty act of 16 and 17 Victoria, chap. 51, the power having been created by an instrument which became effective before such act was passed. It was contended, on the one hand, that the appointees were subject to the duty by virtue of the provision of § 2 of this statute, declaring that every past or future disposition of property by reason whereof any person had or should become beneficially entitled to any property upon the death of any person dying after the time appointed for the commencement of the act, either immediately or after any interval, either certainly or contingently, and either originally or by way of substituted limitation, should be deemed to have conferred, or to confer, a succession on the person entitled by reason of such disposition. It was contended, on the other hand, in effect at least, that § 4 of the act relating to powers of appointment must be deemed to constitute an exclusive legislative declaration in respect of the taxation of powers of appointment, and since such section, which provided that where any person should have a general power of appointment under any disposition of property taking effect upon the death of any person dying after the time appointed for the commencement of the act, over property, he should, in the event of his making any appointment, be deemed to be entitled, at the time of exercising such power, to the property or interest thereby appointed, as a succession derived from the donor of the power, and that where any person should have a limited power of appointment under a disposition taking effect upon any such death, over property, any person taking any property by the exercise of such power should be deemed to take the same as a succession derived from the person creating the power as predecessor,—since such section did not embrace the situation in controversy, which involved a general power of appointment, in which case, under § 4, the donee should,

or he can do it by an omission to exercise the power, or he can dispose of it by an appointment to others, thus terminating the contingent interest and leaving the contingent remaindermen nothing. After a will or deed containing such a power has taken effect, and before the donee of the power has acted under it, have all rights of succession in possession and enjoyment so vested that there is no possibility of a succession that will come into existence later, when the final disposition of the property is determined by an exercise of the power or by a failure to exercise it? It is held, and so far as we know without dissent, that, through the exercise of the power, a right of succession to property may come into existence afterwards, which properly may be a subject for the imposi-

tion of a tax. *Emmons v. Shaw*, 171 Mass. 410, 50 N. E. 1033; *Crocker v. Shaw*, 174 Mass. 266, 54 N. E. 549; *Re Dows*, 167 N. Y. 227, 52 L.R.A. 433, 88 Am. St. Rep. 508, 60 N. E. 439; *Re Cooksey*, 182 N. Y. 92, 74 N. E. 880; *Chanler v. Kelsey*, 205 U. S. 466, 51 L. ed. 882, 27 Sup. Ct. Rep. 550. The tax is imposed as of the time when the succession in possession and enjoyment occurs through the happening of the event that determines it.

The cases above cited, from the New York court of appeals and the Supreme Court of the United States, show that the succession is not so vested in those who will take if the power is not exercised, that it may not go to the appointee through the exercise of the power of appointment. Until the time comes for the final determination,

be deemed the successor of the donor, no duty was enforceable. The court, however, held that the appointees were subject to the tax under § 2, which expressly embraced the situation, and that the mere fact that a power of appointment was involved, not included within § 4, did not operate to exclude it from the provisions of § 2. It was further held in this case that § 2 was applicable notwithstanding the appointee and the donee of the power were domiciled outside of the British Empire, and in this respect the case was followed in *Re Wallop*, 1 De G. J. & S. 656, 5 New Reports, 679, 33 L. J. Ch. N. S. 351, 10 Jur. N. S. 328, 10 L. T. N. S. 174, 12 Week. Rep. 587, which involved a general power of appointment, and in which the court on another point followed *Platt v. Routh*, as affirmed in *Drake v. Atty. Gen.* and regarded such case as having settled the rule that § 18 of the act of 36 Geo. III. chap. 52, so far as it related to general powers of appointment, applied to the duties payable by the donees of the powers, and not to the duties payable by the appointees, leaving the latter to depend upon the 7th section. In construing the latter section, the court alluded to the fact that it is held not to apply to legacies given by wills of persons domiciled outside of Great Britain, and to be paid out of their personal estates, and stated that usually such construction is based upon the doctrine that the personal estate follows the person, but held that this doctrine could have no application to the present case, where the legacies were given by the exercise of a power, there being no property in the donee of the power. The court observed, however, that the real question was as to what the legislature intended by the language of § 7, in terms applying to legacies given by wills of persons to be satisfied out of their personal estate, or out of any personal estate of which they might have had power to dispose, and held that it must have been intended that the same rule should apply to different members of the same class,—that is, that since no duties were

payable by legatees under the wills of persons domiciled outside of Great Britain, none should be chargeable against appointees under the wills of nonresident donees, and that therefore no legacy duty was payable in the case.

Considerable litigation has arisen in New York under the amendatory act of 1897, providing that whenever any person shall exercise a power of appointment, such appointment, when made, shall be deemed a transfer taxable in the same manner as though the property to which the appointment related belonged absolutely to the donee of such power, and had been bequeathed or devised by him by will. As will be seen, the constitutionality of this act is upheld in cases cited *infra* I. b, 2 (b).

In *Re Walworth*, 66 App. Div. 171, 72 N. Y. Supp. 984, the court applied the rule that the amendatory act of 1897 was intended to change the rule that the appointees under the power take by virtue of the will creating the power, and not by virtue of the will by which the power is exercised, with the result that the tax should be fixed "as though the property to which such appointment related belonged absolutely to the donee of such power, and had been bequeathed or devised by such donee by will, and held that where a testator gave his son a life estate with power of appointment limited so that the same should be exercised only in favor of descendants of the testator, and the donee exercised the power in favor of his own nephews, who were lineal descendants of the testator, the tax was assessable at the general rate, and not at the rate provided for lineal descendants. The court said that since the enactment of the amendatory statute of 1897, the word "decendent" in the act of 1892 must be held to refer to the deceased person who should exercise the power, and not the deceased person who should create it.

So, under the amendatory act of 1897, the value of the estate of appointees, who were named by one who was given a life estate in property, with power to dispose

it is not established as belonging to anyone. Then comes the statute which we are considering, and which was considered in the above-cited cases in New York and in the Supreme Court of the United States. It declares, in substance, that the exercise of the power shall be considered as giving the succession to the appointees, and that the refusal or omission to exercise the power shall be considered as giving the succession to the persons who are to take in default of the exercise of it. The statute treats the result as depending upon the conduct of the donee, who may appoint or refrain from appointing. If he appoints, the succession under the statute is to be created as determined by him, and the right thus acquired by the appointee is treated as taxable, because received as a

benefit under our law. Can there be any doubt of the power of the legislature so to treat the coming of the appointee into the succession? It seems not. To this extent the cited cases seem to go.

It is but a short step further to apply the second part of the statute, which refers to coming into succession through the conduct of the donee in refusing or omitting to make an appointment that might carry the succession elsewhere. While he has the power of appointment, he is in control of the succession. He may allow it to go to the persons named in the will or deed, or he may transmit it elsewhere. By exercising the power he may even give his own creditors the benefit of it after his death. When property is held subject to such possibilities of disposition, it is usur-

of the remainder, is the value of the property passing under the power of appointment, and not merely the value of the remainder upon the death of the donor of the power. *Re Tucker*, 27 Misc. 616, 59 N. Y. Supp. 699.

And by virtue of that statute, it has been held that property passing under a power of appointment, the donee and appointee both being residents, comes within the principle that the inheritance tax is a tax on the right or privilege of disposing of property by will, so that the tax is payable in respect of the property, whether it is located within the state or not. *Re Hull*, 111 App. Div. 322, 97 N. Y. Supp. 701, affirmed without opinion in 186 N. Y. 586, 79 N. E. 1107.

It was held in *Re Rogers*, 71 App. Div. 481, 75 N. Y. Supp. 835, affirmed without opinion in 172 N. Y. 617, 64 N. E. 1125, that property passing by virtue of the exercise of a power of appointment is taxable under the amendatory act of 1897, notwithstanding the appointee is a creditor of the donee, in satisfaction of whose debt the appointment is made. The court said that the creditor was not obliged to accept such provision in the instrument exercising the power, apparently upon the theory that he could refuse the provision, and prove his debt against the estate, but that if he did accept it, he was subject to the tax.

(c) *Statute enacted after creation of power.*

See also *Re Lovelace*, supra I. b, 2 (a).

Real property subject to a power of appointment, which before the exercise of the power has been converted by the trustees into personalty, will be subject to the transfer tax provided for the exercise of such power upon personalty, although at the time of the execution of the will creating the power, the tax was not applicable to the transfer of real property. *Re Dows*, 167 N. Y. 227, 52 L.R.A. 433, 88 Am. St. Rep. 509, 60 N. E. 439, affirmed in 183 33 L.R.A. (N.S.)

U. S. 278, 46 L. ed. 196, 22 Sup. Ct. Rep. 213.

In the last case it was sought, under the New York statute of 1897, which is set out in the preceding subdivision, to enforce a transfer tax upon the exercise of a power of appointment by one in favor of his children, created by the will of his father, giving to the son a life estate in the property, and providing that upon the latter's death, the property should vest in such of his surviving children as he should by his last will appoint, and that if he should die intestate, then the property should vest absolutely and at once in his surviving children, share and share alike. The court of appeals, applying the doctrine that the right to take property by devise is not an inherent or natural right, but a privilege accorded by the state, which it may tax or charge for, and that therefore the right of a testator to make a will or testamentary instrument is equally a privilege, and equally subject to the taxing power of the state,—held that when the original testator devised his property to the appointees under the will of his son, he necessarily subjected it to the charge that the state might impose upon the privilege accorded to the son of making a will; and that the title of the appointees must be considered as derived from the exercise of the power, and not from the original will. The case was taken to the United States Supreme Court (reported *sub nom.* *Orr v. Gilman*, 183 U. S. 278, 46 L. ed. 196, 22 Sup. Ct. Rep. 213), where it was insisted, among other things, that upon the death of the original testator, who at that time had a legal right to transfer by will his property or any interest therein to his grandchildren, without any diminution or impairment then imposed by the law of the state upon the exercise of that right, the grandchildren acquired a vested right in the property transferred, and that the subsequent law operated to diminish and impair such vested right. But the Supreme Court adopted the construction placed upon the statute by the New York court of ap-

pation or an unlawful interference with vested rights, for the legislature to say that the succession in possession and enjoyment is not yet determined, that it belongs to no one until it is determined, that the determination of it depends upon the will and conduct of the donee of the power, and that, when it is determined by his conduct, either by action or by refraining from action, it shall be subject to a tax? We think it is in the power of the legislature to say, in reference to succession in possession after the death of the persons whose decease is awaited, that property so held is not vested in anybody, and that when it vests in possession through a proper disposition of it, which is dependent upon the will and conduct of the donee, a succession tax shall be imposed. We think that *Chanler v. Kelsey*, ubi supra, looks

in this direction, although it does not discuss this particular subject. The decision in *Moffit v. Kelly*, 218 U. S. 500, 54 L. ed. 1086, 31 Sup. Ct. Rep. 79, published since the argument in the present case, is almost, if not quite, decisive of the question.

The decision to the contrary in *Re Lansing*, 182 N. Y. 238, 74 N. E. 882, was by four of the judges, two others dissenting in a well-reasoned opinion. So, the decision in *Re Chapman*, 133 App. Div. 337, 117 N. Y. Supp. 679, which was afterwards affirmed by the court of appeals in 196 N. Y. 561, 90 N. E. 1157, without an opinion, was by three judges, while two others joined in a dissenting opinion.

We hold that the decree of the probate court was correct.

Decree of Probate Court affirmed.

peals, and held that as so construed the statute infringed none of the provisions of the 14th Amendment of the United States Constitution.

In *Re Vanderbilt*, 60 App. Div. 246, 63 N. Y. Supp. 1079, affirmed without opinion in 163 N. Y. 597, 57 N. E. 1127, a testator who died after the enactment of the inheritance tax law of 1885, but before the amendment of 1897, bequeathed property in trust to pay the income thereof to his son for life, and upon his death, to his issue in such shares or proportions as he might by his last will appoint, and in default of such appointment, the gift was made directly to the issue. It does not appear from the case whether in the latter alternative provision any particular proportion in which the donee's children should take was specified. The donee, who died subsequently to the enactment of the amendment of 1897, had exercised the power by a will giving one of his children a specified portion of the property, and the balance to his other children equally. It was contended in this case, for the purpose of defeating the tax, that the amendment, if held applicable in this case, would be an unconstitutional deprivation of property without due process of law, as interfering with vested rights, as well as an impairment of the obligation of a contract of the state. The court held that there was no complete vesting of the estate in the children of the donee or life tenant until the power was exercised, and that while appointees take by relation back, so as to derive their title under the donor, they must take their specific shares from the time of the execution of the power, and that the authority of the state to impose the tax on the right of succession continued until the time at which the extent of that right was finally fixed by the exercise of the power of appointment. On the point relating to obligation of contracts, it was insisted that the statute of 1885, under which the will of the donor was subjected to a tax in the form then imposed upon the right of inheritance by will, constituted a contract 33 L.R.A.(N.S.)

between the state and the donor, that if he should die while such statute was in full operation and unchanged, his estate might be disposed of without the imposition of any further tax, which contract was unconstitutionally impaired by the amendment of 1897, making the appointment a taxable transfer; but the court held that by passing the act of 1885, the state had not disposed of its power to tax the right of succession to property, and that such right was properly exercised by the enactment of the amendment.

Substantially the same question was presented in *Re Delano*, 176 N. Y. 486, 64 L.R.A. 279, 68 N. E. 871, petition for rehearing denied in 177 N. Y. 540, 69 N. E. 1122, which involved a conveyance by deed before the act of 1897 was passed, of property to the grantor's daughter for life, with remainder to her brothers and sisters, or their issue *per stirpes*, the deed further providing that the daughter might by will appoint the property among the persons named, in such shares as she chose. She died without issue after the passage of the act of 1897, and after having appointed her nephew beneficiary. The court said that it did not regard the question as open since the decision in the *Vanderbilt* and *Dows* Cases, but went on to say that it was quite immaterial that there was no statute imposing a succession tax of any kind in force when the original disposition of the property was made, and the power was created, for the reason that it is the practical transfer through the exercise of the power by will that is taxed, and nothing else, and that the right of the legislature to impose a tax on the privilege of exercising a power by will is not affected by the fact that no such tax was imposed when the power was created. It was also pointed out that while the lower court gave no consideration to the *Dows* Case, it attempted to distinguish the *Vanderbilt* Case upon the ground that there the power of appointment was created by will, whereas in the then present (*Delano*) case, the power was created by a deed, and also up-

on the ground that the will by which the power was created in the Vanderbilt Case was made after the enactment of the inheritance tax law. The latter distinction was disposed of by the remarks of the court to which reference has just been made, and the former distinction was repudiated with the statement that the effective agency of the power of appointment to produce the result intended is neither strengthened nor weakened by the nature of the instrument used by the donor of the power to create it, and that the power, however or whenever created, authorized the donee by her will to divest certain defeasible estates, and to vest them absolutely in one person, and that therefore the statute applied to all powers alike, without distinction on account of the method of creation, since it provided that the exercise of the power should be deemed a taxable transfer of the property, the same as if it had belonged absolutely to the donee of the power, and had been bequeathed or devised by such donee. This case also went to the United States Supreme Court, and is reported *sub nom.* *Chanler v. Kelsey*, 205 U. S. 466, 51 L. ed. 882, 27 Sup. Ct. Rep. 550, where it was held that the statute as so construed did not take property without due process of law, and that the fact of the reduction of the estate resulting from the imposition of the tax did not render the statute repugnant to the United States Constitution as impairing contract obligation. From the decision of the majority of the latter court, Justice Holmes dissented upon the ground that in this case there was no succession. His idea seemed to be that the means of executing the power depended in the first place upon the deed creating it, and that if the creative instrument had permitted the execution of the power by deed rather than by will, then there would have been no question but that the inheritance tax law had no application; and that since the required method of executing the power could be ascertained only by an inspection of the deed creating the power itself, it was the latter instrument that determined ultimately to whom and how the property should pass, and, such instrument being a deed not of a testamentary character, no question of succession could arise. From this, the conclusion was that, since in such circumstances there is no succession, a statute purporting to impose a tax only upon successions, but construed or expressly declared to be applicable in this case, was void.

In *Re Lansing*, 182 N. Y. 238, 74 N. E. 882, the testator devised property in trust to pay the income to his daughter for life, and after her death to pay the remainder to her heirs at law, subject, however, to a power given to the daughter to dispose by will of the remainder in fee after the termination of the trust estate by her death, "among her heirs at law and her collateral relatives in such proportion and manner and with such limitations as she

may desire." The daughter exercised the power by devising and bequeathing the property to her only daughter in fee simple, and the question before the court was whether the appointee took by virtue of the power of appointment, in which case the property was subject to an inheritance tax, or whether she took under the will of the donor, who died before the enactment of the statute, in which case no tax could be enforced. The appointee insisted that since the exercise of the appointment gave her nothing to which she would not have been entitled under the will in case the power had not been exercised, the property passed to her directly from the donor, it appearing that she rejected the title from the appointment, and elected to take under the former instrument. The court adopted this view, holding that, since the exercise of the power was made in such a manner as not to alter the destination of the property, such attempted exercise was a mere formality, and of no effect, and that, upon the death of the donor, the appointee took a vested interest in remainder, being "a person in being who would have an immediate right to the possession of the lands upon the ceasing of the intermediate or precedent estate," within the meaning of a statute relating to remainders, and that therefore the tax was not enforceable. It should be noted that while it has just been said that the court held that she took a vested remainder, this statement may perhaps be regarded as more of a recital, than as a decision, for, at another point in the opinion, the court said that it was not at all necessary to determine whether the remainder was vested or contingent, for the reason that if it was merely contingent, it was acquired under the donor's will at the instant of his death, and that while it was true that her estate was subject to be defeated by her death before that of the donee, or by diminution if the donee should leave other children, her right to the estate was indefeasible if she survived the donee. The court distinguishes the *Delano Case* upon the ground that there the appointee could have taken an undivided fourth through the deed of the donor, and could have thus escaped the transfer tax, but that he was entitled to the entire estate under the exercise of the power of appointment by the donee, and that when he claimed the entire property, he necessarily elected to take under the power of appointment.

In the *Lansing Case*, the court also distinguished *Re Cooksey*, 182 N. Y. 92, 74 N. E. 880, where, notwithstanding the death of the donor before the enactment of the inheritance tax law of 1896, and its amendment of 1897, it was held that the property was taxable as it passed under the exercise of the power which was effected subsequently to the enactment of the statute, where the donor devised and bequeathed his residuary estate to trustees to pay his daughter the income during her life, and upon her death to such of her

children as she should by will designate and appoint, and in such manner and upon such terms as she might impose, and provided that in case she should die intestate, the funds should vest absolutely and at once in her children, share and share alike, to be paid to them as follows: As each should attain the age of twenty-one years, there should be paid to him or her not to exceed a certain sum; and as each should attain the age of twenty-five, a further sum not to exceed a certain amount; and as each should attain the age of thirty years, the remainder. The donee exercised the power by appointing her children to receive the estate share and share alike, but she provided in her will that as each should attain the age prescribed in the donor's will, he or she should be paid precisely the maximum amount specified in the donor's will. The court held that the property was taxable under the statute for the reason that it vested under the exercise of the power, and this was put upon the ground that, although the share received by each appointee would have been the same whether it vested under the power of appointment or under the will of the donor, the latter instrument left it within the discretion of the trustees as to whether the maximum amount be paid, whereas by the exercise of the power, the donee fixed definitely such maximum amount as the sum to be paid to the children, and without qualification, leaving no discretion in the trustees, and that therefore the exercise of the power could not be treated as a nullity. The variation effected by the exercise of the power in this case should be compared with that in the Ripley Case following, where an apparently greater change in the destination of the property was regarded as insufficient to make the property pass under the exercise of the power.

Whereas in the Lansing Case some importance was attached to the fact that the will of the donor provided that the remainder should pass to the children, and that it was only in case of the exercise of the power in favor of other persons that the operation of the original will would be defeated, the court in *Re Lowndes*, 60 Misc. 506, 113 N. Y. Supp. 1114, relies upon such circumstance absolutely, for the purpose of distinguishing the Lansing Case and following the Cooksey Case. In the Lowndes Case, it appeared that the donor provided that her property should vest in trustees, and that the income should be paid to her daughter during life, and that upon the death of the daughter the property should pass according to the will of the daughter, and in default of a will, to the issue of the daughter, and the daughter exercised the power by giving her husband a life estate, and providing that upon his death the property should pass to the children.

So, quoting the Lansing Case, the New York court held in *Re Ripley*, 122 App. Div. 419, 106 N. Y. Supp. 844, affirmed in 32 L.R.A. (N.S.);

192 N. Y. 536, 84 N. E. 574, that where the will gave a life estate, and provided that upon the death of the life tenant the property should, "unless otherwise disposed of" by the life tenant, pass to the issue of the life tenant, share and share alike, and the life tenant by his will provided that the property should be divided equally between his wife and children,—the children took under the will of the first testator directly, and that their interest therefore was not subject to taxation, such testator having died before the enactment of the laws of 1897. The court points out that the first testator did not say that the children should take in case the life tenant failed to exercise any power of disposition or appointment, but that they should take unless the trust fund was otherwise disposed of, and it is this feature of the case which leads the court to the conclusion that the property passed under the will of the first testator, and not under the exercise of the power of appointment. It was regarded as wholly immaterial that the share of the children was reduced by the provision in the will exercising the power, that the wife should be entitled to one share, whereas the original will provided for an equal division among the children without any mention of the wife, the court saying that, inasmuch as the four fifths (there were four children) were not otherwise disposed of than as provided in the will of the original testator, the provision and direction of his will became operative, and the children took their interest directly thereunder, and independently of the power of appointment. (See, however, the Cooksey Case, *supra*.) The affirmance of this case by the court of appeals was *per curiam*, the court merely pointing out that the power of appointment was limited, and could be exercised only in favor of persons who did not take under the will creating it, and that the children took directly under the original will, except as their interest might have been devested or cut down by a valid exercise of the power.

The settled rule under the act of 1897 seems to be that where the persons named as appointees take under the exercise of the power just exactly what they would have taken under the original will if the power of appointment had not been exercised, their interest vests upon the death of the original testator, subject, of course, to be defeated by their death before that of the donee, and by the exercise of the power adversely to their interest; and their interests are not taxable, where the original testator died before the enactment of any inheritance or transfer tax law. *Re Chapman*, 133 App. Div. 337, 117 N. Y. Supp. 679, appeal dismissed without opinion in 196 N. Y. 561, 90 N. E. 1157.

The Lansing Case was expressly followed in *Re Spencer*, 119 App. Div. 883, 107 N. Y. Supp. 543, where about the only allusion to the state of facts is the remark of the court that the conditions were substantially the same as in the Lansing Case;

and the court lays great stress upon the fact that the will of the donee of the power neither added to nor took from any of the final beneficiaries the benefits which the will of the donor of the power expressly conferred upon them.

So, following the Lansing Case, it was held in *Re Haggerty*, 128 App. Div. 479, 112 N. Y. Supp. 1017, that where the donee of the power exercised it by naming the person who was entitled to take under the will of the donor in case the donee failed to exercise the power, the interest of such donee or beneficiary was not taxable, the will of the original testator having become effective in 1875.

In *Re Lewis*, 129 App. Div. 905, 113 N. Y. Supp. 1136, the court, upon the authority of the Lansing and Haggerty Cases, affirmed without further opinion 60 Misc. 643, 113 N. Y. Supp. 1112, where it appears that the donee exercised the power in favor of her children, who by the will of the donor were made the beneficiaries in case the donee should fail to exercise the power.

So, without any discussion whatever, but citing *Re Lansing* as authority, the New York court in *Re Backhouse*, 110 App. Div. 737, 96 N. Y. Supp. 466, affirmed without opinion in 185 N. Y. 544, 77 N. E. 1181, held that where a testator gave his son a life estate with remainder to his heirs, or to such person or persons as the son should appoint by will, and the son in his will appointed his children, the latter took under the will of the first testator, and were vested with the estate when such will became effective, and that therefore the transfer was not subject to tax, for the reason that the transfer tax law was not enacted until after the will of the first testator became effective.

And where the testator gives a life estate to his daughter with remainder to such persons as she should by will appoint, and in case of her failure to exercise the power, to her lawful issue in the same manner as if she should die intestate, and she appoints her lawful issue, the latter's interests vest under the will of the original testator, and are therefore not taxable under the act of 1897, where the original testator died before the enactment of an inheritance or transfer tax law. *Re Chapman*, 133 App. Div. 337, 117 N. Y. Supp. 679, appeal dismissed without opinion in 196 N. Y. 561, 90 N. E. 1157.

On the other hand, where the donee, in exercising the power, makes a disposition of the property substantially different from the alternative provision by the donor, to be effective if the donee fails to act, the property is deemed to pass by the exercise of the power, and the act of 1897 is held applicable.

Thus, where the testator gives his daughter a life estate with remainder to her issue, share and share alike, and his will further provides that the daughter shall have power to appoint the remainder by will among the testator's descendants liv-

ing at her death, in such proportions as she shall think proper, and the daughter dies leaving four daughters and two sons, after having exercised the power by providing that the property shall be divided in equal proportion among her daughters, the latter take under the power of appointment, and not under the will of the testator, and their interest is subject to taxation under the amendatory act of 1897, the daughter having died after the enactment of such statute, although the testator died before its enactment. *Re Potter*, 51 App. Div. 212, 64 N. Y. Supp. 1013.

And where the donor, who died in 1879, provided that upon the termination of the life estate of the donee, the property should pass to such persons and in such proportions as the donee should by will appoint, and upon failure to appoint, to the heirs of the donee as if the donee had died seized and possessed thereof, and the donee gave his wife a life estate with remainder to three of his four children, it was held that the children did not take under the original will, but that their rights and estates were created and fixed by the exercise of the power, and that therefore they were required to pay a transfer tax under the amendatory act of 1897, the court pointing out that the power of appointment was exercised so that instead of an equal and immediate division of the estate among the four children upon the death of the donee, which would have occurred if the latter had not exercised the power, the division was postponed during the life of the donee's wife, and the absolute estate was given to only three of the four children. *Re Warren*, 62 Misc. 444, 116 N. Y. Supp. 1034.

And it was held in *Re Seaver*, 63 App. Div. 283, 71 N. Y. Supp. 544, that under the amendatory act of 1897, the interest of an appointee acquired under his mother's will, which became effective after the passage of the act, in property devised to the mother by one who gave her a life estate with absolute power of disposition of the same by will, was subject to taxation. The court took pains to say that it did not mean to intimate that the actual title to the property for other than taxing purposes was derived from the mother; but that its conclusion was based upon the fact that the statute explicitly declared that it is the exercise, and not the creation, of a power of appointment which effects the transfer upon which the tax is enforced.

So, where a testator gives a life estate to his widow, and authorizes her to dispose of the remainder by will, and provides that in case of her failure to do so, a life estate shall be given to her brother with remainders over at his death to the widow's heirs at law, next of kin according to the New York law in cases of intestacy, and the widow exercises the power by giving her brother the property absolutely, the property passes by virtue of the exercise of power, and the transfer thereby affected is taxable under the act of 1897. *Re Rogers*, 71 App. Div. 461, 75 N. Y. Supp.

835, affirmed without opinion in 172 N. Y. 617, 64 N. E. 1125.

Upon the ground that, under the amendatory act of 1897, the tax is imposed upon the transfer effected by the exercise of the power of appointment, it was held in *Re Buckingham*, 106 App. Div. 13, 94 N. Y. Supp. 130, that where a testator whose will became effective in 1888 transferred property in trust in favor of his nephew for life with the remainder of the nephew's children, or in default of issue, to such persons as the nephew should appoint, the interest of the person who took as appointee under the exercise of the power by the nephew was subject to taxation under the amendatory act of 1897, notwithstanding the transfer to the life tenant and donee had previously been excessively taxed under the inheritance tax law in force at the time of the death of the original testator, by computing the tax upon the basis of the value of the principal fund, rather than upon the value of the life estate in the donee. The court pointed out that it is not the property that is taxed, but it is the interest taken by the respective beneficiaries, and that the fact that the life tenant was excessively taxed did not operate to prevent an enforcement of the amendatory act of 1897 as against another person, the appointee, whose claim was based upon the exercise of the power, which was distinctive from the transfer under which the person already taxed claimed.

(c) In cases of nonresidents.

See also *Re Lovelace* and *Re Wallop*, supra I. b, 2 (a).

In *Re Thomas*, 39 Misc. 136, 78 N. Y. Supp. 981, the court held that since, in the *Vanderbilt* and *Dows* Cases, the constitutionality of the amendatory act of 1897 had been upheld upon the ground that the tax is not upon property, but upon transfers of property made by will or descent, where the right to make or receive such transfers is accorded by the laws of the state, and which right the sovereign power of the state lawfully exercises by imposing the tax,—the interest on an appointee was not taxable under such statute where the will creating the power of appointment was executed by a nonresident, and disposed of property having its situs in the foreign state, until paid over in due course, after the exercise of the power by the donee became effective, the court saying that while it was true that the will exercising the power was that of a resident, its legal effect depended entirely upon the law of the foreign state, and that if its probate in New York was necessary or useful for any purpose, it was only because the law of the foreign state so declared.

And where a nonresident donee exercised a power of appointment over property having its situs in a foreign state, in favor of beneficiaries of the class limited by the will creating the power, executed

by a resident at such an early date that the transfer, if effected by it, was not subject to an inheritance or transfer tax, and the will exercising the power was executed in the foreign state, and was probated under the laws thereof, it was held that the property was not subject to taxation under the amendatory act of 1897, the court invoking the doctrine that the tax is upon the privilege of transferring property by will, and that since the privilege of exercising the power was granted by the foreign state, the state of New York could impose no tax upon the transfer so effected. *Re Kissel*, 65 Misc. 443, 121 N. Y. Supp. 1088.

And declaring in favor of the doctrine that, irrespective of the time when the instrument creating the power was executed, it was the actual transfer effected by the exercise of the power which was to be taxed under the amendment of 1897, the New York court in *Re Fearing*, 200 N. Y. 340, 93 N. E. 956, held that where a resident testator who died before the enactment of any transfer tax law devised his property in trust for the life of his daughter, and gave her the power to appoint by will the person to whom the trustee should set over the remainder upon her death, and the daughter, a nonresident, exercised the power of appointment by a will made under and by virtue of the laws of her domicile, no tax was enforceable against the property included within the power, notwithstanding a part of it consisted of bonds secured by mortgages of real estate situated in New York. One apparent ground of this decision is that since, by the amendment of 1897, the tax is upon the transfer affected by the appointment, that is, is exacted by the state in return for its indulgence in permitting property to be transferred by will, there is no ground for upholding the tax where the power is exercised by a will whose existence and validity depend upon the laws of another state.

II. Present taxability under donor's will.

A succession tax cannot be assessed at the death of the testator upon the corpus of the estate, when property is devised in trust for a period of twenty years, during which time annuities shall be paid to certain persons named, among whom the estate shall be distributed at the expiration of that period if they are alive at that time, and if they are not alive, among persons whom they shall appoint, and certain persons named by the testator, under a statute authorizing a tax against a person who "shall become beneficially entitled, in possession or expectation, to any property or income thereof," where the tax rate differs according to the relationship of the testator and the person who ultimately becomes entitled to the property. *People v. McCormick*, 208 Ill. 437, 64 L.R.A. 775, 70 N. E. 350.

Money received under a power given by will to a trustee, to appoint the residuary estate to any of certain persons, was held in *Re Stewart*, 131 N. Y. 274, 14 L.R.A. 336, 30 N. E. 184, to pass "by will," within the meaning of the New York inheritance tax law of 1885, imposing a tax upon all property which should pass by will or by the intestate law from any person who might die seised or possessed of the same, to all but certain excepted persons, in trust or otherwise, or by reason whereof any but the excepted persons should become beneficially entitled, in possession or expectancy, to any property or the income thereof. The court applied the doctrine that when the donee of a power has the right of selection, the interest appointed vests in the appointee at the time of the appointment, but that his title relates to and is acquired under the instrument creating the power. It was insisted that the legislature had failed to provide any method for valuing or taxing contingent or uncertain interests, not capable of valuation and assessment immediately upon the death of the decedent; but the court held that although the interest was contingent, and therefore not capable of valuation at the testator's death, it could, after it became vested and ascertained by the appointment, be appraised, by virtue of a provision of such inheritance tax law, authorizing the appointment of an appraiser "as often and whenever occasion requires." The decision in this case was adopted in *Hoyt v. Hancock*, 65 N. J. Eq. 688, 55 Atl. 1004, the court remarking that the statute involved in the latter case was substantially identical with the New York statute.

In *Howe v. Howe*, 179 Mass. 546, 55 L.R.A. 626, 61 N. E. 225, it was held that an interest in property passes by will within the meaning of an inheritance tax act, although its destination is by the will made subject to the appointment of a third person, it being pointed out that the statute specified as subject to the tax any form of interest in property whatsoever. The question before the court was as to the present taxability of property which was subject to the power of appointment.

No present tax is assessable upon the death of a testator who transferred property to trustees to divide it into equal shares for his children, and to pay the income and so much of the principal of any share as the trustee should deem advisable to each child, and upon the death of any child, to give so much of his share as remained in such manner as he should designate in his will, or if he should make no such designation, then to his issue if any, and if there should be no such issue, then to the survivors or survivor of the testator's children, under the amendatory statute of 1899, providing that when property is transferred in trust or otherwise, and the rights, interests, or estates of the transferees are dependent upon contingencies or conditions whereby they may be created, defeated, etc., a tax shall be imposed upon

the transfer at the highest rate which, on the happening of any of the contingencies or conditions, would be possible under the provisions of the act, and that the tax so imposed should be due and payable forthwith out of the property transferred. *Re Howell*, 34 Misc. 432, 69 N. Y. Supp. 1016.

Upon the theory that under the provision of the amendatory act of 1897, it is the exercise of the power of appointment, and not the creation of that power, which effects the transfer which the statute makes taxable, it was held in *Re Howe*, 86 App. Div. 286, 83 N. Y. Supp. 825, affirmed without opinion in 176 N. Y. 570, 68 N. E. 1118, that the remainder is not taxable until the time comes for the exercise of the testamentary power of appointment conferred upon the life beneficiary, and by this the court obviously meant until the death of the life beneficiary after having made, or having failed to make, a will exercising the power. It was insisted in this case that the amendment of 1897, relating to powers of appointment, was impliedly repealed by an amendment enacted in 1899 providing that when property is transferred in trust or otherwise, and the rights of the transferees are dependent upon contingencies or conditions whereby they may be wholly or in part created, defeated, etc., a tax shall be imposed upon said transfer at the highest rate which, on the happening of the said contingencies or conditions, would be possible under the provisions of the act, and such tax so imposed shall be due and payable forthwith out of the property transferred. The court denied this contention saying, in effect, that there is nothing in the amendment of 1899 making a general provision in respect of the manner of taxation of contingent and conditional estates, which must necessarily be regarded as repealing a former amendment to the same statute, making specific provision for the taxation for such conditional or contingent estates as shall arise from the creation of a power of appointment. And the court further said that while the donee might be regarded as the original transferee of the property devised in trust for his benefit, it could not fairly be said that his right or estate was dependent upon contingencies or conditions whereby they might be wholly or in part created, defeated, etc.

It was held in *Re Field*, 36 Misc. 279, 73 N. Y. Supp. 512, that no present tax could be assessed upon the death of the testator upon so much of the property covered by the will as had been subjected to a power of appointment in a donee, the will transferring the property in trust to pay the income to the testator's wife for life, the remainder to his nephew, and a codicil having been made giving the wife power to appoint a certain specified portion of the value of the estate to any descendants of the testator's father in such proportions as she might see fit.

On the other hand, by a surrogate's decision in *Re Le Brun*, 39 Misc. 516, 80 N. Y.

Supp. 486, decided before the *Howe Case*, supra, that a present tax was enforceable upon the death of a testator who transferred his property in trust to pay an income to his daughter for life, with power given to her thereafter to dispose by will of a certain percentage of the estate to and among such persons who might be living at her death, and as she should think proper, and the balance of the remainder to and among any of the testator's descendants, notwithstanding such remainders were not ascertainable until after the death of the life beneficiary, and the persons to take it should be disclosed by her will. The court said that in reaching this conclusion, it did not overlook the laws of 1896 as amended by the laws of 1897, and that when the donee of the power should have exercised it, the question might then arise whether the payment of the tax presently to be imposed would or would not relieve the remainderman of the payment of any new tax because of the transfer effected by the exercise of the power, but that it was sufficient for the then present purposes that, within the meaning of the amendatory act of 1899, transfers from the estate of the decedent had been made upon which it was the court's duty to impose a tax.

III. Power of appointment reserved by grantor.

Of course, where a person reserves to himself a power of appointment in a deed by which he transfers property to a trustee to pay the income to the grantor during his life, and after his death, to such persons as he shall by will appoint, or in default of appointment, to his next of kin, etc., although the legal title passes to the trustee, the property and all interest therein really remained in the grantor; and where he by will appointed the persons to whom the trust company should convey after his death, the property passing to the appointees was taxable under the act of 1885 as amended by the act of 1887, providing that any property which shall be transferred by deed, grant, etc., made or intended to take effect in possession or enjoyment after the death of the grantor, shall be subject to a tax. *Re Ogsbury*, 7 App. Div. 71, 39 N. Y. Supp. 978.

And where one deeds property in trust for the purpose of paying the income to the grantor during her life, and of conveying it after her death to such persons as she shall by will appoint, the property is within the meaning of the collateral inheritance statute imposing a tax upon property passing by deed, grant, sale, or gift made or intended to take effect in possession or enjoyment after the death of the grantor; and the property is taxable thereunder, and the statute is constitutional, and it is immaterial if the deed of trust was executed before the statute went into effect. *Croker v. Shaw*, 174 Mass. 286, 54 N. E. 549. 33 L.R.A. (N.S.)

IV. Miscellaneous cases.

Dispositions by a testatrix in pursuance of a general power of appointment, by a will in which she also disposed of her personal estate, are legacies, within the meaning of a provision of the will directing her executors "to pay out of my residuary estate any and all transfer or inheritance taxes that may be imposed or become due upon any of the legacies hereinbefore made," and are such as are entitled to have the taxes paid out of her residuary estate. *Isham v. New York Asso.* 177 N. Y. 218, 69 N. E. 367.

The fact that one who had an absolute title under an unrecorded deed, and who was given a life estate therein with power of testamentary disposition, under the will of the grantor of the deed, ignored his absolute title and submitted to a transfer tax upon his life estate, and thereby precluded his administrator upon his death intestate, from vacating the assessment upon the ground that the unrecorded deed was found among the intestate's effects after his death, does not prevent the intestate's next of kin and heirs at law, who were made residuary legatees and devisees in case the intestate should fail to exercise the power of disposition, from relying upon the deed of the ancestor, rather than upon his will, and therefore from taking the remainder free from the imposition of a transfer or inheritance tax. *Re Mather*, 90 App. Div. 382, 85 N. Y. Supp. 657, affirmed without opinion in 179 N. Y. 526, 71 N. E. 1134.

Under a statute imposing a tax upon all estates passing from any person who may die seised and possessed thereof, transferred by deed, will, grant, etc., made or intended to take effect in possession after the death of the grantor, deviser, etc., the value at the death of the donee of the power of appointment, who has exercised the power, and not the value at the time of the death of her husband, by whose will the power was created, is to be taken for the purpose of computing the tax. *Fisher v. State*, 106 Md. 104, 66 Atl. 661.

L. A. W.

MICHIGAN SUPREME COURT.

CLAIRVIEW PARK IMPROVEMENT
COMPANY OF GROSSE POINT, Lim-
ited, Plff. in Err.,

v.

DETROIT & LAKE ST. CLAIR RAIL-
WAY et al.

(164 Mich. 74, 129 N. W. 353.)

Appeal — accepting benefit of judgment — effect.

Compelling surrender of the parcel awarded plaintiff in an action of ejectment and payment of taxed costs, by

threat of executing the writ of restitution which had been issued, prevents him from attempting to reverse the judgment on appeal, although he was denied relief as to a large parcel of land upon which he claimed that defendant had wrongfully encroached.

(December 22, 1910.)

ERROR to the Circuit Court for Wayne County to review a judgment for plaintiff for less than the relief demanded in an action brought to recover possession of certain land. Dismissed.

The facts are stated in the opinion.

Mr. William M. Mertz, for plaintiff in error:

An equitable interest is of no avail in an ejectment action.

Wood v. Michigan Air Line R. Co. 90 Mich. 339, 51 N. W. 263; Wilson v. Muskegon, G. R. & I. R. Co. 132 Mich. 471, 93 N. W. 1059; Nowlin Lumber Co. v. Wilson, 119 Mich. 410, 78 N. W. 338; Michigan Land & Iron Co. v. Thoney, 89 Mich. 231, 50 N. W. 845; Buell v. Irwin, 24 Mich. 149; Nowlen v. Hall, 128 Mich. 275, 87 N. W. 232.

Messrs. Gray & Gray, for defendants in error:

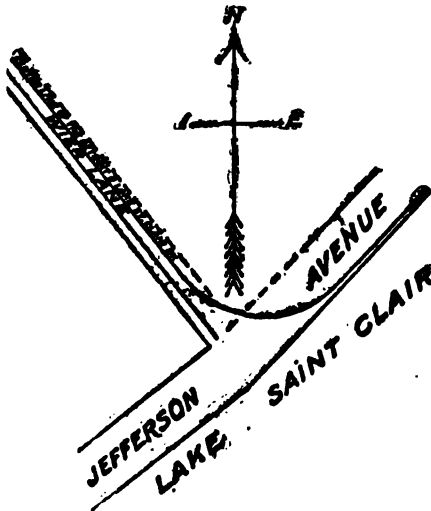
Plaintiff, having availed itself of so much of the judgment as was in its favor, cannot appeal from so much of it as was against it.

Sterne v. Vert, 108 Ind. 232, 9 N. E. 127; Raborn v. Woods, 33 Ind. App. 171, 70 N. E. 399; Easton v. Lockhart, — N. D. —, 59 N. W. 75; Moore v. Williams, 132 Ill. 594, 24 N. E. 617; Com. v. South, 80 Ky. 582; Garner v. Garner, 38 Ind. 139; Bechtel v. Evans, 10 Idaho, 147, 77 Pac. 212; Chase v. Driver, 34 C. C. A. 668, 92 Fed. 780; Manlove v. State, 153 Ind. 80, 53 N. E. 385; Williams v. Richards, 152 Ind. 528, 53 N. E. 765; Babbitt v. Corby, 13 Kan. 612; Cronkhite v. Evans-Snyder-Buel Co. 6 Kan. App. 173, 51 Pac. 295; Re Raber, 4 N. Y. S. R. 845; Smith v. Coleman, 77 Wis. 343, 46 N. W. 664; Murphy v. Spaulding, 46 N. Y. 556; Bennett v. VanSyckel, 18 N. Y. 481; Knapp v. Brown, 45 N. Y. 208; Laird v. Giffin, 84 Wis. 286, 54 N. W. 584; Portland Constr. Co. v. O'Neil, 24 Or. 54, 32 Pac. 764; Flanders v. Merrimac, 44 Wis. 621; Webster-Glover Lumber & Mfg. Co. v. St. Croix County, 71 Wis. 317, 36 N. W. 864; Corwin v. Shoup, 76 Ill. 246; Holt v. Rees, 46 Ill. 181; Bolen v. Cumby, 53 Ark. 514, 14 S. W. 926; Alexander v. Alexander, 104 N. Y. 643, 10 N. E. 37.

Note. — As to right to accept favorable part of decree, judgment, or order, and appeal from the rest of it, see note to McKain v. Mullen, 29 L.R.A. (N.S.) 1. 33 L.R.A. (N.S.)

Stone, J., delivered the opinion of the court:

This is an action in ejectment brought to recover possession of two strips of land, one occupied by defendant's tracks and ties, and the other by a wooden supporting wall known as the "bulkhead." Defendant's track runs upon Wier lane a distance of about 800 feet from the so-called boulevard in the rear, to Jefferson avenue in front, and clips the corner off the property just as it turns into and across Jefferson avenue; then continues northerly toward Mt. Clemens. The second strip is substantially 150 feet long and about 20 feet wide along the shore of Lake St. Clair, extending northerly from the end of Wier lane, parallel with Jefferson avenue, between defendant's tracks and the lake. In and upon this parcel defendant has maintained spiles and a wooden supporting wall known as the "bulkhead," and this last-named strip of land is itself referred to in this record as the "bulkhead." The latter was intended to strengthen the support of the track where it turns from Wier lane along the lake front. A blue print in the record shows the general situation.



Upon the trial, only that portion of the property clipped off where the track turns upon Jefferson avenue was, by the verdict of the jury, awarded to the plaintiff. As to the Wier lane proper, the verdict was for the defendant, and it omitted any finding as to the strip of land between the track and the lake known as the "bulkhead." However, the formal verdict and judgment, as entered, show a finding for defendant as to the "bulkhead" also.

The plaintiff tendered a bill of excep-

tions which it claims was settled and signed April 26, 1910. The printed record does not contain the exact date of settlement.

The plaintiff caused a writ of error to be issued out of this court on June 9, 1910. No supersedeas bond was filed. On June 8, 1910, the plaintiff caused a writ of possession and of execution to be issued out of the circuit court for the enforcement of the judgment in regard to the property awarded to it, and for the payment of costs. This writ was not actually delivered to the sheriff, but was held by the plaintiff's attorney.

As early as April 29, 1910, plaintiff's attorney wrote to defendant's attorneys calling their attention to the judgment, and asking the following question: "Will the defendant move its tracks off of the corner of Wier lane and Jefferson, or will it be necessary for a writ of restitution to issue?" He also requested the payment of the taxed costs. On May 2, 1910, defendant's attorneys replied that they would confer with the defendant, and advise plaintiff's attorney.

As to the subsequent interviews and acts, there is some conflict, as shown by the affidavits on file. It appears, however, that on May 27, 1910, plaintiff's attorney again wrote defendant's attorneys relative to tracks and costs, and counter costs, and concluded as follows: "As to tracks at corner, they are a nuisance and cut in entirely too far. Besides, on a new trial, I think I can show that they are over boundary line of lane on premises proper, all the way down from boulevard. It is bad enough to have them there at all, let alone such encroachment. The company lets the lane grow up with weeds and brush, and so long as they monopolize the lane, pending outcome of suit, they should get off the corner and make sure the tracks are not outside the lane all along."

Again, on June 6, 1910, plaintiff's attorney wrote defendant's attorneys as follows: "I wrote you on April 29th regarding Clairview Park Improv. Co. v. Detroit & L. St. C. R. Co. and received a letter in reply that you would let me know as to inquiry about payment of costs taxed and also removal of tracks. I have heard nothing since, and wrote you over a week ago, to which I have no reply. I gave citations to Mr. Trowbridge over phone showing that D. U. R. were not entitled to costs, and that the costs should be paid as taxed. He seems to have misapprehended regarding the matter. If I am to receive no reply from you definitely on my inquiry, I should at least be obliged for the courtesy of immediate information to that effect."

On June 17, 1910, defendant's attorneys

sent a check for the taxed costs to the plaintiff's attorney.

On August 17, 1910, plaintiff's attorney wrote defendant's attorneys as follows: "I am much disappointed at receiving no indication of the D. U. R. or the Detroit & Lake St. Clair Railway's making any move as to tracks at corner of Wier road on Jefferson. Mr. Trowbridge will, of course, know how I have withheld the writ upon the company's promise to move and also to see as to plan of movement. I will have to let the sheriff act in this matter unless the company sees fit to act immediately. I shall not consider that they intend to act unless it is given immediate consideration by them."

The tracks were moved on the corner on the night of September 21, 1910, but it is the claim of the plaintiff that they were not wholly removed from the corner of Wier lane and Jefferson, but that they still remain outside of Wier lane on said corner, and that said tracks still encroach on said corner for which plaintiff had judgment.

On September 30, 1910, defendant's attorneys entered a motion in this court to dismiss the writ of error, and all proceedings thereunder, for the reason, that the plaintiff appellant has exercised its rights under the judgment below in such a way as to estop it from questioning the same, or further to seek its reversal. This motion was held until the hearing of the case, and should first be disposed of. Counsel have at some length presented arguments and authorities upon the question whether the same rule should apply in an action of ejectment, where there has been a partial recovery, as where the appealing party has obtained satisfaction of judgment in other actions. Counsel seem to agree, however, that, if the state of the case is such that the contention cannot be otherwise than speculative, and no rights of the parties can be changed in point of law, it is not incumbent on this court to formulate an opinion, where the plaintiff could have no legal interest in the result.

The plaintiff contends that the judgment is not in accord with its just rights, and that its recovery was for a small part only of the premises involved, and that almost the whole of Wier lane in front of the boulevard, and the "bulkhead," remain in dispute, and that it seeks judgment for the entire property described in the declaration; and it claims that it was the understanding between the parties and their counsel that what was done by way of payment of costs, and getting possession of the small part recovered by the judgment, was to be without prejudice to its

rights upon appeal. It also claims that the writ of possession was not executed, that it was issued at the suggestion of defendant's counsel, and that a copy of the writ was given to them by arrangement; and finally it is urged that the entire premises recovered have not been surrendered or vacated.

It does appear that while the plaintiff was prosecuting a writ of error for the purpose of reviewing this judgment, it enforced the judgment on the parts thereof which passed in its favor, namely, as to the corner, or a part thereof, and as to costs. It also clearly appears that this was brought about by its repeated statements that if the track was not moved and the taxed costs paid, the same would be enforced by the writ then in possession of its attorney. The motion to dismiss the writ of error is based upon the proposition that a party cannot, while availing himself of the judgment so far as it passed in his favor, seek its reversal. Either party to a judgment in ejectment may of right demand a statutory new trial. There is here but one judgment. If it were to be reversed at all, it must be reversed in its entirety. If the judgment should be reversed, it would follow that it would be only under an invalid judgment that the defendant had been compelled to move its tracks.

It should be borne in mind that no part of the plaintiff's claim was admitted by the defendant, but the entire claim was denied and contested. It is an established rule of procedure that a party to an action cannot receive a benefit under a judgment, and then appeal from it, when the effect of his appeal may be to annul the judgment, unless his right to the benefit is absolute, and cannot possibly be affected by a reversal of the judgment. *Easton v. Lockhart*, — N. D. —, 89 N. W. 75. The earlier case of *Tyler v. Shea*, 4 N. D. 377, 50 Am. St. Rep. 680, 61 N. W. 488, is referred to by Chief Justice Wallin in the above case.

As *Tyler v. Shea* is cited by plaintiff's attorney, the following excerpt therefrom is quoted: After stating the rule as above, and citing many authorities in support thereof, the court says: "We must be careful not to ignore an important qualification of the general doctrine. Where the reversal of the judgment cannot possibly affect the appellant's right to the benefit, he has secured under the judgment, then an appeal may be taken, and will be sustained, despite the fact that the appellant has sought and secured such benefit. To illustrate this doctrine, we may instance the case of an action to recover \$1,000, in which the only defense is a

counterclaim for \$500. It is obvious that \$500 of plaintiff's claim is admitted. If the defendant succeeds in establishing his counterclaim, thus reducing plaintiff's recovery to \$500, the plaintiff may collect the \$500 awarded to him by the judgment, and still appeal from such judgment to secure a reversal, to the end that he may defeat the counterclaim and recover judgment for his entire demand on a new trial. The \$500 he is entitled to absolutely. The reversal of the judgment and the second trial of the case cannot impair his right to it. Accepting this sum is therefore not inconsistent with his attempt to reverse the judgment, that he may on a new trial recover more. He can never recover less. It is the possibility that his appeal may lead to a result showing that he was not entitled to what he has received under the judgment appealed from, that defeats his right to appeal. Where there is no such possibility, the right to appeal is unimpaired by the acceptance of benefits under the judgment appealed from. The following decisions enforce this doctrine: *Reynes v. Dumont*, 130 U. S. 354-394, 32 L. ed. 934-945, 9 Sup. Ct. Rep. 486; *Embry v. Palmer*, 107 U. S. 3, 27 L. ed. 346, 2 Sup. Ct. Rep. 25; *Higbie v. Westlake*, 14 N. Y. 281; *Mellen v. Mellen*, 137 N. Y. 606, 33 N. E. 545; *Cocks v. Haviland*, 55 Hun, 605, 7 N. Y. Supp. 870; *Portland Constr. Co. v. O'Neil*, 24 Or. 54, 32 Pac. 764; *Morris v. Garland*, 78 Va. 215; *Upton Mfg. Co. v. Huiske*, 69 Iowa, 557, 29 N. W. 621; *Dudman v. Earl*, 49 Iowa, 37. The case of *United States v. Dashiell*, 3 Wall. 688, 18 L. ed. 268, belongs to this class. The reasoning of the opinion delivered in denying the motion to dismiss is unsatisfactory in its statement of the grounds on which the decision rests, but, when we turn to the opinion of the court on the merits (*United States v. Dashiell*, 4 Wall. 182, 18 L. ed. 319), we discover that the defendant did not dispute his liability for the amount for which judgment was rendered against him, but only with respect to the balance of the claim; his defense as to such balance being that the money was stolen from him, and that therefore he was not accountable for it to the government, whose money it was in his custody as paymaster in the Army of the United States. The judgment was rendered for this amount not in dispute, and a portion of it was collected before the writ of error was sued out. The motion to dismiss was properly denied, because the reversal of the case could not affect plaintiff's right to what he had collected. Defendant conceded that so much was due. Again, cases will arise —they have arisen—in which the appel-

lant has the right to ask for a more favorable judgment in the appellate court without having the case sent back for a new trial, on which, of course, the whole matter would be open again for investigation, which might result in a judgment not so favorable to plaintiff, or even one that would be adverse to him. In the class of cases in which a new trial of the whole case may result from the appeal, the element does not exist that exists in the one we have already alluded to. No portion of plaintiffs claim is admitted. Everything is in controversy. Under such a state of the pleadings, it is obvious that a reversal of the judgment and a new trial may result in a decision showing that the plaintiff was not entitled to what the former judgment gave him. In such a case the plaintiff cannot accept what that judgment gives him, and then by appeal pursue a course which may overthrow the right of which he has availed himself. But if it is possible for him to obtain a more favorable judgment in the appellate court, without the risk of a less favorable judgment from a new trial of the whole case there or in the lower court, then the acceptance of what the judgment gives him is not inconsistent with an appeal for the sole purpose of securing, without retrial of the whole case, a decision more advantageous to himself. There are several cases in which this doctrine has been enforced, and others in which it has been recognized. *Monnet v. Merz*, 28 Jones & S. 256, 17 N. Y. Supp. 380, affirmed in 131 N. Y. 646, 30 N. E. 866; *Clowes v. Dickenson*, 8 Cow. 328, as explained in *Knapp v. Brown*, 45 N. Y. 208; *Tarleton v. Goldthwaite*, 23 Ala. 346, 58 Am. Dec. 296; *Inverarity v. Stowell*, 10 Or. 261."

The case of *Raborn v. Woods*, 33 Ind. App. 171, 70 N. E. 399, is in point. It was ejectment for 80 acres of land. The judgment was in favor of the plaintiff for the east one half of the 80, and in favor of the defendants for the west one half. The plaintiff and appellant took possession of the 40 acres awarded to him, and exercised all acts of ownership over the same. The court said: "It appears in this case that appellant has elected to receive the benefit of what he is alleging is an erroneous judgment and decree of the court. He has taken possession of the land awarded to him by the judgment, and is receiving the rents and profits therefrom, and is here seeking a reversal of the decree as to the other part of the land, which, by the judgment of the court, was given to appellees. This he cannot do. A reversal of the judgment under the assignment of error could only result in a new trial of the whole case. 33 L.R.A. (N.S.)

The parties to the action could not be placed in the same position that they occupied at the time the action was commenced, because it is alleged, and is not denied, that appellant accepted the benefit of the judgment and decree, and is in possession of a part of the real estate. . . . We think the case falls fully within the rule that a party cannot accept any benefit of an adjudication, and afterward allege it to be erroneous." See also *Sterne v. Vert*, 108 Ind. 232, 9 N. E. 127; *Moore v. Williams*, 132 Ill. 594, 24 N. E. 617; *Smith v. Coleman*, 77 Wis. 343, 46 N. W. 664; *Laird v. Giffin*, 84 Wis. 286, 54 N. W. 584; *Rariden v. Rariden*, 33 Ind. App. 284, 104 Am. St. Rep. 252, 70 N. E. 398; *Chase v. Driver*, 34 C. C. A. 668, 92 Fed. 780. Many more cases might be cited to the same effect. Counsel for the plaintiff seeks to distinguish some of these cases from the instant case by reason of the statute, but we are unable to distinguish them.

In *Talbot v. Mason*, 60 C. C. A. 145, 125 Fed. 101, it was held that a claimant who, on the entry of an order denying his petition for an allowance from a fund in court, on the ground that he had no legal or equitable claim thereon, accepted an offer made in open court by counsel for opposing interests to consent to an allowance of a smaller sum, which allowance was accordingly made, based expressly on the consent, and who accepted payment thereunder, was thereby equitably estopped to prosecute an appeal from the order disallowing his claim. We might cite many cases holding that one who accepts the benefits of a decree or judgment is thereby estopped from reviewing it, or from escaping from its burdens.

It will be noted that this writ of error seeks a reversal of the entire judgment. Should the case be reversed, the judgment below would no longer exist for any purpose.

While there is some disagreement as to the conduct of the plaintiff in seeking the benefits of its judgment, the essential facts are not disputed, that the plaintiff sought the benefit of its judgment by asserting its right under the writ of possession and execution, and is thereby, we think, precluded from prosecuting its appeal.

It is equally undisputed that the defendant at first declined to submit to the demands of the plaintiff, and it was only when threatened with service of process, that the tracks were moved. The motion to dismiss the writ of error was made within ten days after the tracks were moved. We do not think that defendant was guilty of any laches here. Nor do we find that defendant by its conduct misled the plain-

tiff. The plaintiff from the first persisted in its course. The parties were adversaries in a lawsuit, and dealt with each other at arm's length. At most, the defendant stood upon its rights.

We think that the motion to dismiss the writ of error should be granted. Motion granted.

Petition for rehearing denied.

GEORGIA SUPREME COURT.

J. C. MCAULIFFE, Plff. in Err.,
v.

W. J. VAUGHAN.

(135 Ga. 852, 70 S. E. 322.)

Sunday — contract to sell newspaper plant — validity.

1. Where a person who had been conducting and publishing a newspaper made a contract to sell the property, business, and good will to another person, who was in the employment of the publisher of a different newspaper, such a contract was not freed from the invalidity arising from having been made on Sunday, on the ground that selling and buying newspapers was not the ordinary business of either party.

Same — ratification.

2. Although a contract for the sale of a newspaper outfit and the good will of the business may have been invalid, because it was made on Sunday, yet where possession of the property had been delivered on a week day, before the signing of the contract, to one who, in the original negotiations, was expected to be a copurchaser, but who did not sign the written contract finally executed, though forming a partnership with the purchaser, and where, after the contract was signed, the purchaser retained possession, and (having paid one instalment of the purchase money when the contract was made) paid the balance in instalments on other days than Sunday, and the seller received them without objection because of the time when the contract was signed, the parties thereby ratified such contract, and its terms were enforceable as if it had not been made on Sunday.

Headnotes by LUMPKIN, J.

Note. — On the general subject of the validity of a contract partially made on Sunday, and perfected on a secular day, see note to Jacobson v. Bentzler, 4 L.R.A. (N.S.) 1151. As to delivery on week day, pursuant to a contract made on Sunday, see note to King v. Graef, 20 L.R.A. (N.S.) 86.

As to validity of agreement by employee 33 L.R.A. (N.S.)

Contract — sale of newspaper plant — restraint of trade.

3. Where one who had been engaged in publishing a newspaper in a certain county sold the property connected therewith and the business and good will to another, and agreed not to conduct, either directly or indirectly, any other newspaper in that county without the consent of the other party, his heirs and assigns, such a contract was not void, as being in general restraint of trade, or unreasonable in its terms.

Same — consideration.

4. In such a contract, the amount paid by the purchaser furnished a consideration, not only for the transfer of the physical property, but also for the business and good will, and for the agreement of the seller not to conduct another newspaper in the same county.

Same — default in instalments — breach.

5. Although the instalments of purchase money may not have been paid on the exact days when they were due under the contract, yet, where the seller received them afterward, he could not claim that this was such a breach on the part of the buyer as authorized him to disregard the agreement not to conduct another newspaper in that county.

Same — sale as agent — effect.

6. The seller having sold the property and made the contract under seal in his own name, it furnished no defense to a proceeding to enjoin him from conducting another newspaper in the same county, in violation of the contract, to set up that the property which he sold actually belonged to his wife, and that he had no pecuniary interest in it.

(February 18, 1911.)

ERROR to the Superior Court for Baldwin County to review a judgment in defendant's favor in an action brought to enjoin him from entering into or conducting a newspaper business in a certain city and county. Reversed.

Statement by Lumpkin, J.:

W. J. Vaughan and J. C. McAuliffe entered into the following written contract:

State of Georgia, Baldwin County.

This indenture, made this the 7th day of March, in the year of 1908, between W. J.

not to engage in competing business, as affected by its scope in time and territorial extent. see note to Taylor Iron & Steel Co. v. Nichols, 24 L.R.A. (N.S.) 933. As to validity of agreement in restraint of trade ancillary to the sale of a business or profession, as affected by its territorial scope, see note to Fleckenstein Bros. Co. v. Fleckenstein, 24 L.R.A. (N.S.) 913.

Vaughan, of said state and county, as party of the first part, and J. C. McAuliffe, of Richmond county, said state, as party of the second part. Witnesseth: That the said party of the first part agrees to sell to the said party of the second part the following described property, in consideration of the sum of five thousand (\$5,000) dollars, payable as follows: One thousand (\$1,000) dollars cash, the receipt of which is hereby acknowledged, at and before the sealing and delivery of these presents; one thousand (\$1,000) dollars on the 14th day of March; one thousand (\$1,000) dollars on the 21st day of March, 1908; two thousand (\$2,000) dollars on the 1st day of May, 1908; each note bearing interest from date at 8 per cent per annum.

Upon the payment of the above-mentioned notes, according to their tenors and effect, the party of the first part agrees to sell to the party of the second part, his heirs and assigns, the newspaper known as the "Milledgeville News Publishing Company," together with all the equipment, the title of which is warranted, consisting of one Cincinnati cylinder press and equipment, one Price & Chandler job press and equipment, one Price & Chandler paper cutter, one typewriting machine and equipment, one roller top desk, and all other furniture and equipment and property of any nature or value connected with said newspaper and office, including the good will and established business of said newspaper and job office, except stationery.

The party of the first part agrees not to conduct, either directly or indirectly, any other newspaper in the city of Milledgeville, or in the county of Baldwin, without the written consent of the said party of the second part, his heirs and assigns.

In witness whereof, the party of the first part and the party of the second part hereof have hereunto set their hands and seals, in duplicate.

This was signed and sealed by the two parties, and was attested by three witnesses, one of whom was a notary public. On August 10, 1910, McAuliffe filed an equitable petition against Vaughan, seeking to enjoin him from entering into or conducting a newspaper business in the city of Milledgeville, and Baldwin county, which it was alleged he was preparing to do, and for that purpose was organizing a company. The defendant contended that the contract was invalid because, while dated March 7th, it was in fact executed on Sunday, March 8th; that it was also invalid because it was in restraint of trade; that the \$5,000 was paid for the articles of personal property enumerated in the contract, and there 33 L.R.A. (N.S.)

was no consideration for the added agreement not to conduct another newspaper in Baldwin county; that the plaintiff did not pay the amounts due promptly at the times when he agreed to pay them, and this amounted to a breach on his part (it was not denied that the entire amount had been paid); and that the property was in fact that of his wife, and that he had no financial interest in the sale. It is recited in the bill of exceptions that the presiding judge held that the contract was null and void, because executed on the Sabbath day, and because it was in restraint of trade. He denied the injunction, and the plaintiff excepted.

Messrs. Sanford & Sanford and Hines & Vinson, for plaintiff in error:

Defendant's contention that the contract did not contain a valid agreement on his part not to conduct a newspaper in the city of Milledgeville, for the reason that there was no consideration for this clause of the contract, and that the \$5,000 was for personal property described in the contract, is not maintainable.

Jefferson v. Market, 112 Ga. 505, 37 S. E. 758; Kramer v. Old, 119 N. C. 1, 34 L.R.A. 389, 56 Am. St. Rep. 654, 25 S. E. 813; Horner v. Graves, 7 Bing. 743, 5 Moore & P. 768, 9 L. J. C. P. 192.

Admitting that said contract was made on Sunday, this does not render the contract null and void.

Drury v. Defontaine, 1 Taunt. 131; Bloxsome v. Williams, 3 Barn. & C. 233; 5 Dowl. & R. 82, 1 Car. & P. 294, 2 L. J. K. B. 224, 27 Revised Rep. 337; Sandiman v. Breach, 7 Barn. & C. 96, 9 Dowl. & R. 796, 5 L. J. K. B. 298, 31 Revised Rep. 169; Rex v. Whitnash, 7 Barn. & C. 596; 1 Moody & R. 452, 6 L. J. Mag. Cas. 26; Sanders v. Johnson, 29 Ga. 526; Dennis v. Sharman, 31 Ga. 607; Hill v. Wilker, 41 Ga. 449, 5 Am. Rep. 540; Meriwether v. Smith, 44 Ga. 541; Morgan v. Bailey, 59 Ga. 683; Hennington v. State, 90 Ga. 399, 4 Inters. Com. Rep. 413, 17 S. E. 1009; Western U. Teleg. Co. v. Hutcheson, 91 Ga. 252, 18 S. E. 297; Keck v. Gainesville, 98 Ga. 423, 25 S. E. 559; Hayden v. Mitchell, 103 Ga. 440, 30 S. E. 287; Dorrough v. Equitable Mortg. Co. 118 Ga. 178, 45 S. E. 22; Adams v. Candler, 114 Ga. 152, 39 S. E. 893; Ellis v. State, 5 Ga. App. 615, 63 S. E. 588; Southern R. Co. v. Wallis, 133 Ga. 555, 30 L.R.A. (N.S.) 401, 66 S. E. 370, 18 A. & E. Ann. Cas. 67; Hayden v. Mitchell, 103 Ga. 448, 30 S. E. 287.

If the contract was made on Sunday, in the ordinary calling or business, it can be ratified.

Calhoun v. Phillips, 87 Ga. 482, 13 S. E.

593; *Meriwether v. Smith*, 44 Ga. 543; *Catlett v. Methodist Episcopal Church*, 62 Ind. 365, 30 Am. Rep. 197; *Adams v. Gay*, 19 Vt. 358; *Banks v. Werts*, 13 Ind. 203; *Sumner v. Jones*, 24 Vt. 317; *Russell v. Murdock*, 79 Iowa, 101, 18 Am. St. Rep. 348, 44 N. W. 237; *Harrison v. Colton*, 31 Iowa, 16; *Sayles v. Wellman*, 10 R. I. 468; *Tucker v. West*, 29 Ark. 386; *Gwinn v. Simes*, 61 Mo. 335; *Campbell v. Young*, 9 Bush, 240; *Whitmire v. Montgomery*, 165 Pa. 253, 30 Atl. 1016; *Clark, Contr.* 398, note 46.

Provisions in restraint of trade, unlimited in point of time, do not render the contract void.

Rakestraw v. Lanier, 104 Ga. 189, 69 Am. St. Rep. 154, 30 S. E. 735; *Holmes v. Martin*, 10 Ga. 503; *Jenkins v. Temples*, 39 Ga. 655, 99 Am. Dec. 482; *Spier v. Lambdin*, 45 Ga. 319; *Goodman v. Henderson*, 58 Ga. 567; *Brewer v. Lamar*, 69 Ga. 656, 47 Am. Rep. 766; *Newman v. Wolfson*, 69 Ga. 764; *Swanson v. Kirby*, 98 Ga. 586, 26 S. E. 71; *State v. Central R. Co.* 109 Ga. 725, 48 L.R.A. 351, 35 S. E. 37; *Bullock v. Johnson*, 110 Ga. 486, 35 S. E. 703; *Grundy v. Edwards*, 7 J. J. Marsh, 368, 23 Am. Dec. 409; *Smith's Appeal*, 113 Pa. 579, 6 Atl. 251; *Cobbs v. Niblo*, 6 Ill. App. 60; *Kramer v. Old*, 119 N. C. 1, 34 L.R.A. 389, 56 Am. St. Rep. 650, 25 S. E. 813; *Hitchcock v. Coker*, 6 Ad. & El. 447, 1 Nev. & P. 796, 2 Harr. & W. 464, 6 L. J. Exch. N. S. 266; *Bunn v. Guy*, 4 East, 180, 1 Smith, 1, 7 Revised Rep. 560; *Chesman v. Nainby*, 2 Strange, 739; *Wickens v. Evans*, 3 Younge & J. 318; *Story, Sales*, 1st ed. § 493; *Cook v. Johnson*, 47 Conn. 175, 36 Am. Rep. 66; *Bowser v. Bliss*, 7 Blackf. 344, 43 Am. Dec. 95; 2 Addison, *Contr. Abbott's ed.* 1153; *Wharton, Contr.* § 432; *Metcalf, Contr.* 232; *Benjamin, Sales*, § 525; *Pemberton v. Vaughan*, 10 Q. B. 87, 16 L. J. Q. B. N. S. 161, 11 Jur. 411.

Messrs. Allen & Pottle and W. T. Davidson for defendant in error.

Lumpkin, J., delivered the opinion of the court:

The denial of the interlocutory injunction was evidently based not upon conflicting evidence in regard to controlling issues, but on the idea that the contract was void. The Code of this state does not contain any direct statement that contracts made on Sunday are void. That result is generally reached through a consideration of two sections. Section 422 of the Penal Code of 1895 (Penal Code 1910, § 416) declares that "any person who shall pursue his business, or the work of his ordinary calling, on the Lord's Day, works of necessity or charity only excepted, shall, be 33 L.R.A. (N.S.)

guilty of a misdemeanor." By § 3608 of the Civil Code of 1895 (Civil Code 1910, § 4253) it is declared that "a contract which is against the public policy of the law cannot be enforced." It has been held heretofore that where one, in pursuing his business or the work of his ordinary calling on the Sabbath, makes a contract, it is invalid, and cannot be enforced.

1. It was contended that, inasmuch as Vaughan's business was carrying on a newspaper, or, as he expressed it in his answer, that of a "printer," and that of McAuliffe was employment connected with another newspaper, the sale and purchase of a newspaper and outfit was not within the ordinary business or calling of either of them. This contention is unsound. In *Morgan v. Bailey*, 59 Ga. 683, "where a farmer, a part of whose ordinary business was the purchase and cultivation of land, bought a tract of land on Saturday, and agreed to consummate the trade on the next day by signing the necessary papers, and did sign a note for the purchase money on that day (Sunday)," it was held "that the contract was illegal, and, in a suit on the note, the courts would not assist in its collection." Thus buying land in bulk for farming purposes was considered to be so connected with the business of farming that such a contract made on Sunday was illegal. It would be a very narrow verbal construction to hold that, if one merchant contracted to buy out the stock of another on Sunday, for the purpose of continuing the mercantile business, he could say that the contract was not invalid because his business or ordinary calling was to sell at retail, and not to buy entire stocks of goods; or to rule that a manufacturer might proceed on Sunday with the erection of a building to be used in connection with his business, on the ground that manufacturing, not building, was his ordinary business. We think that the contract before us does not escape the test of having been executed on Sunday on the ground that the ordinary business of these two men was not buying and selling newspapers.

2. Assuming that the contract was made on Sunday, the performance of it was carried on between the parties on other days. On a week day prior to the execution of the written contract now sought to be enforced, possession of the property had been delivered to one who, under the original negotiations, was to have joined with McAuliffe in making the purchase, but who did not sign the written contract finally executed (with somewhat different terms), though there was evidence that he formed a partnership with the purchaser. After the contract was signed, McAuliffe pro-

ceeded to use the property and carry on the newspaper, and apparently paid Vaughan all the money, except one payment, on other days than Sunday. The latter received the money without any objection or contention that the contract was illegal, because executed on the Sabbath. The question is whether, under such circumstances, after the payment of the amount stipulated in the contract, and while the purchaser was in possession of the property and conducting the business, he could enforce the provision of the contract that Vaughan should not conduct another newspaper in Baldwin county, or whether, though one retained the property and the other received on subsequent week days and retained the money, that provision of the contract was not enforceable. There are two lines of authority on the subject of ratification of contracts made on Sunday. One class of decisions holds that, if the contract was void because made on Sunday in connection with the business of one of the parties, it could not become valid by a subsequent ratification. The other class holds that the illegality which infects such a contract is not general in its character; that it does not consist in any wrong or impropriety in the contract itself, but simply in the time of its making; that if it were a contract which would be valid if made on a week day, and both parties recognize it on such a day, after it is made, and proceed to carry it out, they thereby ratify the contract, and purge it of the illegality arising from the time when it was entered into. See *Adams v. Gay*, 19 Vt. 358; *Sumner v. Jones*, 24 Vt. 317; *Jacobson v. Bentzler*, 7 A. & E. Ann. Cas. 634, and note 127 Wis. 566, 4 L.R.A. (N.S.) 1151, 115 Am. St. Rep. 1052, 107 N. W. 7. Though there may be some preponderance of authority against ratification, this court has taken its stand with those courts which hold in favor of the doctrine; at least, where the parties on a subsequent day proceed to carry out a contract made on Sunday. *Meriwether v. Smith*, 44 Ga. 541; *Bryant v. Booze*, 55 Ga. 438 (6), 448. Following these decisions, the uncontradicted evidence showed a ratification, and the parties were bound as if the contract had been signed on a day other than Sunday.

3. It was contended that the contract was invalid because it was in restraint of trade. The Code declares that contracts "in general in restraint of trade" cannot be enforced. Civil Code 1895, § 3668; Civil Code 1910, § 4253. This section was a codification of the antecedent law, not a new enactment. As early as 1851 it was held in the case of *Holmes v. Martin*, 10 33 L.R.A. (N.S.)

Ga. 503, that "a contract in general restraint of trade is void; but, if in partial restraint of trade only, it may be supported, provided the restraint be reasonable and the contract founded on a consideration." In that case an owner of a town lot sold it to another, with a restriction contained in the deed that the house and lot should not be used for tavern purposes. In *Ellis v. Jones*, 56 Ga. 504, it was recognized that, where a merchant sold his stock of goods and good will, and agreed not to do business in the town where the stock was located, this was an enforceable contract. In *Goodman v. Henderson*, 58 Ga. 567, a contract to retire forever from the business of purchasing in the Savannah market green hides, sheepskins and hides, and skins dried by butchers, and that the parties so agreeing would use their influence in favor of the other party to the contract, to whom they transferred their good will, for a valuable consideration, was held not an illegal contract as being in general restraint of trade. A distinction was drawn between a contract unlimited as to territory, and therefore territorially general, and one unlimited as to time. See also *Brewer v. Lamar*, 69 Ga. 656, 47 Am. Rep. 766; *Bullock v. Johnson*, 110 Ga. 486, 492, 35 S. E. 703; *Seay v. Spratling*, 133 Ga. 27, 29, 65 S. E. 137. In *Rakestraw v. Lanier*, 104 Ga. 188, 69 Am. St. Rep. 154, 30 S. E. 735, two physicians formed a partnership, and it was agreed by one of them that, in the event the firm should at any time be dissolved, he would not locate or engage in the practice of medicine, surgery, or obstetrics in the town where the two partners resided, or at any place within a radius of 15 miles of the drug store of the other partner, without first obtaining the written consent of such other. It was held that "a contract, in restraint of trade, unlimited as to time, and the enforcement of which literally as made would in certain contingencies likely to arise, and which must necessarily have been in contemplation of the parties, result in needlessly oppressing one of them without affording any corresponding benefit or protection to the other, is unreasonable and should not be enforced." In the opinion a distinction was drawn between cases in which property and the good will of a business were sold, and those in which a covenant was made between professional men, where no property or property rights were conveyed in the contract which imposed the restriction. It was held that the contract there involved was in partial restraint of trade, but that its terms were unreasonable. In the case now under consideration there was a sale of property, an established business, and

the good will connected with it. The vendor agreed not to enter into the same character of business in the county where the newspaper sold was published, although there was no limitation on the time of such restriction. Under the decisions cited, this contract was not invalid as being in general restraint of trade, or unreasonable.

4-6. The judge of the superior court apparently rested his refusal to grant an injunction on the ground that the contract was invalid, because made on Sunday and in general restraint of trade. As the judgment will be reversed, we may state that the other contentions of the defendant were entirely without merit. The sale of the newspaper property and good will, and the agreement not to conduct another newspaper in the same county, were parts of one contract, and were covered by the consideration thereof. *Wellmaker v. Wheatley*, 123 Ga. 201 (2), 203, 51 S. E. 436. Although the purchaser may not have paid the agreed amounts promptly at the time fixed by the contract, yet the vendor could not accept them later, put the money in his pocket, break the obligation imposed on him by the contract, and set up by way of defense that the payments were slow. *Vaughan* contracted in his own name, under seal. When an injunction was sought against him to prevent his violating his contract not to conduct another newspaper in Baldwin county, it furnished no defense to him to say that the property which he sold was really the property of his wife. Judgment reversed.

All the Justices concur.

Petition for rehearing denied February 27, 1911.

ILLINOIS SUPREME COURT.

PEOPLE OF THE STATE OF ILLINOIS
EX REL. JOHN E. W. WAYMAN,
Appt.,

v.

LEROY T. STEWARD et al.

(249 Ill. 311, 94 N. E. 511.)

Policemen — physical examination — unconstitutional search.

The constitutional provision against unreasonable searches and seizures does not extend to the protection of a policeman against a physical examination to ascertain his continued fitness for his position.

(February 25, 1911.)

APPPEAL by relator from an order of the Circuit Court for Cook County overruling 33 L.R.A. (N.S.)

ing a demurrer to a plea to an information in the nature of a quo warranto filed to require defendants to answer by what warrant they claimed the right and privilege of compelling policemen to submit to a physical examination. Affirmed.

The facts are stated in the opinion.

Mr. A. D. Gash for appellant.

Messrs. Edward J. Brundage and Clyde L. Day, for appellees:

The general superintendent of police of Chicago has power to order a member of the police force to submit to a physical examination by physicians detailed by such superintendent for that purpose; and such an order does not contravene "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."

Boyd v. United States, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524; 9 *Enc. Ev.* pp. 791, 793; *People ex rel. Apfel v. Casey*, 66 App. Div. 211, 72 N. Y. Supp. 945; *People ex rel. Metcalf v. McAdoo*, 109 App. Div. 896, 96 N. Y. Supp. 868; *People ex rel. Price v. Bingham*, 125 App. Div. 723, 110 N. Y. Supp. 136.

Refusal to obey the reasonable order of the general superintendent of police, or physical disability, or physical incapacity to perform police duty, constitute causes for discharge of policemen in the classified service within the meaning of the civil service act.

Joyce v. Chicago, 216 Ill. 466, 75 N. E.

Note. — Right to compel public employee to submit to physical examination to determine fitness.

This question seems to have been before the courts in but one other case. In *People ex rel. Mosher v. Roosa*, 43 App. Div. 611, 60 N. Y. Supp. 244, there was an alternative writ of mandamus to determine the relator's right to the office of chief of police or policeman in a village. The return averred that the relator was lame and otherwise physically disabled, and thereby incapacitated to perform the duties of chief of police. In the affidavit which was made the basis for granting the order from which the appeal was taken, no oral examination was sought, but simply a physical examination of the person of the relator; nor was it therein stated that the defendants were not informed of his physical condition, or that they were unable to prove his physical incapacity by other available evidence. The court said that it was clear that no case was made which authorized the order applied for, even though authority in law existed for having such an examination, but there was no authority in law for having the examination of the person of the party in such an action.

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184; 28 Cyc. Law & Proc. pp. 509, 510; Chicago v. Bullis, 124 Ill. App. 15; Rockford v. Compton, 115 Ill. App. 406; Heaney v. Chicago, 117 Ill. App. 405; Chicago v. Gillen, 124 Ill. App. 210; Fitzsimmons v. O'Neill, 214 Ill. 494, 73 N. E. 797.

Cartwright, J., delivered the opinion of the court:

By leave of court granted in pursuance of an affidavit of Jeremiah Cronin and others, who were police patrolmen of the city of Chicago, an information in the nature of quo warranto was filed in the circuit court of Cook county in the name of the people, on the relation of the state's attorney, against the city of Chicago and the superintendent of police, requiring the defendants to answer by what warrant they claimed to hold and execute the right and privilege of compelling police patrolmen to submit to a physical and medical examination by a board of physicians, and expending moneys of the city for that purpose. The defendants filed a plea, which was demurred to by the relator; and, the demurrer being overruled, the relator elected to stand by it, and there was judgment for the defendants. An appeal to this court was allowed, on the ground that a constitutional question was involved in the decision of the case.

The act to provide for the incorporation of cities and villages, under which the city is organized, authorizes the city council to regulate the police of the city, to pass and enforce all necessary police ordinances, and to prescribe the duties and powers of a superintendent of police, policeman, and watchmen. The following facts are alleged in the plea, and admitted by the demurrer:

On March 20, 1905, the city council passed an ordinance establishing the department of police, embracing a superintendent of police, patrolmen and other employees, and creating the office of superintendent of police. The ordinance provided that the superintendent should have the management and control of all matters relating to the department, its officers, and members; that all members of the department should be subject to such rules and regulations as should be prescribed, from time to time, by the superintendent; that he should hear and determine all cases not under the jurisdiction of any trial board, for the violation of any rule, regulation, or other breach of discipline; and that the superintendent should be the head of the police department, with full power and authority over the same, subject to the laws of the state and the rules of the civil service commission. The civil service act (Hurd's Rev. Stat. 1909, chap. 24a) was adopted 33 L.R.A. (N.S.)

by the city, and the civil service commission adopted certain rules, one of which provides that the head of the department may file charges against any officer, which shall be investigated by the commission or some board appointed by it, and that notice shall be served upon the officer, and he shall be given an opportunity to be heard in his own defense. It is the duty of the superintendent of police to enforce strict discipline, and to ascertain, by physical and medical examination conducted under his direction, from time to time, whether active patrolmen are able to perform the duties required of them, to the end that he may make assignments of patrolmen to such duties as they shall be physically able to perform, and that, if any are permanently or totally incapacitated, he may prefer charges of physical incapacity against them before the civil service commission, in order that an investigation may be made, as required by law. An appropriation was duly made for the expense of such examination.

The information charged that the police patrolmen named therein, and who made the affidavit upon which leave to file the information was granted, were appointed under the provisions of the civil service act. The power of the civil service commission to require a physical and medical examination of an applicant for a position on the police force is not denied, and counsel for the relator says that patrolmen must necessarily submit to such examination; but he contends that after such examination there is no power granted by the statute for a subsequent examination. It is also admitted that the civil service commission has power, under § 12 of the civil service act, to try a patrolman upon a charge duly presented alleging that he has become incapacitated or unable to do the work prescribed for him; but it is contended that there is no power in the superintendent of police to require a physical and medical examination for the purpose of securing evidence of the incapacity or inability of the officer to perform his duties, which may afterwards be made the subject of such a charge. The ground of that claim is that an examination which requires a patrolman to remove his clothing is an invasion of his constitutional right, secured by § 6 of article 2 of the Constitution, which provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." The substance of the proposition of counsel is that, while one who has become physically unable to perform the duties of a patrolman may properly be dismissed from the service by the civil service commission, on a charge of that nature, the Constitution

prohibits the superintendent of police from ascertaining by the only practicable and available means, whether the condition exists.

The immunity of the citizen guaranteed by the Constitution is against unreasonable searches, and the courts have never looked upon a physical examination to determine the fitness of a person for a particular service as a search, within the meaning of the constitutional provision. The history and purpose of the provision, and its close relation to the other provision of the same article, that no person shall be compelled in any criminal case to give evidence against himself, were reviewed at considerable length by the Supreme Court of the United States in *Boyd v. United States*, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524, where extensive quotations were made from the opinion of Lord Camden in *Entick v. Carrington*, 19 How. St. Tr. 1029. There is not in that case, or any other of which we have knowledge, any rule or principle by which the constitutional provision can be applied to the situation here. The physical examination under the direction of the superintendent of police, which will enable him to exercise his powers and discharge his duties, is not different in any respect from an examination for military service, or admission to the military or naval school of the government, or any other examination conducted for the purpose of ascertaining the qualifications of a person to perform some particular duty or fill some particular position. The case of a policeman is like that of a soldier, where physical ability is a necessary and material part of an examination; and this is practically conceded by counsel in his admission that such examination may be made by the civil service commission in passing upon the qualifications of applicants. If such an examination is one that is prohibited by the Constitution as unreasonable, it would be no less unreasonable when conducted by the civil service commission than when required by the superintendent of police. The Constitution does not secure to any person the right to be a policeman, and if he desires to be one he must submit to the orders and regulations under which he is admitted to the service. The examination is not for the purpose of obtaining evidence to be used against the patrolman in a criminal prosecution, and it is not necessarily for the purpose of securing evidence upon which to base a charge of incapacity. It is the duty of the superintendent to maintain a capable and efficient police force, and as the duties of policemen are various, and require different degrees of physical strength, an examination would enable the superin-

tendent to assign a policeman to a position where he could perform the duties required of him. It is not contended that the superintendent has authority forcibly to make, or cause to be made, a physical examination of a member of the police department. If a policeman does not choose to submit to the examination and to abide by the rules and regulations of the department, he merely commits the offense of disobeying the superintendent, and subjects himself to a charge of that kind before the civil service commission. No distinction is made, under the constitutional provision, between unreasonable searches of the person and other searches which are unreasonable; but the searches referred to have always been understood as those which are made for the purpose of finding and seizing private papers or articles of personal property, or securing evidence of violations of the law. Even searches of that kind are not necessarily unreasonable, and one who is in legal custody may have his person searched by officers of the law, without violating the provision of the Constitution.

An argument is drawn from the rule of this court, that in a civil suit the court has no power to compel a physical examination of a party to the suit. There is no similarity between the two cases, nor is there any claim that the superintendent may compel the examination of a policeman. But the rule that the court cannot compel an examination of a party does not rest upon immunity, under the Constitution, from an unreasonable search. There is no doubt that a statute might be enacted requiring a party to submit to an examination as a condition of maintaining the suit, and many courts have held that such an examination either rests in the discretion of the court, or may be demanded by the opposite party as a matter of right. In any view of the case, we cannot see how it can be said that the superintendent of police is compelled by the Constitution to remain in ignorance of the physical capacity of policemen to perform the duties required of them, with the necessary consequence that the policemen may retain positions which they are incapacitated to fill, and draw salaries for services they are unable to perform. Even if the examinations conducted for the purpose of ascertaining the facts should be characterized as searches of the person, they cannot be considered unreasonable.

The court did not err in overruling the demurrer, and the judgment is affirmed.

Petition for rehearing denied April 5, 1911.

KANSAS SUPREME COURT.

GIRARD TRUST COMPANY

v.

THOMAS OWEN, Jr., Appt.

(83 Kan. 692, 112 Pac. 619.)

Appeal — service of case made — conflict in testimony — certificate.

1. Where there is conflicting testimony in this court as to whether a case made was served before the expiration of the time allowed, the certificate of the trial judge that the service was made in due time will control.

Limitation of action — acknowledgment to assignor of note.

2. The payee of a note who has assigned it as collateral security has still such an interest therein that a written acknowledgment made to him by the debtor may serve to toll the statute of limitations.

Same — assignor of mortgage.

3. In virtue of the statute (Gen. Stat. 1909, §§ 5214, 5215) making payments to the record owner of a mortgage binding upon the real owner, a part payment to a mortgagee who has made an unrecorded assignment is sufficient to toll the statute of limitations.

Note — reduction in debt — extending payment — provision for maturity — effect.

4. Where the parties to an overdue note enter into a written agreement founded upon a sufficient consideration, by the terms of which a part of the debt is forgiven and the time for paying the reduced amount is extended, a provision therein that a default in the payment of interest shall mature the new principal implies that the debtor is not to forfeit the benefit of the

Headnotes by MASON, J.

Note. — Statute of limitations: person to whom acknowledgment or new promise must be made to toll the statute or remove bar.

The early cases upon this question are gathered in the note to *Doran v. Doran*, 25 L.R.A. (N.S.) 805, and the present note covers only the subsequent decisions.

Acknowledgments to the following persons were held sufficient in the appended cases:

—acknowledgment to solicitors of creditor, *Cooper v. Kendall* [1909] 1 K. B. 405, 78 L. J. K. B. N. S. 580; 100 L. T. N. S. 251, 53 Sol. Jo. 243;

—acknowledgment by maker of notes, in bankruptcy proceedings of payee, made when he knew the notes had been assigned to plaintiff, *Catholic University v. Waggaman*, 32 App. D. C. 307.

And where the creditor of an employee of the government wrote the secretary of the department to ascertain what course

reduction by a failure to meet promptly the terms of the readjustment.

(January 7, 1911.)

APPEAL by defendant from a judgment of the District Court for Cheyenne County in plaintiff's favor in an action on a note and mortgage. Modified.

The facts are stated in the opinion.

Messrs. J. L. Finley and Wheeler & Switzer for appellants.

Messrs. Dempster Scott and Bowersock & Hall for appellee.

Mason, J., delivered the opinion of the court:

The Girard Trust Company, trustee, obtained judgment against Thomas Owen upon a note and mortgage, and he appeals. A preliminary question is presented by a motion to dismiss on the ground that the case made was not served in time. The judgment was rendered December 8, 1908, and the time then allowed for serving a case expired April 7, 1909. A written acknowledgment of service recited that it was made April 8th, and affidavits have been filed here stating such to be the fact. On the other hand, the defendant presents affidavits that service was made at an earlier date. The certificate of the trial judge made at the time of settlement, May 25, 1909, includes a recital that the case made had been served in due time. This is not ordinarily conclusive (*Gimbel v. Turner*, 36 Kan. 679, 14 Pac. 255), but it is competent evidence (*Jones v. Kellogg*, 51 Kan. 263, 271, 272, 37 Am. St. Rep. 278, 33 Pac. 997). It amounts to a finding made at a hearing of which the adverse party had notice, and will be regarded in this instance as controlling, inasmuch

to pursue to collect his debt, an affidavit filed by the debtor with the secretary in response to the latter's inquiry, in which the debtor unequivocally acknowledged an indebtedness of a certain amount, which he promised to make an effort to pay when he was better situated, was held sufficient to defeat the running of limitations, since, when he made such affidavit, he had reason to understand that it would be transmitted to the creditor and would influence his action. *Strong v. Andros*, 34 App. D. C. 278, 19 A. & E. Ann. Cas. 101.

But the fact that the obligors of a bond secured by a mortgage state that the obligations are existing liens on the land will not remove the bar of limitations where such acknowledgment is made to strangers, notwithstanding such strangers, without the obligors' knowledge, at the time contemplated buying the mortgage. *Swinley v. Force*, — N. J. Eq. —, 78 Atl. 249.

J. T. W.

as the conflict of testimony would otherwise leave the fact in doubt. The justice of this solution of the controversy is especially obvious because if the trial judge had found that the case made had been served too late, the defendant would still have had abundant time within which to institute an appeal under the new Code. The note sued on was due June 1, 1892. The action was begun April 2, 1907. To toll the statute of limitations, the plaintiff relies upon a written acknowledgment in the form of an extension agreement signed June 20, 1901, and upon a payment of interest found to have been made May 27, 1902. The defendant maintains that the acknowledgment and the payment were of no effect because neither was made to the owner of the note. The note and mortgage were made payable to Thomas Frahm, who was the cashier of the McKinley-Lanning Loan & Trust Company, to which he shortly transferred them. According to the evidence they were then turned over to the plaintiff as collateral security. While the plaintiff held them, the defendant signed an extension agreement acknowledging the indebtedness, which was described as owned by the McKinley-Lanning Loan & Trust Company. This written agreement was brought about by, and was delivered to, W. H. Lanning, who was the agent of Frahm and the McKinley-Lanning Company, but not of the plaintiff, so far as the record shows. The subsequent payment was likewise made to him.

In *Investment Securities Co. v. Bergthold*, 60 Kan. 813, 58 Pac. 469, it was held that a written acknowledgment incorporated in an extension agreement made with the payee after the assignment of the note does not interrupt the running of the statute. In that case, however, no suggestion seems to have been made regarding the effect of a subsequent adoption by the owner of the acts done by one having no authority at the time to represent him. Possibly the ratification might operate retrospectively by relation. See, as having some bearing upon this phase of the matter, *Dresser v. Wood*, 15 Kan. 344; *Service v. Farmington Sav. Bank*, 62 Kan. 857, 62 Pac. 670; *Haines v. Watts*, 53 N. J. L. 455, 21 Atl. 1032; 31 Cyc. Law & Proc. pp. 1283, 1290. *Moore v. Roper*, 35 Can. S. C. 533, tends to the contrary. In 19 Am. & Eng. Enc. Law, 2d ed. pp. 317, 318, it is said that "an acknowledgment made to the assignee [obviously a misprint for the assignor] after the assignment is of no effect." Of the two cases cited in support of this text one (*Maxwell v. Reilly*, 11 Lea, 307) holds that after the death of the owner of a note, an acknowledgment made

to his widow does not inure to the benefit of an administrator subsequently appointed. The widow claimed to own the note by gift, and the decision was based upon that fact. In the other case (*Stamford Bkg. Co. v. Smith* [1892] 1 Q. B. 765, 66 L. T. N. S. 306, 40 Week. Rep. 355, 56 J. P. 229, 61 L. J. Q. B. N. S. 405, 16 Eng. Rul. Cas. 165) a payment made to a former owner of the note was held not to suspend the statute, because the giving of money to a stranger was not a payment upon the note. The principle of ratification was suggested and might have been applied, but it happened that the adoption of one payment would have been involved recognizing enough others to have wiped out the debt.

In the present case the acknowledgment was sufficient, irrespective of the effect of a subsequent ratification. Although the McKinley-Lanning Company, to whose agent the acknowledgment was made, had previously transferred the note and mortgage, the evidence shows that the transfer was for security. By such a transfer the company lost the right of collection and control, but did not part with all interest in the claim. It was entitled to any surplus over the amount secured, and was itself liable for any deficiency. It had a substantial interest in the payment of the note, and cannot be regarded as a stranger to it. The cases holding that an acknowledgment made to a stranger is without effect have no application to such a situation. This readily appears from an examination of collections in 25 Cyc. Law & Proc. p. 1362, and 19 Am. & Eng. Enc. Law, 2d ed. p. 316, and notes in 102 Am. St. Rep. 754, and 5 A. & E. Ann. Cas. 811. In the note last cited it is said (page 812): "If the relationship between the person to whom the acknowledgment is made and the creditor is such that they have an interest in common in the debt, or that there is privity between them, the acknowledgment will be sufficient to toll the statute."

A situation somewhat analogous to that here presented arises where, upon the death of a creditor, the debtor admits the indebtedness to an heir who has no legal title, but is interested in the payment. By the weight of authority such an acknowledgment is as effective as one made to the administrator. These cases tend to support that view: *Haines v. Watts*, 53 N. J. L. 455, 21 Atl. 1032; *Hodnett v. Gault*, 64 App. Div. 163, 71 N. Y. Supp. 831; *Hill v. Hill*, 51 S. C. 134, 28 S. E. 309; *Robertson v. Burrill*, 22 Ont. App. Rep. 356; *Croman v. Stull*, 119 Pa. 91, 12 Atl. 812. The following have a contrary tendency: *Visher v. Wilbur*, 5 Cal. App. 562, 90 Pac. 1065,

91 Pac. 412; *Kisler v. Saunders*, 40 Ind. 78.

Ordinarily, a part payment is effective to suspend the running of the statute, only when it is made to the creditor or someone authorized to represent him. The reason has already been referred to,—the giving of money to a stranger is not in fact a payment on the debt. Here, however, that reason does not apply. Owen was entitled to credit for the payment made in 1902 to Lanning, the agent of the mortgagee, because at that time no assignment of the mortgage had been recorded. The statute (Gen. Stat. 1909, §§ 5214, 5215) makes payments to the record owner of a mortgage binding upon the real owner; it in effect makes the one the agent of the other for the purpose of receiving payments. As a payment made to such a statutory agent reduces the debt, it gives a new starting point for the period of limitation. Prior to the extension agreement nothing had been paid upon the principal, which was \$500. At that time a payment of \$100 was made, and Owen signed a new contract which recited that the unpaid balance was \$250, and provided for the payment of half of that amount in one year, and the remainder in two years, interest to be paid semi-annually, coupons therefor being attached. Judgment was rendered for the full amount of the original note and interest, less such payments as had actually been made. Owen maintains it should not have been for more than \$250 and interest.

The question for our determination is what contract the parties in fact made. It was, of course, competent for them to agree either that the execution of the instrument relating to the extension should of itself reduce the amount of the debt by the absolute forgiveness of a portion of it, or that such reduction should result only if the new promise to pay the less amount were fully kept. 1 Enc. L. & P. 637, 642. A witness for the plaintiff undertook to give the transaction the latter color, but his testimony must be regarded as expressing merely his view of the legal effect of the writing signed by Owen, for he stated no facts bearing on the matter. The negotiations leading up to the signing of the new contract were conducted by correspondence, and there was no evidence as to the contents of any communication on the subject. The question must therefore be determined upon the face of that instrument.

The new contract was supported by abundant consideration. For one thing the place of payment was changed, and for another Owen's wife, who had not previously been personally bound, assumed liability for the debt. The writing described the original

note and mortgage, and recited that \$250 of the principal remained unpaid. It contained nothing to suggest the payment under any circumstances of a larger sum than it stated to be still owing on the note. It provided, among other things, that, in case of default in the payment of the interest coupons attached to it, the mortgagee might declare the "said principal sum" (referring to the \$250) immediately due and payable. This express provision that a failure to meet the interest promptly should mature the new principal fairly implies that the parties did not intend such a default to have a greater effect,—that there was no purpose to make a delay in meeting the readjusted payments work a forfeiture of all the benefits to Owen of the readjustment.

The judgment will be modified by reducing the amount to the sum due by the terms of the extension agreement.

All the Justices concurring.

WISCONSIN SUPREME COURT.

PETER McARTHUR, Resp't.,

v.

JAMES MOFFETT et al., Appts.

(143 Wis. 564, 128 N. W. 445.)

Action — joinder — quieting title — trespass.

1. A statutory action to quiet title and a common-law action to recover damages for trespass upon the property involved may be joined under a statute permitting the joinder of causes which arise out of transactions connected with the same subject of action.

Same — transaction — physical presence.

2. The physical presence of the injured person is not necessary to effect a transaction within the meaning of a statute permitting the joinder of causes of action arising out of the same transaction, or transactions connected with the same subject of action.

Note. — As intimated in the foregoing opinion, the judicial interpretations of the Code phrase "subject of action," as used in the provisions with respect to the joinder of causes of action, as well as in the other Code provisions, are very numerous; but this case appears to be the only one that has passed upon the specific question whether a statutory cause of action to quiet title to land, and a cause of action for trespass on the same land, may be joined under the Code provision for the joinder of causes of action which arise out of the same transaction, or transactions connected with the same subject of action.

Same — possessory and proprietary actions.

3. In possessory and proprietary actions, whether involving real or personal property, the subject of action, causes arising out of transactions concerning which may, by statute, be joined in a single action, is composed of the plaintiff's primary right, together with the specific property itself.

(November 15, 1910.)

APPEAL by defendants from an order of a Circuit Court for Douglas County, overruling a demurrer to the complaint in an action brought to quiet title to certain land, and to recover damages for alleged unlawful trespassing and cutting of timber thereon. Affirmed.

The facts are stated in the opinion.

Mr. C. R. Fridley for appellants.

Messrs. Grace & Hudnall, for respondent:

Two causes of action, one in equity and one at law, may be joined; the equitable cause to be first tried by the court, and afterwards the legal cause with a jury.

Harrison v. Juneau Bank, 17 Wis. 340; Gunn v. Madigan, 28 Wis. 158; Hammel v. London Queen Ins. Co. 50 Wis. 240, 6 N. W. 805; Cameron v. White, 74 Wis. 425, 5 L.R.A. 493, 43 N. W. 155; Endress v. Shove, 110 Wis. 133, 85 N. W. 653; Krakow v. Wille, 125 Wis. 284, 103 N. W. 1121, 4 A. & E. Ann. Cas. 1016.

Equity having obtained jurisdiction to quiet title, or remove cloud from title, will retain such jurisdiction for the purpose of doing entire justice between the parties, and, if necessary, give a money judgment for damages to the land caused by cutting and removing the timber, rather than turn the plaintiff over to an action at law.

McLachlan v. Staples, 13 Wis. 448; Blake v. Van Tilborg, 21 Wis. 672; Bassett v. Warner, 23 Wis. 673; Turner v. Pierce, 34 Wis. 658; Moon v. McKnight, 54 Wis. 551, 11 N. W. 800; Brickner Woolen Mills Co. v. Henry, 73 Wis. 229, 40 N. W. 809; Leinenkugel v. Kehl, 73 Wis. 238, 40 N. W. 683; Pinkun v. Eau Claire, 81 Wis. 301, 51 N. W. 550; Swihart v. Harless, 93 Wis. 211, 67 N. W. 413; 16 Cyc. Law & Proc. p. 106.

The two causes of action stated in the complaint arose out of the same transaction.

Emerson v. Nash, 124 Wis. 369, 70 L.R.A. 326, 109 Am. St. Rep. 944, 102 N. W. 921.

The subject of plaintiff's action is his right and the invasion of that right by the defendant.

Brahm v. M. C. Gehl Co. 132 Wis. 674, 112 N. W. 1097.

The transactions are connected with the subject of the action.

Kruczynski v. Neuendorf, 99 Wis. 264, 74 33 L.R.A. (N.S.)

N. W. 974; Grignon v. Black, 76 Wis. 674, 45 N. W. 122, 938; Leinenkugel v. Kehl, 73 Wis. 238, 40 N. W. 683; 23 Cyc. Law & Proc. pp. 412, 420; Rogers v. Wheeler, 89 App. Div. 435, 85 N. Y. Supp. 981; McKinney v. Collins, 88 N. Y. 216.

An action in equity can be joined with one *ex delicto*.

Bishop v. Chicago & N. W. R. Co. 67 Wis. 610, 31 N. W. 219; Alliance Elevator Co. v. Wells, 93 Wis. 5, 66 N. W. 796; State ex rel. Alliance Elevator Co. v. Helms, 101 Wis. 280, 77 N. W. 194.

Winslow, Ch. J., delivered the opinion of the court:

The complaint contains two counts: The first states a statutory cause of action under § 3186, Stat. 1898, to quiet plaintiff's title to a number of tracts of unoccupied land to which the defendants "make some claim." The second states a cause of action at law to recover damages for trespass and the cutting of timber on said lands prior to the commencement of the action. A demurrer to this complaint for improper joinder of causes of action was overruled, and the defendants appeal.

The exact question presented is whether a statutory cause of action to quiet title to land and a cause of action for trespass on the same land "arise out of the same transaction, or transactions connected with the same subject of action" within the meaning of subdivision 1, § 2647, Wis. Stat. 1898. These words are found in the first subdivision of that section of our Code which authorizes the joinder of different causes of action in the same complaint. They were first introduced into the New York Code by amendment in 1852. They were incorporated into our original Code in 1856, and have remained there unchanged since that date. They are also to be found substantially unchanged in the Codes of nearly, if not quite all, of the Code states. It would seem that at this late date there ought to be little doubt as to their true scope and meaning. Courts and text writers have been busy for more than half a century drafting and redrafting definitions of the words "transaction" and "subject of action" as new cases have presented themselves, but, on the whole, it may well be doubted whether the discussions have resulted in clarity of thought. The words are general to the last degree; indeed, they must be so, for they are intended to provide for and apply to the myriad difficulties that may arise between man and man in all kinds of situations, and no words of limited or narrow meaning could be used.

The difficulty lies not merely in the unfortunate paucity and poverty of human language, but in the equally unfortunate

incapacity of the human mind to appreciate in advance and provide for future difficulties arising out of new situations and complications. In view of what has been said, it may seem somewhat presumptuous for us to enter upon a new discussion of the subject, or to attempt to make new definitions, and thus perhaps only make confusion worse confounded. We would never willingly "darken counsel by words without knowledge," and we hope not to do so now, but we feel that the case demands a careful re-examination of the meaning of the words in question in the light of all that the various courts and text writers have said about them. It may be that we shall add nothing useful to the discussion, yet it seems as though every treatment of the subject by an intelligent mind viewing it from a new standpoint, and as applied to new circumstances, and aided by the experience and suggestions of previous investigators, should be helpful. Section 143 of the original New York Code of 1848 (chap. 379, N. Y. Laws 1848) provided for the joinder of several causes of action in the same complaint, but it contained no provision of this kind. It simply provided that "the plaintiff may unite several causes of action in the same complaint where they all arise out of (1) contract, express or implied;" and then followed six subdivisions or classes of actions, the section closing with this provision: "But the causes of action so united must all belong to one only of these classes, and must equally affect all the parties to the action, and not require different places of trial." It will be noticed that the section contains no provision expressly allowing the joinder of legal and equitable causes of action, nor does it contain the provision now under consideration, namely, the provision allowing joinder where the different causes "arise out of the same transaction, or transactions connected with the same subject of action."

The cold, not to say inhuman, treatment which the infant Code received from the New York judges is matter of history. They had been bred under the common-law rules of pleading, and taught to regard that system as the perfection of logic, and they viewed with suspicion a system which was heralded as so simple that every man would be able to draw his own pleadings. They proceeded by construction to import into the Code rules and distinctions from the common-law system to such an extent that in a few years they had practically so changed it that it could hardly be recognized by its creators. Although the Code by its terms abolished all existing forms of pleading, and prescribed one general form

of pleading which should be used in all actions, the courts early decided that the distinctive features of pleadings at law and in equity still remained, and so they easily held that what was formerly called a cause of action at law could not be joined with what was formerly called a cause of action in equity. To meet and counteract this narrow and illiberal construction of the law, the amendments of 1852 (Laws 1852, chap. 392) were adopted, providing expressly that legal and equitable causes of action might be joined, provided they both belonged to one of the seven classes, and further creating a new class of joinable actions, to wit, those which arise out of the "same transaction, or transactions connected with the same subject of action." It is very clear that the legislative intent in making these amendments was to permit and encourage the joinder of causes of action which could reasonably be said to involve kindred rights and wrongs, and thus settle such kindred rights and wrongs in one proceeding, rather than to require them to be settled by piecemeal in different actions, with much greater expenditure of time and money.

Some other conclusions seem equally clear concerning these amendments. They were all intended to accomplish some definite purpose,—some change in the existing condition of things. They were not inserted to fill up space or for rhetorical effect. The word "transaction" was intended to define one thing, and the words "same subject of action" another and different thing; and both were intended to define a different thing from the words "cause of action." To hold that any two of these three terms mean the same thing is to make nonsense of the whole phrase. Again, it is very apparent that the dominant idea was to permit joinder of causes of action legal or equitable in case there was some substantial point of unity between them. It was contemplated evidently that this point of unity might be very near to the causes of action,—i. e., that both causes of action might arise directly out of the same event or affair (called a "transaction" in the statute), in which case they were joinable; and it was also contemplated that the point of unity might be further off in the chain of events,—i. e., that, while the two causes of action had their immediate inception in different "transactions," still, if these different transactions were both connected with one fundamental matter or thing, or combination of matters or things, called the "subject of action," there was still a sufficient element of unity to justify their being joined in one action. Now it is manifest

that the principal difficulty here consists in the meaning of the term "subject of action." The words "cause of action" and "transaction" present no very serious difficulties, but "subject of action," as before said, is a very general and comprehensive term which must be applied to very many and very diverse situations. It is relatively easy to give it a definition in terms equally general; for instance, one can say that it is some fundamental matter or thing common in greater or less degree to each cause of action, and without the prior existence of which the cause of action itself could have no existence; but this definition affords little help in applying the words to a concrete case. The definition is as general and vague as the words which it is supposed to define.

The difficulties surrounding the accurate definition of these words were at once appreciated by the courts of New York. Judge Comstock, in 1858, said of the amendment of 1852: "Its language is, I think, well chosen for the purpose intended, because it is so obscure and so general as to justify the interpretations which shall be found most convenient and best calculated to promote the ends of justice. It is certainly impossible to extract from a provision so loose and yet so comprehensive any rules less liberal than those which have long prevailed in courts of equity." *New York & N. H. R. Co. v. Schuyler*, 17 N. Y. 592. In 1876 Chief Justice Church said: "This language is very general and very indefinite. I have examined the various authorities upon this clause, and I am satisfied that it is impracticable to lay down a general rule which will serve as an accurate guide for future cases. It is safer for courts to pass upon the question as each case is presented. To invent a rule for determining what the 'same transaction' means, and when a cause of action shall be deemed to 'arise out' of it, and what the 'same subject of action' means, and when transactions are to be deemed connected with it, has taxed the ingenuity of many learned judges, and I do not deem it necessary to make the effort to find a solution to these questions." *Wiles v. Suydam*, 64 N. Y. 173. The well-known allusion to that unfortunate class of people who rush in where "angels fear to tread" may occur to the irreverent mind at this point, but we feel compelled to proceed with our investigations nevertheless.

As before indicated, it is entirely certain that the three expressions "cause of action," "transaction," and "subject of action," mean different things as used in this statute. To say that "subject of action"

means the same thing as "transaction" is to say that the legislature chose to be wilfully obscure and misleading at a time and place where clarity was above all things necessary. To say that it means the same thing as "cause of action" would make the clause proclaim that causes of action may be joined if the same cause of action is common to both of them,—a construction which involves a manifest absurdity. Our main concern here is with the meaning of the words "subject of action;" because, if the two causes of action are joinable at all, it is because they arise out of transactions connected with the same subject of action, rather than because they arise out of the same transaction. The intimate relationship between the three terms, "cause of action," "transaction," and "subject of action," in the sentence, however, and the evident necessity of the drawing of some fairly accurate distinction between them in order that the true significance of the latter term may be arrived at, renders it proper, if not absolutely necessary, to consider them all. As the meaning of the first two terms seems to be quite well settled, both in this state and in the Code states generally, it seems wise to take them up first in the discussion.

1. The term "cause of action" occurs several times in the original Wisconsin Code. Perhaps its appearance is most significant in subd. 2 of § 47 of that Code (chap. 120, Laws 1856), now subd. 2 of § 2646 of the Statutes of 1898, which provides that the complaint shall contain "a plain and concise statement of the facts constituting each cause of action, without unnecessary repetition." This makes it very clear that, in the minds of the makers of the Code, the "cause of action" is made up of the facts necessary to be pleaded and proved in order to establish the defendant's liability to the plaintiff. These must be of two classes: (1) The facts which show the plaintiff's right, and (2) the facts which show the defendant's violation of that right. Pomeroy says (*Pom. Code Remedies*, 4th ed. § 347): "The cause of action as it appears in the complaint, when properly pleaded, will therefore always be the facts from which the plaintiff's primary right and the defendant's corresponding primary duty have arisen, together with the facts which constitute the defendant's delict or act of wrong." Substantially this definition is supported by the authorities generally. It is supported in this state in *Bruil v. North Western Mut. Relief Assn.* 72 Wis. 430, 39 N. W. 529. Rapalje's definition is there quoted,—"The fact or combination of facts

which give rise to a right of action,"—and it is said: "A cause of action does not arise until the facts exist which constitute the cause of action, and not merely the one fact which may be the breach of duty." In *South Bend Chilled Plow Co. v. George C. Cribb Co.* 105 Wis. 443, 81 N. W. 675, it is said: "In every cause of action there must exist a primary right, a corresponding primary duty, and a failure to perform that duty." In *Emerson v. Nash*, 124 Wis. 369, 387, 70 L.R.A. 326, 109 Am. St. Rep. 944, 102 N. W. 921, 928, it is said: "A cause of action consists of those facts as to two or more persons entitling at least some one of them to a judicial remedy of some sort against the other or others for the redress or prevention of a wrong. . . . There should be a right to be violated and a violation thereof." There seems no logical escape from the conclusion that the term "cause of action" must include the facts showing (1) the plaintiff's right; (2) the defendant's corresponding duty; and (3) the defendant's breach of that duty; or, to put it more tersely, the plaintiff's right and its violation by the defendant.

2. The word "transaction" is defined in *Pomeroy's Code Remedies*, 4th ed. § 367, as follows: "A negotiation, or a proceeding, or a conduct of business, between the parties, of such a nature that it produces as necessary results two or more different primary rights in favor of the plaintiff, and wrongs done by the defendant which are violations of such rights." In *Craft Refrigerating Mach. Co. v. Quinpiac Brewing Co.* 63 Conn. 551, 25 L.R.A. 856, 29 Atl. 76, it is defined as "something which has taken place whereby a cause of action has arisen. It must . . . consist of an act or agreement or several acts or agreements having some connection with each other in which more than one person is concerned, and by which the legal relations of such persons between themselves are altered." This court defines it in the *Emerson Case*, 124 Wis. 369, at page 389, as follows: "Any event in which two or more persons are actors, involving a right which may presently, or by what may proximately occur in respect thereto, be violated, creating a redressible wrong, is a transaction within the meaning of the statute." This seems practically to be the same as *Pomeroy's* definition. In *Scarborough v. Smith*, 18 Kan. 399 (a very interesting and instructive case), it is defined thus: "A transaction is whatever may be done by one person which affects another person's rights, and out of which a cause of action may arise." At first glance both *Pomeroy's* definition and the definition given in the *Emerson Case* 33 L.R.A. (N.S.)

might seem to imply that both parties to the action must be active participants in the event or affair in order that it constitute a "transaction." If this were so, neither a trespass on land in the absence of the owner, nor an unfounded claim of title to land in like absence, would amount to a transaction, and it would necessarily follow that neither cause of action here stated arises out of a "transaction" within the meaning of the statute, and hence there could be no connection between either cause of action and the subject of the action. The definitions referred to, however, do not, when properly understood, mean that both parties must actually be present in order that an event or affair may arise to the dignity of a transaction. If the act of one person wrongfully invades or infringes upon the right of another, there is undoubtedly a transaction," though the injured party be not physically present. He may, in such case, truly be called a participant in the act, because he is represented by his right which is invaded or violated by his adversary's act. The definition in the *Kansas case* cited exactly fits this view. With this understanding of its meaning, there seems no reason to doubt that the definition given by this court in the *Emerson Case* is substantially correct.

3. We pass now to the consideration of the phrase "subject of action," which presents much greater difficulty as well as greater confusion in the authorities. We start with a proposition which seems to us incontrovertible; namely, that the makers of the Code not only had some definite and certain idea in mind when they used these words, but that such idea was a different idea from the ideas embodied in the words "cause of action" or "transaction." It is entirely true that in literature, logic, and grammar the word "subject" means that which is treated of, the theme of discourse, or that of which something is affirmed or predicated; hence it could logically be said, if there were no other considerations to be kept in view, that the subject of an action is the defendant's invasion of the plaintiff's right, because this is the matter which is the paramount theme treated of. It by no means follows, however, that this definition can or ought to be applied here. The question is not necessarily what do literary purists or lexicographers mean by the word, although this is helpful and should be considered, but what did the legislature mean by it? It is not a word like "horse" or "cow," which can mean but one thing in whatever position it be placed, but it may be applied and probably rightly applied by different minds to different things, tangible or intangible, under the

same circumstances. For example, in an action of ejectment, one mind might arrive at the conclusion that the land alone was the subject of the action, another that its title was the subject, another that the defendant's wrongful possession was the subject, and still another that all these things together constitute the subject. All of them are treated of in the action. Which or how many of them did the legislature intend to refer to when it spoke of the "subject of action?" This is the problem which it is necessary to solve in order to decide the present case. In considering this question it is important in the first place to note that the term is used several times in the original, as well as in the present, Code, in entirely different connections. Of course, it must be assumed that, wherever it is used in the same act, it means the same thing; and it ought to be helpful to ascertain the meaning which seems ascribed to the term in its other connections, if any particular meaning be apparent.

In the original Wisconsin Code the term was used at least seven times, including the instance under discussion. The first instance seems to be in § 21 (chap. 120, Laws 1856), now § 2602, Stat. 1898, which provides that "all persons having an interest in the subject of the action and in obtaining the relief demanded may be joined as plaintiffs." The inference here would seem to be that tangible property might, in some cases, at least, be considered the subject of the action, but perhaps the inference is not very persuasive, and we pass to the next instance of the use of the term, which occurs in § 27 of the original Code, now appearing in slightly altered form as § 2619, Stat. Wis. 1898. This section provides that four classes of actions must (subject to the power of the court to change the venue) be tried in the county in which the subject of the action or some part thereof is situated. These classes of actions are: (1) actions for the recovery of real property, or of any estate or interest therein, or for the determination in any form of such right or interest, or for injuries to real property; (2) actions for the partition of real property; (3) actions for the foreclosure of a mortgage of real property; and (4) actions for the recovery of personal property distrained for any cause. It will be noticed that these are all actions involving either the title or some interest in or lien upon specific real or personal property. Now, can there be any doubt from the language of the section and the careful grouping of these actions which all involve specific tangible property that the legislature meant to refer to that specific tangible property as the subject of the ac-

tion, and to require that the action be tried in the county where it is situated? Again, is there any doubt that the profession and the courts have so construed the section without question, from 1856 up to the present time? We believe no case will be found in this state where it has been even suggested by court or counsel that this section means anything but that the actions named are local actions whose locality (subject to change of venue for sufficient cause) is fixed by the locality of the real or personal property involved, which real or personal property is called by the legislature the "subject of the action." *Young v. Lego*, 38 Wis. 206; *West v. Walker*, 77 Wis. 557. 46 N. W. 819.

But any lingering doubt as to the meaning of the term here must surely be removed when we consider subds. 3 and 4 of § 40 of the original Code, now found in expanded form in subds. 1, 3, and 7 of § 2639 of the Statutes of 1898. This section provides for service of the summons by publication where personal service cannot be made. Such substituted service may be made under these subdivisions (1) where the defendant is a nonresident, but has property within the state, and the action is on contract, "and the court has jurisdiction of the subject of the action;" and (3) where "the subject of the action is real or personal property in this state, and the defendant has or claims a lien or interest, actual or contingent, therein, or the relief demanded consists wholly or partly in excluding the defendant from any interest or lien therein." Here it is definitely stated that there are actions in which the subject of action is real or personal property. Here, also, we think, there has been a universal consensus of opinion among lawyers and courts that the last-mentioned clause was intended to, and did, apply to all controversies involving the title of specific real or personal property situated within the state, and that in such cases there could be service by publication, because of the fact that such property was the subject of the action, and was within the state. In § 49 of the original Code, now § 2649, Stat. 1898, it is provided that the defendant may demur to the complaint when it appears upon the face thereof that the court has "no jurisdiction of . . . the subject of the action," and in § 55, Id., now § 2656, Stat. 1898, it is provided that the defendant may interpose by way of counterclaim "a cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action,"

and, lastly, in § 73, Id., now § 2647, Stat. 1898, we find the provision for joinder of causes of action legal or equitable "where they arise out of the same transaction, or transactions connected with the same subject of action."

Some time and space have been spent in collating and considering these various instances of the use of the term "subject of action," in the original Code, not only to show that it must have been used by the Code makers deliberately and advisedly, but also because it seems that in many of the discussions of its meaning as used in the joinder and counterclaim sections there has been little or no attention paid to the help which might be derived from considering the obvious meaning attached to it when used in the other sections above referred to. Possibly some of the confusion in the authorities might have been avoided had all the provisions of the act in which the term is used been viewed together. That there is much confusion upon the subject, both in the decisions and in the text-books, cannot be denied, and there seems to be as much in Wisconsin as elsewhere. In *Scheunert v. Kaehler*, 23 Wis. 523, it was said, considering the counterclaim statute, that the subject of an action for conversion of money was the "tort or wrong committed;" and in *Stolze v. Torrison*, 118 Wis. 315, 95 N. W. 114, it was said of an action of trespass upon real estate that the subject of the action is not the land nor the title to the land, but the torts alleged. These two cases seem to indicate that in actions for torts committed upon property, the tort, and not the property, is the subject of the action. On the other hand, it is said in *Cornelius v. Kessel*, 58 Wis. 237, 16 N. W. 550 (still considering the counterclaim statute), that in ejectment "the subject of the action is the land in controversy;" and in *Kruczynski v. Neuendorf*, 99 Wis. 264, 74 N. W. 974, it is said that an equitable cause of action to remove a cloud fraudulently placed on the title of land, and a legal cause of action to recover possession of the land, with rents and profits for its use, may be joined under the statute because "the subject of the action is the land." In *Leinenkugel v. Kehl*, 73 Wis. 238, 40 N. W. 683, which was an action to quiet title to land, the conclusion seems to be based upon the idea that the land is the subject of the action, although the proposition is not definitely stated in the opinion. In *Grignon v. Black*, 76 Wis. 674, 45 N. W. 122, 938, which was an action to quiet title, it was said, considering the counterclaim statute, that the subject of the plaintiff's action was "their title and right of possession to the land in 33 L.R.A. (N.S.)

question." The radical inconsistency in these holdings is very apparent. In a trespass action, which is brought to redress a wrongful entry on land, the subject is the tort, and not the land. In an ejectment action, which is brought to redress a wrongful holding of land, the subject is the land, and not the tort, while in *quia timet* the subject is said in one case to be the land itself, and in another to be the plaintiff's title and right of possession of the land.

But this is not all. As we have seen, it was held in the *Scheunert* Case, in the twenty-third Wisconsin, that in an action for conversion the subject was the tort or wrong committed; but in the later case of *Mulberger v. Koenig*, 62 Wis. 558, 22 N. W. 745, which was an action in equity to prevent the wrongful obstruction of a mill race, it was said that the subject of the action "is nothing more or less than the facts constituting the plaintiff's causes of action." This latter case was followed in *Telulah Paper Co. v. Patten Paper Co.* 132 Wis. 425, 112 N. W. 522 (another water power case), where it was said that the subject of the plaintiff's action is "his right and the invasion of that right" by the defendant, and this definition was approved and applied in *Brahm v. M. C. Gehl Co.* 132 Wis. 674, 679, 112 N. W. 1097. Now, can it be possible that it is true that the subject of the action, as the term is used in the Code, means the plaintiff's right and the defendant's invasion of that right? If so, then it is synonymous with "cause of action," and we should be able to substitute the words "subject of the action" for "cause of action" wherever they occur in the Code, and *vice versa*. It is very certain that we cannot do this without making nonsense of the Code and convicting its authors of the reckless use of misleading language in the crucial paragraphs of a law which was intended to completely revolutionize all legal procedure.

There is another class of cases in this court in which the subject has received passing consideration. *viz.*, the cases involving the winding up of the affairs of insolvent corporations, and the enforcement of the liabilities of corporate officers and stockholders. In these cases the settlement of the corporate affairs, the enforcement of the various liabilities, and the administration of the trust fund have been said to constitute the "subject" or "subject-matter" of the action (not, however, in direct reference to the joinder section of the statute), and it has also been said in these cases that the various liabilities sought to be enforced in such actions are not separate causes of action, but mere incidents of one cause of action; *i. e.*, the

"settlement of the corporate affairs." In the first of the cases cited below, "subject-matter" and "cause of action" seem to be considered practically the same. *Gager v. Maraden*, 101 Wis. 598, 604, 77 N. W. 922; *Harrigan v. Gilchrist*, 121 Wis. 127, 296, 99 N. W. 909; *Foster v. Posson*, 105 Wis. 39, 81 N. W. 123.

Again, there are several cases, which can hardly be classified under any given head, in which the question was whether one or several causes of action are stated in the complaint, and in the treatment of that question the term "subject of action" or "subject of litigation" has been used and given a meaning, not, however, with direct reference to the joinder statute. Thus, in *Zinc Carbonate Co. v. First Nat. Bank*, 103 Wis. 125, 74 Am. St. Rep. 845, 79 N. W. 229, which was an action by a corporation against alleged conspirators, to recover back corporate assets and set aside a fraudulent judgment, it was said, in answer to the objection that two causes of action were improperly joined, that "there is but one subject of action,—the conspiracy to defraud, and its consummation to the damage of plaintiff." In *Jordan v. Warner*, 107 Wis. 539, 83 N. W. 946, which was a claim against an estate for the proceeds of lands alleged to belong to the plaintiff, but sold by the deceased as plaintiff's agent, involving also a claim that a deed of the lands made to the deceased was in fact a mortgage, it was said: "The sole primary subject of the litigation was the alleged indebtedness of the estate to plaintiffs." In *Adkins v. Loucks*, 107 Wis. 587, 83 N. W. 934, which was an action by the creditor of a deceased person to enforce the liability of heirs under § 3274, Stat. 1898, who had received the real estate of deceased, other parties being joined to whom part of the land had been fraudulently conveyed, it was said: "The infallible test by which to determine whether a complaint states more than one cause of action is, Does it present more than one subject of action or primary right for adjudication?" And again: "The sole subject of the action stated in the complaint being to recover plaintiff's claim out of the land that descended to the Loucks heirs," the setting aside of the fraudulent deeds is germane to that subject. Other Wisconsin cases in which casual attention has been given to the subject are *Alliance Elevator Co. v. Wells*, 93 Wis. 5, 66 N. W. 796; *Endress v. Shove*, 110 Wis. 133, 85 N. W. 653; *Aultman Co. v. McDonough*, 110 Wis. 263, 85 N. W. 980; *Koepke v. Winterfield*, 116 Wis. 44, 92 N. W. 437; *Krakow v. Wille*, 125 Wis. 284, 103 N. W. 1121, 4 A. & E. Ann. Cas. 1016; *Tallman v. Barnes*, 54 Wis. 181, 11 N. W. 478, and 33 L.R.A. (N.S.)

Kuhn v. Sol. Heavenrich Co. 115 Wis. 447, 60 L.R.A. 585, 91 N. W. 994, but in none of them do we find any helpful discussion of the question. It seems very evident to us that the cases in this court cannot be harmonized, and we shall not undertake the task. The confusion is hopeless. Looking to the decisions in New York and other Code states, as well as to the attempts of text writers to solve the difficulty, we find the same confused condition. To attempt to analyze the decisions would be impossible within any permissible limits, but the conclusions of the leading text writers may profitably be considered.

Mr. Pomeroy, in his valuable work on Code remedies, has made three attempts to define the term "subject of action." At § 369, 4th ed. he says: "The term 'subject of action' found in the Code in this and one or two other sections was doubtless employed by its authors and the legislature as synonymous with, or rather in place of, 'subject-matter of the action.' I can conceive of no other interpretation which will apply to the phrase and meet all the requirements of the context. 'Subject-matter of the action' is not the 'cause of action' nor the 'object of the action.' It rather describes the physical facts, the things real or personal, the money, lands, chattels, and the like in relation to which the suit is prosecuted. It is possible, therefore, that several different 'transactions' should have a connection with this 'subject-matter,' or, what seems to me to be the same thing, with this 'subject of action.'" This seems a fairly definite and workable definition as applied to actions relating to specific real or personal property, but in § 384 of the same work, after discussing and criticizing the definition given by Mr. Calvert in his work on Parties, he says: "In equitable actions there is generally, if not quite always, a fund, or estate, or property, which is the subject of the suit, as well as questions concerning the same to which the term may also be applied. The provisions of the Codes, however, embrace legal actions; and in them it cannot generally be said that there is any fund, property, or estate in relation to which the questions at issue have arisen, and which can be regarded as the 'subject.' In a very large proportion of legal actions, therefore, the term 'subject of the action' can only be conceived of in the second sense which has been attributed to it, and denotes the totality of questions at issue between the parties, embracing, in short, both the primary rights and duties of the litigants, and the remedial rights and duties which have sprung from the injuries complained of. The term does not seem capable of any clear and complete

analysis, and the result is that it may denote the 'thing' if any,—land, chattel, person, fund, estate, and the like,—in respect of which rights are sought to be maintained and duties enforced, or it may denote the sum of the questions between the parties to be determined by the judgment of the court. The latter meaning is distinguishable, and is to be distinguished from the 'object of the action,' which is always the relief to be obtained by the determination of the questions which constitute the 'subject of the action.'" This seems sufficiently vague and confusing, but when we come to the discussion of the term under the counterclaim section, at § 651 of the same work, we find a definition which seems to disregard the previous discussions entirely, viz: "It would, as it seems to me, be correct to say in all cases, legal or equitable, that the 'subject of the action' is the plaintiff's main primary right, which has been broken, and by means of whose breach a remedial right arises. Thus the right of property and possession in ejectment and replevin, the right of possession in trover and trespass, the right to the money in all cases of debt, and the like, would be the 'subject' of the respective actions. Although in a certain sense and in some classes of suits the things themselves, the land or chattels, may be regarded as the 'subject,' and are sometimes spoken of as such, yet this cannot be true in all cases; for in many actions there is no such specific thing in controversy over which a right of property exists. The primary right, however, always exists, and is always the very central element of the controversy around which all the other elements are grouped, and to which they are subordinate. In possessory and proprietary actions this right, which will then be always one of property or of possession, will be intimately associated with the specific thing itself which is the object of the right; but this relation is not, and cannot be, universal. It seems, therefore, more in accordance with the nature of actions, and more in harmony with the language of the statute, to regard the 'subject of the action' as denoting the plaintiff's principal primary right, to enforce or maintain which the action is brought, than to regard it as denoting the specific thing in regard to which the legal controversy is carried on. In this manner alone can we arrive at a general rule applicable to all possible cases, and the rule thus reached fully satisfies all the requirements of the legislative language, and can be invoked in all classes of actions. While I suggest and adopt this meaning of the term 'subject,' I freely concede that no decision, so far as I have discovered, pro-

ounces this interpretation to be the only one admissible. Many cases sanction it, none directly reject it; but none, on the other hand, have gone so far as to declare in its favor to the exclusion of all other meanings. The construction proposed, as it has been judicially approved in many instances, would remove all doubt and conflict of opinion, and would furnish a simple and practical rule of universal application." Acknowledging as we do Mr. Pomeroy's very valuable services to the profession and to the law, we think it must be admitted that he also has left the question of the meaning of "subject of action" in great confusion.

Mr. Nichols, in volume 1 of his work on New York Practice, at page 68, quotes Mr. Pomeroy's first definition, "the physical facts, the things, real or personal, the money, lands, chattels and the like in relation to which the suit is prosecuted," and escapes any further difficulty by not attempting any additional discussion of the subject.

Mr. Bliss, in his work on Code Pleading, 3d ed. has also attempted to reach a conclusion on the subject, and perhaps with some greater degree of success. Thus he says at § 126: "The cause of action has been described as being a legal wrong threatened or committed against the complaining party, and the object of the action is to prevent or redress the wrong by obtaining some legal relief. The subject of the action is clearly neither of these. It is not the wrong which gives the plaintiff the right to ask the interposition of the court, nor is it that which the court is asked to do for him, but it must be the matter or thing, differing both from the wrong and the relief, in regard to which the controversy has arisen, concerning which the wrong has been done; and this is ordinarily the property or the contract and its subject-matter or other thing involved in the dispute." He then proceeds to state what he deems to be the subject-matter of various contract actions, and proceeds with the consideration of tort actions, as follows: "In an action for a tort, the injury complained of is the wrong, and the subject of the action would be that right, interest [relation], or property which has been affected,—as, in replevin or trover, the property taken; for libel or slander, the plaintiff's character or occupation; for an injury to a servant, the service; for the seduction of, or for harboring, a wife, the marital relation; for negligence, the duty, property, or person in respect to which the negligence occurred; for false imprisonment, the plaintiff's liberty; and for trespass upon property, the property." He also clear-

ly appreciates that the words should be held to mean the same thing wherever used, and in § 373 makes the following observations concerning the term as used in the counterclaim statute: "I know of no reason why the same interpretation should not be given it in this connection as when it is used to designate a class of causes of action that may be united in one proceeding, and the reader is referred to the view heretofore taken. This general view is not elaborated in any of the reported cases. It is not, perhaps, the duty of judges to write essays, only to apply the law to the facts before them; but by a preponderance of authority it is recognized, and the cloudiness, if not blunders, that are seen in this connection, have arisen chiefly from a failure to distinguish the 'subject' of the action from the 'cause,' or from the 'object' of the action, or from the facts which constitute it. Our system of pleading will never be reduced to scientific accuracy until the statutory phrases embodying it come to have a fixed signification. Technics are essential to exact knowledge. The pleader may state in common language the facts that constitute his cause of action because he describes the common events of life; and yet, at every step, he is controlled by the stern rules of legal logic. Looseness, indefiniteness, uncertainty in the interpretation of phrases that control his action, leave him wholly at sea, and tossed about by the shifting winds of mere opinion, or, perhaps, caprice. It is because a fixed and definite meaning has not been given to the term 'subject of action,'—because it so often fails to present to the mind any distinct conception,—that we find so many differences of opinion in respect to this class of counterclaims; and, as we shall presently see, nowhere does the conception seem to be less certain than in the great state to whose jurisprudence we owe so much, and whose enlightened bar first called the new system into existence."

In this connection we will again refer to the case of *Scarborough v. Smith*, 18 Kan. 309, where, under the joinder clause which we are considering, it was held that an action of ejectment, an action to recover the value of the rents and profits of the same property, and an action for partition thereof, could be joined because they all arose out of transactions connected with one subject of action, which was said to be the "right to use and enjoy in the manner he chooses his said interest in said real property, with all the proceeds and avails thereof;" and it is further said: "Of course, the 'subject of action' is not the 'cause of action' or the cause of any action or any cause of action. It is simply one of the

elements of each of the several causes of action, uniting and binding them together in one action."

We are not to be understood as approving without qualification the propositions laid down by Pomeroy and Bliss in the quoted paragraphs. The quotations have been made rather for the purpose of showing the drift of thought on the subject in two acute legal minds. We do not propose in the present case to attempt to lay down any hard and fast definition which shall be applicable to all cases which may arise. "Sufficient unto the day is the evil thereof." But we feel that we must recede from the proposition laid down in the *Telulah Case*, to wit, that the subject of the action is composed of the plaintiff's right and the defendant's invasion thereof. If the phrase stood alone, this might be logically correct; but when we face the fact that we must differentiate "subject of action" from "cause of action," and when we also know that the definition last quoted must be applied to "cause of action," we must find some other meaning for "subject of action." It seems probable, as Mr. Pomeroy suggests, that the Code makers used the term having in mind the term "subject-matter of the action," which was in use before the Code, and which is defined by Bouvier as "the cause, the object, the thing in dispute." It seems also probable that they had in mind equitable actions involving complicated matters arising out of and surrounding a single parent stem or primary right, which manifestly ought to be all handled at the same time and by the same court in order to settle closely related rights; but we cannot assent to the suggestion of Mr. Pomeroy (§ 369, *Id.*) that it probably has no application to legal causes of action, although it was said by this court in the *Emerson Case*, supra, at page 389 of 124 Wis., that "doubtless . . . the second clause of the statute applies more generally, if not exclusively, to equitable suits." There can be little doubt that the clause will find its most frequent application in equitable actions, but the Code makers neither had nor expressed any intention to limit it in that way. The very wording of the introductory words of the clause precludes that idea. Causes of action "whether . . . legal or equitable or both" may be joined where they arise out of transactions connected with the same subject of action. They intended to give the court power to lay hold of, sift out, and determine in one action rights and wrongs between the same parties which had this element of unity, and they did not intend to limit this broad power in any way. It should be con-

strued and administered by the courts with a view to most effectively and fully carry out its purpose so far as may be consistent with the orderly and prompt administration of justice and the preservation of the rights of litigants.

We have before us two causes of action,—one by the owner of certain lands to prevent the further assertion of a wrongful claim of title to those lands, and another to recover for a wrongful entry on the same lands by the same person. Can they be joined? They do not arise out of the same transaction. One arises out of some oral or written claim, the other out of an actual physical entry on the land. Both of these are transactions under the rule heretofore given, but are they both connected with the same subject of action? Evidently we are obliged to define the words "subject of action" to reach an answer. If we say that the subject of the action is the plaintiff's alleged right alone,—i. e., his title,—then could it be said logically that the physical trespass on the land was in any way connected with the subject? On the other hand, if we say that the subject of the action is the land alone, and not the plaintiff's title thereto, could it be said logically that the false claim of title was connected with the subject? The questions suggest that either holding would be too narrow, and that with better reason it should be said in a case like the present that the subject of the action is composed both of the land and the plaintiff's alleged title, taken together. Indeed, this seems the only logical holding. How can the title be dissociated from the land itself? The land must exist in order that there be any title; and both land and title must exist together if the plaintiff have any standing in court or any right to ask for affirmative action by a court of justice in his behalf.

Now, if the subject of the action in cases like the present be the land and the plaintiff's title taken together, then any transaction which is connected with either the land or the title is connected with the subject of action, because the two are inseparable.

There are two reasons why, in actions involving conflicting claims or interests in specific real or personal property, the property itself must be considered as an essential part, at least, of the subject of the action: First. Because, if it be not so, then the Code provisions before cited, which provide (1) that certain classes of actions shall be tried in the county where the subject of the action is situated; and (2) that the summons may be served by publication where the subject of the action is real or personal property in this state, become

nonsense, because they can apply to nothing. Second. Because, when it is admitted that in using the words "subject of action" the Code makers had in mind the idea of subject-matter, as used before the Code, it must also be admitted that the words cover the specific real estate in any action where conflicting claims to such real estate are in issue. "Subject-matter" as used before the Code, when applied to such a case, meant the real estate itself. *Burrall v. Eames*, 5 Wis. 260. But, if it were to be held that the words in question refer only to specific real and personal property, then they could not apply to the actions involving only rights and wrongs not connected with specific property, and as to these latter actions, comprising the great mass of ordinary litigation, there would either be no subject of action at all, or the subject of action would be something of entirely different nature. It seems that something like a uniform rule should be established if it be possible. The Code makers were striving for uniformity as well as for simplicity. If some essential basic element can be found which inheres in all causes of action, local as well as transitory, real as well as personal, which, in actions involving specific property, can be joined with the specific property, both together forming the subject, and which in other actions can stand alone or in connection with the intangible thing involved, like the character in slander, and form the subject, it would seem that this might be said to solve the problem.

It seems to us that this basic and fundamental element is to be found in the plaintiff's main primary right, for the invasion of which the action is brought. Thus, in controversies involving conflicting claims to specific real or personal property, the property itself plus the right, title, interest, claim, or lien upon that property which the plaintiff alleges, and which gives him his standing in court, is to be considered as forming the subject of the action, and he may join to his first cause of action another based on a different transaction from the first, but which is connected with reasonable directness with either the property itself or with the plaintiff's title or interest therein alleged in the first cause of action. It seems to us that this solution of the questions harmonizes all of the Code provisions which use the term, and that it also solves to a very large extent, if not completely, the difficulties found by Mr. Pomeroy, and which seem to have compelled him to disagree with himself. We think the principle will be found to be capable of satisfactory application to actions not involving property, but simply involving personal rights and wrongs. As said by Mr. Pome-

roy at § 651: "The primary right, however, always exists, and is always the very central element of the controversy around which all the other elements are grouped, and to which they are subordinate."

We therefore come to this conclusion: That in possessory and proprietary actions, whether involving real or personal property, the subject of action is composed of the plaintiff's primary right, together with the specific property itself. Further than this we do not go, except to say that as it seems to us, the plaintiff's primary right, which is alleged to have been invaded, must in all other actions be held to be an essential part, and perhaps in many cases the whole, of the "subject of the action," as those words are used in the Code.

It follows that the two causes of action before us are properly joined.

Order affirmed.

Vinje, J., took no part.

NORTH DAKOTA SUPREME COURT.

JOHN J. LEE, Sheriff, Resp't.,
v.

JOHN CHARMLEY
and

V. J. WINSET et al., Appts.

(— N. D. —, 129 N. W. 448.)

Officer — bond — liability of sureties.

1. The sureties upon the official bond of a deputy sheriff, who undertake that he

Headnotes by ELLSWORTH, J.

Note. — Liability of sureties on bond of officer for an illegal arrest.

Analogous questions relating to the liability of sureties on officer's bonds have been previously annotated in this series. The note appended to *Growbarger v. United States Fidelity & G. Co.* 11 L.R.A. (N.S.) 758, deals with the liability of sureties on the bond of a peace officer for the death of a person, due to the act or default of the principal or one of his deputies.

And the question of the liability of sureties on a constable's bond for assault made in serving or executing a civil writ or process is discussed in the note appended to *Greenberg v. People*, 8 L.R.A. (N.S.) 1223.

Attention is also directed to the note appended to *Martin v. Smith*, 29 L.R.A. (N.S.) 463, on the question of the liability of sureties on the bond of a peace officer for the latter's act in killing or injuring one person while attempting to execute criminal process against another.

The precise question indicated by the foregoing title was considered in subdivision VI. of the note to *Leger v. Warren*, 33 L.R.A. (N.S.)

shall faithfully and impartially discharge the duties of his office, are liable for any unlawful or oppressive act done by such officer under color or by virtue of his office.

Same — purpose of bond.

2. The purpose of an official bond is to provide indemnity against malfeasance and misbehavior in public office, the misuse of powers belonging to the office, and the assumption, under guise of official action, of powers not belonging to it. All acts so performed, though unlawful or wrongful, are official acts within the meaning of an undertaking that an officer shall faithfully and impartially discharge the duties of his office; and as such may be reasonably considered to have been within the contemplation of the sureties at the time they entered into the undertaking, as constituting a breach of its conditions.

Same — arrest under pretended warrant — liability.

3. A deputy sheriff who, falsely claiming to have a warrant for the arrest of a person not formally charged with crime of any kind, goes to his house in the nighttime, and, under guise of the authority of his office, arrests and takes such person into custody, has committed an unauthorized and unlawful act under color of his office, for which the sureties upon his official bond are liable in a proper action.

(December 31, 1910.)

A PEAL by defendant's Winset et al. from an order of the district court for Ward County overruling a demurrer to the complaint in a suit upon the bond of a deputy sheriff. Affirmed.

The facts are stated in the opinion.

51 L.R.A. 193, and only cases decided since the preparation of that note are included within the present one.

The bond of a city marshal, stipulating that he will faithfully perform the duties required or to be required of him by ordinance or law, is sufficiently broad to cover an unlawful arrest. *Com. use of Rosenthal v. Teel*, 33 Ky. L. Rep. 741, 111 S. W. 340. And the same is true of a policeman's bond stipulating that he will "well and truly perform each and all of the duties . . . required of him by law." *Connelly v. American Bonding & T. Co.* 113 Ky. 903, 69 S. W. 959.

The surety's undertaking is, and is only; that his principal shall faithfully discharge the duties of his office according to law; and when the officer, assuming to act as such, commits a wrong under circumstances not imposing upon him any duty to act at all, the wrong is not a violation of any official duty, and consequently is not embraced within the sponsorship of the surety. *Felonicher v. Stingley*, 142 Cal. 630, 76 Pac. 504; *Gomez v. Scanlan*, 155 Cal. 528, 102 Pac. 12.

Messrs. Murphy & Woledge, for appellants:

An officer must have something—other than mere holding of office—which appears to give him authority to act, which, if valid, would authorize the act, to bring his act within color of his office.

State, Allen, Prosecutor, v. Conover, 28 N. J. L. 224, 78 Am. Dec. 54; Taylor v. Parker, 43 Wis. 78; Gerber v. Ackley, 32 Wis. 233, 37 Wis. 43, 19 Am. Rep. 751; Kendall v. Aleshire, 28 Neb. 707, 26 Am. St. Rep. 367, 45 N. W. 167; Marquis v. Willard, 12 Wash. 528, 50 Am. St. Rep. 906, 41 Pac. 889; Huffman v. Koppelkom, 8 Neb. 344, 1 N. W. 243; Ottenstein v. Alpaugh, 9 Neb. 237, 2 N. W. 219; State use of Wilson v. Fowler, 88 Md. 601, 42 L.R.A. 849, 71 Am. St. Rep. 452, 42 Atl. 201; Feller v. Gates, 40 Or. 543, 56 L.R.A. 630, 91 Am. St. Rep. 492, 67 Pac. 416; Greenberg v. People, 225 Ill. 174, 8 L.R.A.

(N.S.) 1223, 116 Am. St. Rep. 127, 80 N. E. 100; McLendon v. State, 92 Tenn. 520, 21 L.R.A. 738, 22 S. W. 200; State ex rel. Bruns v. Clausmeier, 154 Ind. 599, 50 L.R.A. 73, 77 Am. St. Rep. 511, 57 N. E. 541; Leger v. Warren, 62 Ohio St. 500, 51 L.R.A. 193, 78 Am. St. Rep. 738, 57 N. E. 506; Brown v. Wallis, 100 Tex. 546, 12 L.R.A. (N.S.) 1019, 101 S. W. 1070; Allison v. People, 6 Colo. App. 83, 39 Pac. 903; Palmer v. St. Albans, 60 Vt. 427, 6 Am. St. Rep. 131, 13 Atl. 569; State ex rel. Russell v. Hendricks, 88 Mo. App. 560; Dysart v. Lurty, 3 Okla. 601, 41 Pac. 724; San Luis Obispo County v. Farnum, 108 Cal. 562, 41 Pac. 447.

An official bond is not an engagement for general good behavior on the part of the principal, nor an undertaking that he shall in all things keep the peace, but rather a limited and literal contract to the effect

The doctrine that where the act of the officer is done not *virtute officii*, but *colore officii*, the bondsmen are liable only when the illegality consists in an abuse of authority, as distinguished from a usurpation, was apparently regarded as the proper criterion in State ex rel. Brennan v. Dierker, 101 Mo. App. 636, 74 S. W. 153. The decision in this case was that the sureties were not liable, for the reason that the arrest complained of was not *colore officii*, although the officer thought he was acting officially, and was personally liable for his misconduct, the arrest having been made without a warrant, for a misdemeanor not committed in his view, and his bond having been conditioned merely for the faithful performance of his duty.

So, the failure to show that a constable was acting under color of his office is fatal to a complaint upon his bond, alleging that he, in his official capacity, and without authority, law, or right, maliciously made an assault upon the plaintiff, compelling her to submit to an examination of her person, and taking from her certain property. *Felonicher v. Stingley*, supra.

And a complaint in an action for the unlawful arrest of the plaintiff was held in *Connelly v. American Bonding & T. Co.* supra, to be insufficient as against a demurrer of the surety upon the officer's bond, for failing properly to allege that the arrest was without authority of law.

A sheriff acts extraofficially in making an arrest in his own county, upon a warrant issued in another county, by a justice of the peace, and directed to any sheriff or constable of that county, but without having been indorsed by a magistrate of the former county, as required by statute; and in such circumstances, the sureties on the sheriff's bond cannot be held responsible in an action for false imprisonment, although the sheriff is personally liable. *Sneed v. McFatridge*, 43 Tex. Civ. App. 592, 97 S. W. 113. 33 L.R.A. (N.S.)

So, where an arrest is made under a void warrant, or without a warrant, in a case where a warrant is required, or if not made in such circumstances as justify the arrest without a warrant, the officer does not act officially, so as to warrant an action upon his official bond. *People use of Tamplin v. Beach*, — Colo. —, 113 Pac. 513.

And it is no part of the duty of a constable, for which his bondsmen are in any way liable, to make affidavit for the arrest of a party, and no action can be maintained against them by one arrested on such an affidavit, no matter how maliciously it may have been made. *State ex rel. Ostman v. Meyer*, 138 Mo. App. 507, 120 S. W. 116.

But it was held in *Roberts v. Brown*, 43 Tex. Civ. App. 206, 94 S. W. 388, that where a sheriff made an unlawful arrest upon a warrant issued upon his own void complaint to the justice of the peace, and kept the prisoner confined for a period of forty hours, with no opportunity to make bond, the sureties upon the sheriff's bond would be liable in damages.

The requirement that the complaint must show that the act of the constable must have been committed under color of office, or in the line of his official duties, was held in *Gomez v. Scanlan*, 155 Cal. 528, 102 Pac. 12, to have been satisfied as against general demurrer by allegations that the constable, acting in his capacity as constable, did arrest and imprison the plaintiff on a pretended charge of grand larceny, such a charge being one upon which he had authority as a peace officer to make an arrest without a warrant.

The sureties on the bond of an officer, conditioned for the faithful discharge of his duties, are liable thereon to the party injured, where, in making an arrest under color of his office, with or without warrant, and without probable cause, he uses more force and violence than is necessary. *Drolesbaugh v. Hill*, 64 Ohio St. 257, 60 N. E. 202.

that such officer will not violate some duty resting upon him as a public officer.

Feller v. Gates, 91 Am. St. Rep. 533, note; Gerber v. Ackley, 37 Wis. 43, 19 Am. Rep. 751; Kendall v. Aleshire, 28 Neb. 707, 26 Am. St. Rep. 367, 45 N. W. 167; Marquis v. Willard, 12 Wash. 528, 50 Am. St. Rep. 906, 41 Pac. 889; State use of Willson v. Fowler, 88 Md. 601, 42 L.R.A. 849, 71 Am. St. Rep. 452, 42 Atl. 201; State v. Timmons, 78 Am. St. Rep. 420, note.

Messrs. John E. Greene, R. H. Bosard, and G. W. Twiford, for respondent:

The sureties on an official bond are liable for acts done by the principle *colore officii*.

Lammon v. Feusier, 111 U. S. 17, 28 L. ed. 337, 4 Sup. Ct. Rep. 286.

It is as much the duty of an officer to refrain from corruptly usurping or assuming powers not pertaining to his office as

to refrain from corruptly exercising those which properly belong to it.

State v. Wedge, 24 Minn. 150; Hall v. Tierney, 89 Minn. 407, 95 N. W. 219; Clancy v. Kenworthy, 74 Iowa, 740, 7 Am. St. Rep. 508, 35 N. W. 427; Turner v. Sisson, 137 Mass. 191; Drolesbaugh v. Hill, 64 Ohio St. 257, 60 N. E. 202; Ader v. Foley, 50 La. Ann. 1262, 24 So. 333; State v. Leach, 60 Me. 58, 11 Am. Rep. 172.

Ellsworth, J., delivered the opinion of the court:

The action in which this appeal is taken is brought by the plaintiff, as sheriff of Ward county, against defendant Charmley, as a deputy sheriff appointed by him, and the other defendants as sureties upon the deputy's bond. The conditions of the bond, as set out in the complaint, are to the effect that "if the said John Charmley shall faithfully and impartially discharge the du-

The decision in Bonebrake v. Hunt, 11 Ariz. 98, 89 Pac. 544, is merely to the effect that the failure to allege that the arrest was unlawful rendered insufficient a complaint upon a sheriff's bond for the arrest of the plaintiff by the sheriff's deputy, although it negatived conditions which characterize lawful arrest, and the court, having so held, declared that it was unnecessary to determine whether, in any event, the sheriff and the sureties upon his bond could be held responsible for an unlawful arrest by the deputy.

But it has been held that a sheriff is liable on his bond for the killing by a deputy of a third person under the mistaken belief that he was one for whose arrest on a charge of felony he had a warrant, and that the killing was necessary to prevent his escape, where the statute provides that the sheriff shall be liable upon his bond for any misconduct or default of his deputies. Johnson v. Williams, 111 Ky. 289, 54 L.R.A. 220, 98 Am. St. Rep. 416, 63 S. W. 759.

Punitive damages cannot be awarded against a sheriff's bond for the wrongful act of the sheriff's deputy in killing a third person under the mistaken belief that he was a felon for whose arrest the deputy had a warrant, and that the killing was necessary to prevent his escape. Ibid. This case was regarded in Scott v. Com. 20 Ky. L. Rep. 571, 93 S. W. 668, as holding that in no case can punitive damages be recovered on the bond of a police officer, the latter case holding that only compensatory damages could be recovered on the bond of a town marshal for false arrest.

A judgment against a United States marshal and the sureties on his bond, for the false arrest and imprisonment of the plaintiff under a warrant for the arrest of another, was affirmed in Bailey v. Warner, 55 C. C. A. 329, 119 Fed. 395, where it seems not to have been questioned that the officer's

act was one for which the sureties might be responsible.

The rule that, in respect of the amount recoverable, the responsibility of the surety and the liability of the officer are measured by the same standard, was invoked in Gomez v. Scanlan, supra, where it was held that the measure of damages was not that adopted in actions for breach of contract, but was the amount which would compensate the plaintiff for all the detriment proximately caused by the injury, whether it had been anticipated or not, such being the statutory rule for fixing the damages in cases of tort.

It was held in United States Fidelity & G. Co. v. Crittenden, — Tex. Civ. App. —, 131 S. W. 232, that where a policeman's bond conditioned for the faithful performance of his official duty was made payable to the city, no action could be maintained against the sureties by a person unlawfully arrested by the policeman, in the absence of some express provision of law authorizing suits by the persons injured, although an action might be maintained against the officer independently of the bond.

But under a statute providing that the obligation required for the discharge or performance of any public office shall be a covenant to the commonwealth, and that actions may be brought on any such bond in the name of the commonwealth, for the benefit of any person injured by a breach of the condition, the right of one unlawfully arrested by a city marshal to maintain an action upon the latter's bond without making the city a party is not affected by the fact that a covenant in the bond is made to the city (Connely v. American Bonding & T. Co. 113 Ky. 903, 69 S. W. 959); or that it is made to the commonwealth, for the use of the city (Com. use of Rosenthal v. Teel, 33 Ky. L. Rep. 741, 111 S. W. 340).

L. A. W.

ties of said office of deputy sheriff, and render a true account of all moneys and property of every kind that shall come into his hands as such officer, and pay over and deliver the same according to law, then the above obligation to be void," etc. Then follows an allegation in these words: "That on or about the 8th day of July, 1905, at or about the hour of 11:30 P. M., in the nighttime, in the city of Kenmare, Ward county, North Dakota, the defendant, John Charmley, a deputy sheriff, did go to the home of one Edward J. Brown, and did, as deputy sheriff, wrongfully, unlawfully, and without reasonable cause or authority of law, place under arrest and take into custody the said Edward J. Brown; that said John Charmley, as deputy sheriff, at the time said arrest was made, had no warrant for the arrest of said Edward J. Brown, nor was there at such time any complaint filed charging the said Edward J. Brown with any crime, nor was any crime committed by the said Edward J. Brown; that the said John Charmley, as deputy sheriff, represented at the time said arrest was made that he had a warrant for the arrest of Edward J. Brown, which statement was false, and the said John Charmley compelled the said Edward J. Brown to accompany him as such deputy sheriff, and as such deputy sheriff took him into custody; that said acts were in violation of the duties of said John Charmley as deputy sheriff, and by reason thereof the said John Charmley did not faithfully and impartially perform his duties as deputy sheriff in the premises; that such acts were in violation of the conditions of the bond of said John Charmley as deputy sheriff, hereinbefore set forth, for the faithful performance of his duties as such deputy sheriff." Then follow allegations to the effect that, by reason of said unlawful acts of defendant Charmley, the plaintiff, as sheriff of Ward county, was sued by said Edward J. Brown, and a judgment recovered against him by said Brown in the sum of \$652.65; that the defendant sureties were duly notified to come in and defend said action, and that one of them appeared and took some steps in the procedure; that the plaintiff was compelled to pay the amount of said judgment, and to expend large sums of money in the defense of said action, to his damage in the aggregate in the sum of \$906.65, for which sum he demands judgment against the defendants. The defendant sureties appeared and jointly interposed a demurrer to the complaint on the ground that it does not state facts sufficient to constitute a cause of action against them. A trial upon the issues of law presented by this demurrer was had before the 33 L.R.A. (N.S.)

district court of Ward county, which made an order overruling the demurrer. From this order of the district court the sureties have appealed to this court.

The only point, therefore, presented by this appeal or urged in this court, is that based upon the contention of appellants' counsel that the complaint does not state a cause of action against appellant sureties for the reason that the facts set forth in the complaint do not, though admitted, constitute such a breach of the official bond given by defendant Charmley as deputy sheriff as to render liable the appellants as sureties; that the complaint negatives the conclusion that the acts complained of were the official acts of the deputy sheriff, or that he acted under "color of office," and, on the contrary, show that he was a mere private trespasser.

The courts in their consideration of those acts of public officers which result in liability to the sureties upon their official bonds have found it convenient to divide such actions into three distinct classes: (1) Acts done by virtue of office; (2) acts done under color of office; and (3) acts done in a purely private or individual capacity. By an absolute agreement of authority, the sureties upon an official bond are liable for wrongful acts within the first class, and are not liable for those of the third class. Regarding those acts falling within the second class, there has been for generations an irreconcilable conflict of authority. We are cited to long lines of cases in which the holding of liability or nonliability of the sureties is based entirely upon the distinction between acts done *virtute officii* and *colore officii*; the courts of many different states having announced holdings that are diametrically opposed. The learned discussions contained in the opinions handed down in these cases are interesting, and serve admirably to accentuate the remark of the supreme court of Maryland that when authorities so eminent as Chief Justice Green of New Jersey, Judge Cowen of New York, and Judge Ruffin of North Carolina, are found in accord with one principle of liability, and Judge Shaw of Massachusetts, Tilghman of Pennsylvania, Bronson of New York, Thurman of Ohio, and Justice Gray of the Supreme Court of the United States, are committed to the opposite view, "it is apparent that the question is one of much difficulty." State use of *Wilson v. Fowler*. 88 Md. 601, 42 L.R.A. 849, 71 Am. St. Rep. 452, 42 Atl. 201. The distinction made between the official acts that serve as the bases of these conflicting lines of authority is that "acts done *virtute officii* are where they are within the authority of the

officer, but in doing them he exercises that authority improperly, or abuses the confidence which the law reposes in him; whilst acts done *colore officii* are where they are of such a nature that his office gives him no authority to do them." Brandt, Suretyship, 3d ed. § 690; Gerber v. Ackley, 37 Wis. 43, 19 Am. Rep. 751; People ex rel. Kellogg v. Schuyler, 4 N. Y. 187. Under the rule of the common law adopted by the courts of New York, New Jersey, North Carolina, and Wisconsin, the sureties upon an official bond were held liable only for wrongful acts of the officer done *virtute officii*. Acts done *colore officii* within the meaning of the definition above quoted were classed as unofficial acts, in doing which the officer was a mere trespasser, and for which the sureties were not bound. State, Allen, Prosecutor, v. Conover, 28 N. J. L. 224, 78 Am. Dec. 54.

The almost universal current of the later cases, however, regards wrongful acts of a public officer *colore officii* as official acts for which the sureties upon his bond are liable. Such is the holding of the courts of last resort of Pennsylvania, Maine, Massachusetts, Ohio, Virginia, Kentucky, Missouri, Iowa, Nebraska, Texas, California, Minnesota, Illinois, and of the Supreme Court of the United States. And in reviewing these authorities this court, in one of its former opinions, has remarked: "While there is a dispute among the authorities whether the sureties on a sheriff's bond are liable for the wrongful act of their principal in seizing the property of a third person, the more numerous decisions are found arrayed in support of the rule that they are liable, and these cases appear to us to have the best of the argument. See Lammon v. Feusier, 111 U. S. 17, 28 L. ed. 337, 4 Sup. Ct. Rep. 286, where the authorities are reviewed and where the doctrine we deem sound is enunciated." Welter v. Jacobson, 7 N. D. 32, 66 Am. St. Rep. 32, 73 N. W. 65. In accepting the principle that the sureties upon an official bond are liable for the acts of the officer done *colore officii* as well as *virtute officii*, we are aided by the admission of appellants' counsel in his brief to the effect that "if the court should hold that, under the allegations of the complaint, Charmley acted under color of office, then these appellants are bound. If it should be held that he acted individually, unofficially, respondent has failed to state a proper cause of action and appellants are not liable." With whatever controversy, therefore, that has waged between conflicting principles based on the distinction of official acts done by virtue of office and by color of office we are not concerned, and the only

point that remains for our determination is. Were the acts of defendant Charmley done either by virtue of office or color of office, or were they such as lacked all official character?

Summarized, the allegations of the complaint are to the effect that Charmley, as deputy sheriff, in the nighttime, went to the home of Brown, and, announcing that he had in his possession a warrant for the arrest of Brown, as such deputy sheriff took him into custody and compelled him to accompany him; which acts, being wrongful, unlawful, and without reasonable cause or authority of law, caused the damage upon which the suit against his principal, the sheriff, was based. By reason of such acts, it is alleged Charmley did not faithfully and impartially perform his duties as deputy sheriff, in accordance with the conditions of his bond. This status of fact admitted, appellants strenuously contend that "the acts alleged by the complaint do not constitute such a breach of the official bond of said deputy sheriff as to hold these appellants liable as sureties;" that "an officer must have something other than mere holding of office, which appears to give him authority to act, which, if valid, would authorize the act." This contention has apparent support in many cases which seem to predicate color of office wholly upon the fact that the officer was armed with a warrant or some process of that character, directing him to do some official act; and, this being the case, the fact that the unlawful act complained of was committed against the person or property of a party not named in the writ did not deprive it of the "color" requisite to its official character. Lammon v. Feusier, supra, and cases cited therein. Distinctions such as this, however, seem to us to be fanciful refinements rather than substantial reasoning. It is true that Charmley, as deputy sheriff, was authorized to make an arrest at night without a warrant only in case he had reasonable cause to believe that the person arrested had committed a felony. Rev. Codes, 1905, § 9733. It is also true that the complaint expressly negatives any such authority by the statement that, at the time of the arrest, the man arrested had not committed any crime, and that his arrest was made "without reasonable cause or authority of law." Yet it appears that Charmley went to Brown's house, demeaning himself as an officer, claiming that he had authority for making an arrest, and made the arrest, and compelled Brown to accompany him in his official character. In such character he was authorized to make the arrest if provided with a warrant, or without in case he had reasonable cause for believing

that Brown had committed a felony. He pretended to have such authority, and intimidated, as we may presume, by such pretense, Brown, without resistance, submitted to arrest and to being held in custody. Charmley's official insignia was the means by which he was enabled to accomplish the wrongful act. It may safely be assumed that had he gone at such time and under such circumstances as a private citizen, he would have met with immediate resistance. He abused authority derived wholly from the fact that he held the office of deputy sheriff. An act so performed by a public officer seems to us clearly to have been done under color of office within any accepted definition of that term. Certainly, his act was given a color as distinctive as though he had held a warrant directed against a person other than Brown, which state of fact, according to the holding of all later authority, constitutes color of office. Viewed from any standpoint, it was gross misbehavior in office, the wrongful character of which was greatly aggravated by reason of being done under pretense of official authority. It is argued that the authority he assumed to exercise was wholly usurped; but "it is as much his duty as an officer to refrain from corruptly usurping or assuming powers not pertaining to his office as to refrain from corruptly exercising those which properly belong to it." *State v. Wedge*, 24 Minn. 160; *Hall v. Tierney*, 89 Minn. 407, 95 N. W. 219. The condition of his bond to which the defendant sureties subscribed was that he should "faithfully and impartially discharge the duties of said office of deputy sheriff." To use the powers pertaining to such office as a means of maltreating, oppressing, or injuring another within the jurisdiction in which he was authorized to exercise the functions of his office was not a faithful or impartial discharge of its duties. As said by the supreme court of Iowa in a case where a constable arrested without a warrant and maltreated a person whom he had no reasonable cause to believe was guilty of crime: "His act was in the line—direction—of official duty, but was illegal, because it was in excess of his duty. In the discharge of official functions he violated his duty and oppressed the plaintiff. This is all there is of it. If, in exercising the functions of his office, defendant is not liable for acts because they are illegal or forbidden by law, and for that reason are trespasses or wrongs, he cannot be held liable on the bond at all, for the reason that all violations of duty and acts of oppression result in trespasses or wrongs. For lawful acts in discharge of his duty, he, of course, is not liable." *Clancy v. Kenworthy*, 74 Iowa, 33 L.R.A. (N.S.)

740, 7 Am. St. Rep. 508, 35 N. W. 427: "An official act . . . means any act done by the officer in his official capacity under color and by virtue of his office." *Turner v. Sisson*, 137 Mass. 191.

We think, therefore, that the allegations of the complaint set out a wrongful malfeasance of Charmley, committed under the guise of an official act unquestionably under color of office, and with characteristics which might almost warrant a holding that it was done by virtue of office. Certainly it is such an act as the sureties upon his official bond should reasonably be held to have had in contemplation as constituting a breach of its conditions at the time they entered into their undertaking. *Greenberg v. State*, 225 Ill. 174, 80 N. E. 100, 8 L.R.A. (N.S.) 1223, 116 Am. St. Rep. 127, and note.

The action of the District Court in holding that the complaint stated facts constituting a cause of action against the defendant sureties was proper, and its order is affirmed.

All concur except Carmody, J., who did not participate in the decision.

GEORGIA SUPREME COURT.

R. E. MASON, Plff. in Err.,
v.
NASHVILLE, CHATTANOOGA, & ST.
LOUIS RAILWAY COMPANY.

(135 Ga. 741, 70 S. E. 225.)

Evidence — foreign record — unverified transcript.

1. What purported to be a certified transcript from the docket of the mayor's court of a town in Alabama, certified by a person signing himself clerk of such court, with no seal attached, and not certified as provided by the acts of Congress, adopted into the Code of this state (Civil Code 1910,

Headnotes by LUMPKIN, J.

Note. — Carriers: abusive language as justification for assault on passenger by a train employee.

For cases involving the general question as to the liability of a carrier for an assault by its employee upon a passenger, see note to *Houston & T. C. R. Co. v. Bush*, 32 L.R.A. (N.S.) 1201.

Some of the cases hold that abusive or insulting language on the part of the passenger will not justify an assault by the carrier's employee, so as to relieve the carrier from damages resulting from the assault. *Birmingham R. Light & P. Co. v. Mullen*, 138 Ala. 614, 35 So. 701; *Coggins*

§§ 5824, 5827), was not admissible in evidence.

(a) Nor was it rendered admissible because a person who testified that he presided in the mayor's court of the town mentioned stated that he had fined the defendant in that proceeding, and that he did not recollect the amount of the fine, "but the amount will be shown by the attached papers certified by the city clerk."

Venue — bringing action away from home — effect.

2. Where an action against a railroad company was brought in a county of this state, for the purpose of recovering damages on account of an injury alleged to have occurred in Alabama, after the judge had

stated to the jury that the plaintiff had a right to bring his suit in any county of this state where the defendant company had an office or agent, it was error to add, "but the fact that he brought it away from his home, and among strangers, is a circumstance you may consider in so far as it may throw light, or tend to throw light, upon the alleged transaction."

Trial — instruction — duty of carrier.

3. In an action to recover against a railroad company on account of a battery committed by its conductor on a passenger, it was not a correct statement of the rule of duty on the part of the company towards the passenger to charge: "I charge you that carriers must treat their passengers

v. Chicago & A. R. Co. 18 Ill. App. 620; Hanson v. Urbana & C. Electric Street R. Co. 75 Ill. App. 474; Baltimore & O. S. W. R. Co. v. Davis, 44 Ind. App. 375, 89 N. E. 403; Danziger v. Interborough Rapid Transit Co. 104 N. Y. Supp. 845; McDade v. Norfolk & W. R. Co. 67 W. Va. 582, 68 S. E. 378.

Thus, in Neuer v. Metropolitan Street R. Co. 143 Mo. App. 402, 127 S. W. 669, it was held that a carrier is liable for assault by its conductor under such circumstances precisely as the conductor would be liable personally.

In Williams v. Gill, 122 N. C. 967, 29 S. E. 879, the court says: "Insulting language does not justify an assault, and certainly an employee of a common carrier, on duty upon the carrier's train, ought to be the last to make an assault for insulting language used to him, for he stands in relation to a passenger as a protector and a guard."

In Coleman v. Yazoo & M. Valley R. Co. 90 Miss. 629, 43 So. 473, it was held that the company would be excused from liability for the conductor's act if he struck the passenger in response to abusive and insulting language, and not as a means of self-defense. It is to be noted, however, that while the assault was upon a passenger, the action was brought by an innocent bystander, who was accidentally injured by the conductor's act.

Other cases, however, hold that abusive language by a passenger toward the carrier's employee may relieve the carrier from liability for an assault by the employee upon the passenger. Wise v. South Covington & C. R. Co. 17 Ky. L. Rep. 1359, 34 S. W. 894.

Cases taking this view do so not so much on the ground that insulting language will justify the assault, as on the ground of contributory negligence on the part of the passenger in unfitting the employee from properly observing his duty toward passengers.

Thus, in Peavy v. Georgia R. & Bkg. Co. 81 Ga. 485, 12 Am. St. Rep. 334, 8 S. E. 70, where plaintiff was armed with a pistol and used profane and obscene language, and the conductor armed himself and ejected 33 L.R.A. (N.S.)

him from the train, and after being expelled and warned not to board the train again, he replied with grossly vituperative obscenity and profanity, whereupon the conductor shot him, the court, in denying recovery, says: "But for his fault, the conductor would not have been brought into a state of excitement from danger and insult which unfitted him for discharging his proper duties, either to the company or to the passenger. Whether the conductor was more or less in fault than the plaintiff was in the shooting, certainly the plaintiff was more in fault than the company; because the plaintiff was there upon the ground, stirring up excitement, and bringing on danger both to the conductor and himself. He unfitted the conductor for exercising the care and prudence that were essential to guarding the interest of the company, and essential to performing in a proper manner his duty to the company or to the plaintiff."

And to the same effect is City Electric R. Co. v. Shrophshire, 101 Ga. 33, 28 S. E. 508.

And the provocative language on the part of plaintiff may relieve the carrier from liability for the assault, though it would not be a defense to a criminal or civil action against the employee personally. Rohrbach v. Pullman's Palace Car Co. 166 Fed. 797; Scott v. Central Park, N. & E. River R. Co. 53 Hun, 414, 6 N. Y. Supp. 382.

Some cases which do not recognize abusive language as a complete defense for an assault by the carrier's employee, nevertheless recognize such conduct on the part of a plaintiff as an element in mitigation of damages. Jackson v. Old Colony Street R. Co. 206 Mass. 477, 30 L.R.A. (N.S.) 1046, 92 N. E. 725, 19 A. & E. Ann. Cas. 615; Baltimore & O. R. Co. v. Barger, 80 Md. 23, 26 L.R.A. 220, 45 Am. St. Rep. 319, 30 Atl. 560; Haman v. Omaha Horse R. Co. 35 Neb. 74, 52 N. W. 830; Freedman v. Metropolitan Street R. Co. 89 App. Div. 486, 85 N. Y. Supp. 986.

In St. Louis Southwestern R. Co. v. Myzell, 87 Ark. 123, 112 S. W. 203, and Mitchell v. United R. Co. 125 Mo. App. 1, 102 S. W. 661, while such conduct on the part of the passenger was not recognized

respectfully, and protect them so far as they reasonably can, from injury or insult on the part of their employees."

Carrier — assault on passenger — justification.

4. Where a suit was brought against a railroad company for an assault and battery committed by its conductor upon a passenger, if the conduct of the passenger was such as to justify the act of the conductor, the company would not be liable. If the conductor's act was not justified, but mitigated by provocative words or conduct of the passenger at the time, such mitigation would inure to the benefit of the company. But if the conductor committed an assault and battery upon the passenger, and the words and conduct of the passenger were such as to arouse the anger of the conductor, and to tend to provoke a difficulty, but not such as to justify the act of the conductor, this would not free the company from liability.

(February 18, 1911.)

ERROR to the Superior Court for Dade County to review a judgment in defendant's favor in an action brought to recover damages for an alleged assault on plaintiff by defendant's servant, while a passenger on its train. Reversed.

The facts are stated in the opinion.

Messrs. J. P. Jacoway, H. P. Lumpkin, Paul D. Wright, J. E. Rosser, and W. M. Henry for plaintiff in error.

Messrs. Brown, Spurlock, & Brown and Payne, Foust, & Payne for defendant in error.

Lumpkin, J., delivered the opinion of the court:

Mason brought suit against the Nashville, Chattanooga, & St. Louis Railway

as a ground for mitigation of compensatory damages, it was held to preclude the recovery of exemplary damages.

And this rule is recognized in a *dictum* in *Houston Electric Co. v. Park*, — Tex. Civ. App. —, 135 S. W. 229.

And in *Weber v. Brooklyn, Q. C. & Suburban R. Co.* 47 App. Div. 306, 62 N. Y. Supp. 1, and *Missouri, K. & T. R. Co. v. Gerren*, — Tex. Civ. App. —, 121 S. W. 905, it is held that while ordinarily abusive language will only be allowed to mitigate damages for an assault provoked thereby, yet, if the offensive language was addressed to the employee for the purpose of bringing about a conflict, it would prevent any recovery.

In *Houston & T. C. R. Co. v. Batchler*, 37 Tex. Civ. App. 116, 83 S. W. 902, it was held that insulting words to train employees, while not a justification for an assault, may be shown in mitigation of damages; but that if there had been time for cool reflection after their use, or if the in-

Company to recover damages on account of an alleged assault by the conductor of the defendant. The defendant contended that the plaintiff was drunk and disorderly, used foul and abusive language to the conductor, and brought on the difficulty, and that the conductor was justified in what he did; or, at least, that the company was not liable. The jury found for the defendant. The plaintiff moved for a new trial, which was refused, and he excepted.

1. What purported to be a certified transcript from the docket of the mayor's court of Bridgeport, Alabama, certified by a person signing himself "Clerk Mayor's Court of Bridgeport," with no seal attached, and not certified as provided by the acts of Congress, adopted into our Code, was admitted in evidence over objection. The presiding judge, in admitting it, said: "As the certificate shows that he appeared and pleaded guilty, let it go in so far as it may show an admission that he was intoxicated on that day. Let it go in for that purpose." The certificate was not such as to render the purported transcript admissible in evidence. Civil Code 1895, §§ 5237, 5238 (Civil Code 1910, §§ 5824, 5827). Nor do we see how an inadmissible certificate became legal evidence because it undertook to certify to an admission or plea of guilty. This certificate was attached to answers of a witness to interrogatories, tending to show that the witness had presided in the mayor's court, and had fined the defendant in the proceeding when brought before him; and that he did not recollect the amount of the fine, "but the amount will be shown by the attached papers certified by the city clerk." This

sulting words were themselves provoked by insulting words or disrespectful conduct of the employee, the principle of mitigation would not apply.

In *Texas & P. R. Co. v. Williams*, 10 C. C. A. 463, 23 U. S. App. 379, 62 Fed. 440, where defendant's conductor assaulted plaintiff in resenting an insult offered in response to an insult by the conductor in the first place, the defense offered was not on the ground that plaintiff's insult justified the assault, but that, in resenting the insult offered by plaintiff, the conductor was acting to avenge a personal wrong, and was therefore acting without the scope of his authority. It was held, however, that, inasmuch as the conductor was acting as conductor when he insulted plaintiff, this character would cover the whole transaction, and the question of the scope of his authority was not reasonably raised so as to require its submission to the jury.

R. L. S.

reference did not make the transcript admissible.

2. The court charged as follows: "Now, gentlemen, I will state in the outset that the plaintiff had the right to bring his suit in this county or in any other county where the defendant company had an office or agent; but the fact that he brought it away from his home, and among strangers, is a circumstance you may consider in so far as it may throw light, or tend to throw light, upon the alleged transaction." If the plaintiff had a legal right to bring suit in Georgia, this charge brought into the case a new issue,—his motive or reason for so doing. If this were an issue for the jury, the plaintiff and defendant could introduce evidence in regard to it, and a collateral question would be injected into the main trial. Suppose he had been asked why he had brought the suit in this state, and had replied that the rules of practice or evidence in Georgia were more favorable to such suits than those of Alabama,—would it have been competent to enter into a trial of the relative effect of the rules of practice or evidence of the two states on the subject of damage suits? Or suppose he had answered that the presiding judge of the circuit in Alabama where the suit could be brought was his personal enemy,—could evidence pro and con as to the truth of this statement have been introduced, and could a trial of the qualification of a foreign judge have been superimposed upon the trial of the claim for damages? Where would be the limit of the examination, if the motive or reason of a plaintiff in selecting a certain jurisdiction, where he had a right to sue, could be made an issue in the case?

The fact that counsel on both sides had commented on the location of the suit, and that the plaintiff's counsel orally requested a charge that the plaintiff had the right to bring it in the county where it was brought did not authorize an additional charge that his bringing it away from home and among strangers was a circumstance which the jury might consider, "in so far as it may throw light, or tend to throw light, on the alleged transaction." The "alleged transaction" was an assault by a conductor on a passenger, occurring in Alabama. How could a choice of jurisdiction, if lawful, throw light on the alleged assault? If there might be a case where something appearing on the face of the record or the manner of conducting a trial might furnish legitimate ground for the jury to consider, a mere selection authorized by law between two jurisdictions in which to sue does not open the door for a charge authorizing

prejudicial inferences therefrom in regard to the alleged cause of action.

3. The court further charged: "I charge you that carriers must treat their passengers respectfully, and protect them, so far as they reasonably can, from injury or insult on the part of their employees." "A carrier of passengers is bound also to extraordinary diligence on behalf of himself and his agents to protect the lives and persons of his passengers." (Italics ours.) Civil Code 1895, § 2286 (Civil Code 1910, § 2714). This duty is due from the carrier, not only on behalf of himself, but on behalf of his agents to whom he intrusts its discharge. The charge quoted was erroneous.

4. A consideration of the charges of which complaint was made on the subject of the provocation by the plaintiff of the difficulty with the conductor will show that they were in some respects inaptly worded. But aside from any question of inaccuracy in expression on the part of the presiding judge, this court has said that if a passenger on a railroad train, by assault upon the conductor, or by abusive language, or the like, provokes a difficulty and unfits the conductor for the performance of his duties as such, and the latter commits an assault and battery upon him, the company is not liable, although the battery may not be entirely justifiable, or may be excessive in its character. In some instances even a broader mode of expression has been employed. See *Peavy v. Georgia R. & Bkg. Co.* 81 Ga. 485, 12 Am. St. Rep. 334, 8 S. E. 70; *Georgia R. & Bkg. Co. v. Richmond*, 98 Ga. 495, 25 S. E. 565; *City Electric R. Co. v. Shropshire*, 101 Ga. 33, 28 S. E. 508; *Georgia R. & Bkg. Co. v. Hopkins*, 108 Ga. 324, 75 Am. St. Rep. 39, 33 S. E. 965; *Central R. Co. v. Motes*, 117 Ga. 923, 62 L.R.A. 507, 97 Am. St. Rep. 223, 43 S. E. 990; *Dannenberg v. Berkner*, 118 Ga. 885, 889, 45 S. E. 682; *Macon R. & Light Co. v. Mason*, 123 Ga. 773, 776, 51 S. E. 569. Permission was given to review the decisions in these cases, so far as necessary on the point now under consideration. We will consider what such cases respectively decided; then whether the rulings actually made were sound and should be allowed to stand or not, so far as they seek to lay down a rule of law to be given in charge to the jury, or whether they should be reversed or modified. In doing this we will first deal with the matter more especially with reference to the statutes and decisions of this state, and will afterward refer somewhat to the decisions of courts in other jurisdictions, and to text-books based upon adjudications.

At the outset it is well to remember that

in dealing with the general question of whether a master is liable for a wilful tort of his servant, the doctrine of *respondet superior* furnishes the basis for decision, if there are no statutory provisions on the subject; but that, in certain instances, there is a relation between the master and the injured person, out of which arises a duty of protection, and this duty is to be considered in addition to the general doctrine mentioned above. This is true as to a carrier and its passengers. The carrier owes to its passengers a duty of protection even against outsiders. *A fortiori* it must protect its passengers against its own employees engaged in the performance of its contract of carriage, and for whose acts in so doing it is responsible. Under Civil Code 1910, § 2714 (Civil Code 1895, § 2266), a carrier is bound not only for extraordinary diligence on his part or "behalf," but also on the part of his agents, for the protection of his passengers. A failure to bear this in mind has caused some confusion and lack of harmony in decisions.

Let us see what was actually decided in the cases under review, and what was the basis on which they rested. In *Peavy v. Georgia R. & Bkg. Co.* 81 Ga. 485, 12 Am. St. Rep. 334, 8 S. E. 70, there was strong evidence tending to show these facts: A drunken passenger, armed with a pistol, was using profane language while standing on the platform of a car forming part of a passenger train. The conductor approached him, and either took him by the collar or touched him on the shoulder, and admonished him not to swear. After some conversation, the plaintiff went into the car and took a seat. When the conductor came to take up tickets, the conversation was renewed, the passenger again cursing and using obscene language. He was profane and disorderly; and upon the conductor's trying to put him off the train, he drew a pistol. He had already made a threat as to what he would do if the latter sought to eject him. The conductor borrowed a pistol from a sheriff who happened to be a passenger, forced the passenger to lower his hand, and backed him off the train, and then shook the pistol in his face, and told him that if he got on the train any more he would get hurt. The passenger replied with grossly vituperative obscenity and profanity, too foul to be reproduced in the published opinion. The conductor shot at him, hitting him in the shoulder, and about the same time the plaintiff shot at the conductor, and they exchanged five shots, the conductor hitting three times, but not being hit. He still dared the conductor to leave the train, and

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when the latter went back into the car, endeavoring to get another pistol, the bell rope was pulled and the train moved on. Even then the ex-passenger attempted to board it again, and was last seen standing beside the track waving his pistol. The jury found a verdict for the plaintiff for \$1,500. The presiding judge granted a new trial. On the next trial they found for him \$2,250. The judge granted a second new trial. The plaintiff excepted, and assigned error on this grant. The actual ruling made by this court was thus stated: "We think the court below was well warranted in granting a second new trial." The judgment was affirmed, and we think rightly so. What was said by Bleckley, Ch. J., was in discussing the question whether, under the evidence, the presiding judge erred in not allowing the verdict to stand. No charge of the court was involved, and what was said in the opinion must be considered in view of the question actually before the court and decided. That distinguished jurist discussed the case in his usual terse and graphic style. Among other things he said: "He unfitted the conductor for exercising the care and prudence that were essential to guarding the interest of the company, and essential to performing in a proper manner his duty to the company or to the plaintiff. The plaintiff spoiled the instrument, and then sued the manager because the performer did not make good music. It was the plaintiff's fault that the conductor was out of tune." It was added that, according to the conductor's evidence, he was excusable; though it was also said that, even if the conductor was not altogether excusable, the plaintiff should not recover from the company.

In *Georgia R. & Bkg. Co. v. Richmond*, 98 Ga. 495, 25 S. E. 565, a person purchased a railroad ticket, intending to take a train about to arrive, but failed to do so because he did not succeed in getting his baggage checked in time. He left the premises of the railroad company and registered at a hotel, intending to take a train for his destination the next morning. Afterward on the same day he returned to the station to make inquiries about, or arrange for the storage or checking of, his baggage, as he claimed. It was held that at the time he was not a passenger, but nevertheless had the right to go to the station for the purpose stated. While at the station, an altercation occurred about his being left, his treatment, and the failure to check his baggage for the train which he had desired to take. He sued the company for an assault and battery committed by the agent. One of the defenses

was that the plaintiff had, without sufficient provocation, used to the agent opprobrious and insulting language, accompanied with sneers and contemptuous gestures; and this court was of the opinion that there was evidence to support this defense. It was held that the court erred in giving this charge without qualification: "Sneers, looks, or contemptuous gestures will not justify an assault by an agent of a railroad company upon one who has a ticket, and has become entitled under the contract to courteous treatment until the contract was fully carried out by the railroad company or its agents." A similar charge had been upheld in *East Tennessee, V. & G. R. Co. v. Fleetwood*, 90 Ga. 23, 15 S. E. 778, but it was said that in that case the plaintiff was a passenger actually riding upon the defendant's train, and entitled to protection at the hands of the conductor, who assaulted him, and that in other respects the facts were different. In the opinion in the *Richmond Case*, after declaring that for an unlawful battery by the agent upon one lawfully at the station to see about his baggage, the company would be responsible in damages, it was added: "It may, in this connection, be proper to add, however, that even if *Richmond* [the plaintiff] went to the station for the lawful purpose of attending to the business above mentioned, it was nevertheless incumbent upon him to treat the agent with the same respect due him by the agent. Therefore if, instead of so doing, he, without provocation, used insulting or opprobrious language to the agent, which naturally enough resulted in a difficulty, the company should not be held responsible. In other words, if *Richmond*, by his own improper behavior, unfitted the agent for exercising the care and prudence which were essential to his performing in a proper manner his duty to the company and to the plaintiff, the latter should not complain." The *Peavy Case* was cited as authority. The actual ruling made was that the plaintiff was not a passenger, and that a charge applicable to passengers did not apply to him. The quotation above shows on its face that it was an *obiter dictum*, and was something which the writer of the opinion merely thought it might be proper to add in connection with the ruling made. In the *Peavy Case* there was an actual assault and an endeavor to shoot the conductor, accompanied by threats and the foulest obscenity and profanity. In the *Richmond Case*, the evidence for the defendant tended to show harsh words, some rudeness of manner, and a declaration that the statement of the railroad agent that the plaintiff himself was at fault was

untrue and the agent knew it. The altercation arose from a complaint on the part of the plaintiff that the agent had been negligent in the discharge of his duty, and had thereby caused him to get left. He used no profanity or obscenity, and committed no assault. It can hardly be thought that this court ever intended to lay down as a rule of law to be given in charge to juries that, if a person seeking to take passage on a train gets left by reason of his baggage not being checked and complains, even somewhat harshly, that the agent is at fault, he may be knocked down and beaten without responsibility on the part of the railroad company, if the act of the servant of the company is not justified. No such rule was established by the obvious *obiter* in that case.

In *City Electric R. Co. v. Shropshire*, 101 Ga. 33, 28 S. E. 508, there was evidence tending to show these facts: The plaintiff was not a passenger, but stopped an electric car and entered it in order to look for a bundle which he said belonged to his sister. He delayed the car, refused to get off, after it started caused it to stop again, and again refused to leave it, when the conductor informed him that the car was behind time, and that he could not "fool away" time with him. He replied by cursing the conductor and inviting the latter to put him off. When the conductor took hold of his arm, he struck the conductor in the breast and started to jump off, and while in the act of doing so, the conductor kicked him. As the car moved off he was hunting for rocks. The judge charged the jury, that "if the plaintiff brought about a difficulty, and a difficulty was had, and he brought it about by his own fault, and the defendant went too far and did more than it was authorized to do in ejecting him, in considering what amount of damage you would give, you would be authorized to diminish the amount of the damages proportionate to the fault of the plaintiff in bringing about the result that came upon him." It was held that this instruction cut the jury off from considering the evidence above mentioned for any other purpose save that of determining to what extent they should reduce the plaintiff's recovery, in the event they believed the conductor was not wholly justified in using the degree of force to which he resorted. In the headnote it was said that if, under the circumstances like those recited, the conductor used unnecessary violence in the expulsion, the company would not be liable in damages for personal injuries thus inflicted, provided the assault made upon its servant was of

such a nature as to excite his passion, and render him unfit to perform duties devolving upon him. The reason for this ruling given in the headnote was as follows: "This is so because the person injured, by his own grossly improper conduct, is to be regarded as having forfeited his right to immunity from unnecessary violence, by inviting the conductor to disregard and abandon his official duties and enter into a personal encounter on his own account and upon his individual responsibility." Here there was an actual assault upon the conductor. But in the opinion broad language was used as to an act brought about "by his own grossly improper conduct." It was sought to suggest an analogy between the duty of a railroad company to use due care in the selection of machinery and appliances, and a duty to use similar care in the selection of its employees. This is an analogy that plainly does not exist, as between carrier and passenger. It is a confusion of the duty of a carrier to its passenger with that of the duty of a master to his servant, in which there is such an analogy. The master is not generally liable to one servant for the tort of a fellow servant, if he has used due care in the selection of the fellow servant. The statutory provision as to railroad employees, and the change made as to them by the act of August 16, 1909 (Civil Code 1910, §§ 2782-2787), need not be mentioned here. But a carrier is liable for the tort of its servant upon its passenger, and it is no reply to say that it used ordinary care, or even extraordinary care in selecting its servants. To hold that for a tort committed upon a passenger by a servant of the carrier, in the discharge of the business intrusted to him, the carrier could free itself from liability by showing that it used care in selecting the servant, would be to subvert all rules on that subject as heretofore laid down.

In *Georgia R. & Bkg. Co. v. Hopkins*, 108 Ga. 324, 75 Am. St. Rep. 39, 33 S. E. 965, in an action for an assault and battery by a night watchman of the company in charge of its station, the defense was that the plaintiff went to the station on a cold night, long before the arrival of the train, and when the station was not open, and asked the night watchman to be allowed to enter it and wait; that this was permitted, and the plaintiff and the persons with him were cautioned not to go among the cars standing near by or the cotton, on account of danger of fire from cigars and cigarettes; that, later in the night, the watchman had his attention directed to someone in a vacant car, and, on going to it, found the plaintiff and a woman,

and another man and another woman, all engaged in acts of immorality; that the plaintiff took great offense at being required to come out, and cursed and abused the night watchman, continuing this after returning to the waiting room; that the watchman caught him by the coat sleeve and pulled him from the seat where he was, and he then assaulted the watchman and continued his insulting language; whereupon the watchman struck him. On the request of the defendant, the court charged: "If you believe that the plaintiff was guilty of immoral conduct in his acts in the depot of the defendant, and that, as a result of the discovery of such conduct, words followed between the plaintiff and the watchman, and that the plaintiff used insulting and opprobrious language to the watchman which naturally enough resulted in a difficulty, the company should not be held responsible for alleged assault by the watchman;" and added: "That I give you in charge in this connection, or with this added to it: That the assault by the watchman must not be disproportioned to the insult offered; it being still left a question of fact for you to determine whether the battery was disproportioned to the insult." On the authority of the *Shropshire Case* it was held error to add this qualification to the requested charge.

In *Central R. Co. v. Motes*, 117 Ga. 923, 62 L.R.A. 507, 97 Am. St. Rep. 223, 43 S. E. 990, a person who had been left by a railway train insisted on lying down and sleeping on the benches in the waiting room, and in spite of warnings from the company's servant in charge of the room that this was against the rule and could not be permitted, persisted in his conduct. Finally the official caught hold of him by the coat and pulled him from the position in which he was. The plaintiff contended that he was pulled out of his seat, and a button was broken off his coat, and that a threat was made to have him locked up. According to the evidence for the defendant, the company's servant caught hold of the plaintiff merely to pull him into a sitting position. It was said that "a passenger who displays a persistent determination to disregard such a regulation, and by his wrongful conduct so exasperates a servant of the company as to unfit him for properly performing the duty he owes his master with respect to his treatment of its patrons, cannot justly complain that the company's servant lost his temper and resorted to unnecessary force in compelling an observance of the regulation on the part of the passenger." The decision was by five justices, and was based on those already cited. This case seems to carry the

doctrine of those preceding a step further. If the decision meant that, in an action for an assault or the use of unnecessary violence in the discharge of the duty of ejecting a person from a train or a station, the company is relieved from liability if the plaintiff is somewhat aggravating, and merely fails to promptly regard the rules of the company, it made a long advance.

In *Dannenberg v. Berkner*, 118 Ga. 885, 889, 45 S. E. 682, 683, it was merely said: "Nor was he [the court] bound to charge the principle laid down in *Peavy v. Georgia R. & Bkg. Co.* 81 Ga. 485, 12 Am. St. Rep. 334, 8 S. E. 70, the same not having been requested in writing,"—which does not seem to accord with statements in other cases *supra*, if the facts authorized the charge.

In *Macon R. & Light Co. v. Mason*, 123 Ga. 773, 51 S. E. 569, the question was whether a charge on the subject of punitive damages was authorized. A conductor of an electric car, in putting on the brake, struck a passenger who was standing on the platform of a "trailer." It was stated in the opinion that there was no dispute that this was unintentional, but there was a difference as to whether it was negligently done. The plaintiff demanded of the conductor what he meant by treating a gentleman that way; and the conductor responded that the passenger had no business standing there. The ruling was that this presented no case for a charge on the subject of punitive damages. In the course of the opinion it was said: "A conductor has been judicially recognized as human. . . . And this court is committed to the doctrine that if a passenger is himself responsible for exciting the anger of an agent or employee of a railway company, whereby he is for the time being unfitted for performing the exacting duties he owes to his employer with respect to his treatment of passengers, the company cannot be held accountable for improper conduct on the part of its servant." This was *obiter dictum*. There was no case of intentional assault, but a mere question of negligence.

These are the cases under review. It will be perceived that, from certain expressions used in the *Peavy* Case, carried by other cases into the domain of substantive propositions of law suitable to be given in charge, and aided by *obiter dicta*, has grown the present theory that if a passenger excites the anger of the servant of a railroad company, even of a conductor to whom is intrusted the company's duty of protecting him, whereby the conductor is for the time being unfitted for the performance of his duties, though the con-

ductor unjustifiably assaults him, the company cannot be held liable.

Of course, if the conduct of the servant of the railroad was justifiable, neither the servant nor the master would be liable. But a rule which would free the carrier from liability, although holding its servant to whom it intrusted the performance of its contract of carriage not justifiable, presents, we think, an untenable doctrine. What shall be the legal test of the sufficiency of conduct on the part of the passenger to put a conductor "out of tune," or disqualify him by reason of anger from performing his duty, but not justify his action? Shall it be based on some theoretical average conductor; and, if so, shall we look to the average sensitiveness of conductors throughout the country, or only on a particular road? Or shall the question be determinable by the sensitive disposition and inflammable temperament of the particular conductor whose act is under consideration, and his condition at the time of the occurrence? Is it meant that a passenger must be entirely free from fault in order to hold a carrier liable for an assault and battery committed by its conductor? Or that imperfection of temper on the part of the conductor, if annoyed or aggravated by a passenger, will free the carrier from responsibility; and that the passenger alone is held to a rule of perfection in conduct, manner, and speech?

Let us now consider the statutes of this state and some of the decisions rendered before and after those above mentioned. By Civil Code 1895, § 3817 (Civil Code 1910, § 4413), it is declared that "every person shall be liable for torts committed by his . . . servant by his command, or in the prosecution and within the scope of his business, whether the same be by negligence or voluntary." By § 2321 (Civil Code 1910, § 2780), it is declared that "a railroad company shall be liable . . . for damage done by any person in the employment and service of such company, unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence; the presumption in all cases being against the company." Section 1861 (Civil Code 1910, § 2225) declares that "every corporation acts through its officers, and is responsible for the acts of such officers in the sphere of their appropriate duties." Section 902 of the Penal Code of 1895 (Penal Code 1910, § 925), codified from the act of 1881, declares that "the conductors of a train carrying passengers are invested with all the powers, duties, and responsibilities of police officers while on duty on their trains: Provided, nothing herein contained

shall affect the liability of any railroad company for the acts of its employees. When a passenger is guilty of disorderly conduct, or uses any obscene, profane, or vulgar language, or plays any game of cards or other game of chance for money or other thing of value, upon any passenger train, the conductor of the train may stop it at the place where such offense is committed, or at the next stopping place of the train, and eject the passenger from the train, using only such force as may be necessary to accomplish the removal; and the conductor may command the assistance of the employees of the company and of the passengers on the train to assist in the removal," etc. These statutes were in force when the decisions under review were made. We fail to see in them any intimation that if a conductor is put "out of tune," or made angry by the conduct of a passenger, and commits an unlawful assault and battery upon him, or unjustifiably uses excessive force and violence upon him, the company shall not be liable. On the contrary, the statute last quoted contemplates that the passenger may be ejected if he is guilty of disorderly conduct, or uses obscene, profane, or vulgar language, or gambles on the train, but it distinctly declares that the conductor shall use "only such force as may be necessary to accomplish the removal," and also that nothing in the statute shall affect the liability of the company for the acts of its employees.

In *Gasway v. Atlanta & W. P. R. Co.* 58 Ga. 216 (decided before the *Peavy Case* in 81 Ga. 485, 12 Am. St. Rep. 334, 8 S. E. 70), it was ruled that "railroad companies are responsible to passengers for the torts of the conductors and other servants of the company employed in running trains, where such torts are committed in connection with the business intrusted to such servants, and spring from or grow immediately out of such business." The plaintiff, a negro, sought to obtain a check for the baggage of his wife, who had taken her seat in the car. The baggage master refused it, unless the plaintiff would produce his passenger, saying that this was not allowed by the rules of the company. As the plaintiff turned off, he said it was "a damned bad rule," if it was a rule. The baggage master testified that the plaintiff called him a damned fool. He jumped out of the car, followed the plaintiff alongside the train, and beat him. The conductor came up and took hold of the plaintiff's arm. It was held that for such a tort the railroad company was liable, and that a charge in regard to punitive damages should have been given on request. The court did not intimate at that time that

the railroad would be freed from liability, if the baggage master was put "out of tune" by the language of the colored person with whom he was dealing, but not justified in the battery.

In *Western & A. R. Co. v. Turner*, 72 Ga. 292, 53 Am. Rep. 842, where a person entered a cab of a freight train and sought to take passage, which was refused, and a battery was committed by the conductor, it was held that it was the conductor's duty to refuse the passage in a polite manner, and give the plaintiff a reasonable opportunity to quit the cab, and, if he still refused to leave it, then to use such reasonable force as was necessary to eject him therefrom. It was said: "Whatever the conductor did in relation to either of these matters was, under the facts of this case, clearly done in the prosecution and within the scope of his business, and the company was liable for his conduct, even though it was voluntary." It was also held that the section of the Code (Civil Code 1910, § 3603) which states that "the principal is not liable for the wilful trespass of his agent, unless done by his command or assented to by him," must be construed in harmony with the section (Civil Code 1910, § 4413) which makes every person liable for torts committed by his servant, by his command, or in the prosecution and within the scope of his business, so as to allow both to remain of force in the cases to which they apply."

In *Christian v. Columbus & R. R. Co.* 79 Ga. 460, 7 S. E. 216, a widow brought suit for the homicide of her husband, alleging that, while in the office of the defendant's agent for the transaction of business pertaining to the agency, her husband was killed by the agent. In ruling in regard to a demurrer, it was said that "if the agent killed this lady's husband wrongfully, the company is liable for it, under the facts alleged in this declaration." There was also a count in the declaration which alleged that the agent was subject to mental aberration, and that the company employed him with knowledge of the fact. In regard to this it was said: "We think, also, that if the homicide was the result of insanity, and the railroad company was faultless in regard to employing the agent, anything that would excuse the agent criminally from the act would excuse the railroad company civilly." The opinion was written by the same justice who prepared that in the *Peavy Case*. The same case was again before this court in 97 Ga. 56, 25 S. E. 411, with the parties reversed in its statement. It was said (p. 58): "Of course, in such a case, if an employee, charged with the duty of executing upon

the part of the master the contract of passenger carriage, should wrongfully inflict injuries upon the person of the passenger, the carrier would be liable." Again it was said (p. 60.): "If the patron were himself guilty of such disorderly conduct as would authorize his expulsion from the premises, the agent of the company might be authorized to expel him, using only such force as would be necessary to accomplish that purpose; but such conduct or provocation would not justify the homicide of the patron upon the part of the agent, and the company could not exonerate itself from liability for the consequences of the act of the agent done on its behalf, without showing that the agent was justified in the premises. Of course, if the homicide committed by the agent was justifiable, the justifiable act of the agent could not be made by relation the wrongful act of the company." And again: "If the homicide be wrongful, and committed in the course of the transaction of the business of the company, it can make no difference whether the offense committed by the agent be classed as manslaughter or murder, the company would nevertheless be liable; but if the agent was justified in its commission, no liability could arise against the company, whether the act was committed by him while engaged in the business of the company in the line of his duty, or otherwise." Here it was distinctly ruled that justification of the act of the agent was the test of whether the company would be freed from liability; not mere annoyance of the agent, or putting him "out of tune." It was said that it mattered not whether the homicide was murder or manslaughter as to relieving the company from liability. But a killing is not reduced from murder to manslaughter except by reason of an assault, or equivalent circumstances, justifying violent passion, but not amounting to justification of the act done. It cannot be that, if the servant of the company commits an unlawful battery, though aggravated or provoked by language or conduct of the passenger, the company is relieved from liability, but if the passenger dies from the effects of the battery, the company is liable. This would be to make the liability of the company for the same conduct of its servant depend rather upon the vigor or weakness of the passenger's constitution than upon the certainty of the law of the state.

In *Thompson v. Wright*, 109 Ga. 466, 469, 34 S. E. 560, 561, the following was quoted approvingly from *Cooley on Torts*: "The master who puts the servant in a place of trust or responsibility, or commits to him the management of his business, or the care of his property, is justly held re-

sponsible when the servant, through lack of judgment or discretion, or from infirmity of temper, or under the influence of passion aroused by the circumstances and the occasion, goes beyond the strict line of his duty or authority, and inflicts an unjustifiable injury upon another." In *Central R. Co. v. Brown*, 113 Ga. 414, 84 Am. St. Rep. 250, 38 S. E. 989, it was held that "a master is liable for the wilful torts of his servant, committed in the course of the servant's employment, just as though the master had himself committed them. This rule applies as well where the master is a corporation as where he is a private individual." In the opinion Chief Justice Simmons said: "The theory that one may be a servant one minute, and, the very next minute get angry, commit an assault, and in that act be not a servant, was to refined a distinction." It was also held that a master and servant might be jointly sued in trespass for a wilful tort committed by the servant within the scope of his employment. Now, suppose that, in the cases under review, the master and servant had been jointly sued in trespass for a battery committed by the servant,—how could it be said, consistently with the decision last quoted, that the jury should find that there was an unlawful battery, or a use of such excessive force as amounted to a battery, that this was a tort of the agent for which he was liable, but that the master was freed from liability because the injured person was guilty of conduct calculated to anger the servant, but not to justify him? Would there be a verdict for the plaintiff against the servant, but in favor of the master? At what point in the anger of the servant does his agency and the liability of the master cease? Or at what point, short of justification, does the liability of the agent continue and that of the master terminate? The relation of master and servant does not cease because the servant is mad, though aggravated. See also *Savannah Street etc. R. Co. v. Bryan*, 86 Ga. 312, 22 Am. St. Rep. 464, 12 S. E. 307; *East Tennessee, V. & G. R. Co. v. Fleetwood*, 90 Ga. 23, 15 S. E. 778; *Southern R. Co. v. James*, 118 Ga. 340, 63 L.R.A. 257, 45 S. E. 303; *Savannah Electric Co. v. Wheeler*, 128 Ga. 550, 10 L.R.A.(N.S.) 1176, 58 S. E. 38.

In some jurisdictions opprobrious words will not justify a battery. In this state, on the trial of an indictment for an assault, or an assault and battery, the defendant may give in evidence to the jury any opprobrious words or abusive language used by the prosecutor or person assaulted or beaten, "and such words and language may or may not amount to a justification,

according to the nature and extent of the battery, all of which will be determined by the jury." If the jury find that the opprobrious words of the passenger, or act by him amounting to an assault, would justify the servant, his conduct, so justified, would not furnish a ground for recovery against the master. But the rule works both ways. If the servant represents the master in his act, and the master is responsible for his tort, aggravation of the servant which will not justify him will not free the master from liability. Acts which may not amount to a justification may yet amount to a mitigation, and if the mitigating circumstances be strong, or the injury small, may furnish a basis only for recovery of nominal damages. Civil Code 1895, §§ 3905, 3892 (Civil Code 1910, §§ 4502, 4489). It would seem that provocation given by a passenger at a different time could not be considered. *East Tennessee, V. & G. R. Co. v. Fleetwood*, 90 Ga. 23(3), 15 S. E. 778, *supra*. In some jurisdictions it is held that words of provocation, not justifying, can only be considered to mitigate punitive damages. But in this state, where words may excuse entirely, they should be allowed to excuse in part; that is, mitigate. *Thompson v. Shelverton*, 131 Ga. 714, 63 S. E. 220. The test of whether the employee was justified was recognized as the correct one in *New Orleans & N. E. R. Co. v. Jopes*, 142 U. S. 18, 35 L. ed. 919, 12 Sup. Ct. Rep. 109, where it was held that "if an act of an employee be lawful and one which he is justified in doing, and which casts no personal responsibility upon him, no responsibility attaches to the employer therefor."

It will appear from what has been said that the decisions reviewed on the subject now under consideration are in conflict with earlier as well as later decisions of this court, and are not in harmony with the statute law or sound legal reason. They are therefore modified so as to accord with the rule herein enunciated. We are aware that in *Harrison v. Fink*, 42 Fed. 787, the United States circuit court upheld the direction of a verdict for a defendant railway company, and quoted at some length from the *Peavy Case*. This, however, had reference to the facts of the particular case, and whether they would authorize a finding for the plaintiff.

This opinion has already reached a length which precludes a full discussion of the views of text writers and of courts in other jurisdictions. It is sufficient to say that they are not in perfect harmony. Among 33 L.R.A. (N.S.)

the cases which hold abusive language, not justifying an assault by the conductor, will not free the company from liability, are *Birmingham R. Light & P. Co. v. Mullen*, 138 Ala. 614, 35 So. 701; *Birmingham R. & Electric Co. v. Baird*, 130 Ala. 350, 54 L.R.A. 752, 89 Am. St. Rep. 43, 30 So. 456; *Weber v. Brooklyn, Q. C. & Suburban R. Co.* 47 App. Div. 306, 62 N. Y. Supp. 1; *Hanson v. European & N. A. R. Co.* 62 Me. 84, 16 Am. Rep. 404; *Haman v. Omaha Horse R. Co.* 35 Neb. 74, 52 N. W. 830; *Chicago & E. R. Co. v. Flexman*, 103 Ill. 546, 42 Am. Rep. 33; *Baltimore & O. R. Co. v. Barger*, 80 Md. 23, 26 L.R.A. 220, 45 Am. St. Rep. 319, 30 Atl. 560; *St. Louis Southwestern R. Co. v. Berger* (St. Louis Southwestern R. Co. v. Jones) 64 Ark. 613, 39 L.R.A. 785, 44 S. W. 809. In the states where it had been held that abusive language, though not justifying the conductor, will relieve the company, it will usually be found that the theory prevails that a wilful tort by a conductor is, *ipso facto*, outside the scope of his employment,—a doctrine which has been distinctly repudiated by this court in cases heretofore cited. The only case outside of Georgia, cited by counsel to sustain this doctrine, was that of *Scott v. Central Park, N. & E. River R. Co.* 53 Hun, 414, 6 N. Y. Supp. 382, where it was said: "That while it might be true that the use of the abusive language to the driver [of a street car] did not justify the assault, so far as the driver was concerned, in the eyes of the criminal law, there was no reason for holding that where a passenger, by his own improper and insulting behavior, while a passenger on the road of the railway company, brought upon himself an assault, that the carrier should be held responsible;" and it was immediately added, "that it was clear that the act of the driver was not in the course of his employment." This view has not been followed in New York in later cases; but it has been held that provocation might be considered in mitigation of damages. *Freedman v. Metropolitan Street Ry. Co.* 89 App. Div. 486, 85 N. Y. Supp. 986; *Weber v. Brooklyn, Q. C. & Suburban R. Co.* 47 App. Div. 306, 62 N. Y. Supp. 1, *supra*; *Stewart v. Brooklyn & Ct. R. Co.* 90 N. Y. 588, 43 Am. Rep. 185. The injury for which the present suit was brought occurred in Alabama. Rulings of the supreme court of that state on the subject now under consideration have been cited above.

In 4 Elliott, Railroads, § 1638, it is said: "A carrier is bound to discharge the im-

plied duty, arising out of its contract and imposed by law, that its passengers shall be protected from injury by its servants, and shall not be wilfully insulted and harmed by them; and if it commits the discharge of this duty to an employee, it may well be held to do so at its peril, notwithstanding the exercise of care on its part in selecting its servants. Either the company or the passengers must take the risk of infirmities of temper, maliciousness, and misconduct of the employees whom the company has placed upon the train and to whom it has committed the discharge of its duty to protect and look after the safety of its passengers."

It is not to be understood that this court approves of such conduct as the evidence for the defendant tended to show that the plaintiff was guilty of, but which he in part denied, though he admitted drinking about six glasses of beer shortly before entering the train and going out and standing on the step of the car, where he had no business to be. Without passing on the facts of the present case, we may say generally that we would lend no countenance to drunken rowdies going upon railroad trains, using foul and profane language, sometimes in the presence of women and children, seeking to terrorize or pick quarrels with the passengers or railroad employees, and then, when they bring trouble upon themselves, or are ejected from the train, asking juries to award them large damages against the company as salve for their besotted but wounded feelings. In this state, conductors in charge of trains are clothed with police powers, and on proper occasions must use them, though they must not abuse them. *Hillman v. Georgia R. & Bkg. Co.* 126 Ga. 814, 56 S. E. 68, 8 A. & E. Ann. Cas. 222. Honest juries should not make profitable such disorderly conduct on the part of passengers as that hypothetically mentioned. To do so would be a violation of their duty. If, in any case of that character, a jury should render a verdict which does not accord with justice and the weight of the evidence, the trial judge should grant a new trial. It would be his duty to do so. In *Peavy's Case*, 81 Ga. 485, 12 Am. St. Rep. 334, 8 S. E. 70, supra, the second grant of a new trial was sustained. But this is different from laying down an erroneous rule of law to be given in charge to the jury, lest perhaps juries may be biased, or judges may fail to fully discharge their duty.

Judgment reversed.

All the Justices concur.

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CONNECTICUT SUPREME COURT OF ERRORS.

MICHAEL SEIDLER

v.

JOHN J. BURNS, Appt.

(— Conn. —, 79 Atl. 53.)

Pleading — improper claims — demurrer — motion.

1. The striking out of portions of a complaint claiming improper elements of damage must be accomplished, not by demurrer, but by motion.

Damages — malicious prosecution — suffering under arrest.

2. One maliciously prosecuting another which results in his arrest is not answerable in damages for physical suffering caused by cold, want of bed, or deprivation of food, due to acts of persons over whom he had no control, and which he had no reason to anticipate.

Trial — instruction — support — evidence.

3. An instruction in an action to recover damages for malicious prosecution, that the damages might include an allowance for suffering caused by cold and lack of bed and food during his imprisonment, cannot be regarded as prejudicial where the only evidence to which it is applicable is to the effect that the bed furnished was hard and that plaintiff ate nothing, which may have been due to his own volition.

Damages — malicious prosecution — risk of conviction.

4. The risk of conviction is not an element of damages for malicious prosecution resulting in illegal arrest.

(March 8, 1911.)

Note. — Condition of place of imprisonment and treatment while in custody as elements of damages in action of malicious prosecution or false imprisonment.

While there is some conflict, it is generally held that these matters may properly be taken into consideration in reaching the amount of damages.

Actions for malicious prosecution.

Thus, in actions for malicious prosecutions the filthy and loathsome condition of the jail and surroundings may be shown. *Fuqua v. Gambill*, 140 Ala. 464, 37 So. 235; *Grimes v. Greenblatt*, 47 Colo. 495, 107 Pac. 1111, 19 A. & E. Ann. Cas. 608; *Mexican C. R. Co. v. Gehr*, 66 Ill. App. 173; *Atchison, T. & S. F. R. Co. v. Rice*, 36 Kan. 593, 14 Pac. 229; *Drumm v. Cessnum*, 61 Kan. 467, 59 Pac. 1078; *Driggs v. Morgan*, 10 Rob. (La.) 119; *Stoecker v. Nathanson*, 5 Neb. (Unof.) 435, 70 L.R.A. 667, 98 N. W. 1061.

The court in *Stoecker v. Nathanson*, supra, said: "On the question of the admis-

APPEAL by defendant from a judgment of the Superior Court for Hartford County in plaintiff's favor in an action brought to recover damages for alleged malicious prosecution. Reversed.

Statement by Prentice, J.:

As the result of the defendant's complaint a warrant for the plaintiff's arrest upon the criminal charge of wilfully injuring the defendant's property was issued by proper authority, and the plaintiff arrested thereon. He was placed in a cell in the Hartford police station, where he remained overnight. He continued in custody until the afternoon of the following day, when he was given his liberty. Upon his presentment to court later, he was found not guilty, and dis-

sion of testimony as to the sanitary condition of the jail in which plaintiff was confined, we are cited to the case of *Zebley v. Storey*, 117 Pa. 478, 12 Atl. 569, which is a case squarely in point, tending to support defendant's theory as to the inadmissibility of this evidence. It appears, however, that this case is wrong in principle, and stands practically alone against the clear weight of authority both in the United States and in England. The well-considered cases on this question hold, with this single exception, that in an action for false imprisonment or malicious prosecution, proof of the circumstances of plaintiff's family and the filthy condition of the jail used for the imprisonment are admissible to prove special damages."

But it was held in *Zebley v. Storey*, supra, in an action for malicious prosecution, that the plaintiff could not show the nature of his treatment or the conditions of the jail while he was confined in it. The court said: "This testimony could hardly fail to inflame the minds of the jury and enhance the damages. And if the treatment referred to had been the act of the defendant, he would have no reason to complain of the admission of the evidence. But it is a matter with which he had nothing to do. He is not responsible for the way in which the county of Philadelphia, acting through its officials, treats persons confined in the county prison. He is responsible for the unlawful restraint of the plaintiff's liberty, if he has so restrained it, but it would be unreasonable, as well as unjust, to hold him liable for the acts or conduct of public officials, over whom he had no control."

This case is clearly against the weight of authority, and is also in conflict with *Abrahams v. Cooper*, infra.

The case, however, is supported by the decision in *SEIDLER v. BURNS*.

So, suffering from cold, from want of bed, and deprivation of food for many hours, have been held proper elements of damages. *Abrahams v. Cooper*, 81 Pa. 232.

And the facts that plaintiff was placed

charged. Other facts are sufficiently stated in the opinion.

Messrs. Joseph L. Barbour and Stewart N. Dunning, for appellant:

It is the duty of the police station authorities to provide suitable accommodations for those confined there.

Zebley v. Storey, 117 Pa. 478, 12 Atl. 569; *Garvey v. Wayson*, 42 Md. 178..

Mr. A. Storrs Campbell, for appellee:

It was not obligatory upon the plaintiff to prove express malice. Any act done wilfully to the injury of another, which is unlawful, is malice.

Pullen v. Glidden, 66 Me. 202; *Wills v. Noyes*, 12 Pick. 324; *Com. v. Snelling*, 15 Pick. 337.

in jail and surrounded by the usual gloomy and depressing features of such places, and that the arrest was made before plaintiff's mother, have also been proper for consideration or the amount of damages. *Flam v. Lee*, 116, Iowa, 289, 93 Am. St. Rep. 243, 90 N. W. 70.

So, where a railroad employed a man to watch plaintiff, and if he found him stealing coal to arrest him, the person so employed acts within the scope of his authority in undertaking to give notice to the plaintiff's wife and friends, and his failure to perform the undertaking, and his efforts to have the plaintiff's sureties surrender him into custody, may be shown in an action for malicious prosecution. *San Antonio & A. P. R. Co. v. Griffin*, 20 Tex. Civ. App. 91, 48 S. W. 542.

And in *Laing v. Mitten*, 185 Mass. 233, 70 N. E. 128, it was held that while a defendant was not liable for any acts of the officers done in excess of the authority conferred by the warrant, yet, having started the prosecution, he was liable for anything done with such authority, and that this was so although the officer might have been a little more considerate than he was. The court said: "It may be said in passing that while the bill of exceptions recites that 'the arrest was made in an unusual manner, and with acts of unnecessary and unwarrantable cruelty and indignity,' the acts which are set forth in the bill, with the possible exception of the confinement in a cell not sufficiently warmed (and even this might have occurred with no fault upon the part of any person), are all plainly within the authority of the precept under which the officer acted. Unless there were acts besides those shown in the record, to which the words 'unnecessary' and 'unwarrantable' are applicable, the words would not seem to imply an act beyond the authority of the process. The exceptions applicable to this count must therefore be overruled."

And the same rule was applied in *Spear v. Hiles*, 67 Wis. 350, 30 N. W. 506, where the plaintiff and his wife were arrested, and while in jail he was kept separate

It is not necessary to prove actual damage; deprivation of liberty, and injury to reputation, feelings, and person, will support a verdict for the plaintiff.

Hogg v. Pinckney, 16 S. C. 387; Spear v. Hiles, 67 Wis. 350, 30 N. W. 506; Hampton v. Jones, 58 Iowa, 317, 12 N. W. 267; Closson v. Staples, 42 Vt. 209, 1 Am. Rep. 316; Hamilton v. Smith, 39 Mich. 222.

Prentice, J., delivered the opinion of the court:

The defendant complains of the court's action in overruling his demurrer to the complaint, of several portions of its charge, and of a ruling upon the admission of testimony. The demurrer was properly overruled. It was a misdirected effort to have

stricken from the complaint a portion of the allegations of one paragraph claimed to set out improper elements of damage in connection with others admittedly proper. A motion, and not a demurrer, was the appropriate proceeding to resort to to accomplish that end. Rules under the Practice Book 1908, p. 247, § 155c. In that part of the charge which dealt with the subject of damages, the jury were informed that the plaintiff might, in the event that he established a right of action, recover compensation for, among other things, "injury to the person by being imprisoned upon the defendant's charge, such as injury to his health, for physical suffering caused by cold, and want of a bed, and deprivation of food." By this broad and unqualified lan-

from her, which was lawful; but it was held that recovery could not be had in such an action for any unlawful restraints or acts of oppression to which the plaintiff was subjected by the keeper.

And in Marks v. Hastings, 101 Ala. 165, 13 So. 297, the number of persons present when the officer went to make the arrest was held inadmissible, since the defendants were not responsible for any wrong or abuse in the manner of making the arrest.

And in Vansickle v. Brown, 68 Mo. 627, evidence that the arresting officer conducted himself in an uncivil and insulting manner when arresting plaintiff was held not admissible where it was not shown that the defendant was connected with such conduct; but it was said that such evidence might be admissible if it was shown that the misconduct was instigated by the defendant.

And in Garvey v. Wayson, 42 Md. 178, the fact that, pursuant to the regular custom of the detective department, plaintiff's name was entered upon the detective police annals of the city, and open to the inspection and use by the police force, was held inadmissible to increase the damages, without proving that there was some law of which the defendant would be bound to take notice requiring such entries, or that it was the custom of such department to make such entries, and that the defendant had knowledge of that fact.

The right to take into consideration the kind of treatment received by the plaintiff was also assumed in the following cases, in passing upon the question whether the damages allowed were excessive: Neys v. Taylor, 12 S. D. 488, 81 N. W. 901 (plaintiff, who was sick, not treated with proper care by officer); Clarke v. American Dock & Improv. Co. 35 Fed. 478 (plaintiff, a respectable woman, committed to jail with disorderly persons); Clark v. Baldwin, 25 Kan. 120 (plaintiff contracted severe cold and suffered ill health in consequence); Rule v. McGregor, 115 Iowa, 323, 88 N. W. 814 (plaintiff was driven by the officer through a neighborhood where he was well 33 L.R.A. (N.S.)

acquainted during part of an afternoon and the whole of a night, and, after his discharge, was rearrested in the presence of the members of a political convention to which he was a delegate).

Actions for false imprisonment.

It is also held that the filthy condition of the place of confinement and of the surroundings may be shown in actions for false imprisonment. Kindred v. Stitt, 51 Ill. 401; Fenelon v. Butts, 53 Wis. 344, 10 N. W. 501.

And in Hall v. Hall, 3 Allen, 5, an action for false imprisonment, evidence as to the manner in which the plaintiff lived while he was confined in jail was held admissible. The court said: "His detention in prison, and the inconvenience and suffering to which it subjected him, were direct consequences of the illegal acts of the defendant in the service of the warrant of distress; and proof of these facts was therefore competent to show the damage he had sustained, and the compensation which he ought justly to recover."

And in the following cases the matter in question was held to be an element of damages in actions for false imprisonment.

So it is proper to show that plaintiff was confined with persons charged with crimes, and compelled to sleep in a bed without adequate clothing. Miller v. Fano, 134 Cal. 103, 66 Pac. 183.

And evidence that a woman prisoner was incarcerated in a filthy cell, and not allowed food or water for eight hours, and, together with her husband, was separated during that time from her young child, is admissible on the question of damages. Johnson v. McDaniel, 5 Ohio S. & C. P. Dec. 717.

So, in an action for false imprisonment of a girl in an industrial school, testimony consisting of the description of the industrial school, and an account of the restraints on her and her treatment in the institution, including the fact that she was compelled to sleep with a colored girl, and also as to her journey from the county

guage they were permitted to compensate the plaintiff for the physical consequences to him for cold, the lack of a bed, and deprivation of food while under arrest, whatever the circumstances attending those conditions might have been, and whoever might have been the responsible author of them. The defendant was made responsible for those conditions and consequences, although they might have been due to the conduct of persons over whom he had no control, and of conduct on the part of such persons of which he had no knowledge and no occasion to anticipate, and which was not in any way the natural or probable result of the plaintiff's arrest.

The authorities are in singular conflict as to the law upon the subject of these instructions. In several decisions it appears to have been held that in cases of this sort the prosecutor is legally responsible for all the consequences of the prosecution, which, through his malice, he caused to be brought without probable cause. *Abrahams v. Cooper*, 81 Pa. 232, 235; *San Antonio & A. P. R. Co. v. Griffin*, 20 Tex. Civ. App. 91, 95, 48 S. W. 542; *Fenelon v. Butts*, 53 Wis. 344, 349, 10 N. W. 501; *Drumm v. Cessnum*, 61 Kan. 467, 472, 59 Pac. 1078; *Johnson v. McDaniel*, 5 Ohio S. & C. P. Dec. 717.

court to the institution, was held properly received as bearing on the question of damages. *Scott v. Flowers*, 60 Neb. 675, 84 N. W. 81.

And in an action for the false imprisonment of a civilian by a military officer, the fact that the plaintiff was confined in the guardhouse with drunken soldiers, and compelled to labor with military culprits may be considered in fixing the damages. *McCall v. McDowell*, 1 Abb. (U. S.) 212, Fed. Cas. No. 8,673.

And in *Dinsman v. Wilkes*, 12 How. 390, 13 L. ed. 1036, where an action was brought by a marine who was imprisoned in a foreign prison by the commanding officer of a squadron, the court said: "And, further, that, under the order to imprison him in the fort, if the jury believe it to be truly stated in the defendant's testimony, the plaintiff was left at liberty to relieve himself from confinement at any moment by returning to his duty. But, on the other hand, the jury must likewise take into consideration the different punishments he received: his confinement in the fort on shore; the situation and condition of the place; the character of the persons by whose authority it was governed; his food, his clothing, and general treatment; and whether Captain Wilkes, through proper officers, inquired into his treatment and condition during the time of his confinement. For, certainly, when, from whatever motives he had placed him out of the protection which the ordinary place of confinement on shipboard afforded, in a prison belonging to and under the control of an

In the first-named and earliest of these cases, it was determined that the precise elements under discussion were proper ones for the jury's consideration. In *Sedgwick on Damages*, § 45, is a statement to the same effect, and in the same language; *Abrahams v. Cooper*, 81 Pa. 232, 235, being referred to as authority, and the sole authority, for it. *Sutherland on Damages* gives countenance to the rule, to the extent of saying that it is claimed for it that it has the support of the most numerous cases. Section 1237. Other cases either distinctly express or plainly indicate a different view. *Zebbley v. Storey*, 117 Pa. 478, 485, 12 Atl. 569; *Flam v. Lee*, 116 Iowa, 289, 293, 93 Am. St. Rep. 242, 90 N. W. 70; *Garvey v. Wayson*, 42 Md. 178, 189; *Laing v. Mitten*, 185 Mass. 233, 234, 70 N. E. 128; *Lock v. Ashton*, 13 Jur. 167, 12 Q. B. 871, 18 L. J. Q. B. N. S. 76. The reason assigned for the first-named position, and the only one which has been attempted, as far as we have been able to discover, is that expressed in the brief opinion in *Abrahams v. Cooper*, 81 Pa. 232, 235, as follows: "Malice was the gist of this action, and the natural and probable consequence of this arrest was the imprisonment of the plaintiff. The suffering of the plaintiff from cold, the want of

uncivilized people, it was his duty, through proper and trustworthy officers, to inquire into his situation and treatment, and to see that it was not cruel or barbarous in any respect, and that he did not suffer for the want of those necessities which the humanity of civilized countries always provides even for the hardened offender."

And where a young man of industrious habits, while passing down a street in an orderly manner, is arrested by one not an officer, who in a loud voice accused him of stealing his bicycle, and, when the young man denied the charge and requested his accuser to go to some of the best citizens of the place to establish his innocence, his accuser roughly refused the request and handed him over to the night watchman, and in the presence of others told him that he believed the young man had stolen his bicycle, and the watchman kept the young man for an hour exposing him to passers-by and refusing to allow him to see those by whom he claimed he could establish his innocence, punitive damages may be allowed in an action for false imprisonment against his accuser, and a verdict of \$300 is not excessive. *Hight v. Naylor*, 86 Ill. App. 508.

But in *Stoness v. Lake*, 40 U. C. Q. B. 320, in an action against justices of the peace, for causing an unlawful assault upon the plaintiff and his imprisonment, it was held that there could be no recovery against the defendants, for suffering from the harsh regulations of the prison during his imprisonment.

J. T. W.

a bed to lie upon, and deprivation of food for many hours sprang directly from the imprisonment to which the malice of the defendant exposed the plaintiff. Because others may have also been in fault, it does not take away the participation of the defendant in the wrong done to the plaintiff." Our examination of the authorities and text-books indicates that this decision is the original source of this doctrine. Notwithstanding the allegiance which it appears to have secured, it does not impress us as founded in sound reason. We fail to discover in the fact that the gist of these actions is malice any just reason why a prosecutor should be held responsible for the misconduct of others, including officials charged with the duty of taking proper action in directing the machinery of the law, and in executing its processes, which misconduct he has no part in bringing about, of which he has no knowledge, and which he had no reason to anticipate, either as being the natural or probable result of the prosecution or otherwise. The fact that *Zebbley v. Storey*, 117 Pa. 478, 485, 12 Atl. 569, was decided by the same court which laid down the broad doctrine of *Abrahams v. Cooper*, suggests either that the language of the earlier opinion has been misconstrued as to its scope, or that that court has come to realize that in the first instance it went too far. In the later case it was said: "He [the prosecutor] is not responsible for the way in which the county of Philadelphia, acting through its officials, treats persons confined in the county prison. He is responsible for the unlawful restraint of the plaintiff's liberty, if he has so restrained it, but it would be unreasonable, as well as unjust, to hold him liable for the acts or conduct of public officials over whom he had no control."

We are of opinion that the trial court was in error in instructing the jury with respect to these possible elements of damage in the unqualified language which was used. It is evident, however, that the defendant could not have been harmed by the error. The finding shows that the only facts relating to conditions or treatment claimed to have been productive of harmful results sought to be established by the plaintiff, which could have been regarded by the jury as being touched by the instructions in question, and therefore the only ones which could have been used in awarding damages under them, were that the bed in the cell was hard, and that the plaintiff ate nothing from the time of his arrest in the afternoon until after 3 p. m. the next day. One who is instrumental in the confinement of another in a cell may well be assumed to anticipate that a soft bed may not be pro-

vided. In this case it does not appear that the plaintiff claimed to have proved that the bed which was provided was harder and more uncomfortable than those usually furnished under such conditions, or than would be reasonably expected in such a place. As to the eating, there is no claim that it was established that the plaintiff's fasting for twenty-four hours was enforced by the action of his keepers in not providing food. For all that appears it was the result of his own volition.

The court further told the jury that it might consider as an element of damage the plaintiff's "risk of conviction." What it meant by the term as thus used is not apparent. Its language in the sentence immediately following, in which it took up the subject of mental suffering, plainly indicates that "risk of conviction" was not referred to for the purpose of calling the jurors' attention to a feeling of fear or apprehension of possible conviction which the plaintiff may have entertained as bearing upon the subject of mental anguish. If it were, the language of the court was unfortunately inapt and misleading. It is quite evident from its context that the term was used to point out an independent basis for the assessment of damages. We know of no authority, and can conceive of no reason, for such action. Risk of conviction of a criminal charge made without probable cause there is not, unless there is an utter failure of the judicial machinery. This situation is certainly not one which the law contemplates. The serious fault in the instruction is that the attention of the jurors was called to it as presenting a substantial matter for consideration and that they were invited to enter upon a field of speculative and indefinite inquiry in which, through ignorance of the legal conditions, or sympathy or prejudice, they might easily be led to unwarranted and harmful results.

The remaining reasons of appeal need not be considered.

There is error, the judgment is set aside, and a new trial ordered.

In this opinion the other Judges concur.

MISSISSIPPI SUPREME COURT.

ALEXANDER PALM et al., Appts.,
v.

CHARLES C. FANCHER et al.

(93 Miss. 785, 48 So. 818.)

Usury — compound interest.

A note is not made usurious by a provision that interest, which is the highest rate

allowed by law, shall, if not paid at maturity, become principal, and bear interest at the same rate.

(March 29, 1909.)

A PPEAL by defendants from a decree of the Chancery Court for Attala County, foreclosing a mortgage on certain real estate. Affirmed.

The facts are stated in the opinion.

Messrs. Alexander & Alexander and J. G. Smythe for appellants.

Messrs. McWillie & Thompson, for appellees:

The usury law does not prevent the renewal of notes carrying interest already due into a new note, and making it bear interest.

Note. — Validity of agreement, made before interest becomes due, to pay interest on interest.

The complement of the question with which this note is concerned has already been discussed in a note to Sanford v. Lundquist, 18 L.R.A. (N.S.) 633, on "Validity of agreement to pay interest on interest, made after interest has become due."

Another question of collateral interest, viz., the right, in the case of renewal of a loan, to compute interest on the basis of including accumulated interest as part of the principal of the renewal, forms the subject of a note to Bramblett v. Deposit Bank, 6 L.R.A. (N.S.) 612.

An analysis of the decisions bearing on the question of the validity of agreements made before interest has become due, to pay interest on interest, discloses a curious lack of uniformity of opinion on a question which one might suppose would long since have been settled. This is doubtless due to the slow disintegration of the ancient prejudice against interest of any kind, which was based on economic and religious beliefs since shown to be erroneous. The majority of the decisions condemn such agreements without making the distinction observed in *PALM v. FANCHER* between agreements simply to pay interest on overdue interest, and agreements for the compounding of interest at regular intervals. Some of them make the distinction only where the interest is evidenced by a coupon note. But it is to be observed that the currency of this doctrine, which, as will subsequently be shown, is wholly rejected in some states, is due principally to statements of a purely obiter character. Where the question has been directly before the court, a tendency is apparent to avoid the effect of the doctrine wherever possible by restricting its operation by means of exceptions, the most important of which is in the case of the so-called coupon notes, which have just been mentioned. While some courts recognizing this exception have characterized it as purely arbitrary or illegal, and as based on commercial usage, others have assigned 33 L.R.A. (N.S.)

Perkins v. Coleman, 51 Miss. 298; 29 Am. & Eng. Enc. Law, 2d ed. p. 493; Webb, Usury, § 127, p. 144; Scott v. Saf-fold, 37 Ga. 384.

Messrs. Dodd & Dodd also for appellees.

Mayes, J., delivered the opinion of the court:

The chancellor has settled all questions in this case save one of law. On the 12th day of February, 1903, the appellants gave a mortgage on property therein described to secure the appellees in the sum of \$356.42 then owing. The note is as follows: \$356.42, McCool, Miss., Feb. 12, 1903.

On November 1, 1903, after date, we or either of us promise to pay to the order

what seems to be the true reason, viz., that in such case the interest is not compounded indefinitely, but is only simple interest on the amount represented by the coupon.

The conflict of opinion with respect to the validity of an agreement before interest becomes due, that it shall, if unpaid, itself bear interest, has led in some states to the enactment of legislation legalizing such contracts, and in others, to statutory provisions forbidding them.

With regard to the matter of usury, it may be stated that it is generally held, even where the courts decline to enforce such agreements, as being oppressive and "savoring of usury," that they do not taint the obligation with usury, the stipulation being looked upon as in the nature of a penalty for default. As to whether they are enforceable where the interest on the original obligation plus the interest on the interest exceeds the amount of simple interest which the original obligation would yield at the maximum legal rate, there is a conflict of opinion.

As above stated, the doctrine to which most of the decisions declare their adherence is that an agreement, forming part of the original obligation, to pay interest on interest, will not be enforced by the courts, on grounds of public policy, as being oppressive and unjust, and tending to usury. This is supported by the following cases in which the question was directly involved: Sir Thomas Meers Case, cited in 1 Atk. 304, and Cas. t. Talb. 40 (a covenant in a mortgage that, if interest were not paid punctually, it should from that time, and so from time to time, be turned into principal and bear interest); Ossulston v. Yarmouth, 2 Salk. 449 (covenant in mortgage that if interest be behind six months, it should be accounted principal and carry interest); Es-lava v. Lepretre, 21 Ala. 504, 56 Am. Dec. 266 (agreement for converting interest into principal from time to time, as it should become due); Hochmark v. Richler, 16 Colo. 263, 26 Pac. 818 (note including interest to maturity, and bearing interest thereafter); Drury v. Wolfe, 134 Ill. 294, 25 N. E. 626 (see detailed statement of this case

of Seward & Fancher three hundred and fifty-six and 42/100 dollars, for value received, negotiable and payable, without defalcation or discount, and with interest from maturity at the rate of 10 per cent per annum, and if interest be not paid annually, to become as principal, and bear the same rate of interest. If suit be instituted on this note, it is agreed that judgment shall include a reasonable amount as fee for the plaintiff's attorneys.

It is claimed that this note is usurious, because there is in it an agreement to compound the interest, if it be not paid annually as provided for in the note; and the case of *Perkins v. Coleman*, 51 Miss. 298, is relied on as authority on this point.

infra); *Bowman v. Neely*, 137 Ill. 443, 27 N. E. 758 (interest payable annually, and if not so paid, to become principal, and to bear the same rate of interest); *Breckenridge v. Brooks*, 2 A. K. Marsh. 335, 12 Am. Dec. 401 (interest agreed to be compounded annually if not paid); *Henry v. Flagg*, 13 Met. 64 (guaranty of compound interest); *Hoyle v. Page*, 41 Mich. 533, 2 N. W. 665 (interest to become principal if not paid at the end of each year); *Gay v. Berkey*, 137 Mich. 658, 100 N. W. 920 (agreement to compute interest with annual rests); *Mason v. Callender*, 2 Minn. 350, Gil. 302, 72 Am. Dec. 102 (agreement to pay interest after maturity of obligation on principal and interest); *Lee v. Melby*, 93 Minn. 4, 100 N. W. 379 (interest remaining unpaid when due, to bear interest thereafter); *Perkins v. Coleman*, 51 Miss. 298 (agreement that interest should be made part of principal so as to carry interest); *Hager v. Blake*, 16 Neb. 12, 19 N. W. 780 (overdue interest to draw interest); *Cox v. Smith*, 1 Nev. 161, 90 Am. Dec. 476 (interest not paid when due to be added to principal and bear interest at the same rate); *Levens v. Briggs*, 21 Or. 333, 14 L.R.A. 188, 28 Pac. 15 (interest not paid at the expiration of each year to be considered as an additional amount of principal to the original, and bear like interest per annum from the date of the expiration of each year, to be paid in like manner as the original).

In *Drury v. Wolfe*, 134 Ill. 294, 25 N. E. 626, where four notes were given for a loan, payable one, two, three, and four years after date, respectively, and bearing interest only after maturity, the amount of the last of the series being the balance resulting from a deduction of the amount of the first note from the amount of the principal, with one year's interest, then deducting the amount of the second note from the balance, plus another year's interest, and so on, it was held that the effect of this was to charge compound interest; and that the case came within the general rule that parties cannot be bound by any contract made before interest is due, for the payment of compound interest.

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We think that the case above referred to is, on its face, a different case from the one here presented. By the contract in *Perkins v. Coleman* it was provided that the principal debt was to run for twenty six months, bearing interest at 10 per cent annually, interest to be compounded and to become principal. No annual rest period was allowed for the payment of the interest, but the contract itself forbade the payment of interest under twenty six months, and required its compounding, thus making it imperative that the borrower pay a greater rate of interest than a straight 10 per cent on the principal amount borrowed, and the court held this contract to be usurious, because by its very terms it compelled the borrower to pay

The doctrine above stated is also supported by *obiter dicta* in the following cases: *Blackburn v. Warwick*, 2 Younge & C. Exch. 92, 6 L. J. Exch. N. S. 17; *Moss v. Bainbridge*, 6 De G. M. & G. 330; *Clancarty v. Latouche*, 1 Ball & B. 420; *Bainbridge v. Wilcocks*, Baldw. 536, Fed. Cas. No. 755; *Paulling v. Creagh*, 54 Ala. 646; *Rose v. Bridgeport*, 17 Conn. 243; *Niles v. Sinking Fund Comrs.* 8 Blackf. 158; *Rodes v. Blythe*, 2 B. Mon. 335; *Parkhurst v. Cummings*, 56 Me. 155; *Von Hemert v. Porter*, 11 Met. 210; *Gunn v. Head*, 21 Mo. 432; *Wilson v. Davis*, 1 Mont. 183; *Stanford v. Coram*, 26 Mont. 285, 67 Pac. 1005; *Mowry v. Bishop*, 5 Paige, 98; *Connecticut v. Jackson*, 1 Johns. Ch. 13, 7 Am. Dec. 471; *Van Benschooten v. Lawson*, 6 Johns. Ch. 313, 10 Am. Dec. 333; *Quackenbush v. Leonard*, 9 Paige, 334; *Stewart v. Petree*, 55 N. Y. 621, 14 Am. Rep. 352; *Young v. Hill*, 67 N. Y. 162, 23 Am. Rep. 99; *Van Rensselaer v. Jones*, 2 Barb. 643; *Higbie v. Heath*, 3 Thomp. & C. 783; *Reusens v. Arkenburgh*, 135 App. Div. 75, 119 N. Y. Supp. 821; *Catlin v. Lyman*, 16 Vt. 44; *Childers v. Deane*, 4 Rand. (Va.) 406; *Fultz v. Davis*, 26 Gratt. 903; *Stansbury v. Stansbury*, 24 W. Va. 634.

So, also, in *Chambers v. Goldwin*, 9 Ves. Jr. 254, 7 Revised Rep. 181, it was said by Lord Eldon that there is nothing unfair or perhaps illegal in taking a covenant originally that, if interest is not paid at the end of the year, it shall be converted into principal: but that a court of equity will not permit it, as tending to usury, though it is not usury.

And in *Ferguson v. Fyffe*, 8 Clark & F. 121, it was said that generally a contract or promise for compound interest is not available in England, except, perhaps, as to mercantile accounts current for mutual transactions.

"Now, in holding this to be the rule," said Alderson, B., in *Blackburn v. Warwick*, 2 Younge & C. Exch. 92, "I presume the courts suppose that some advantage immediately accrues to the mortgagee under the deed, ultra the allowance of £5 per cent interest, and that that advantage being secured by

more than 10 per cent interest on the amount borrowed by him. Under the facts of this case there is no stipulation compelling the borrower to pay compound interest, except in the event of his failure to pay the annual interest at maturity. If the borrower, under the agreement in this case, fulfil his contract, it is impossible for the lender to collect more than the legal contractual rate of interest. The note provides for annual payment of interest, in default of which the interest then becomes principal and bears interest; but the note here does not, as did the contract in case of *Perkins v. Coleman*, forbid annual payment of interest, and require same to be compounded. There is a wilderness of authority on this subject. Decisions may be found taking almost any view of the question.

We do not think this contract is, in any sense usurious. It would never be doubted but that the parties might, under a separate agreement, after the interest became due and default therein, have executed a second note for the interest, and made this

second note for the arrearage in interest become interest-bearing principal. It would not be seriously contended that such an agreement would constitute usury, though interest was thereby compounded. Conceding this, we fail to see why parties may not provide in the same instrument for the compounding of interest, when the stipulations of the contract are not such as require a compounding of the interest as a part of the contract, not leaving any option or right in the borrower to avoid paying compound interest. Such a contract is a mere matter of convenience to the parties, and places nothing in the contract they could not lawfully do as an independent transaction.

We concur in the view expressed in § 129 of *Webb on Usury*, which says: "It is difficult to understand how such an agreement, made after the loan contract, is generally accepted as valid; but, if made contemporaneously with the loan contract, it is in many cases held to be usurious."

Affirmed.

an original stipulation, the contract savors of usury. If the rule cannot be supported on that ground, it appears to me that it cannot be supported at all. I confess I do not see why such interest might not be allowed even where the stipulation to pay is contained in the original deed; but be that as it may, there the covenant, being part of the original terms of the contract, is part of the original advantage accruing to the mortgagee, and the courts will not sanction such a contract."

"The principle of not giving effect to a stipulation for the compounding of future interest upon a debt does not arise from the usury laws. It is merely adopted as a rule of public policy to prevent an accumulation of compound interest in favor of negligent creditors who do not collect their interest when it becomes due, which negligence is found in the end to be an injury rather than a benefit to the debtor." *Quackembush v. Leonard*, 9 Paige, 334.

The cases above cited, although, as shown, involving agreements both where the undertaking was simply to pay interest on interest and where the effect of the covenant was to compound interest indefinitely, seem to make no distinction between them. Such distinction, however, appears to have been taken in *Cox v. Brookshire*, 76 N. C. 314, in which it was held that although an agreement to pay interest upon interest not paid when it should become due is valid, an agreement that interest shall be compounded annually is usurious. But see *Bowman v. Neely*, 137 Ill. 443, 27 N. E. 758, in which an opportunity to make the distinction was deliberately rejected, the court saying: "In the case of coupons, the interest is not compounded indefinitely, and that is one of the reasons given by the courts for excepting

them from the operation of the general rule; and it is said that interest is not here sought to be compounded indefinitely, but only upon the annual interest upon the principal sum as it fell due and remained unpaid. This is undoubtedly true; but it is here reserved or contracted to be paid in the same instrument, and the commercial usage before referred to, in respect of detached coupons, or which may be detached, and pass as independent commercial paper, cannot apply."

On the other hand, agreements of the kind under discussion have been recognized as valid in a number of states. See *Scott v. Saffold*, 37 Ga. 384 (where a stipulation that interest should be paid annually, otherwise counted as principal, was held to be valid and binding, being neither usurious, unconscionable, nor contrary to public policy); *Merck v. American Freehold Land Mortg. Co.* 79 Ga. 213, 7 S. E. 265, and *Ellard v. Scottish American Mortg. Co.* 97 Ga. 329, 22 S. E. 893 (where notes representing interest were made to bear interest from maturity); *Pawling v. Pawling*, 4 Yeates, 229 (agreement that if any part of the interest should remain unpaid for the space of three months, to allow the obligee lawful interest for the same from the end of the said three months until paid); *Hale v. Hale*, 1 Coldw. 233, 78 Am. Dec. 490, and *Woods v. Rankin*, 2 Heisk. 46 (set forth infra); *Lewis v. Paschal*, 37 Tex. 315 (agreement to compound interest); *Yaws v. Jones*, — Tex. —, 19 S. W. 443 (stipulation that, in case of failure to pay the note at maturity, the interest should be added to the principal, and the total draw interest with annual rests). And see also *Burke v. Trabue*, 137 Ky. 580, 126 S. W. 125, and *Bura v. Thompson*, 2 Clark (Pa.) 143.

The following cases may be taken as instances of the reasoning upon which the minority doctrine is based:

Thus, in *Hale v. Hale*, 1 Coldw. 233, 78 Am. Dec. 490, it is said that there is nothing illegal or immoral or contrary to public policy in an agreement at the time a loan is made that, if the interest is not paid at the time stipulated, it shall be deemed principal and bear interest, the court saying: "The interest is both legally and equitably due at the expiration of the period limited for its payment; and if, instead of paying the interest, it be converted into principal by the previous agreement of the parties, we think there can be no objection to enforcing such an agreement."

And in *Woods v. Rankin*, 2 Heisk. 46, an agreement in a note that it should bear compound interest *eo nomine* was held valid, the court saying: "Compounding interest is the charging of interest against a debtor upon a sum which has accrued as interest upon the principal debt. This is not allowed by law, except in cases where the debtor expressly contracts to pay it. If the debtor, at the time of contracting the debt, agree to pay interest upon interest, such a contract is not illegal. At the time of the creation of the debt, the creditor may stipulate with his debtor for the payment of the interest thereon at stated periods, with the condition expressed upon the face of the obligation for the debt, that if the interest is not paid at the time stipulated for its payment, it should thereafter bear interest. Or separate notes for the interest upon the debt might lawfully be taken, to fall due at the periods at which the interest upon the principal debt would amount to the sums for which they were severally given; and such notes, if not paid when they fell due, would bear interest, and would be enforced in our courts, as executed on a good and sufficient consideration. In either case, the promise would be to pay only the amount that would be due to the creditor for interest at the time at which the debtor was bound by his contract to pay it. So that there would be upon the face of such contracts no obligation or promise to pay more than legal interest upon the sum due, and therefore an agreement to pay interest upon interest is neither illegal nor usurious."

In *Morgan v. Mather*, 2 Ves. Jr. 15, 2 Revised Rep. 163, it was said by Lords Commissioner Eyre and Ashhurst, that there may be a previous contract for compound interest; but this *dictum* was subsequently overruled.

In *Clarkson v. Henderson*, L. R. 14 Ch. Div. 348, 49 L. J. Ch. N. S. 289, 43 L. T. N. S. 29, 28 Week. Rep. 907, a provision in a mortgage that all interest which should, during the continuance of the security, accrue due on the principal, and all interest which should accrue due on that interest, or upon any other interest which should be capitalized under the provision, should, if not paid within twenty-one days from the respective times of the same coming due, 33 L.R.A. (N.S.)

become principal and be added to the principal sum, as, or in the nature of, a further advance, and should carry interest, which should be considered to accrue and should be payable from time to time on the days thereinbefore appointed for the payment of interest on the original sum, was held good and valid.

Interest coupons.

As to the effect upon coupon notes of statutes forbidding compound interest, see under heading, "Effect of statutory provisions," *infra*.

For decisions upon the question whether interest-bearing coupon notes render a contract usurious, and upon the question whether such notes contravene statutory provisions fixing the maximum rate of interest, see under heading "The question of usury," *infra*.

A generally recognized exception usually attributed to commercial usage, but more logically based on the fact that the contract requires only the payment of interest on interest, and not an indefinite compounding of interest, exists in the case of separate obligations for the payment of interest, known as interest or coupon notes.

Thus, in *Drury v. Wolfe*, 134 Ill. 294, 25 N. E. 626, it is said that there is perhaps an exception to the rule that parties cannot be bound by any contract made before interest is due for the payment of compound interest, in the case of interest coupons annexed to commercial paper, as in such case interest is not compounded indefinitely, but is simply payable upon the amount of the face of the coupon.

And in *Bowman v. Neely*, 137 Ill. 443, 27 N. E. 758, it is said that while it is a well-settled rule that parties to a contract cannot stipulate in advance for the payment of interest upon interest, an exception to this rule is made in respect of interest-bearing coupons attached to bonds or other securities for the payment of money. By commercial usage, such coupons, when payable to bearer, have the legal effect of promissory notes by the law merchant, and possess the attributes of negotiable paper. They are written contracts for the payment of a definite sum of money on a given day, and pass from hand to hand by commercial usage as negotiable paper, and it is for this reason that they have been sustained.

In *Hoyle v. Page*, 41 Mich. 533, 2 N. W. 665, it is said that interest coupons attached to negotiable paper are for many purposes several contracts, and are in the nature of notes given in advance for interest to become due at a certain time.

In *Lee v. Melby*, 93 Minn. 4, 100 N. W. 379, it is said that coupon notes have always been treated as an illogical exception to the rule prohibiting the making of an agreement in a single instrument, obligating the promisor to pay interest after due upon interest then unmaturing.

In *New England Mortg. Secur. Co. v.*

Vader, 28 Fed. 265, a provision in a note, the interest on which was represented by coupons, that unpaid interest should bear interest at 10 per cent per annum, was held valid, the court saying: "By the law of this state (Sess. Laws 1880, p. 17), interest is allowed at '8 per centum per annum, and no more, on all moneys after the same become due; . . . but on contracts, interest at the rate of 10 per centum per annum may be charged by express agreement of the parties, and no more.' These interest notes are distinct contracts for the payment of money, and when they became due were entitled, under this statute, without any agreement of the parties on the subject, to draw interest at 8 per centum per annum until paid, or, by the agreement of the parties, they might draw 10 per centum. The provision of the statute is, in effect, that interest shall be allowed 'on all moneys after the same become due,' and that at least includes the case of money due on an interest or coupon note, or a promise or agreement in a principal note, to the effect that the interest thereon shall be paid at a certain period or periods prior to the maturity thereof. But interest concerning the payment of which no special promise is made, and which no otherwise exists or is due than as an increment of the principal sum, is not included in this statute as 'money' due and entitled to bear interest. But a promise to pay interest as a distinct debt or liability, either in or out of the principal contract, and before or as the principal sum falls due, is a promise to pay a sum of money which, when due, bears interest under the statute, either at the legal rate, or according to the agreement of the parties, within the limit allowed thereby."

Effect of statutory provisions.

The following decisions deal with the effect of statutory provisions, other than those relating to rates of interest, upon contracts to pay interest on interest.

In California it has been held that in view of Civil Code, § 1919, which provides: "The parties may, in any contract in writing whereby any debt is secured to be paid, agree that if the interest on such debt is not punctually paid . . . [the difference] shall become a part of the principal, and thereafter bear the same rate of interest as the principal debt," a stipulation that the deferred instalments of interest shall bear interest at a higher rate than that borne by the principal is wholly illegal and void. *Yndart v. Den*, 118 Cal. 533, 58 Am. St. Rep. 200, 48 Pac. 618.

In view of the Idaho statute, § 1266, Revised Statutes, forbidding compound interest, coupon notes given for the interest of the principal debt, which, by their terms, draw interest after maturity, are usurious, although the compound interest provided for in the coupon notes, when added to the simple interest, falls below the legal con-

tractual rates fixed by law. *Vermont Loan & T. Co. v. Hoffman*, 5 Idaho, 376, 37 L.R.A. 509, 95 Am. St. Rep. 186, 49 Pac. 31'; *Vermont Loan & T. Co. v. Tetzlaff*, 6 Idaho, 105, 53 Pac. 104.

It was at one time the law of Louisiana that no stipulation in the original contract to pay interest upon interest should be valid. See *Lee v. Goodrich*, 21 La. Ann. 278; *Compton v. Compton*, 5 La. Ann. 618, in the last-cited of which cases such provision was regarded as rendering void a stipulation to pay 10 per cent on interest notes after maturity.

A provision that notes given for interest shall draw interest after maturity is not usurious, as there is in effect a capitalization of interest which brings the case within the provisions of art. 2924 of the Revised Civil Code. *Scottish-American Mortg. Co. v. Ogden*, 49 La. Ann. 8, 21 So. 116.

Where it is provided by statute that parties may contract in writing for the payment of interest, but the interest shall not be compounded oftener than once in a year, an agreement that interest may be compounded every six months is invalid. *Moore v. Macon Sav. Bank*, 22 Mo. App. 684; *Citizens' Nat. Bank v. Donnell*, 172 Mo. 384, 72 S. W. 925.

A statute providing that the parties to any note may stipulate that if interest is not punctually paid, such interest shall draw interest and become a part of the principal, but that the interest shall not be compounded oftener than once a year, renders void a contract that interest shall be paid semiannually, and that, if not paid when due, it shall be compounded. *Murray v. Oliver*, 3 Or. 539.

In *Stanford v. Coran*, 26 Mont. 285, 67 Pac. 1005, it seems to be implied that since the adoption in 1895 of the Civil Code, § 2587, which provides that parties may contract in writing for the payment of compound interest, an agreement to pay interest on interest not paid when due is valid.

But a statute providing: "The parties to any bond, bill, promissory note, or other instrument of writing, may stipulate therein for a greater or higher rate of interest than 10 per cent per annum, and any such stipulation contained in any such instrument of writing may be enforced in any court of law or equity of competent jurisdiction," does not render valid a stipulation that if interest is not paid when due, it shall bear interest the same as the principal. *Wilson v. Davis*, 1 Mont. 183.

So, also, in *Co. v. Smith*, 1 Nev. 161, 90 Am. Dec. 476, a similar statute was held not to warrant compound interest, such conclusion being strengthened by the fact that the California act from which such statute was copied contained a further provision permitting the parties to agree that if interest is not punctually paid, it shall become a part of the principal, and thereafter pay the same rate of interest as the principal debt.

The question of usury.

It is thoroughly settled that a stipulation made before interest has become due, that unpaid interest shall itself bear interest, or shall from time to time become principal, and bear interest as such, does not, unless intended as a cover for usurious interest, taint the original obligation with usury. This statement is supported by *Le Grange v. Hamilton*, 4 T. R. 613; *Grider v. Driver*, 46 Ark. 50; *Carney v. Matthews*, 86 Ark. 25, 109 S. W. 1024; *Hovey v. Edmison*, 3 Dak. 449, 22 N. W. 594; *Scott v. Saffold*, 37 Ga. 384; *Bowman v. Neely*, 137 Ill. 443, 27 N. E. 758; *Burns v. Anderson*, 68 Ind. 181; *Breckenridge v. Brooks*, 2 A. K. Marsh. 335, 12 Am. Dec. 401; *Bradley v. Merrill*, 91 Me. 340, 40 Atl. 132; *Levens v. Briggs*, 21 Or. 333, 14 L.R.A. 188, 28 Pac. 15; *Baum v. Raley*, 53 S. C. 32, 30 S. E. 713; *Goodale v. Wallace*, 19 S. D. 405, 117 Am. St. Rep. 962, 103 N. W. 651, 9 A. & E. Ann. Cas. 545; *Yaws v. Jones*, — Tex. —, 19 S. W. 443; *Hillsboro Oil Co. v. Citizens' Nat. Bank*, 32 Tex. Civ. App. 610, 75 S. W. 336; *Tallman v. Truesdell*, 3 Wis. 443; and by dicta in *Ex parte Bevan*, 9 Ves. Jr. 223; *Pauling v. Creagh*, 54 Ala. 646; *First Nat. Bank v. Waddell*, 74 Ark. 241, 4 A. & E. Ann. Cas. 818, 85 S. W. 417; *Farwell v. Sturdivant*, 37 Me. 308; *Connecticut v. Jackson*, 1 Johns. Ch. 13, 7 Am. Dec. 471; *Mowry v. Bishop*, 5 Paige, 98; *Quackenbush v. Leonard*, 9 Paige, 334; *Stewart v. Petree*, 55 N. Y. 621, 14 Am. Rep. 352; *Young v. Hill*, 67 N. Y. 162, 23 Am. Rep. 99; *Van Rensselaer v. Jones*, 2 Barb. 643; *Geisberg v. Mutual Bldg. & L. Asso.* — Tex. Civ. App. —, 60 S. W. 478.

If the original contract does not provide for a higher rate of interest than the law authorizes, an agreement to pay interest on overdue interest will not render the original contract usurious. *Hager v. Blake*, 16 Neb. 12, 19 N. W. 780; *Mathews v. Toogood*, 25 Neb. 99, 41 N. W. 130; *Rose v. Munford*, 36 Neb. 148, 54 N. W. 129; *Lewis Invest. Co. v. Boyd*, 48 Neb. 604, 67 N. W. 456; *Sanford v. Lundquist*, 80 Neb. 408, 114 N. W. 279, s. c. on rehearing, 80 Neb. 414, 18 L.R.A.(N.S.) 633, 118 N. W. 129.

In *Rose v. Bridgeport*, 17 Conn. 243, it is said that to stipulate for the payment of compound interest *a priori*, although sometimes regarded as tending to usury, has never been holden to be really usurious; but it is suggested that such a stipulation may perhaps be considered as somewhat inconsistent with the phraseology of the statute which prohibits the taking of more than 6 per cent per annum, "directly or indirectly."

In *Covington v. Fisher*, 22 Okla. 207, 97 Pac. 615, it is held that a clause in a promissory note which reads "with interest at 12 per cent per annum after maturity, interest payable semiannually, defaulting interest to draw same rate as 33 L.R.A.(N.S.)

principal,"—does not make such note usurious on its face.

In *Mount v. Suydam*, 4 Sandf. Ch. 399, it was held that a mortgage drawn for \$3,000, with interest, on a loan of \$2,800, under an agreement that the interest on the loan should, as it fell due, be added to the principal until it should be made up to \$3,000, and thereafter interest should be paid upon that sum, was not usurious.

The inclusion of the amount due as interest in a note to bear interest after maturity is not unlawful. *McCrae v. Gunter*, 14 Ky. L. Rep. 5, 18 S. W. 1034.

In *Merchants' & Planters' Bank v. Caston*, — Miss. —, 52 So. 633, it was held that a note the amount of which included interest on the indebtedness for which it was given up to the time of its maturity, and which provided that it should bear interest after maturity, was not usurious, the court saying that the case of *Carter v. Holloway*, — Miss. —, 28 So. 941, which holds the contrary, was necessarily overruled by *PALM v. FANCHER*.

But in *First Nat. Bank v. Davis*, 108 Ill. 633, a note the amount of which was made up of the amount of the loan, the amount of interest at the highest legal rate which would accrue thereon up to the time of its maturity, and the amount of interest on such interest, similarly computed, was held usurious; although it was conceded that interest might lawfully have been taken in advance.

Interest coupons themselves bearing interest after maturity are not usurious. *Abbott v. Stone*, 172 Ill. 634, 64 Am. St. Rep. 60, 50 N. E. 328; *Martin v. Land Mortg. Bank*, 5 Tex. Civ. App. 167, 23 S. W. 1032.

So, also, in *Stickney v. Moore*, 108 Ala. 590, 19 So. 76, and *Graham v. Fitts*, 53 Fla. 1053, 43 So. 512, 13 A. & E. Ann. Cas. 149, it is held that "the payment of interest on overdue instalments of interest, evidenced by separate coupon notes for interest on the principal, does not constitute usury, and such interest is recoverable upon coupon notes after their maturity, which were given at the time of the accrual of a debt, for the interest accruing thereon; for, being promissory notes, it is only just that, if not paid when due, they should draw interest, by way of damages for the detention of the money."

So, also, it has been held that a stipulation in a mortgage that interest should be paid on overdue instalments, evidenced by separate notes, of interest on the principal, does not render the transaction usurious. *Ginn v. New England Mortg. Secur. Co.* 92 Ala. 135, 8 So. 388.

An agreement made before interest becomes due, that interest shall be paid on overdue instalments of interest evidenced by separate notes, is enforceable in equity as well as at law. *Stickney v. Moore*, 108 Ala. 590, 19 So. 76.

As to the effect of a statute forbidding compound interest to render coupon notes

usurious, see under heading, "Effect of statutory provisions," supra. As to whether such notes contravene statutes fixing maximum rate of interest, see *infra*.

There is a conflict of opinion as to whether a stipulation of the kind herein under consideration may be in contravention of a statutory provision fixing the maximum rate of interest; the preponderance of authority, however, being that it does not.

Thus, it has been held that a stipulation in a note bearing the maximum legal rate of interest, that interest should be paid periodically, although the principal is not payable until a future day, and that, if not paid when due, it should bear interest, does not violate a statute against the taking of more than legal interest. *Ragan v. Day*, 46 Iowa, 239; *Hawley v. Howell*, 60 Iowa, 79, 14 N. W. 199.

So, also, in *Radford v. Southern Mut. L. Ins. Co.* 12 Bush, 434, it was held that an agreement to pay interest semiannually, and that each instalment should bear interest from the time it should fall due until paid, does not violate the statute limiting the amount of interest which may lawfully be exacted, the court saying: "A party may lawfully contract for the payment of interest as it accrues, and it is not necessary that the principal debt should be due at the time the payment of accrued interest is exacted. It may be that the instalments of interest might be made so frequent or unusual as to indicate a disposition to evade the spirit of the law, and compound the interest so rapidly as thereby to secure a greater rate of interest than can be lawfully contracted for; but we cannot say that this transaction bears upon its face satisfactory evidence of such an intention. It is not unusual, when money is loaned for a long period of time, to exact the payment of the accrued interest at stated periods. It is not unreasonable that the borrower should pay interest upon accrued interest if he fails to pay it when, according to the contract, it ought to have been paid. It may be sued for and recovered, and it is neither oppressive nor unreasonable to require the defaulting debtor to pay interest on money wrongfully withheld from the creditor at the rate he agreed in advance to pay, that rate being authorized by law."

In *Taylor v. Hiestand*, 46 Ohio St. 345, 20 N. E. 345, a stipulation in a note bearing interest at the highest legal rate, that the semiannual instalments of interest, if not paid when due, should bear interest at such rate, was held not to violate a statute providing that the parties to any promissory note for the forbearance or payment of money at any future time may stipulate thereon for the payment of interest upon the amount thereof at any rate of interest not exceeding 8 per cent per annum, payable annually, although it is apparent that the note may earn in any one year as interest a sum greater than 8 per cent on the principal sum.

In *Newton v. Woodley*, 55 S. C. 132, 32 33 L.R.A. (N.S.)

S. E. 531, 33 S. E. 1, it was held by an equally divided court, affirming a judgment of the court below, that an agreement to pay interest in advance, unpaid interest to draw interest at the same rate as principal, was not usurious, although the result of such a transaction was to give the lender more than the lawful rate of interest.

In *Blake v. Yount*, 42 Wash. 101, 114 Am. St. Rep. 106, 84 Pac. 625, 7 A. & E. Ann. Cas. 487, a stipulation in a promissory note payable one year after date, with interest, that, if not paid when due, the interest should be added to and become a part of the principal sum, to bear interest thereafter at 12 per cent per annum, was held not to violate a statutory provision that no person shall, directly or indirectly, take or receive any greater interest, sum, or value for the loan or forbearance of any money, goods, or thing in action, than 12 per cent per annum, since it was within the power of the borrower to avoid paying interest on the interest by paying it to its legal and equitable owner, the court saying: "Of course, if it appears upon the face of the transaction that there is any trick or device or subterfuge by which the borrower is compelled, in order to get the money, to pay a larger amount of interest than is allowed by the statute, the note will be determined to be usurious; as, for instance, where the interest is computed in advance and added to the principal, and the maximum rate of interest charged on the principal and interest so compounded. In such case it is evident that the borrower is compelled to pay more than the maximum rate of interest prescribed by the statute, because the form of the note can in no wise change the legal character of the contract. Or, if the interest is to be paid so often, and, if not so paid, compounded, and it is evident that the intention is to obtain more than the legal rate of interest, the result would be the same. But in this case, where the interest is not due or payable until the end of a year (the cycle of time which is taken notice of by the statute), the borrower has the privilege of paying the interest at that time, and we see no reason for holding the note usurious."

There is, however, a series of Nebraska cases which hold that where the interest provided for in a promissory note is the maximum rate allowed by law, and is represented by coupon notes providing that interest shall be allowed thereon after maturity at the maximum rate, a stipulation for interest on interest will not be enforced, since, as the two notes represent but one transaction and one indebtedness, to enforce such stipulation would be to evade the statutory provision limiting the amount which can by law be taken. *Mathews v. Toogood*, 25 Neb. 99, 41 N. W. 130; *Richardson v. Campbell*, 27 Neb. 644, 11 L.R.A. 189, 43 N. W. 405; *Rose v. Munford*, 36 Neb. 148, 54 N. W. 129.

If such coupon notes had been separated and sold as independent notes to a bona

fide purchaser for value before maturity, there is but little doubt that such purchaser would have been entitled to interest after the notes became due. *Richardson v. Campbell*, 27 Neb. 644, 11 L.R.A. 189, 43 N. W. 405.

But it is only where the rate agreed upon, together with the interest on the coupons, will exceed the amount of simple interest which might lawfully have been contracted for upon the principal, that the contract is unlawful; and so, where the interest on the coupon notes from the time of maturity until the principal debt becomes due does not, when added to the interest on the principal, exceed the amount of simple interest computed at the maximum rate, it may be collected. *Murtagh v. Thompson*, 28 Neb. 358, 44 N. W. 451; *Richardson v. Campbell*, 34 Neb. 181, 33 Am. St. Rep. 633, 51 N. W. 753; *Lewis Invest. Co. v. Boyd*, 48 Neb. 604, 67 N. W. 456; *Sanford v. Lundquist*, 80 Neb. 408, 18 L.R.A.(N.S.) 633, 114 N. W. 279, 118 N. W. 129.

And the same rule applies where a stipulation for interest on interest is contained in the principal note. See *Hallam v. Telleren*, 55 Neb. 255, 75 N. W. 560.

In *Brown v. Crow*, — Tex. Civ. App. —, 29 S. W. 653, it was held that while the mere compounding of interest in a note is not, of itself, usurious, yet, if, by compounding, the legal rate of interest is exceeded, it is a violation of the law; but this decision is criticized in *Crider v. San Antonio Real Estate Bldg. & L. Asso.* 13 Tex. Civ. App. 399, 37 S. W. 237, 46 S. W. 863, as ignoring the principle that where, by the terms of the contract, payment by the time certain may avoid usury, the contract is not usurious, the interest in such case being regarded as a penalty for the default.

And in *Crider v. San Antonio Real Estate Bldg. & L. Asso.* 89 Tex. 597, 35 S. W. 1047, a position at variance with *Brown v. Crow* was taken by the Texas supreme court, which held that a note which included the amount of interest on the loan was not usurious in providing for interest on the whole amount from maturity until paid, even though the interest upon the matured interest and that upon the principal, added together, would exceed interest on the principal at the highest rate allowed by law, the court saying: "Interest is the compensation paid for the use of money and for the forbearance to sue. A contract for compounding interest upon a loan at the highest rate allowed by law is a contract for more interest than the law permits during the term of the forbearance. But a contract for the legal rate of interest during the time of the forbearance and for interest upon interest thereafter is not usurious; because the contract contemplates a continuance of the debt after maturity, only through the default of the debtor. When the debt falls due, the creditor is as much entitled to his interest as to his principal, and if the

parties have elected, in good faith, to provide for the default, and to agree that after maturity the interest shall bear interest, it is a contract for interest upon the forbearance of a new obligation which has accrued, and not a contract for additional interest upon the original principal."

E. S. O.

KENTUCKY COURT OF APPEALS.

LOUISVILLE & NASHVILLE RAILROAD
COMPANY, Appt.,
v.

D. S. GAY.

(143 Ky. 56, 135 S. W. 400.)

Carrier — refusal to accept part of shipment — effect.

A consignee of a machine shipped in parts cannot refuse to accept a tender by the carrier of a portion of the parts, although the others are missing, so as to prevent the liability of the carrier from changing from that of insurer to that of warehouseman.

(March 18, 1911.)

APPEAL by defendant from a judgment of the Circuit Court for Clark County in plaintiff's favor in an action brought to recover the value of a certain machine, parts of which were destroyed by fire while in defendant's possession. Reversed.

The facts are stated in the opinion.

Messrs. Pendleton, Bush & Bush, John T. Shelby, and Benjamin D. Warfield for appellant.

Mr. J. M. Stevenson for appellee.

Nunn, J., delivered the opinion of the court:

Appellee brought this action to recover the value of a special seed separator which was shipped to him by S. Howes & Company, from Silver Creek, New York, to be delivered to him by appellant in Winchester, Kentucky. On March 21st the depot of appellant in Winchester was destroyed by fire, and five pieces of appellee's machine, which had arrived immediately prior to that date, were also burned. The other part of the machine did not arrive in Winchester until April 6, 1906. Appellee recovered judgment in the lower court against appellant for \$420, the value of the machine, with interest from March 22, 1906, until paid. Appellant asks a reversal of that judgment for three reasons: First,

Note. — The right of shipper or consignee, as against the carrier, to refuse to accept goods damaged in its hands, is covered in the note to *Parsons v. United States Exp. Co.* 25 L.R.A.(N.S.) 842.

because the court erred in instructing the jury, peremptorily, to find for appellee; second, because the court erred in sustaining appellee's demurrer to a part of appellant's answer; third, because the court erred in holding that appellee was not required to accept a tender by appellant to make a partial delivery of the machine. Although appellant submits the foregoing propositions for a reversal, its real contention is that appellee was not justified in refusing to accept the five parts of the machine tendered to him in Winchester before the fire, solely upon the ground that one part of the machine was missing, and that, as he did so refuse, it held them not as a carrier, but under the less onerous responsibility of a warehouseman. This we consider to be the real and only question necessary to be considered by the court. We deem it unnecessary to consider the difference between the liability of one undertaking to carry, and the liability of one acting as a warehouseman. We must determine whether or not appellant's responsibility as a carrier ended before March 21, 1906, the date of the fire. If it did, its responsibility was that of a warehouseman, and the judgment will have to be reversed. The liability of the carrier cannot end until that of the consignee, owner, or warehouseman begins, and the carrier must show some open act or offer of delivery before its liability can be changed from that of a carrier to that of a warehouseman. It is agreed that the separator was "knocked down" and shipped in six separate pieces; that it was delivered to the initial carrier in this manner; and that when appellant received it from the initial carrier in Cincinnati, Ohio, and delivered it in Winchester, only five parts of the machine were to be had. These parts were offered to appellee several days before the fire, but he refused to receive them because all of the machine was not there and tendered him. If appellee had a right to refuse to accept these parts the judgment should stand, but, if he had no such right, the judgment should be reversed. Appellant says that only five parts of the machine were delivered to it in Cincinnati, Ohio; that it accepted, carried them to Winchester, and offered to deliver them to appellee there. It admitted that the machine was shipped under one contract of carriage, and, of course, this fact was known to appellant at the time it received the five parts of the machine in Cincinnati.

Appellee contends that nothing short of delivery or an offer to deliver the whole of the machine could have relieved the company of its liability as an answer, and cites from 6 Cyc. Law & Proc. p. 465, the follow-

ing: "There may be delivery and acceptance as to a part of the goods, leaving the carrier liable as to the balance. But, unless there is something to indicate a contrary agreement, the contract of carriage will be deemed indivisible, and the consignee will not be bound to accept part performance." The cases of *Sayward v. Stevens*, 3 Gray, 97, and *Chicago & R. I. R. Co. v. Warren*, 16 Ill. 502, 63 Am. Dec. 317, are cited to support this, but they do not do so in all particulars. In the Massachusetts case the owner of a vessel sued the consignee for unpaid freight on a bill of lumber. A portion of the lumber was lost from the vessel while on its way from Boston to San Francisco, and the owner of the vessel sold the balance of the lumber for the freight, but it paid only a part of it. The exact question before us was not in that case. The Illinois case was one where the shipper delivered to the railroad company about 1,700 pounds of rags packed in sacks, to be delivered at a certain point to the consignee. The railroad company attempted to deliver the consignee about 500 pounds of rags lying loose about the depot, in fulfillment of its contract of carriage. The court determined that the consignee was not compelled to receive them. They were loose; that is, they were not packed in sacks as were the rags which he delivered to the company, and there was no evidence that the rags offered to be delivered were any part of the rags shipped to him.

Appellant cites from volume 3, § 1365, *Hutchinson on Carriers*, as the true rule governing cases like the one at bar, the following: "As a general rule, the doctrine that where goods are injured the owner may abandon them as for a total loss, and sue for their value, does not apply to contracts of affreightment. The fact, therefore, that the goods are injured upon the journey, through causes for which the carrier is responsible, does not of itself justify the consignee in refusing to receive them, but he must accept them and hold the carrier responsible for the injury. Where, however, the damage is such that the entire value of the goods is destroyed, the consignee may refuse to receive them, and sue the carrier for their value. Thus, where a patented machine, while being transported from the manufacturer's, was so injured as to be practically worthless, and to cost as much to repair it as to buy a new one, it was held that the consignee was justified in refusing to receive it, and might recover from the carrier the value of the machine and the amount paid for carriage, with interest from the time when it should have been allowed. But, where

one of a number of boxes shipped was missing, it was held that the consignee was not justified in refusing to receive the balance, but was bound to accept them and hold the carrier for the missing portion." And in support of this text appellant cites the cases of *Gulf, C. & S. F. R. Co. v. Booton*, 4 Tex. App. Civ. Cas. (Willson), 103, 15 S. W. 502; *Gulf, C. & S. F. R. Co. v. Jackson*, 4 Tex. App. Civ. Cas. (Willson) 73, 15 S. W. 128. These cases do support the text. In the *Booton Case* a lot of sewing machines were "knocked down" and put up in seventeen boxes and fifteen crates. Sixteen of the boxes and all the crates were transported and offered to be delivered to the consignee, but he refused to accept them because one of the boxes was missing. The court in that case determined that under the circumstances it was his duty to receive them and hold the company responsible for the other box. In the *Jackson Case* a trunk was shipped and a portion of the articles it contained when delivered to the carrier were missing when offered to be delivered to the consignee. The court determined that it was his duty to have received the trunk when tendered to him, and that the railroad would have still been responsible to him for the value of the articles lost. The trunk and the articles it contained, which were offered to be delivered to the consignee, were of value without the missing articles. This text and these authorities do not meet the issue presented in the case at bar. The things transported and offered to be delivered to the consignee in the cases cited were of value. The five pieces of machinery offered to be delivered in the case at bar were of no value as a machine without the missing part. We have been cited no opinion by this or any other court exactly in point.

Our conclusion is that, if appellant tendered to appellee the five parts of the machine, it was his duty to receive and receipt for these parts so tendered, and look to the railroad company for the delivery of the missing part and damages, if any, for the delay; and, if not delivered, he should have attempted to supply the missing part from the factory at the expense of appellant, and, in the event he could not supply it, he could recover the full value of the machine.

For these reasons, the judgment of the lower court is reversed, and remanded for further proceedings consistent herewith.
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DISTRICT OF COLUMBIA COURT OF APPEALS.

HERMAN L. MINTON, Appt.,
v.

F. G. SMITH PIANO COMPANY OF WASHINGTON.

(36 App. D. C. 137.)

Prize — competition — right to award.

1. One who advertises an offer to give a prize to whoever rightly counts the dots in the advertisement, and states that in case of a tie a prize of equal value will be given to each one making a correct answer, cannot avoid liability to anyone making a correct answer, on the ground that the answer was not as neatly and legibly written as was the one for which the prize was awarded.

Same — decision of judges — agreement to obey — effect.

2. One who, in sending an answer to an advertised offer of a prize for a correct solution of a problem, agrees to abide by the decision of the judges does not thereby estop himself from contesting their rejection of his solution on a ground not made a condition of the contest in the advertisement.

Pleading — offer of prize — fraud.

3. An allegation of fraud is not necessary to enable one accepting an advertised offer of a prize for a correct solution of a problem, to hold the one making the offer responsible therefor in case he refuses to comply therewith, and it may be ignored if made, and will therefore not render demurrable a complaint stating the offer, acceptance, performance of the contract, and refusal of the prize.

(January 3, 1911.)

Note. — Right to maintain action for prize offered in prize contest.

Most of the cases involving the right to maintain an action for a prize offered in a prize contest are actions to secure prizes won in horse races. In such cases it is generally held that there is a sufficient agreement to support an action for the prize, and that such transactions do not come within the prohibition of statutes against gambling or wagering transactions. *Alvord v. Smith*, 63 Ind. 58; *Deliar v. Plymouth County Agri. Soc.* 57 Iowa, 481, 10 N. W. 872; *Misner v. Knapp*, 13 Or. 135, 57 Am. Rep. 6, 9 Pac. 65.

But in *Bronson Agri. & Breeders' Asso. v. Ramsdell*, 24 Mich. 441, under a statute making the racing of horses and giving of premiums therefor illegal, it was held in an action for the unpaid balance of a premium won in a horse race, that the whole proceeding, including the order on which the action was based, was illegal, and that

A PPEAL by plaintiff from a judgment of the Supreme Court entered upon demurrer to the declaration in an action for damages for deceit and for a breach of contract in the awarding of a prize alleged to have been successfully won by plaintiff. Reversed.

The facts are stated in the opinion.

Mr. William Bradford, for appellant:

The court below should have considered each of the counts of the declaration separately, upon each separate demurrer; and should have decided the issue in each case separately, in order to avoid confusion and fallacy.

Gerhard v. Bates, 2 El. & Bl. 476, 22 L. J. Q. B. N. S. 384, 17 Jur. 1097, 1 C. L. R. 868, 1 Week. Rep. 383; Denton v. Great Northern R. Co. 5 El. & Bl. 860, 25 L. J. Q. B. N. S. 129, 2 Jur. N. S. 185, 4 Week. Rep. 240; Shippen v. Bowen, 122 U. S. 576, 30 L. ed. 1172, 7 Sup. Ct. Rep. 1283; Brownlie v. Campbell, L. R. 5 App. Cas. 953; Pollock, Torts, 257.

The allegation and admission of the warranty, and its breach, are of themselves sufficient to establish the deceit, even if there were no allegation that the judges had or had not decided the question submitted to them by the parties. Carter v.

Glass, 44 Mich. 154, 38 Am. Rep. 240, 6 N. W. 200; Walsh v. St. Louis Exposition & Music Hall Assn. 90 Mo. 459, 2 S. W. 842; Ryer v. Stockwell, 14 Cal. 134, 73 Am. Dec. 634; Harson v. Pike, 16 Ind. 140; Wentworth v. Day, 3 Met. 352, 37 Am. Dec. 145; Carlill v. Carbolic Smoke Ball Co. 61 L. J. Q. B. N. S. 698 [1892] 2 Q. B. 484, 56 J. P. 665.

Mr. W. C. Sullivan for appellee.

Shepard, Ch. J., delivered the opinion of the court:

On October 17, 1909, the F. G. Smith Piano Company, a corporation engaged in business in the District, published in the Washington Daily Post the following advertisement of a prize scheme:

Free—\$675 Webster Player-Piano.
First Prize in the Great Counting Contest
of the F. G. Smith Piano Company.

Prize No. 2—\$25 in Gold.

Prize No. 3—\$20 in Gold.

Prize No. 4—\$15 in Gold.

Prize No. 5—\$10 in Gold.

Prize No. 6—\$5 in Gold.

These prizes given absolutely free to Successful Counters.

Additional prizes aggregating \$4,250 will

no action was maintainable for the money won.

A horse race for a prize does not become a wagering contract because the entrants paid an entrance fee. Hankins v. Ottinger, 115 Cal. 454, 40 L.R.A. 76, 47 Pac. 254; Porter v. Day, 71 Wis. 296, 37 N. W. 259.

But in Applegarth v. Colley, 7 Jur. 18, 12 L. J. Exch. N. S. 34, 10 Mees. & W. 723, which was an action against a stakeholder for a stake won in a horse race, part of which consisted of sums deposited by entrants and part of which was donated by a third party as a prize, whether or not plaintiff could recover the part of the wager represented by the subscriptions was left in doubt, though it was held that he was entitled to recover the amount put up by the third party as a prize.

In Wilkinson v. Stitt, 175 Mass. 581, 56 N. E. 830, it was held that an action in equity was maintainable by the members of a bicycle club, against the members of another club, to get possession of a cup won by the plaintiff club, which cup had been offered as a prize for a series of races between members of three different clubs, and was purchased by subscription of persons not members of any of the competing clubs, the court saying that the contention that the transaction was gambling, betting, or wagering was too plainly untenable to require discussion.

In Trego v. Pennsylvania Academy, 2 Sadler (Pa.) 313, 18 W. N. C. 98, 3 Atl. 819, defendant offered prizes for paintings to be submitted. The judges decided that 33 L.R.A. (N.S.)

no paintings submitted merited either the first or second prize, and awarded plaintiff the third prize. In a suit by him for the first prize, it was held that unless awarded by the judges the prize was not demandable, and a demurrer for defendant was sustained.

In Holt v. Wood, 24 Pittsb. L. J. N. S. 443, 14 Pa. Co. Ct. 499, defendant offered a house and lot worth \$2,500 to persons sending in a name which should be chosen for a new suburb, the name to be selected by a committee from those submitted. Nineteen different persons sent in the name selected, and defendant deeded the house and lot to the one first sending in that name. Plaintiff, one of the other eighteen, sued for the prize, and it was held that the transaction was not a lottery, and that plaintiff was entitled to recover; but whether he could recover the full value of the prize, or only $\frac{1}{19}$ thereof, was not definitely decided.

In Carlill v. Carbolic Smoke Ball Co. 61 L. J. Q. B. N. S. 698 [1892] 2 Q. B. 484, 56 J. P. 665, 698, defendant offered a reward to any person who, after purchasing and using according to directions a certain remedy, should contract influenza. Plaintiff used the remedy, and thereafter, in spite of its supposed powers, contracted influenza, and sued defendant for the reward. The court held that this was not a wagering contract, and not without consideration, which was furnished by the purchase and use of the remedy, and that therefore she was entitled to recover.

R. L. S.

be awarded contestants in the order of merit.

This great counting contest offers you the easiest chance you've ever had to earn a valuable prize by simply using your brains. All you have to do is to count the dots which appear in and around the outlined Webster player-piano. Then send your answer, with your name and address neatly and legibly written, to the "Contest Department," F. G. Smith Piano Company, before 6 P. M., Tuesday, October 26, 1909.

Enter the contest now. All who get their answers in within the time limit have an equal chance to earn a prize. This liberal offer is part of our plan for extending the fame and popularity of our Webster pianos and player-pianos.

Rules Governing Contest.

Count the dots and send your answer in with name and address plainly written. Only one member of a family may enter. Only one estimate will be accepted from the same contestant. No one connected with the music trade may enter. In case of ties, premiums of equal value will be given to each. Winners will be notified by mail. The correct number of dots is known only to the manufacturers of the Webster piano. This number has been forwarded in a sealed envelop to the four judges of the contest, who are representatives of the four newspapers of the city of Washington. We do not know the number, and the judges will not know it until they open the envelopes on the day the contest is decided.

Remember it costs nothing to enter this counting contest, and it requires very little time and just a little brain work to count the dots and send in your answer. Do it now!

The F. G. Smith Piano Company.

1225 Pennsylvania avenue,
Washington, D. C.

I have counted ——— dots in and around the piano player, and I agree to abide by the decision of the judges.

Name ———,

Address ———, City ———, State ———,

You may fill out this blank, or at your option use other paper.

Contest closes Tuesday, October 26, 1909, at 6 P. M.

All answers must be addressed to the "Contest Department."

The F. G. Smith Piano Company,
1225 Pennsylvania avenue,

Bradbury Building, Washington, D. C.

The appellant, Herman L. Minton, claiming to have successfully counted the dots and to have become entitled to the first prize offered therein, or its equivalent in 33 L.R.A. (N.S.)

value, began this action by a declaration filed January, 19, 1910. This declaration is in two counts.

The first count sets out in full the advertisement above quoted, declaring the same an offer to any and all persons who might undertake compliance with the same. It alleges that plaintiff, in consideration of defendants offer to give prizes to successful counters, and its promise and warranty that in case of ties premiums of equal value would be given to each, and that the judges of the contest should, within a reasonable time, decide said contest according to the "rules governing contest," and not otherwise, was induced to accept and did accept the said offer as made in said advertisement; that he counted the dots in and around said picture, and ascertained the true number to be 3,228; that on October 23, 1909, he sent his said acceptance and solution to defendant. The written statement of plaintiff's acceptance and compliance is set out, and it is alleged that it was made out by filling the blank spaces left for the number and the name and address of the answerer in the form attached to said advertisement. It further alleges that said form was deceitfully designed to entrap plaintiff and others to make in advance a promise to abide by the fraud contemplated and practised by the defendant; that plaintiff's acceptance, answer, and solution were duly received and the receipt thereof acknowledged. It then alleged facts showing that plaintiff was not within any of the exceptions of said offer of premiums as published; that having so done and made a correct answer, plaintiff became entitled to the first prize offered in case no other ascertained the true number of dots, and in case of other correct answers, so that a tie might arise, the plaintiff became entitled to receive a premium of equal value, to wit \$675; that he became entitled to notice of action on his answer in a reasonable time, and to the delivery of said prize or premium on demand; that, notwithstanding plaintiff was a successful counter and had fully performed all of the requirements of said contract, the defendant has fraudulently and tortiously neglected to deliver him either the first prize or one in equal value thereto; that in pursuance of its design to defraud plaintiff, the defendant, on November 27, 1909, addressed him the following letter.

Washington, D. C., November 27th, 1909.

Mr. Herman L. Minton,

618 7th St. N. E., City.

Dear Sir:—

The judges in our recent dot counting

contest regretted that your solution, while correct in number, did not measure up in the other two points, neatness and legibility, with other correctly numbered solutions submitted to them, so that, under the rules governing the contest, they were unable to award you one of the advertised prizes; however, they agreed that the originality of your design should have some recognition aside from contest rules, and suggested that an extra prize of \$2.50 in gold be awarded to you as a mark of appreciation, and if you will call at our wareroom, will be pleased to carry out their suggestion.

Very truly yours,

(Signed, F. G. Smith Piano Company.

(Countersigned) W. P. Van Wickle,
Vice-President.

That on December 9, 1909, it addressed him another letter as follows:

Washington, D. C., December 9th, 1909.

Mr. William Bradford,

405 5th St. N. W., City.

Dear Sir:—

We have your favor dated December 8th, in which you state that a client of yours, Herman L. Minton, claims to have entered a "contest" advertised by us in the several daily papers a few weeks ago, and that he won a \$675 piano, which has not been delivered to him.

This would be important if true, but unfortunately for Mr. Minton his statement is not correct; he won no prize, and there is absolutely no foundation for his claim.

In the contest referred to, persons were invited to compete under the printed rules governing the contest, in the Washington Post and other daily papers, we calling to mind the Star of October 21st, 1909; the rules specified that contestants were to count the dots in the advertisement, and send in their solution either on the printed coupon connected with the advertisement, or another paper at their option; the rules also stated that neatness, legibility, and accuracy (correctness of number) were to be the three points to be considered by the judges in coming to their decisions, making the awards of prizes; in other words, the mere sending in of the correct number was not of itself sufficient to win any prize; there were two other points to be complied with by all contestants; in addition to this, every contestant over his or her signature, had to agree to abide by the decision of the judges, four (4) representatives of the Washington daily papers; Mr. Minton entered the contest with this agreement, as did all contestants, the decision of the judges to be final; in this connection we wish to say that as ad-
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vertised this company had nothing whatever to do with the making of the awards of prizes, or arriving at any conclusion whatsoever relative to the awards; this was relegated to the judges, and if Mr. Minton had any grounds for complaint, it would be against the judges, from whose decision he agreed not to appeal, and not against the F. G. Smith Piano Company.

The correct number as announced by the judges was 3,238, and a great many persons sent in this number, among others Mr. Minton, and while they all had the correct number, one of the three points to be attained, many fell down on the other two points, neatness and legibility; the judges went over the correctly numbered solutions, eliminating those not up to the standard of neatness and legibility, and awarded the prizes in the order of merit to those solutions which they adjudged as the neatest and most legible; the judges did not find that Minton's solution, and many others, while correct in one point (the right number), compared with other solutions in points of neatness and legibility, the two other points to be observed, and Mr. Minton, and all others not awarded prizes, were so advised.

We trust we have made it plain that sending the correct number alone did not entitle anyone to a prize; there were other conditions to be observed under the rules; nor did sending the correct number alone by two or more persons constitute a tie under the rules, for solutions had to be not only correct in number, but so equal in point of neatness and legibility that the judges could not discriminate between them, but that did not occur; the judges found no solutions perfectly equal in all three points.

Plaintiff then further alleges that, in consideration of the representation and warranty so falsely and fraudulently made by defendant, he was induced to accept said offer supposing it to be bona fide, honest, and fair, and upon no other supposition and condition, and that his promise to abide by the decision of the judges in said contest was not absolute, but contingent upon said supposition and condition, and was nullified by defendant's fraud and deceit; that defendant has never performed the conditions on its part offered according to the terms of the same, but has fraudulently and tortiously neglected and refused to perform the same, to the great damage of plaintiff, namely, \$675.

The second count sets out the offer of the premiums as advertised, and alleges that the same was fraudulent and deceitful. It further alleges that plaintiff was

induced by the same to count the said dots, and perform all the things required by said offer and warranty to entitle him to the said prize. That he did so perform the same, and became entitled thereby to the benefit of said offer and warranty. That he has often requested the defendant to fulfil said warranty and deliver to him a premium equal in value to a \$675 Webster player-piano, but that the defendant has neglected and refused so to do, and has broken its said warranty, although all conditions precedent have been performed, and the period of time for so doing has elapsed, and plaintiff has become entitled to maintain this action. That he therefore sues the defendant for \$675 due and owing to him in consideration of the breach of said warranty. He asks judgment for said sum.

Defendant demurred to each count, assigning as one of the matters of law to be argued that neither count shows that plaintiff was a "winner" in the counting contest set out in said counts. The demurrer was sustained to each count, the opinion of the learned trial justice being stated as follows:

"If the plaintiff was induced into a contract by fraud, he can either rescind or affirm it; not both. If he affirms it, he must abide by its terms as well as the other party. By suing for its breach he appears to affirm it. One of its terms is that he shall abide by the decision of the judges, and this term is obligatory unless there was a fraudulent award by the judges. Indeed, in the absence of even an averment that the judges have or have not decided, he shows only a state of fact in which he can have no right of action."

Plaintiff declined to amend, and final judgment was entered for the defendant, from which this appeal has been prosecuted.

The appellant characterizes the first count as an action for damages for deceit, and the second as an action on an implied warranty, claiming that he is authorized to join the two counts in one declaration by the provisions of the Code, § 1532 [31 Stat. at L. 1418, chap. 854]. See also *Shippen v. Bowen*, 122 U. S. 575-582, 30 L. ed. 1172-1174, 7 Sup. Ct. Rep. 1283.

The advertised offer of a reward or premium for the performance of a specified act is a proposition submitted to all persons who may accept and comply with its condition. Until accepted it may be withdrawn; but when accepted it becomes a binding contract between the proposer and the acceptor, who shall have performed the service or done the act required.

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The formal action by the acceptor against the proposer who fails to carry out his undertaking would seem to be *assumpsit* or possibly *debt*.

It may be conceded that the declaration in this case is inartificial and redundant. It contains unnecessary charges of fraud, but its character and sufficiency are not to be determined by these, but by the substantial facts alleged. The substantial facts to be alleged are a plain statement of the offer made, acceptance, and substantial compliance by the plaintiff with the terms and conditions of the offer, and the refusal of the defendant to perform. If these appear in either count, their effect is not impaired by superfluous charges of fraud. It is substance, not form, that governs the construction.

Although plaintiff entitles the contract a warranty, yet, as set out in the count with the allegations of performance by the plaintiff, it became a contract, for the failure to perform, which he sues. Treating the first count as sounding in tort, he had the right to join therewith the count sounding in contract. Code, § 1532. While this second count might have been more specific in its details, we are of the opinion that it was not subject to demurrer. The argument that he does not show that he was a winner in the proposed contest for prizes is founded upon the contention, sustained by the learned trial justice, that he was bound by the award of the judges of the contest, unless there was a fraudulent award by them, which has not been alleged.

The acceptance by plaintiff and his agreement to abide by the decision of the judges binds him, in the absence of allegations of a fraudulent award, to accept their decision in the matters properly submitted to them under the terms of the offer, which became a contract by plaintiff's compliance with its terms. The authority of the judges of the contest must be determined by the terms of the published offer and rules governing the contest. These must be given a reasonable interpretation, and in case of ambiguity in any particular, the construction should favor the acceptor rather than the proposer who prepared and submitted the offer.

There is, however, no ambiguity. The offer states: "All you have to do is to count the dots which appear in and around the outlined Webster player-piano. Then send your answer, with your name and address neatly and legibly written, to the 'Contest Department,' F. G. Smith Piano Company before 6 P. M., Tuesday, October 26th, 1909." In the "rules governing con-

test" the following appears: "Count the dots and send your answer in with the name and address plainly written." . . . "The correct number of dots is known only to the manufacturers of the Webster-piano. This number has been forwarded in a sealed envelop to the four judges of the contest, who are representatives of the four newspapers of the city of Washington. We do not know the number, and the judges will not know it until they open the envelopes on the day the contest is decided." Then follows the form which those entering the contest are authorized to send in after filling the blank left for the number, and signing the same with the address of the signer. It appears from this that the piano company was to ascertain if the name and address were plainly written. If not, it was under no obligation to transmit the answer to the judges. By such transmission they affirmed that these were plainly written. All that the judges were required to do was to compare the number of dots given in the answer with the number contained in the sealed envelop submitted by the manufacturers. The number was plainly enough written for them to make this comparison, and they reported that the answer contained the correct number of dots. Their duty according to the terms of the advertisement was fully performed when they did this. It seems that there was very little margin for "neatness and legibility" in the answer as returned on the blank form as authorized; but whether so or not, the determination of that was entirely beyond the power of the judges, and their finding on that ground was without weight or effect. Their duty was fully performed when they found and reported that the number given in the answer was the correct one. Everything beyond that was superfluous. The actual finding that plaintiff had given the correct number in his answer entitled him either to the special first prize offered, or, in case of a tie with others, to a premium of equal value. It was not necessary for him to allege fraud in the award of the judges in respect of a matter not submitted to their judgment by the terms of the offer as published and accepted.

It was error, therefore, to sustain the demurrers, and the judgment will be reversed, with costs. The cause will be remanded with directions to grant a new trial, and for further proceedings not inconsistent with this opinion, pending which the plaintiff will be permitted to amend his declaration if so advised. Reversed.

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GEORGIA SUPREME COURT.

W. B. TATE, Plff. in Err.,

v.

MIKE GOODE et al.

('135 Ga. 738, 70 S. E. 571.)

Pleading — demurrer — joint defendants — benefit.

1. Where some of several joint defendants demur to the plaintiff's petition, and the demurrer goes to the substance of the whole petition, and challenges the plaintiff's right to any relief, such demurrer inures to the benefit of all, though some may be in default.

Appeal — reversal — remittitur — dismissal.

2. In a case described in the preceding headnote, if the trial judge overrules the demurrer, and, on exceptions of the demurrants, this judgment is reversed, and this court holds that the petition fails to state a cause of action against any of the defendants, upon the remittitur being made the judgment of the trial court, the petition will be dismissed, unless amended to meet the defects indicated by this court.

Appeal — permitting amendment of pleadings.

3. Where the remittitur is made the judgment of the trial court, reserving the right to the plaintiff to amend, and before any amendment is made, the court allows defendants who are in default to file pleading over the objections of the plaintiff, such a ruling is not a final judgment, from which a writ of error will lie.

(February 18, 1911.)

Headnotes by EVANS, P. J.

Note. — Right of one defendant to benefit of other's demurrer.

The scope of this note does not include cases arising upon answers, but some are cited in illustration and explanation.

The principle asserted in the first headnote to TATE v. GOODE was an ancient rule, applicable to defendants' other pleadings as well as to their demurrers. The matter is explained in Morrison v. Stoner, 7 Iowa, 493, where the matter arose upon an answer. The court said: "By the common law, when the makers of a joint contract were sued, the plaintiff must obtain judgment against all, or against none. The spirit of this rule still pervades the law to a greater or less extent. Thus, if one defendant pleads a defense which goes to the substance of the contract, it must, of course, inure to the benefit of the other. So, if his defense is to a part of the contract, but wholly destroys that portion as a payment of part. . . . In the case at bar, both contractors are in court. If the one pleads a matter which goes to the validity of the contract, or which is a defense for both, in its nature, on the whole or a part, and sue-

ERROR to the Superior Court for Lumpkin County to review an order allowing defendants to file pleading over the objections of plaintiff. Dismissed.

Statement by Evans, P. J.:

W. B. Tate filed his petition against Barilla D. Satterfield, Mike Goode, and several other defendants, some of whom were residents of the county where the suit was filed, and others were nonresidents. Service was had on the nonresidents by publication. In the petition it was alleged that a testator devised certain lands to A and B, and conferred upon his executor power to sell any portion of the land should this be necessary by reason of some cause unforeseen to the testator, with the consent of

the devisees. There was a limitation on the devise to A and B that, if they died leaving no child, children, or grandchildren, the property undisposed of in their lifetime "reverts to those who now by law would be entitled to the same if I had made no will." The devisees conveyed the land to the plaintiff by ordinary warranty deed, making no reference to the will, to the executor, or to the power of sale conferred on the executor. Under this deed the plaintiff went into possession of the land, and has since continued in possession. The executor was fully cognizant of and consented to the sale of the land to the plaintiff by this deed, and the plaintiff purchased the land from the executor, who acted in the premises on the authority of

ceeds, the books hold that the other, even though in default, takes the benefit of it. 1 Chitty, Pl. 47, 50, 567; 1 Wms' Saund. 153, note 1; 2 Tidd, Pr. 803; Hall v. Rochester, 3 Cow. 374; Van Schaick v. Trotter, 6 Cow. 599."

So, in *Bowman v. Noyes*, 12 N. H. 302, the court said: "We are of opinion . . . that in an action on contract against two or more, if one defendant is defaulted, and the others, under the general issue, set up and maintain a defense which clearly negatives the plaintiff's right to recover against either of the defendants, and shows that he has no cause of action, the plaintiff cannot be entitled to judgment against the defendant who is defaulted. The court ought to take notice of the defense in such case. . . . It follows that, in such case, the defendant who is defaulted cannot be a witness for the other, because he has an interest. A verdict for that other will operate to discharge him."

The same was held in *trespass*. Thus, in a case of *trespass quare clausum*, and carrying away and converting the plaintiff's goods, against A and B, judgment was given against A by default. B pleaded that, as A's servant, he had, at his command, entered, the door being open, and taken the goods as a distress for rent due by the plaintiff to A, and that thereafter the plaintiff licensed him to sell the goods and pay the rent, which he did, so far as the proceeds availed (they being not sufficient to pay in full). A verdict was found for B, but judgment was entered against A for damages. Upon a motion by A in arrest of judgment, it was argued on his behalf, "that if, in a plea personal against divers defendants, the one defendant pleads in bar to parcel, or which extends only to him that pleads it, and the other pleads a plea that goes to the whole, that last plea shall first be tried, because it goes to the whole, and the other defendant shall have advantage of it; for in a personal action the discharge of one is the discharge of both. . . . In this case, the verdict having found that the goods were sold by the defendant [B] by the plaintiff's license, 33 L.R.A. (N.S.)

that goes to the whole, as to the disposing and converting the goods to the defendant's use; and the damages being assessed entire against [A], no judgment could be given for the plaintiff against him." Of which opinion was the whole court for those reasons, and judgment was absolutely arrested. *Biggs v. Bengier*, 2 Ld. Raym. 1372.

In *Marler v. Ayliffe*, Cro. Jac. 134, it was said by way of explanation in a case of trespass against two for taking a gun and dagger away from the plaintiff, that if one defendant "justifies by gift of the goods so as he destroys the plaintiff's title, and shows that he could not have any cause of action, which is found accordingly for that defendant, although the other defendant be found guilty, yet no judgment shall be against him."

In *State v. Williams*, 17 Ark. 371, it was held in a suit on a forfeited recognizance to which one defendant demurred, that his demurrer, if successful, discharged a non-demurring defendant, unless the nature of the plea was of a character going to the personal discharge of the pleader, as distinguished from one challenging the cause of action.

Where the demurrer of one defendant in a chancery suit is not personal, but goes to the foundation of the complainant's right to recover upon the case stated, it is not error to dismiss the cause not only as to the demurrant, but also as to his co-defendant, although the latter failed to appear and make defense. *Harrison v. Wallton* (Harrison v. Turnbull) 95 Va. 721, 41 L.R.A. 703, 64 Am. St. Rep. 830, 30 S. E. 372.

In an action for the construction of a will and to remove a cloud on title, the court said: "The record shows that but two of the defendants appeared in the court below and demurred to the bill, and it is insisted that it was error to dismiss it as to all the defendants. The demurrer by the two defendants made an issue upon the bill, which, being sustained, left nothing to be decided by the court. It does not appear that the complainant asked that it be retained as to the defendants not appear-

and by the consent of the devisees, A and B, and the sale was made pursuant to the provisions in the will. The devisee B died without children or grandchildren, and the devisee A is still in life, more than eighty years of age, and has no children or grandchildren, and the possibility of issue is extinct because of her great age. The defendants claim to be entitled under the will to the land on the death of A, and such claim operates as a cloud on the plaintiff's title. The prayers were that the defendants be required to set up their claim to the land, and that a decree be

granted establishing the plaintiff's title, for injunction, etc. Some of the defendants failed to appear, and a default was noted on the docket. Others demurred and filed answers. Among the grounds of the demurrer were that the petition showed no title to the fee of the land in the plaintiff, and that no equitable right against the defendants was set forth. The demurrer was overruled, and the plaintiff submitted certain evidence, upon the conclusion of which a verdict was directed in his favor. The defendants who demurred and answered sued out a bill of exceptions, and this court

ing, for the purpose of determining any rights personal to them, and it is perfectly clear that the complainant could have no equities against them distinct from her rights against those who did not appear. The court, having determined that, upon the face of the bill, the complainant was not entitled to the relief prayed, might, of its own motion, have dismissed it." *Griffiths v. Griffiths*, 198 Ill. 637, 64 N. E. 1069.

On a petition to redeem from a tax sale, the court said: "It is contended that the petition should not have been dismissed as against the defendant O'Hanlon, because he did not join in the demurrer. We think the ruling upon the demurrer in effect disposed of the case as to all the defendants. The petition sought to redeem the land from a tax sale to the defendant Stone. All the other defendants held under him. If there was no right in the plaintiff to redeem from Stone, there was no right to redeem from his grantees." *Byington v. Stone*, 51 Iowa, 320, 1 N. W. 647.

The principle, however, is not of universal acceptance. In *Williamson v. Joyce*, 140 Cal. 669, 74 Pac. 290, an action to foreclose an assessment lien, a demurrer of one defendant was sustained, and before the entry of judgment thereon, the other defendant put in a "cross complaint" to which the plaintiff filed an answer, after which judgment was entered on the demurrer. It was held that there was nothing in the contention of the plaintiff that it was error to enter such judgment before the issues arising on the "cross complaint" had been disposed of. The court said: "The complaint failed to state facts sufficient to constitute a cause of action against Joyce, and the judgment given upon the demurrer can have no greater effect than to prevent the plaintiff from proceeding upon his complaint as against Joyce. It does not affect the other parties to the action, nor does it prevent the court from proceeding upon the cross complaint of Winders, and determining all the issues tendered thereby." While the report is not full, it would seem to indicate that the defects challenged by the demurrer were fatal to the cause of action as to both of the defendants.

In *Farwell v. Jackson*, 28 Cal. 105, an action of foreclosure brought by the pledgee of a mortgage, one defendant demurred, and 33 L.R.A. (N.S.)

other defaulted in pleading and appearance, and the third was not served; the demurrer was sustained and judgment rendered against the plaintiff in favor of all the defendants. On appeal the demurrer was held bad, and it was held that "the judgment in favor of the defendant who was served, but did not appear in the action, cannot be sustained, whatever may be the nature of the action." It would seem that the demurrer did not reach the root of the cause of action; and that the defaulting defendant joined the plaintiff in his appeal.

Some of the cases seem to deny the principle, but leave it in some doubt whether the court meant to do more than rule that it was not applicable in the particular case. Thus, in *Dyal v. Hays*, — Ark. —, 12 S. W. 874, an action to enforce a vendor's lien, it was held that the legal effect of the sustaining of a separate demurrer was to dismiss as to the demurrant, leaving the action pending as to the other defendants. It does not appear that the demurrer touched the cause of action against the other defendants.

And in *National Ins. Co. v. Bowman*, 60 Mo. 252, it was held error to give judgment in favor of both defendants in an action against partners on a promissory note when only one of them filed a demurrer. As an additional ground for its decision, the court held the demurrer frivolous.

Where, in an action to recover money paid upon fraudulent representations, there were two defendants, one of them not served with process and not appearing or pleading, the other's demurrer was sustained, and the action dismissed as to both defendants. Upon a writ of error to which both of the defendants were cited, it was held that the demurrer should have been overruled, the court holding further that, as the nonserved defendant was not in the court below, it was error to sustain the demurrer and dismiss the action as to him. It seems that the legal liability of both defendants was substantially the same. *United States v. Piatt*, 157 U. S. 113, 39 L. ed. 639, 15 Sup. Ct. Rep. 498.

It is held in Georgia that when one of the defendants demurs separately for the want of equity, the bill will not be dismissed as to the other defendants, though there may be no equity as to them. Sustaining the demurrer dismisses the bill as

held that the demurrer should have been sustained. *Satterfield v. Tate*, 132 Ga. 256, 64 S. E. 60. When the remittitur from this court was offered to be made the judgment of the trial court, the plaintiff claimed his right to amend his petition to cure the defects pointed out by the supreme court; and the trial court passed an order making the judgment of the supreme court the judgment of the trial court, "reserving the right to plaintiff to offer any amendment which may be adjudged to be legal as if offered before this order is signed." Pending the submission of an amendment, cer-

tain defendants who were in default, and had not accepted to the final decree, applied to the court to be permitted to file a demurrer and answer in the case. To this the plaintiff made written objections upon the grounds that applicants had been adjudged to be in default, which judgment of default has never been opened, and they were estopped from further litigation by the final decree, to which they did not except, and were not further parties to the cause. The court then passed an order, adjudging that the parties offering to plead were entitled to do so, and that their plead-

to him only. *Ballin v. Ferst*, 55 Ga. 546. And this is probably what the court intended to decide in *Byrom v. Gunn*, 111 Ga. 805, 35 S. E. 649, where it is held that "when a petition is filed against two defendants, a separate demurrer by one of them in his own name and behalf only affords no cause for dismissing the petition as to the defendant who does not demur."

Conversely to the principle first referred to, where the demurrer of a defendant does not touch the cause of action against his codefendant, the latter will take nothing by such demurrer.

Thus, in an action for personal injuries against a lot owner and a city on account of negligence in the condition of a sidewalk, the separate demurrer of the lot owner having been sustained, it was claimed on the trial that there was no petition in court. The appellate court said: "The action of the court in sustaining the insurance company's demurrer to the plaintiff's petition in no way affected the cause of action therein stated against the city. The company thereafter was in court for one purpose only,—to take judgment on the demurrer,—and had no right to interpose objections upon the trial of the issue of fact joined between the plaintiff and the city on the amended petition of the plaintiff and the answer thereto of the city. The petition not having been demurred to by the city, or adjudged insufficient, in whole or in part, as to such defendant, nor any part of it stricken out on motion, it was not necessary that a further amended petition should have been filed." *Norton v. St. Louis*, 97 Mo. 538, 11 S. W. 242.

And whether averments are sufficient against a codefendant cannot be challenged by a demurrant on his separate demurrer to a paragraph which clearly states a cause of action against him on other grounds. *Lake Erie & W. R. Co. v. Charman*, 161 Ind. 95, 67 N. E. 923.

The following cases arising upon answers may be referred to in illustration:

In *State use of Peterson v. Gibson*, 21 Ark. 140, on action of debt the court said: "Three of the defendants having interposed pleas in bar of the whole action, a finding in their favor necessarily inured to the benefit of the party in default; and he, as well as the others, was entitled to a judgment of discharge."

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Where, in an action at law for the possession of a slave, two defendants defaulted and two others answered and had judgment, the court said: "The defense made by Mary and Sarah, which resulted in the verdict and judgment for them, was not based upon any ground personally to themselves, but was equally available by the other defendants, and was such as showed that the plaintiff had no cause of action. And it is the settled law in such cases that after verdict and judgment for the defendant who pleads, the plaintiff cannot take judgment against the defendants in default, for the reason that, upon the whole record, it appears the plaintiff has no right of action." *Adderton v. Collier*, 32 Mo. 511.

In *Tod v. Stambaugh*, 37 Ohio St. 469, the supreme court of Ohio, in reversing a judgment of the intermediate court, and in sustaining the trial court in upholding a demurrer to an answer, held that where an answer in equity of one defendant was, if correct, a good answer as to all the defendants, it operated equally as a defense to the nonanswering defendants; and it was also held that where such an answer by one defendant was held bad on demurrer, judgment of reversal could not be entered solely in favor of the answering party.

While without the scope of the note, it may be of interest in this connection to refer to *Walker v. Page*, 21 Gratt. 636, where the court said in respect to appeals as to non-appealing parties: "The rule established by the practice and decisions of this court may be stated to be this: Where the parties stand upon distinct and unconnected grounds, where their rights are separate, and not equally affected by the same decree or judgment, then the appeal of one will not bring up for adjudication the rights or claims of the other. . . . But where the parties appealing and the parties not appealing stand upon the same ground, and their rights are involved in the same question, and equally affected by the same decree or judgment, this court will consider the whole case, and settle the rights of the parties not appealing, as well as those who bring their case up by appeal." Quoted and followed in *Saunders v. Griggs*, 81 Va. 506.

B. B. B.

ings be allowed filed as timely pleadings in the case. Exceptions are taken to this judgment.

Messrs. W. A. Charters, H. H. Dean, L. C. Tate, and Samuel H. Sibley for plaintiff in error.

Mr. H. H. Perry, for defendants in error:

If the ground of demurrer is common to all, the bill will be dismissed as to all, though some did not appear.

Saunders v. Griggs, 81 Va. 506; Walker v. Page, 21 Gratt. 636; Smith v. Cooper, 21 Ga. 359; Lewis v. Chisholm, 68 Ga. 42.

Messrs. O. J. Lilly and R. H. Baker also for defendants in error.

Evans, P. J., delivered the opinion of the court:

The only matter passed on by this court was the correctness of the judgment overruling the demurrer of the excepting defendants. When that judgment was found to be erroneous, the subsequent proceedings, at least, as against the demurrants, were nugatory and presented no question for adjudication. Jones v. Hurst, 91 Ga. 338, 17 S. E. 635. It will be observed from the statement of facts that the grounds of the demurrer went to the right of the plaintiff to maintain his cause of action, and were common to all the defendants. The trial court was called upon to adjudicate, and did erroneously adjudicate, that the plaintiff had such title as could be asserted against all the defendants as residuary devisees under the will of the common propositus. If the trial court in the first instance had sustained the demurrer, that judgment would have inured to the benefit of all the defendants; because it is a general rule that, if one defendant pleads matter whereby it appears that the plaintiff has no cause of action against any defendant, and obtains a verdict, the plaintiff is not entitled to judgment against a defendant who has defaulted. Biggs v. Benger, 2 Ld. Raym. 1372; Marler v. Ayliffe, Cro. Jac. 134; State v. Gibson, 21 Ark. 140; Bowman v. Noyes, 12 N. H. 302; Adderton v. Collier, 32 Mo. 507; Morrison v. Stoner, 7 Iowa, 493. When the trial court erroneously overrules a demurrer interposed by some of the defendants, which goes to the very vitals of the plaintiff's case, and the parties excepting and those not excepting stand upon the same ground, and their rights are involved in the same question, and equally affected by the same decree or judgment, the judgment of reversal will operate in favor of all the defendants. Willie v. Thomas, 22 Tex. 175; Walker v. Page, 21 Gratt. 636; Tod v. Stambaugh, 37 Ohio St. 469. The adjudication by this court was that, under the alle-

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gations of the petition, the plaintiff had no other title than that of a tenant *per autre vie*,—that is, for the life of the surviving devisee, A,—and was not entitled to maintain the action against the residuary devisees of the testator, when the defendants were alleged to be. Satterfield v. Tate, 132 Ga. 256, 64 S. E. 60. So that the judgment of this court operates as a reversal of the decree as to all the parties to the case.

We have found it necessary to actually decide the controlling point in the case on its merits, as a premise to the point actually up for decision; *viz.*, that the writ of error is premature because no final judgment has been rendered. When the remittitur was made the judgment of the court, it was in order for the petition to be dismissed, unless its defects, as pointed out in the decision of this court, were cured by appropriate amendment. No amendment has been made, so far as this record discloses. Unless the petition be amended, the petition must be dismissed; if amended, then the case will still pend. If the amendment will suffice to hold the petition in court, necessarily it is a material amendment which will open a default. Calhoun v. Mosley, 114 Ga. 641, 40 S. E. 714; Lippman v. Aetna Ins. Co. 120 Ga. 247, 47 S. E. 593. The interlocutory character of the judgment complained of, as well as the uncertain status of the plaintiff's petition, furnishes no basis for a writ of error.

Writ of error dismissed.

All the Justices concur.

MICHIGAN SUPREME COURT.

FRANCIS H. WARREN

v.

WILLIAM F. CONNOLLY, Judge.

(— Mich. —, 130 N. W. 637.)

Contempt — charging bribery of jury — power of court to compel justification.

The court cannot by *ex parte* order require the publisher of a newspaper, although he is also an attorney at law, to justify in open court an article in which he raises a suspicion that the jury was bribed in an action tried before the court, where the information may necessitate the naming of persons in good standing before the community, and subject the publisher to libel suits.

(March 31, 1911.)

PETITION for a writ of mandamus to compel respondent to show cause why

Note. — WARREN v. CONNOLLY seems to be a case of first impression upon the question whether a court has power to require the

an order requiring relator to justify the publication of certain articles should not be vacated. Writ granted.

The facts are stated in the opinion.

Messrs. Warren & Marshall, for relator.

Mr. Stewart Hanley, *amicus curiae*:

Every regularly constituted court has inherent powers to do all things that are reasonably necessary for the administration of justice within the scope of its jurisdiction.

8 Am. & Eng. Enc. Law, 2d ed. p. 28; Denton v. Erwin, 5 La. Ann. 18.

The court had the authority to direct relator to make the required statement.

Randall v. Brigham, 7 Wall. 523, 19 L. ed. 285; Re Wool, 36 Mich. 299; 7 Am. & Eng. Enc. Law, 2d ed. p. 44; Mechem, Pub. Off. § 24; 4 Enc. U. S. Sup. Ct. Rep. p. 887; 1 Wait, Act. & Def. 430; 2 Enc. U. S. Sup. Ct. Rep. p. 709; Ex parte Secombe, 19 How. 9, 15 L. ed. 565; Bradley v. Fisher, 13 Wall. 335, 20 L. ed. 646; Kneeland v. American Loan & T. Co. 138 U. S. 509, 34 L. ed. 1052, 11 Sup. Ct. Rep. 426; Weeks, Attorneys at Law, §§ 91, 92; Langdon v. Wayne Circuit Judges, 76 Mich. 358, 43 N. W. 310; Rapalje, Contempts, 2; Ex parte Briggs, 64 N. C. 202.

Moore, J., delivered the opinion of the court:

On December 6, 1910, one Wesley B. Schram was tried in the recorder's court of the city of Detroit before the Honorable William F. Connolly, judge of the recorder's court, upon the charge of unlawfully discriminating against one Emma Davis, for the reason that she was a colored person. The case was in the recorder's court on appeal from the police court. The trial resulted in a verdict of not guilty, and the defendant, Schram, was accordingly discharged.

On the 10th day of December, 1910, an article appeared in a newspaper called the Detroit Reformer, reading as follows:

disclosure of facts upon which intimations of corruption or misconduct by the jury or officers of court are based.

A note on the question of the necessity of finding the facts before finding one guilty of contempt is appended to Hoffman v. Hoffman, 30 L.R.A.(N.S.) 564.

And the note appended to Haaren v. Mould, 24 L.R.A.(N.S.) 404, deals with the right to take judicial notice of a decree in a proceeding to punish a violation of the same as a contempt.

Whether a judge is qualified to sit on a trial for contempt consisting of reflections upon himself is discussed in the note to Lamberson v. Superior Ct. 11 L.R.A.(N.S.) 619.

Attention is also directed to the following 33 L.R.A.(N.S.)

Was the Jury Fixed?

Prosecutor Aldrich Made a Very Strong Case for the People in the Majestic Theater Case.

Despite the fact that defense made weak case, the jury, after being out several hours, said defendant, Schram, was "not guilty."

Charge of Judge Connolly a Correct Statement of the Law.

The Emma Davis-Majestic Theater Case, otherwise known as the case of the People v. Wesley B. Schram, was tried in Judge Connolly's court, Tuesday, December 6. Judge Aldrich appeared for the people and made an exceptionally strong case. Misses Davis and Gertrude Thompson were the People's witnesses, and told a clear, straight forward story of their exclusion from the theater, expressly because "this place is not for colored people," and "if you don't go out, we will throw you out."

Defense Looked Like "Frame Up."

Mr. Frank D. Eamans was the defendant's counsel, and he made a rather novel, but apparently weak, defense. Setting up as facts that the two young ladies were politely told that the seats they occupied belonged to a lady and child who had gone to the retiring room, and that because of this gentle treatment they left the theater in a huff. But the very witness sworn for the defense admitted that the "lady and child" were given other seats, that seats were being vacated all the time, and others filling them. This witness got badly tangled in his testimony, and others were nearly as bad, exemplifying the old saying about certain persons needing "a long memory." Mr. Eamans made a strong plea to the jury, but his position was shot all to pieces by the powerful logic of Judge Aldrich.

Was the Jury Fixed?

And it seemed to many that the defend-

notes, dealing with the questions whether contempt may be committed:

—by a refusal to produce books or papers in response to a subpoena, upon the ground that they contain private matter. 29 L.R.A.(N.S.) 716;

—by publishing an inaccurate report of a court decision, 17 L.R.A.(N.S.) 583;

—by the disclosure by a grand juror of evidence given before the grand jury. 17 L.R.A.(N.S.) 1049;

—or by reflecting on a judge as a ministerial officer. 15 L.R.A.(N.S.) 621.

Other notes dealing with various specific aspects of the question what amounts to a contempt are referred to in the index to notes under the title "contempt."

L. A. W.

ant would surely be convicted by the jury under the correct statement of the law of the case by Judge Connolly. But a suspicious incident took place just as the jury was entering the jury room. One of the jurors tarried in the court room fumbling with his coat and hat, and had a conversation with the officer in charge of the jury. When the case first started this same officer was seen to receive a small package resembling money. Of course, there may have been no connection between the two acts of this officer receiving the small package and his conversation later with the juror, who apparently hung back for that purpose. Nor yet between either or both of these incidents and the verdict of the jury, and the Informer does not claim there is.

Mrs. Davis, mother of Miss Emma, and others, were told of these incidents at the time, and to look out for a verdict of not guilty, or a disagreement if the jury were out very long. In view of the verdict as thus predicted, the incidents referred to have at least a suspicious look.

Defendant Fined by Judge Jeffries.

This is the same case in which the defendant was fined \$50 by Judge Jeffries when the case was tried in his court, and defendant was found guilty. He appealed the case to Judge Connolly's court, and here the jury discharged him as shown above.

An editorial appeared in the same issue as follows:

"The incidents related in another column of this issue, that cast a suspicion that there was a connection between the acts of court officers and verdicts of the jury, should never occur in courts of justice. The officials having in charge the jury to determine the right or wrong of a case should be like Cæsar's wife, above suspicion. There should be no clandestine passing of suspicious looking packages, no conversation with any of the jurors as they are passing into their room to judge the acts of defendants. They should stand out in the open all the time, and never do or say anything that could possibly lead one to believe that they were other than strictly honest in their official conduct."

Upon the same day, and without notice to the relator, the following order was entered:

"In the Recorder's Court of the City of Detroit.

"In re Francis H. Warren."

Connolly, J. The Session of December 10, 1910.

The Court: It appearing to the court that a paper called the Detroit Informer, which purports to be edited by Francis H. Warren, who is a member of this bar, contains 33 L.R.A. (N.S.)

an article which the court feels reflects upon the conduct of the officers in charge of the jury in the case of the People v. Wesley B. Schram, by innuendo, and there appearing in the same edition an editorial in corroboration of the article, the court enters an order directing the said Francis H. Warren to file upon oath a statement of facts justifying the publication of this article, on or before Thursday, December 15th, at 9:30 A. M. Mr. Clerk, you will notify Mr. Warren of the order of the court."

Mr. Warren appeared before the court and stated he was appearing, not as an attorney, but as publisher and editor, and that he was willing to give the court all the information he had under oath, if desired, but not in open court. The court declined to receive this information, and a motion was made to vacate the order of the court for the following, among other, reasons:

"(1) The article complained of by the honorable court contains all the information necessary to aid the court in making such investigation it may see fit to make. There was but one officer that had charge of the jury in the case of the People v. Wesley B. Schram at the time it retired, and the court well knows who that officer is, and if he is an honest man, as he is said to be, he will tell the court all about the incidents referred to in the Detroit Informer, and should have told of them before now. Then there was but one juror who hung back in the court room after the others had entered the jury room. If his conversation with officer was innocent, he should step to the front and relieve his fellow jurors of suspicion. There was but one person who handed the officer the package 'resembling money.' This man is well and favorably known, but if his act was innocent of wrong, doubtless he can give the court a satisfactory explanation of the incident, for he knows Francis H. Warren saw it.

"(2) For the reason that the demand made in the order of December 10, 1910, calls for matter in a public way that is more properly the subject of private examination, resembling matters that should be examined by grand juries. . . .

"(5) There is no legal duty devolved upon publisher to comply with the court's order until matter is brought up in regular manner."

The notice to vacate was overruled, and the case is brought here by mandamus.

The attitude of the relator and the respondent is indicated by the following extract from the record. Mr. Warren is addressing the court:

It may be that the incidents referred to were innocent, and if they are, certainly

I ought not, as publisher of the Detroit Informer, to be made to expose these gentlemen in a criminal matter by making a criminal charge under oath. Your Honor can sit as a grand jury; the same matter may be disposed of by the grand jury method, by the court taking the place of a grand jury. The court says it does not approve of star chamber sessions; but the ordinary grand jury sessions are star-chamber sessions. Nothing is supposed to leak out from the grand jury, and nothing should leak out from an investigation of this kind, unless the court is satisfied that a crime has been committed. Let me point out that the Detroit Informer did not claim that a crime has been committed, but there was only a suspicion that there might have been a crime committed, and that gave rise to the question that the court objected to or does object to.

The court: You are entirely mistaken in your position of the attitude of the court—

Mr. Warren: Apparently you did object, or you would not have called me in to make a sworn statement about what I stated in the Informer.

The court: The natural inference was that some officer of the court, and jurors of the court, who were and are officers of the court, had so comported themselves as to render them open to the suspicion of fixing somebody, or being fixed. You are an officer of this court. As an attorney—

Mr. Warren: I am not appearing in this matter as an officer of the court. I am appearing as publisher and editor of the Detroit Informer.

The court: You cannot be a dual personality with reference to this. If you have any facts upon which to base a statement that this jury was fixed, and that any man on this jury was fixed, or that any officer did any act which would lay him open to the suspicion that he had tampered with the jury, the court is entitled to know it, and it is your duty to give it.

Mr. Warren: Not in open court.

The court: Why not?

Mr. Warren: Because it may be that the acts could be explained without exposing them to the open.

The court: You have done worse than that. In the way you publish the story no one knows who is the responsible one; and, among other things, one of the honored officers of this court has been retired since this thing happened; and we want to know, if anybody is under suspicion, who he is.

Mr. Warren: You are perfectly welcome to the information, but not to file it in a public way. The law says,—the Supreme 33 L.R.A. (N.S.)

Court says that written complaints are unnecessary.

The court: That may be; but I don't want to do anything as judge of this court which is not public. I do not propose to have any man accused, unless in public. If any man is under suspicion, or is to be accused, I want him in public where he can hear it and defend himself against it. I won't allow any body to be accused in any other way.

Mr. Warren: In the very case that the court cited last Monday, the case of George W. Parker, the court does not say that it must be in the open; it does not direct that the investigation must be in the open, the preliminary investigation.

The court: The judge who wrote the opinion says that the practice indulged in in the Ascher Case was bad. That's what he does say. . . . Here is a case where an individual's constitutional right is involved, the equal right of a man to be treated the same as every other man, notwithstanding his color; and you print an article in your paper to the effect that the jury was fixed,—not saying that the jury was fixed, as a bald statement, but, by the use of that figurative form that is well recognized in rhetoric, asking the question, "Was the jury fixed?" which is tantamount to the expression,—

Mr. Warren: It is one thing to entertain a suspicion and another thing to make a charge.

The court: A suspicion may be more damning than a charge.

Mr. Warren: There is no law resting upon me to convey this information to the court.

The court: I think there is.

Mr. Warren: I wish the court would point it out.

The court: There is the oath which you took as an officer of this court when you were admitted to the bar.

The court: You occupy a peculiar position different from the ordinary individual, with reference to the court. You are an officer of the court, and as such, where anything affects the integrity of the court's proceeding or the administration of justice, your duty, it seems to me, is plain.

Mr. Warren: I have made no claim where it did affect it.

The court: I think you have.

Mr. Warren: If the court takes that view of it, we will have to try it out on that ground. But I claim I have made no such claim. I said these acts, specifically, may be innocent, but they gave rise to a suspicion; and not only in the article itself, but in the editorial, I say so.

The court: What the court wants to know,—the court will determine whether or not the acts are suspicious, or criminal,—but the court wants to know what the acts are.

Mr. Warren: The court is entitled to know; but not in public. That is the position we take in this matter, just the same as a grand jury is entitled to know.

The court: I think any proceedings of a court ought to be public. I do not propose to be led by anybody into the policy of holding secret investigations of anybody. Any time a man comes into my court, he is going to be where he can hear it, and if he isn't around he is not going to be accused.

Mr. Warren: There is no objection to his presence, and his hearing these things; hearing them right there with me and you.

The court: If you have any facts, and the court tells you it is your duty to indicate them, I can't see why you should hesitate.

Mr. Warren: I do not think the court has the right to censor publications, unless they are absolutely criminal.

The court: I am not trying to censor your publications.

Mr. Warren: That would be the effect of your order.

The court: Oh, no. I am trying to get from you all the facts.

Mr. Warren: If the suspicion proved groundless, then every one of these men could sue the Informer for libel.

The court: I think not.

The attorney who appears for the respondent says in his brief: "It would be well, we believe, at the outset of this discussion, that it be understood that the order entered by Judge Connolly was not for the purpose of censoring relator's publication, nor to punish relator as the publisher of the articles in question. The proceeding was solely for the purpose of requiring Mr. Warren, an officer of the court, to disclose those facts within his knowledge upon which were based the articles casting suspicion upon the jury in the Schram Case and the officers in charge thereof. Mr. Warren indicated his willingness to give these facts to the judge in private, but objected to filing such a statement in open court, as requested by the judge."

It appears to us that if that was the only purpose of the court, the relator indicated a willingness to do all he should be required to do to realize that purpose. Counsel say: "The court had authority to direct the manner in which Mr. Warren made his statement. Upon this point the only question involved is whether the court had authority to order Mr. Warren to file 33 L.R.A. (N.S.)

the required statement under oath in open court. By asking permission to file such a statement, but only for the private perusal of the judge, Mr. Warren practically concedes that the court had authority to demand the statement, but only questions the authority of the court to direct this to be done in open court." And cite in support of this proposition the language used in *People v. Parker*, 145 Mich. 488, 108 N. W. 999. A reference to the case will show that what was said does not refer to something which occurred out of court and after the trial was over, but related to an investigation during the progress of the trial, in which investigation the parties to the litigation were deeply interested. This was also true of the inquiry in the case of *Re Ascher*, 130 Mich. 540, 57 L.R.A. 806, 90 N. W. 418. The language quoted in the brief by the attorney for the respondent shows it was not necessary to the disposition of the case, and the justice writing the language was careful to say, "Speaking for myself, I desire to say I do not regard that as the proper practice." We find nothing in those cases to indicate that the course suggested by the relator was not a proper one.

We again quote from brief of counsel for respondent: "No court is bound to await the complaint of a third party before investigating any matter touching the misconduct of its officers, when information considered sufficient is received, and the circumstances in its judgment demand its interposition. The court alone is to judge of the grounds upon which a rule may issue. *Randall v. Brigham*, 7 Wall. 523, 539, 19 L. ed. 285, page 293; *Re Wool*, 36 Mich. 299." We submit that this matter is controlled by *Randall v. Brigham* and *Re Wool*, supra.

A reference to the two cases will show that they were both disbarment proceedings. In the last of these cases the disbarment proceedings grew out of what appeared in a chancery case, heard and decided by the court in which the disbarment proceedings were pending. In disposing of the case the court used the following language: "The charges made against Wool in the bill of complaint, which formed the only basis of action in that case, were such as, if true, were enough to render him deserving of punishment. If no such suit had been brought, and a complaint had been laid before us against him, a full hearing on evidence taken in some adequate way would have been necessary. But no method of examination adopted in summary proceedings could have been so full or suitable as that furnished by the issues and hearing in an equity cause, where the witnesses are

examined and cross-examined in such manner as the parties desire, and there is time for an exhaustive scrutiny. After such a hearing there is no very good reason why any further showing on the main facts should be had, unless under circumstances which would justify a rehearing. Accordingly, where the court has itself heard the cause and passed upon the facts, as is done in equity, an order to show cause is properly based on the decree, and might have been incorporated in the decree itself.

In the case of *Randall v. Brigham*, supra, the court said, among other things: "The informality of the notice, or of the complaint by the letter, did not touch the question of jurisdiction. The plaintiff understood from them the nature of the charge against him; and it is not pretended that the investigation which followed was not conducted with entire fairness. He was afforded ample opportunity to explain the transaction and vindicate his conduct. He introduced testimony upon the matter, and was sworn himself. It is not necessary that proceedings against attorneys for malpractice or any unprofessional conduct should be founded upon formal allegations against them. Such proceedings are often instituted upon information developed in the progress of a cause, or from what the court learns of the conduct of the attorney from its own observation. Sometimes they are moved by third parties upon affidavit; and sometimes they are taken by the court upon its own motion. All that is requisite to their validity is that, when not taken for matters occurring in open court, in the presence of the judges, notice should be given to the attorney of the charges made, and opportunity afforded him for explanation and defense. The manner in which the proceeding shall be conducted, so that it be without oppression or unfairness, is a matter of judicial regulation."

So far as these cases are in point, they are against the contention of respondent. In the case at bar we have an *ex parte* order entered, not in the alternative, but requiring the relator to justify in writing under oath and in open court, an act which occurred out of court. Our attention has not been called to any authority justifying such an order.

The writ of mandamus will issue as prayed, but without costs to either party.
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NEBRASKA SUPREME COURT.

RE ESTATE OF MARY A. GRAY, Deceased.

ROBERT E. NEITZEL, Exr., etc., of Mary A. Gray, Deceased, Appt.,

v.

HARRIET E. PURCHASE et al.

(88 Neb. 835, 130 N. W. 746.)

Trial — instruction — absence of evidence.

1. In a contest over the probate of a will, it is error to instruct the jury that their verdict will be that the instrument offered for probate is not the will of decedent, if they find she did not sign it, where the evidence is insufficient to sustain such a finding.

Witness — privilege — capacity of testatrix.

2. In a contest over the probate of a will between the persons therein named as an executor or a legatee, and the heirs at law of decedent, § 333 of the Code of Civil Procedure, forbidding the disclosure of privileged communications, does not prevent a physician from testifying on behalf of either side of the controversy to the mental condition of testatrix, though the information which enables him to do so was acquired solely in his professional capacity while attending her during her last illness.

(March 24, 1911.)

APPEAL by proponent from a judgment of the District Court for Douglas County denying probate of the will of Mary A. Gray, deceased. Reversed.

The facts are stated in the opinion.

Messrs. McGilton, Gaines & Smith, and T. A. Hollister for appellant.

Messrs. John C. Wharton and Byron G. Burbank for appellees.

Rose, J., delivered the opinion of the court:

In this suit the will of Mary A. Gray, deceased, is contested. It was dated and witnessed at her home in Waterloo, Douglas county, October 31, 1907, and she died at the same place November 8, 1907. Robert E. Neitzel was named in the will as

Headnotes by ROSE, J.

Note. — The question of the competency of an attending physician to testify as to the mental capacity of the testator, in a will contest, is covered in the note to *Auld v. Cathro*, 32 L.R.A. (N.S.) 71.

an executor, and is the proponent. The principal legatee is Electa A. Teal, with whom testatrix lived at the time of her death. They were relatives by marriage, but not by blood. When proponent presented the will to the county court of Douglas county for probate, the heirs at law of testatrix, who are contestants, made a number of objections, among which are the following: Testatrix was not of sound mind when she pretended to execute the will. She did not sign it. She did not execute it. In undertaking to make the will, she was unduly influenced by Electa A. Teal. The county court overruled all the objections, and admitted the will to probate. Contestants appealed to the district court, where a trial resulted in a verdict in their favor. From a judgment reciting that the instrument offered for probate is not the will of Mary A. Gray, deceased, proponent has appealed to this court. The real controversy is between the heirs at law and the principal legatee.

In substance, the trial court instructed the jury: Your verdict will be that the instrument offered for probate is not the will of decedent, if you find from the evidence she did not sign it. This is assigned as error on the ground that there is no evidence to sustain such a finding. The argument of proponent on this point seems to be conclusive. The attestation clause is in due form, and it was signed by the following witnesses: Helen B. Gould, a neighbor of testatrix; Anna Buman, a professional nurse who attended her during her last illness; Harvey D. Kelly, an attending physician; Robert E. Neitzel, cashier of the Bank of Waterloo. At the trial each of these persons testified to having signed the attestation clause as a subscribing witness at the time and place stated in the will, and that Mary A. Gray, in the presence of each of them, signed the will. Anna Buman further testified: "Mrs. Gray wrote her name first, and I was asked to write mine, and the rest followed me." She also testified: "We signed immediately after she signed her name." And further: "Mrs. Gray asked me to sign the will." The testimony of all the subscribing witnesses was of like import. In addition each testified, after showing the proper qualifications, that at the time the will was signed, testatrix was of sound mind. The evidence of her testamentary competency is uncontradicted. Contestants made no effort to prove that testatrix did not sign the will, except by H. B. Waldron, who was an officer of the Citizens' State Bank of Waterloo. She had formerly been a depositor of his, and her last business transaction with him occurred March 2, 1906, when she transferred by check from his bank to the bank

of which proponent was cashier a balance of \$3,538.89. Waldron produced the check on the witness stand, and identified the signature of the drawer as that of testatrix. In qualifying himself to express an opinion on the genuineness of her signature, he stated, in answer to a question, that he knew "the signature of Mary A. Gray in the usual transaction of her affairs." The will was then submitted to him, and he was asked whether the signature was that of Mary A. Gray, and answered: "It is not her signature." On cross-examination he was asked: "You do not say that she did not write the name that appears there?" His reply was: "No, sir." He was not present when the will was signed, and his opinion, in connection with the signatures themselves, is the only proof on that subject outside of the testimony of the subscribing witnesses. The facts showing the reasons for a difference in the appearance of the signatures on the two instruments were fully shown by uncontradicted evidence. The check was drawn March 2, 1906, when testatrix was an active woman. More than a year later she fell and was fatally injured by the breaking of a bone. She had been an invalid five months when she signed her will October 31, 1907, and she was reclining in an invalid's chair at the time. Her nurse had given her long-distance glasses, instead of her reading glasses, and for that reason she could not see well while signing her name. According to his own testimony, Waldron's last business transaction with testatrix occurred March 2, 1906, and there is nothing to indicate that he took into account the changed conditions when he expressed the opinion that the signature to the will was not hers. His testimony was applicable alone to earlier times and circumstances. When all the facts are considered, his opinion does not contradict the direct and positive testimony of the four subscribing witnesses, that testatrix signed the will in their presence October 31, 1907. There is nothing to impeach these witnesses or to discredit their testimony. The original check and the will itself are in the record, and the signatures themselves contain no indication that either is not genuine, when the changed conditions and difference in time are understood. The evidence is wholly insufficient to sustain a finding that the will was not signed by testatrix, and that question should not have been submitted to the jury. Proof that testatrix was of sound mind, and that the will was duly executed, is also uncontradicted. These questions likewise were erroneously submitted to the jury.

Proponent offered to show the mental condition of testatrix by Dr. James C. Agee, who was called as a witness, but the trial

court rejected his testimony on the ground that the information which enabled him to testify on that subject was acquired by him in his professional capacity while he was attending her as a physician during her last illness. This ruling is assigned as error. To sustain the trial court, contestants invoke the statutory provision that no physician "shall be allowed, in giving testimony, to disclose any confidential communication, properly intrusted to him in his professional capacity, and necessary and proper to enable him to discharge the functions of his office according to the usual course of practice or discipline." Code Civ. Proc. §§ 333, 334. The question presented by the record may be stated in this form: In a contest over the probate of a will between a legatee or an executor, and the heirs at law of the testatrix, may the latter's physician testify to her mental competency, over the objection of such heirs, where the information which enables him to do so was acquired solely in his professional capacity, while attending her during her last illness? The Code provides that the patient may waive the privilege or protection of the statute; but there is eminent authority for the doctrine that the right of waiver cannot be exercised by anyone else, and that testimony of the physician as to the mental competency of his deceased patient should be excluded under the circumstances of this case. *Re Hunt*, 122 Wis. 460, 100 N. W. 874; *Re Van Alstine*, 26 Utah, 193, 72 Pac. 942; *Auld v. Cathro*, 20 N. D. 461, 32 L.R.A.(N.S.) 71, 128 N. W. 1025, and cases cited; *Re Nelson*, 132 Cal. 182, 64 Pac. 294. This court, however, has held that the statutory right of waiver extends to "the personal representative of a deceased person." *Parker v. Parker*, 78 Neb. 535, 111 N. W. 119. May one class of representatives in a contest over the probate of a will waive the privilege to the exclusion of another class, where the respective rights of the disputants depend on the mental condition of a deceased person? Does the statute permit heirs at law to require a disclosure on part of the physician if his patient was insane, and suppress the truth if mentally competent? No such intention can be found in the statute or in the reasons for its enactment. If heirs at law to protect the property of their ancestor from an insane act, and to obtain their own rights under the statute of distributions, may require a physician to testify to the condition of his patient's mind, there is no reason why a legatee or an executor may not also call upon him for the purpose of protecting the will and a legacy under it. Having held in the case last cited that the right to waive the statutory privilege extends to the personal representative of a

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deceased person, consistency and justice require a construction which permits an executor or a legatee to compel a physician to testify to the mental condition of his patient, when that question is involved in a contest with the heirs over the probate of the patient's will. Though the courts of the country are divided on this question, the construction here announced has frequently been adopted under similar statutes. *Thompson v. Ish*, 99 Mo. 160, 17 Am. St. Rep. 552, 12 S. W. 510; *Denning v. Butcher*, 91 Iowa, 425, 59 N. W. 69; *Winters v. Winters*, 102 Iowa, 53, 63 Am. St. Rep. 428, 71 N. W. 184; *Re Walker*, — Iowa, —, 128 N. W. 386; *Re Shapter*, 35 Colo. 578, 6 L.R.A.(N.S.) 575, 117 Am. St. Rep. 216, 85 Pac. 688; *Olson v. Court of Honor*, 100 Minn. 117, 8 L.R.A.(N.S.) 521, 117 Am. St. Rep. 676, 110 N. W. 374, 10 A. & E. Ann. Cas. 622. The courts, however, have authority to protect the memory of deceased persons from objectionable disclosures. *Denning v. Butcher*, 91 Iowa, 425, 59 N. W. 69.

For the errors discussed, the judgment of the District Court is reversed, and the cause remanded for further proceedings.

NEBRASKA SUPREME COURT.

JOHN M. WILLITS, by Guardian and Next Friend, Appt.,

v.

ROBERT EARLE CONKLIN et al.

(88 Neb. 805, 130 N. W. 757.)

Will — death without issue — construction.

1. The rule that words of limitation shall be applied to the death of the first taker without issue during the life of the testator is extremely technical in its character, and does not apply where there are any indications, however slight, that the testator referred to death subsequent to his own demise.

Same — time of survivorship.

2. The general rule is that the period of time to which survivorship relates depends

Headnotes by LITTON, J.

Note.—The question as to what time the contingency of death of a legatee or devisee without child or issue, upon which a gift is conditioned, is referable, is covered by the note to *Smith v. Smith*, 25 L.R.A.(N.S.) 1045. It may be noted, however, that what is said in *WILLITS v. CONKLIN* with respect to this question is of an obiter character, the limitation over therein under construction being conditioned upon the first taker's death simply, and not upon his death without issue. As pointed out in such note, while in the first class

upon the intention of the testator, rather than upon technical language used in a particular clause in a will.

Same — equitable conversion — power to convert.

3. Where power is given to an executor to convert the real estate into money, and he is directed to pay the proceeds over to the guardians of certain minors during their minority, a court of equity will decree that an equitable conversion of the real estate of the testator took place, and that the estate should be distributed as personal property, in accordance with the terms of the will.

Same — alternative gift — time of vesting.

4. A testator devised and bequeathed all his property, real and personal, to A and B, two grandsons, share and share alike, and provided that, in case of the death of either, his share should revert to the other. He also gave power to the executor to sell the real estate, and directed that the proceeds should be paid to the lawful guardians of the minor grandsons, and held in trust "until each attain his majority, when he shall have his share." Held that the period of distribution limited the survivorship, and that the gift took effect at the testator's death, with a gift over to the survivor upon a contingency terminable at the attainment of majority.

Same — vesting of estate before death.

5. Held, further, that since A attained his majority before his death, the contingency by which his title might be divested and B substituted became impossible, and B thereafter had no interest in the one half of the estate given to A.

(Reese, Ch. J., dissents.)

(March 24, 1911.)

APPEAL by plaintiff from a judgment of the District Court for Harlan County affirming a decree of the County Court directing equal payment of the proceeds of the estate of Wells Willits, deceased, to plaintiff and to defendants as beneficiaries of the estate under the will of Lee C. Willits, deceased. Affirmed.

The facts are stated in the opinion.

of cases it is necessary, in order to give effect to the language which refers to the absolutely certain event of death as being contingent, to start with the presumption, in the absence of any indication of a contrary intention, that the period of time to which the testator refers is the period of possession or payment; in the second class of cases there is a contingency without resorting to any such presumption. In other words, in the one case the presumption is that the testator meant to refer to the period of possession or payment, which presumption may on the one hand be strengthened or on the other hand be overcome by the 33 L.R.A. (N.S.)

Messrs. John Everson, C. M. Miller, and C. O. Flansburg, for appellant:

If there is any contingency the period referred to by the testator was the death of either of said grandsons before final distribution of his estate; in which event such share should revert to the other.

Vass v. Freeman, 56 N. C. (3 Jones, Eq.) 221, 69 Am. Dec. 734; Vandervee v. Slingerland, 103 N. Y. 47, 57 Am. Rep. 701, 8 N. E. 247; Cambridge v. Rous, 8 Ves. Jr. 12; 6 Revised Rep. 199; Rood, Wills, § 650; Ewing v. Winters, 34 W. Va. 23, 11 S. E. 713; Woolverton v. Johnson, 69 Kan. 708, 77 Pac. 559; Arlington State Bank v. Paulsen, 57 Neb. 717, 78 N. W. 303; Chick v. Ives, 2 Neb. (Unof.) 879, 80 N. W. 751; Engel v. State, 65 Md. 539, 5 Atl. 249.

Where, by the terms of a will, the executor is directed to sell the real estate and pay over the proceeds arising therefrom to or for the benefit of certain named persons, such real estate is, under the doctrine of equitable conversion, regarded as personal property, and the title thereto vested in the executor, so that such beneficiary would take nothing absolutely until final distribution by the executor.

People use of Jennings v. Jennings, 44 Ill. 488; Banta v. Boyd, 118 Ill. 186, 8 N. E. 671; Ebey v. Adams, 135 Ill. 80, 10 L.R.A. 162, 25 N. E. 1013; Starr v. Willoughby, 218 Ill. 485, 2 L.R.A. (N.S.) 623, 75 N. E. 1029; Barnes v. Johnston, 233 Ill. 620, 84 N. E. 610; Brown v. Lippincott, 49 N. J. Eq. 44, 23 Atl. 497; Bartholomew's Estate, 155 Pa. 314, 26 Atl. 550; Doe ex dem. Cooper v. Roe, 7 Houst. (Del.) 488, 31 Atl. 1043; Gordon v. Gordon, 32 S. C. 563, 11 S. E. 334; Brograve v. Winder, 2 Ves. Jr. 634; Newton v. Ayscough, 19 Ves. Jr. 534; Cudlip v. Rundall, 4 Mod. 11; Browne v. Lockhart, 10 Sim. 421; 9 L. J. Ch. N. S. 53; Sinton v. Boyd, 19 Ohio St. 30, 2 Am. Rep. 369.

A devise of personal property to one for life with limitation over is valid.

Harrison v. Stockton, 19 N. J. Eq. 235; Re Denton, 137 N. Y. 428, 33 N. E. 482;

context, while in the other case construction starts with a presumption which refers the contingency to quite a different period, viz., the death of the first taker without issue whenever it may occur.

This comment is not intended in any way to impugn the correctness of the decision in WILLITS v. CONKLIN, but is made for the purpose of calling attention to the fact of the distinction between the two classes of cases. The question as to what time the contingency of the first taker's death, upon which a gift over is conditioned, is referable, will be annotated at a future time.

Re Winters, 114 Cal. 186, 45 Pac. 1063; Simpson v. Cherry, 34 S. C. 68, 12 S. E. 886.

Messrs. Gomer Thomas and J. G. Thompson for appellees.

Letton, J., delivered the opinion of the court:

In 1899 Wells Willits and Rachael C. Willits, husband and wife, resided in Harlan county, Nebraska. In that year Mrs. Willits died, leaving her husband and her only son, Edward L. Willits, surviving. In 1882 Edward L. Willits was married to his first wife, Blanche Conklin, who died in 1887, leaving as the only issue of the marriage a son, Lee C. Willits, born July 4, 1886. In 1898 Edward L. Willits was married to Rebecca Metz. The only issue of this marriage was John M. Willits, who was born May 14, 1902, and is still living. On October 8, 1903, Edward L. Willits died intestate, leaving surviving him his sons, Lee C. Willits and John M. Willits, and his widow, Rebecca M. Willits. His father, Wells Willits, died on November 13, 1903. From the time his wife died in 1899 until the time of his death, Wells Willits lived in the family of Edward L. Willits. He was an invalid, having suffered from locomotor ataxia for years, and was virtually on his deathbed when his son died. About two weeks after his son's death he executed a will, which was duly probated. The executor named in the will qualified, sold the personal property and real estate, and paid a portion of the proceeds in equal sums to the guardians of the respective minors before Lee C. Willits reached his majority. Lee C. Willits died on the 23d of September, 1907, after attaining his majority. He left a will by which his property was bequeathed to the defendants, Robert Earle Conklin and Mary E. Conklin.

The present controversy arose upon the final distribution of the proceeds of the estate of Wells Willits. Upon the final report of the executor being filed in the county court, John M. Willits, by his guardian, filed a petition in that court praying for a construction of the will, that the money paid by the executor to the guardian of Lee C. Willits be recovered back, and in substance that he be declared the owner of the entire estate. The county court held in substance that one half the estate vested in each of the grandchildren, and directed the payment of the proceeds to the guardian of John M. Willits and the executor of the estate of Lee C. Willits, respectively. On appeal to the district court, this judgment was affirmed, and the judgment is now before us for review.

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The point at issue is the construction which should be placed upon the second and third paragraphs of the will, which are as follows:

"I give, devise, and bequeath all my property both personal and real of which I may die possessed, to my grandsons, Lee C. Willits and John M. Willits, share and share alike. In case of the death of either of the above-named grandsons, his share of my estate to revert to the other.

"I give and confer upon the executor, to be hereinafter named, and acting under this will, full power and authority, by public or private sale, as he shall deem expedient, to make sale of all real estate of which I may die possessed, and do all needful acts to convey title to the purchasers thereof. The proceeds of such sales to be turned over to the lawful guardians of my grandsons, above named, and held in trust by said guardians until each attain his majority, when he shall have his share."

The question presented is, What right in the property did Lee C. Willits possess at the time of his death? Was it an indefeasible vested estate, or did all the property devised to him "revert to the other" grandson on the happening of that event? The surviving grandson takes the position that on the death of Lee C. Willits at any time the entire estate passed to him, and that the legatees of Lee took nothing by his will. He contends that the intention of the deceased was to divide his estate equally between his two grandchildren, and to prevent the diversion of the property to the heirs or legatees of either, and that the proper construction to be placed upon the will is that "whenever the first legatee dies, whether before or after the testator, the other shall take; or it means that, if one dies before some contingency which the testator then had in his mind, the other shall take all; or it means that, if the first is prevented from taking by dying during the lifetime of the testator, the other shall be substituted for him." On the other hand, the defendants contend that the contingency referred to in the will was death before the death of the testator, and that in any event the estate of Lee C. Willits became absolute upon his arrival at twenty-one years of age.

The general rule is that where there is a legacy to a person absolutely, and a provision that in case of his death the estate shall revert to another, the contingency referred to is the death of the first taker before the death of the testator, but special circumstances will prevent the application of this general rule. In Schnitter v. McManaman, 85 Neb. 337, 27 L.R.A.(N.S.) 1047, 123 N. W. 299, it is said: "The rule

that the words of limitation shall be applied to the death of the first taker without issue during the life of the testator is said to be extremely technical in its character, and does not apply where there are indications, however slight, that the testator referred to death subsequent to his own demise."

In *Britton v. Thornton*, 112 U. S. 526, 28 L. ed. 816, 5 Sup. Ct. Rep. 291, Mr. Justice Gray says: "When, indeed, a devise is made to one person in fee, and 'in case of his death' to another in fee, the absurdity of speaking of the one event, which is sure to occur to all living, as uncertain and contingent, has led the courts to interpret the devise over as referring only to death in the testator's lifetime. 2 Jarman, Wills, chap. 48; *Briggs v. Shaw*, 9 Allen, 516; Lord Cairns in *O'Mahoney v. Burdett*, L. R. 7 H. L. 388, 395, 31 L. T. N. S. 705, 23 Week. Rep. 361. But when the death of the first taker is coupled with other circumstances which may or may not ever take place, as, for instance, death under age or without children, the devise over, unless controlled by other provisions of the will, takes effect, according to the ordinary and literal meaning of the words, upon death under the circumstances indicated at any time, whether before or after the death of the testator. *O'Mahoney v. Burdett*, above cited; 2 Jarman, Wills, chap. 49."

It is elementary that in the construction of a will it is the duty of the court to effectuate the intention of the testator, if it can be ascertained, and, in order to ascertain this intention, the court should place itself as nearly as possible in the position of the testator, and consider not only the particular clause of the will which is in dispute, but the whole instrument. *McCulloch v. Valentine*, 24 Neb. 215, 38 N. W. 854; *Chick v. Ives*, 2 Neb. (Unof.) 879, 90 N. W. 751; *Yoesel v. Rieger*, 75 Neb. 180, 106 N. W. 428; *Lewis's Estate*, 203 Pa. 219, 52 Atl. 208, 30 Am. & Eng. Enc. Law, 2d ed. p. 666; *Albin v. Parmele*, 70 Neb. 740, 98 N. W. 29, 99 N. W. 646.

Appellant bases much of his argument upon the provision that in case of the death of either grandson, his share "shall revert to the other," but we think he places too much stress upon this phrase, and does not give sufficient consideration to the other provisions of the will.

Coming now to a consideration of the whole instrument, the will first devises and bequeaths all the testator's property, both real and personal, to the grandsons, share and share alike. This language clearly conveys a vested interest upon the death of the testator to each grandson. The next provision is that in case of the death of either grandson, his share shall revert

to the other. Standing alone, these two provisions would, under the general rule, apply to death before the death of the testator, but, as we shall see there are other clauses which must be taken into account.

The next paragraph empowers the executor to sell and convey all the real estate, and further directs: "The proceeds of such sales to be turned over to the lawful guardians of my grandsons, above named, and held in trust by said guardians until each attain his majority, when he shall have his share." While this provision does not expressly direct the executor to convert the real estate into money, it is apparent that it was the intention of the testator that the land should be sold and the proceeds paid during the minority of the grandsons; otherwise the provisions for payment to the guardian would be useless, and the direction that each shall have his share at majority would also be without force. 1 Jarman, Wills, 6th ed. 558; *Chick v. Ives*, 2 Neb. (Unof.) 879, 90 N. W. 751.

The direction in this clause that the proceeds shall be held in trust for each grandson until his majority, "when he shall have his share," seems to us to be of great importance in the ascertainment of the testator's intention. From his circumstances at the time the will was made, it is evident that he knew and realized his condition, and that the possibility of his living until either grandson reached the age of twenty-one years was beyond his most sanguine hope. He was an aged man; his wife was dead; he was suffering from a fatal disease, and required constant care and attention. In his ailing and stricken condition, he had just sustained the loss of his only son. He believed that his days were numbered, and so expressed himself. Placing ourselves as nearly as we can in his position, we think it clear that the contingency of the death of either of his grandsons before his own was not within his contemplation. By the terms of the will the money is placed beyond the reach of either until he reaches majority. If he die before majority, the fund which is then in the hands of either the executor or guardian must pass to the other grandson. It was evidently in the testator's mind that until each grandson arrived at man's estate, it was improbable that he should have issue of his own, and thus perpetuate the family name. He desired to take reasonable precaution that his property should remain in the family. We cannot think that it was his purpose to divert the estate conferred upon one grandson from the children of such grandson, or that the other should receive the whole estate. We think it was his intention that the period of distribution should limit the survivorship, and that the executory gift

over to the surviving grandson was limited by its terms to that period.

The language of Lord Hatherley in *O'Mahoney v. Burdett*, L. R. 7 H. L. 388, 403, in discussing the second and fourth rule in *Edwards v. Edwards*, 15 Beav. 357, 21 L. J. Ch. N. S. 324, 16 Jur. 259, is peculiarly applicable: "So again, I apprehend, in another class of cases, many of which were cited before us, which have been decided since *Edwards v. Edwards*, one of them having been before myself; in those cases where the court has found upon the face of the will a positive direction to pay over the personalty to the legatee, or to make a distribution among several legatees at a given time, the period of distribution being fixed at which, as it appears from the face of the will, the whole estate was intended to be entirely disposed of and divided, and to pass from the hands of the executors, the courts have laid hold of that circumstance to say, 'We hold this defeasance to be before that period of distribution arrives,' holding it to be an unreasonable construction of the testator's will to say that he directed, on the one hand, that the money shall be absolutely paid and divided and distributed, and put into the hands of those who, having it in their hands, will of course, spend it without any farther trust, and, on the other hand, that a subsequent event, namely, a certain person's dying childless after that distribution has taken place, should divest the property; that is to say, make it necessary for the executor to take steps to get back again and recall that money which he has paid, in order to hand it over to those who would take under the executory devise. The courts have held that that was unreasonable. In the case I alluded to it was a trade, which was directed to be carried on by the executors until the son attained a certain age, when the trade (and not the trade only, but other property as well) was to be handed over to him, and then there was what appeared to be a divesting executory devise in the event of his dying without issue. I held in that case, and I should be disposed to hold the same again if a similar case came before me, that the time was evidently pointed out when the final and complete distribution was to be made, and that the executory devise must be held to be referred to that time, because it was impossible to call the property back again, and hold that the executory devise was then to take effect after there had been that full and complete distribution of the funds." Vice Chancellor Wood (the same judge) decided *Dean v. Handley*, 2 Hem. & M. 635, where there was a gift in remainder and a gift over, upon a contingency determinable at the period of distribution. 33 L.R.A. (N.S.)

Mr. Hawkins, in his treatise on Wills, 2d ed. 254, deduces the following rule from the cases: "Where there is a bequest to one person, and 'in case of his death' to another, the gift over is construed to take effect only in the event of the death of the prior legatee before the period of payment or distribution, unless an intention appear to the contrary. *Cambridge v. Rous*, 8 Ves. Jr. 12, 6 Revised Rep. 199; *Ommaney v. Bevan*, 18 Ves. Jr. 291; *Home v. Pillans*, 2 Myl. & K. 15, Coop. t. Brougham, 198, 4 L. J. Ch. N. S. 2." See also 2 Jarman, Wills, 6th ed. 1602, 1609, 1610; Theobald, Wills, Can. ed. 681, 685; *Lewis's Estate*, 203 Pa. 219, 52 Atl. 208. We find it unnecessary to cite or consider at length all the cases an examination of which has aided us to reach this conclusion. Most of them may be found collected and examined in an exhaustive monographic note to *Smith v. Smith*, 25 L.R.A. (N.S.) 1045, 1145.

We are of opinion that the gift took effect at the testator's death, with a gift over to the survivor, upon a contingency terminable at the attainment of majority, which was the period of distribution. The contingency by which the title of *Lee C. Willits* might be devested, and the other grandson substituted, became impossible on *Lee* attaining his majority; after that time the appellant had no interest in the half of the estate given to the first taker.

It follows that the judgment of the District Court should be and is affirmed.

Reese, C. J., dissents.

ARKANSAS SUPREME COURT.

C. L. CARRELL et al., Appts.,
v.

STATE OF ARKANSAS EX REL PAUL
LITTLE.

(— Ark. —, 136, S. W. 174.)

**Injunction — against Sunday show —
breach of criminal laws.**

A court of equity will not enjoin the operation of a theater on Sunday upon the ground that it is a public nuisance in that it is a violation of the Sunday laws, and tends to bring together a lawless and tur-

**Note. — Injunction at suit of state
against public nuisance which is also
a crime.**

This note brings down to date the notes to *State ex rel. Crow v. Canty*, 15 L.R.A. (N.S.) 747, and *State v. Ehrlick*, 23 L.R.A. (N.S.) 691.

In *State ex rel. West v. State Capital Co.* — Okla. —, 103 Pac. 1021, followed in *State ex rel. West v. Journal Co.* — Okla. —, 105 Pac. 655, it was held that, in the

bulent assemblage of people contrary to the criminal laws of the state, where neither the civil or property rights or privileges of the public, nor the public health, is affected.

(March 27, 1911.)

APPEAL by defendants from a decree of the Sebastian Chancery Court in plaintiff's favor in a suit to enjoin defendants from operating their theater on Sunday. Reversed.

The facts are stated in the opinion.

Messrs. Cravens & Cravens, for appellants.

If everything charged in the petition of the appellee for injunction is true, still the state is not entitled to the relief sought, and a chancery court is without authority to grant it.

Jones v. Little Rock, 25 Ark. 301; State v. Vaughan, 81 Ark. 117, 7 L.R.A.(N.S.) 899, 118 Am. St. Rep. 29, 98 S. W. 685, 11 A. & E. Ann. Cas. 277; State ex rel. Circuit Attorney v. Uhrig, 14 Mo. App. 413; Sheridan v. Colvin, 78 Ill. 237; Cope v. District Fair Asso. 99 Ill. 489, 39 Am. Rep. 30; People v. Condon, 102 Ill. App. 449; Re Debs, 158 U. S. 564, 39 L. ed. 1092, 15 Sup. Ct. Rep. 900; State v. Patterson, 14 Tex. Civ. App. 465, 37 S. W. 478; Quarles v. State, 55 Ark. 10, 14 L.R.A. 192, 17 S. W. 269; Wood, Nuisances, §§ 788-791; State

absence of express statutory authority, a court of equity will not enjoin the advertising for sale and purchase of intoxicating liquors kept for sale without the state, on the ground that it is a public nuisance, in that it is a solicitation in the state of the sale of such liquors, and prohibited by the laws of the state, where the state has an adequate remedy at law through constitutional and statutory provisions prescribing an adequate penalty and punishment to prevent such advertisements or solicitations.

In *People v. Kizer*, 151 Ill. App. 6, a proceeding by information for contempt in violating an injunction decree entered by consent at the suit of a city against a common nuisance consisting of the illegal sale of intoxicating liquors in a certain building, where it was urged that the court was without jurisdiction to hear and determine the contempt proceeding, as the city had no power or authority to invoke the aid of a court of equity in the proceeding for an injunction, upon the decree in which the contempt proceeding was based, the court said: "If the sufficiency of the bill for injunction in the proceeding in equity had been then questioned by the demurrer, upon the ground that there was a want of proper parties, or that there was an adequate remedy at law, or that the bill improperly sought to enjoin the commission of a criminal offense, such demurrer might properly have been sustained, but the defendants named in said bill not only confessed all of its allegations, 33 L.R.A.(N.S.)

ex rel. Vance v. Crawford, 28 Kan. 726, 42 Am. Rep. 182.

Where the remedy at law was complete, equity is without jurisdiction and will not grant relief.

Crow v. Dallas County, 13 Ark. 630; *M. & L. R. R. Co. v. Woodruff*, 26 Ark. 649; *Byers v. Danley*, 27 Ark. 77; *Shaul v. Duprey*, 48 Ark. 331, 3 S. W. 366; *People v. Condon*, 102 Ill. App. 449; *People v. Equity Gaslight Co.* 141 N. Y. 232, 36 N. E. 194; *McKibbin v. Ft. Smith*, 35 Ark. 352.

Messrs. Hal L. Norwood, Attorney General, and William H. Rector for the State.

Frauenthal, J., delivered the opinion of the court:

This was a suit instituted in the name of the state of Arkansas, on the relation of the prosecuting attorney of the twelfth judicial circuit, seeking to enjoin appellants from giving any vaudeville or moving picture shows upon Sunday in a theater conducted by them in the city of Ft. Smith. It was alleged in the complaint that appellants had advertised that they would conduct such shows at their theater on certain Sundays, and, upon being notified by the law officers that they would be arrested for the offense of Sabbath breaking if they did so, they thereupon made no charge for admittance to such performances, in order

but expressly consented that the decree now sought to be held invalid should be entered in the case. . . . The mere fact that there was a defect of parties did not deprive the court of jurisdiction to hear and determine the question involved, so as to render the order granting the injunction void, and justify the plaintiff in error in wilfully violating the same. . . . A court of equity having jurisdiction to declare and abate a nuisance is not deprived of such jurisdiction merely because the maintenance of such nuisance constitutes a criminal or statutory offense. . . . Furthermore, the decree having been entered by the consent of the plaintiff in error, error cannot properly be assigned upon it."

In *Ex parte Roper*, — Tex. Crim. Rep. —, 134 S. W. 334, under a statute conferring power to enjoin a public nuisance at the suit of the state or of an individual, although it may be also a crime, the right of the state to proceed by way of injunction against a nuisance consisting of the illegal sale of intoxicating liquors was upheld against the contention that it was in substance an attempt to prevent the commission of crime by an injunction, which the law does not permit or sanction.

As to injunction against crime which is private nuisance or which involves property rights, see notes to *Detroit Realty Co. v. Oppenheim*, 21 L.R.A.(N.S.) 585, and *Ex parte Allison*, 3 L.R.A.(N.S.) 622.

A. C. W.

to evade the criminal laws of the state in that respect. It was further alleged that such Sunday performances were legally and morally wrong, and would tend to create a violation of the Sabbath breaking laws; that they would bring together a lawless and turbulent assembly of persons, which would result in an injury to the morals and general welfare of the people of that community; and that such performances constituted a public nuisance. It was also claimed that one of the purposes of appellants in giving such Sunday exhibitions was to advertise their show which was given during the other days of the week, and that the amount of the fine fixed by law for Sabbath breaking was not sufficient to prevent appellants from violating such laws. There was a demurrer interposed to this complaint, which was overruled. Thereupon the appellants filed an answer in which they denied that these performances given by them were illegal, or that they constituted a nuisance. They alleged that the persons assembled at such exhibitions were quiet and orderly, and that the performances were of a good and proper character, and not detrimental to the moral and religious sentiment of the people.

It appears that the appellants were, and had been for some time prior to the filing of the complaint herein, engaged in giving moving picture shows in a building located on one of the principal streets in the city of Ft. Smith. They advertised that on Sunday October 30, 1910, and on the following Sunday, they would give these performances at their theater, and did so. There was no charge of any kind made for admission to these performances. The evidence shows that these performances were given in an inclosed building, and consisted of moving pictures. On the first Sunday there was portrayed by these pictures the life of Damon and Pythias, accompanied by a lecture thereon and sacred songs and music; and on the following Sunday light the performance was of a similar character. The undisputed evidence shows that neither the moving pictures, songs, or music was immoral or objectionable in any regard. Upon final hearing of this cause the chancellor entered a decree perpetually enjoining the appellants from giving these performances in their theater upon Sunday, and from this decree they have appealed to this court.

The question involved in this case is whether or not the acts complained of were of such a nature as a court in the exercise of its chancery jurisdiction would restrain. The appellants could not be enjoined from doing any act which was not in itself wrongful. Under the undisputed testimony adduced upon the trial of this case, the per-

formances themselves were not of a character which was illegal or immoral. It is contended, however, that the day upon which these performances were given, being Sunday, made them wrong and immoral. It is urged that the giving of the performances upon Sunday constituted an infraction of the law against Sabbath breaking, and that they gathered together an assembly of lawless and turbulent persons, and that this constituted a public nuisance. But the illegal acts thus complained of were only violations of the criminal laws, and courts of equity will not interfere simply for the purpose of restraining acts constituting crimes because they are criminal. Courts of equity do not exercise their powers to enforce the criminal laws. It has been held by this court that theatrical performances or exhibitions given upon Sunday, where admittance is charged, are violations of the law against Sabbath breaking. *Quarles v. State*, 55 Ark. 10, 14 L.R.A. 192, 17 S. W. 269.

It is also well established that, although a theater is not a nuisance in itself, still it may become a public nuisance where it collects together a crowd of noisy and lawless people to the annoyance of the community in which it is situated; and such a nuisance is a violation of the criminal laws of the state, and punishable. *Bishop*, *Crim. Law*, § 1135; 29 *Cyc. Law & Proc.* p. 1183.

It is true that courts of equity have jurisdiction to enjoin acts constituting public nuisances, and to abate them. But such jurisdiction is interposed solely for the protection of property or of civil rights; and, whether the nuisance be private or public, the same principle must guide the interference of a court of equity in both cases. In the absence of an injury to property or to civil rights, the chancery court has no jurisdiction to restrain acts simply because they are criminal, nor has it the power to enforce the performance of moral duties solely as such. The power of a court of equity to exercise its jurisdiction in cases similar to the one herein has been fully discussed by this court in the case of *State v. Vaughan*, 81 Ark. 117, 7 L.R.A. (N.S.) 899, 118 Am. St. Rep. 29, 98 S. W. 685, and its right to issue an injunction against acts constituting a public nuisance has therein been determined. In that case it is said that there are some courts holding that common-law nuisances may be restrained by injunction; and, after discussing the legality of the exercise of such right, this court finally decided that "it is a sound principle of equity jurisprudence that an injunction will not lie at the instance of the state to restrain a public nuisance where the

nuisance is one arising from the illegal, immoral, or pernicious acts of men, which for the time being make the property devoted to such use a nuisance, where such nuisance is indictable and punishable under the criminal law." It was there held that before an injunction could issue restraining acts constituting a public nuisance, it was necessary that the public nuisance should affect the civil or property rights or privileges of the public, or the public health; that the criminality of the act itself will not be sufficient to give jurisdiction in chancery. In that case the defendants were charged with operating what is known as a "turf exchange," or poolroom, where a great number of people were assembled for the purpose of gambling. It was there held that this was in effect a gaming house, where these people were congregated, and that it constituted a public nuisance and a common-law misdemeanor, but that it did not touch civil property rights or the privileges of the public, and that an injunction would not lie at the instance of the state to restrain the operation and maintenance of this public nuisance.

We think that the principles enunciated in the opinion delivered in that case are controlling in the case at bar, even if the testimony proved that the appellants were violating the law against Sabbath breaking or the law against maintaining a public nuisance. No civil property rights or privileges of the public were affected by the giving of these performances; and therefore there was no ground shown for the exercise by a court of chancery of its power to issue a writ of injunction herein. *Re Debs*, 158 U. S. 590, 39 L. ed. 1104, 15 Sup. Ct. Rep. 900; *State v. Patterson*, 14 Tex. Civ. App. 465, 37 S. W. 478; *Atty. Gen. ex rel. Muskegon Booming Co. v. Ewart Booming Co.* 34 Mich. 462.

The decree is therefore reversed, and the complaint dismissed.

KANSAS SUPREME COURT.

MATTIE CRELLY

v.

MISSOURI & KANSAS TELEPHONE COMPANY, App't.

(— Kan. —, 113 Pac. 386.)

Master — assault by servant — scope of employment — liability.

A local manager of a telephone company demanded of an operator of the company who was about to quit the service, that she sign a voucher for the compensation due

her, and, when she refused to sign the voucher, he violently assaulted and beat her. Held, in an action brought by her against the telephone company to recover damages for the assault and resulting injuries, that the assault and use of force by the local manager to procure the signature of the voucher was not within the scope of his employment, and the telephone company was therefore not liable for his wrongful acts.

(February 11, 1911.)

A PPEAL by defendant from a judgment of the District Court for Crawford County in plaintiff's favor in an action brought to recover damages for injuries alleged to have been sustained by her through the fault of defendant. Reversed.

The facts are stated in the opinion.

Messrs. J. W. Gleed, John L. Hunt, and D. E. Palmer, for appellant:

If the judgment of the court below is to stand, the court must find some authority, express or implied, for Casen to do what he did.

1 *Thomp. Neg.* § 525; 20 *Am. & Eng. Enc. Law*, p. 167; *Hudson v. Missouri*, K. & T. R. Co. 16 Kan. 470; *Mirick v. Suchy*, 74 Kan. 717, 87 Pac. 1141, 11 A. & E. Ann. Cas. 366; *Collette v. Rebori*, 107 Mo. App. 711, 82 S. W. 552; *Thames S. B. Co. v. Housatonic R. Co.* 24 Conn. 40, 63 *Am. Dec.* 154; *Meehan v. Morewood*, 52 Hun, 566, 5 N. Y. Supp. 710, affirmed 126 N. Y. 667, 27 N. E. 854; *Jones v. St. Louis, N. & P. Packet Co.* 43 Mo. App. 398; *Knowles v. Bullene*, 71 Mo. App. 341; *Dillingham v. Anthony*, 73 Tex. 47, 3 L.R.A. 634, 15 *Am. St. Rep.* 753, 11 S. W. 139; *Little Miami R. Co. v. Wetmore*, 19 Ohio St. 110, 2 *Am. Rep.* 373; *Kinsella v. Hamilton, Jr.* L. R.

Note.—For liability of master for assault by a servant sent to recover property, see note to *Grant v. Singer Mfg. Co.* 6 L.R.A.(N.S.) 567, and subsequent note to *Hardeman v. Williams*, 10 L.R.A.(N.S.) 653.

As to liability for tort by servant sent to commit trespass, see note to *Waler v. Great Northern R. Co.* 18 L.R.A. (N.S.) 297.

As to liability of master for tort committed by servant in course of his employment, and with a view to the furtherance of his master's business, but contrary to the master's express instructions, see note to *Bartlett v. Minneapolis, St. P. & S. Ste. M. R. Co.* 18 L.R.A.(N.S.) 416.

As to liability of innkeeper or restaurant keeper for assault by his servant upon a patron, see note to *Chase v. Knabel*, 12 L.R.A.(N.S.) 1155.

Various phases of a carrier's liability for assault by employees will be found in the notes referred to in the Index to Notes, under the title "Carriers."

26 C. L. 671; Poulton v. London & S. W. R. Co. L. R. 2 Q. B. 534, 8 Best & S. 616, 36 L. J. Q. B. N. S. 294, 17 L. T. N. S. 11, 16 Week. Rep. 309; Staples v. Schmid, 18 R. I. 224, 19 L.R.A. 824, 26 Atl. 193; Labatt, Mast. & S. § 537, p. 1540; Mali v. Lord, 39 N. Y. 381, 100 Am. Dec. 448; Howe v. Newmarch, 12 Allen, 49; Rounds v. Delaware, L. & W. R. Co. 64 N. Y. 129, 21 Am. Rep. 597; Evansville & C. R. Co. v. Baum, 26 Ind. 70.

Messrs. J. J. Campbell, R. S. Galtskill, and W. J. True, for appellee:

Whatever Casen did, he did as a representative of the defendant, and was certainly acting within the scope of his employment in discharging plaintiff and settling with her and ejecting her from the premises.

Rogahn v. Moore Mfg. & Foundry Co. 79 Wis. 573, 48 N. W. 669; Fick v. Chicago & N. W. R. Co. 68 Wis. 469, 60 Am. Rep. 878, 32 N. W. 527; Bergman v. Hendrickson, 106 Wis. 434, 80 Am. St. Rep. 47, 82 N. W. 304; McDonald v. Franchere Bros. 102 Iowa, 496, 71 N. W. 427; Cohen v. Dry Dock, E. B. & B. R. Co. 69 N. Y. 170, 8 Jones & S. 368; Haehl v. Wabash R. Co. 119 Mo. 325, 24 S. W. 737; Meade v. Chicago, R. I. & P. R. Co. 68 Mo. App. 92; Curtis v. Chicago, R. I. & P. R. Co. 99 Mo. App. 502, 73 S. W. 1103; Atchison, T. & S. F. R. Co. v. Randall, 40 Kan. 421, 19 Pac. 783; Comphor v. Missouri & K. Teleph. Co. 127 Mo. App. 553, 106 S. W. 536.

Johnston, Ch. J., delivered the opinion of the court:

This was an action by Mattie Crelly to recover damages from the Missouri & Kansas Telephone Company for injuries resulting from a violent assault made upon her by E. S. Casen, the local manager of the company at Pittsburg, Kansas.

She alleges that Casen was local manager with authority to supervise and control the business of the company at Pittsburg, including authority to employ and discharge the servants of the company in that office, including herself, who was acting as chief operator, and that, on October 25, 1907, while she was in the employment of the company, Casen came into the office and commanded her to sign a salary voucher, which she declined to do until she could figure out the amount actually due her, and, after another demand and refusal, he struck her upon the chest with great force and violence, then shoved her 7 or 8 feet, and ordered her from the room; that, as she left the room, he struck her several blows on the back and shoulders, and would have pushed her down the stairway leading to the street but for the interference of other employees of the company. The answer of

the company was a general denial, and also that Casen was not authorized to do the acts complained of, and that, if such acts were committed, he did not act as its agent or servant. The averment that Casen was not acting for the company in assaulting and beating appellee, or with its authority, was verified. The testimony of appellee in a general way sustained the allegations of her petition. It appeared that she had learned from the district manager at Joplin that she was to be discharged, and that shortly afterwards, while she was preparing to leave, Casen asked her to sign the voucher. When she refused, he struck her with his fist, and then she struck him with her umbrella, and, following this, he violently shoved her through a door, and she, in turn, kicked him. He continued to push and strike her until another employee interfered.

Among other special findings the following were returned:

Q. Did Casen assault Miss Crelly because she refused to sign the voucher?

A. He did.

Q. Were the plaintiff's injuries due to the assault occasioned and caused by her refusal to sign the voucher?

A. Yes.

In a general verdict the jury awarded the damages to appellee in the sum of \$1,470.

The telephone company appeals, and raises the question whether, on the pleading and the plaintiff's own testimony, it can be held responsible for the assault of Casen upon appellee, and liable for the resulting injuries. It is argued that, accepting her testimony as true, the assault of Casen had no necessary or legal relation to his authority from the company or his duty to it. The contention is that the assault, whatever may have been the occasion or provocation, did not tend to further any business or purpose of the company, and was not one of the methods or things which came in the line of Casen's duty, or any interest which he was employed to promote, and that the assault was a personal wrong of Casen, for which he alone is responsible. The general rule is that the master is responsible for the acts of his servants done in the execution of the master's business and within the scope of his employment. It is not enough to exempt the master that the act is wilful or malicious, or in excess of the authority expressly conferred. If the tortious act is done while the servant is acting in behalf of his master and within the scope of his employment, the master will be responsible, although the act may be wilful and wanton. The act, as in this

instance, may have been done while the servant was in the master's service, but unless it was expressly or impliedly authorized, or within the scope of the employment, the servant alone is responsible. The question of difficulty is whether the wrongful act is within the scope of the employment, and the contrariety of judicial opinion in cases brought to our attention arises largely from the application of this test. Here Casen was in the employ of the company, and was acting for it when he asked appellee to sign the voucher; but did the obtaining of the signature to the voucher contemplate the use of any force, or can it be said that an assault had any natural or necessary relation to the authority conferred at the time of his employment? The case is quite similar in its facts to *Hudson v. Missouri, K. & T. R. Co.* 16 Kan. 470. The third paragraph of the syllabus of that case reads: "Where it appears that plaintiff was authorized to receive freight for certain parties, and, in pursuance thereof, went to the depot of defendant, and there demanded the same of the agent who was in charge of the depot and authorized to receive and deliver freight, and while so demanding it the said agent made an assault upon him, and it does not appear that said assault was made in ejecting or attempting to eject plaintiff from the depot, or in preventing or attempting to prevent him from committing any injury to the property of the defendant, or from transgressing any rules for the regulation of its depot and the transaction of its business; held that it did not appear that the company was liable for the assault, and that only the agent who actually made it was liable." In the course of the decision Mr. Justice Brewer tersely stated that "Trotter was employed to deliver freight. Plaintiff came and demanded freight. Trotter replied to his demand with an assault. Was such assault in the course of Trotter's employment? Did it grow out of any services he was engaged in, or was it in the line of his duty? It seems to us it was clearly disconnected therefrom, and a mere volunteer assault. True, the employment may have given the opportunity and occasion, but it was not an act which in any fair sense the company could have been said to have employed him to do, or to have anticipated that he would do, nor an act which was the act of the company." The assault of Casen did not grow out of the service he was employed to perform, and was not an act which the company, or anyone else, would have anticipated that he would do. It was not a case of enforcing discipline or preserving order in the office, and was not one which contemplated the use of force. The jury found that the

assault was made by Casen because appellee refused to sign the voucher. No circumstances indicate that the company contemplated the use of force to obtain signatures to vouchers, nor anything to show any connection between the assault and any duty which devolved on him.

In the *Hudson Case* the court used this illustration: "A party goes into a store to purchase goods, and is therefore rightfully there. He makes an inquiry as to the price of an article of a clerk behind the counter, who in reply takes a weight and knocks him down with it. Can this be said to be an act which the proprietor contemplated when he employed the clerk? That it was in the line of the clerk's employment, and that therefore the employer was responsible? But the cases are parallel. The employment in each furnishes the opportunity and the occasion; but in each the act is not one the agent was employed to perform, nor within the scope of his employment." In *Mirick v. Suchy*, 74 Kan. 717, 87 Pac. 1141, 11 A. & E. Ann. Cas. 366, it was held that the master is not liable for acts outside the scope of employment, although the act was intended to promote the master's interest. In 26 Cyc. Law & Proc. p. 1528, it is said: "The test is not the character of the act nor whether it was done during the existence of the servant's employment; but whether the injury complained of was committed by the authority of the master expressly conferred or fairly implied in the nature of the employment and the duties incident thereto." The case of *Collette v. Rebori*, 107 Mo. App. 711, 82 S. W. 552, involved the liability of one who sent another to collect a bill, and the collector assaulted the debtor because he refused to pay. It was said: "The best considered cases hold that the master is liable to third persons for the negligent, fraudulent, or tortious acts of his agent or servant when it is shown that the agent or servant was acting within the scope of his employment, and that the act complained of was done as a means or for the purpose of doing the work assigned him by the master. To assault and beat a creditor is not a recognized or usual means resorted to for the collection of a debt, nor is it one likely to bring about a settlement of a disputed account."

And so we might say here that to assault or beat a telephone operator is not a recognized or usual way of procuring her signature to a voucher on which to draw the wages due to her. There are many cases bearing upon the question involved, and the following are a few of those which tend to support the view that the assault did not pertain to the duty of Casen nor come with-

in the scope of his employment: *Sachowitz v. Atchison, T. & S. F. R. Co.* 37 Kan. 212, 15 Pac. 242; *Laird v. Farwell*, 60 Kan. 512, 57 Pac. 98; *Clark v. Folcroft*, 67 Kan. 446, 73 Pac. 86; *Dolan v. Hubinger*, 109 Iowa, 498, 80 N. W. 514; *Henry v. Pittsburgh & L. E. R. Co.* 139 Pa. 289, 21 Atl. 157; *McCann v. Tillinghast*, 140 Mass. 327, 5 N. E. 164; *Stone v. Hills*, 45 Conn. 44, 29 Am. Rep. 635; *Chicago City R. Co. v. Mogk*, 44 Ill. App. 17; *Holler v. Ross*, 68 N. J. L. 324, 59 L.R.A. 943, 96 Am. St. Rep. 546, 53 Atl. 472; *Sagers v. Nuckolls*, 3 Colo. App. 95, 32 Pac. 187; *Vanderbilt v. Richmond Turnp. Co.* 2 N. Y. 479, 51 Am. Dec. 315; *Searle v. Parke*, 68 N. H. 311, 34 Atl. 744; *Waaler v. Great Northern R. Co.* 18 S. D. 420, 70 L.R.A. 731, 112 Am. St. Rep. 794, 100 N. W. 1097; *Rounds v. Delaware, L. & W. R. Co.* 64 N. Y. 129, 21 Am. Rep. 597; *Mali v. Lord*, 39 N. Y. 381, 100 Am. Dec. 448; *Meehan v. Morewood*, 52 Hun, 566, 5 N. Y. Supp. 710, also 126 N. Y. 667, 27 N. E. 854; *Jones v. St. Louis, M. & P. Packet Co.* 43 Mo. App. 398; *Cobb v. Simon*, 124 Wis. 467, 102 N. W. 891; *Little Miami R. Co. v. Wetmore*, 19 Ohio St. 110, 2 Am. Rep. 373; *Wood, Mast. & S.* §§ 286, 307; *Labatt, Mast. & S.* § 537; 1 *Thomp. Neg.* § 527; 20 *Am. & Eng. Enc. Law*, p. 167. The cases are not uniform as to what acts fall within the implied authority conferred on servants or agents, but most of those cited in behalf of appellee were where the business or employment contemplated the enforcement of discipline or implied the use of some force, and the rule is that, where the master authorizes force, he is liable for excessive force or the abuse of the authority given. In this case the use of force did not pertain to the business intrusted to Casen by the company. It was not an incident of the authority vested in him to compute what was due operators, and to procure their signatures to vouchers, and we find no basis in the pleadings or the evidence which would justify a holding that an assault upon an operator who refused to sign a voucher came within the implied authority of Casen, or can in any sense be regarded as within the scope of his employment.

The demurrer to the evidence should have been sustained, and the judgment will therefore be reversed, with the direction to sustain the demurrer to the evidence of appellee, and enter judgment in favor of the appellant.

All the Justices concurring.
33 L.R.A. (N.S.)

KENTUCKY COURT OF APPEALS.

M. TUTT, Appt.,
v.

CITY OF GREENVILLE et al.

(142 Ky. 536, 134 S. W. 890.)

Municipal corporations — nonresident offender — prosecution.

1. A nonresident may be prosecuted in a police court of a city, the jurisdiction of which is limited to offenses occurring within its limits, for permitting his cow to be at large within the city, contrary to a municipal ordinance, although he was not personally within the city at the time, if process is subsequently served upon him within the jurisdiction.

Same — personal liability — remedy in rem.

2. The personal liability of a nonresident owner of a cow for permitting it to run at large within the limits of a municipal corporation, contrary to the provisions of its ordinances, is not defeated by the fact that the ordinances also provide for proceeding against the animal *in rem* for collection of the penalty.

(March 2, 1911.)

Note. — Absence of accused from territorial jurisdiction at time of offense as affecting jurisdiction of the offense.

There are many cases dealing with the question as to the locus of an offense where part of the action or sequence of events occurred in one jurisdiction and part in another, which, without discussing the point, assume that the absence of accused from the territorial jurisdiction at the time of the offense does not in itself deprive the court of jurisdiction if the offense is deemed to have been committed within the territorial jurisdiction. These cases, however, are not included in this note, which is confined to cases which expressly discuss the effect of the accused's absence on the jurisdiction as distinct from the question as to what part of the action or sequence of events must have occurred within the jurisdictional limits.

As to the locality of a crime committed through the agency of the mails or of carriers, see note to *State v. Hudson*, 19 L.R.A. 775.

As to the locality of a crime committed by shooting or striking across a state boundary, see note to *State v. Hall*, 28 L.R.A. 59.

It seems to be unanimously held that one accused of committing an offense within a certain territorial jurisdiction need not have been personally present therein at the time, in order to have committed the offense there, and to give the court jurisdiction. As said in *Simpson v. State*, 92 Ga. 41, 22 L.R.A. 248, 44 Am. St. Rep. 75, 17 S. E.

A PPEAL by plaintiff from an order of the Circuit Court for Muhlenberg County sustaining a general demurrer to a petition to prohibit defendants from enforcing the collection of a fine against plaintiff for permitting his cow to run at large, in violation of an ordinance of the city. Affirmed.

The facts are stated in the opinion.

Messrs. Ross, Clarke, & Stroud for appellant.

Mr. Campbell Howard, for appellees:

The running at large of stray cattle in a populous community is treated generally as a kind of public nuisance,—one that endangers the safety and the property of citizens. It is therefore competent to regulate the matter by punishing the owners,

as well as by proceeding *in rem* against the property itself.

Thompson v. Millen, 24 Ky. L. Rep. 2479, 74 S. W. 288; McKee v. McKee, 8 B. Mon. 433; Paducah v. Ragdale, 122 Ky. 425, 92 S. W. 13; Ky. Stat. § 3637, subsec. 10.

Carroll, J., delivered the opinion of the court:

The city of Greenville has an ordinance prohibiting cattle from running at large in the city, and making it a misdemeanor for any person to suffer or permit his cattle to be at large in the city. The appellant, Tutt, resides outside of the city limits, and under a warrant issued against him for suffering a cow owned by him to

984: "Of course, the presence of the accused within this state is essential to make his act one which is done in this state, but the presence need not be actual. It may be constructive. The well-established theory of the law is that, where one puts in force an agency for the commission of crime, he, in legal contemplation, accompanies the same to the point where it becomes effectual."

In *State v. Lichliter*, 95 Mo. 402, 8 S. W. 720, it was held that a criminal court of the city of St. Louis had jurisdiction of a prosecution for obtaining goods by false pretenses, although, at the time of the offense, the defendant was personally without the territorial jurisdiction of that court, where, for the purpose of obtaining the goods, he sent by mail from without the jurisdiction a statement as to his financial condition, which was received in the city, and the goods were there delivered to a railway company, consigned to him.

In *De Queen v. Fenton*, — Ark. —, 136 S. W. 945, a suit in chancery to enjoin certain nonresidents of a city from permitting their stock and cattle to run at large within the city limits, in violation of ordinances, the supreme court, holding that the chancery court had no jurisdiction in the matter, said that the ordinances should be enforced by a criminal prosecution for the violation thereof, instituted in the police court of the city, and that there could be no legal difficulty in enforcing them, although the defendants were nonresidents.

And in *Moore v. Crenshaw*, 1 Tex. App. Civ. Cas. (White & W.) 105, it was held that city ordinances prohibiting the running at large of certain animals within the city, and providing for the impounding and sale of animals found at large, in violation of the ordinance, and not redeemed by the owner before sale, were valid and binding, and operated upon all animals found running at large within the city limits in violation of the ordinance, regardless of whether owned by residents or nonresidents.

But in *Beattie v. State*, 73 Ark. 428, 84 S. W. 477, reversing a judgment convicting a nonresident of the state for permitting cattle to run at large within the state, by 33 L.R.A. (N.S.)

turning them out of his inclosure in an adjoining state, knowing that they would go across the state line, the court said that it was clear that the Arkansas statute "does not subject a resident of Missouri, who turns his cattle at large in that state, to a criminal prosecution and fine if the cattle afterwards come into this state; for the legislature of this state has no power to punish a resident of Missouri for a lawful act done in that state. Nor do we think that it would alter the case if the defendant knew, at the time he turned them at large in Missouri, that they would probably come into Arkansas, for the legislature of this state cannot compel the residents of Missouri who live near the state line to keep their cattle in inclosed lots or fields, in order to prevent them from coming into this state, and we do not think that it was the intention of this statute to do so. The people of Missouri have the right to permit their cattle to run at large in that state, unless forbidden by the law of that state; and if the people of this state desire to keep such cattle from entering this state, they can do so by putting up a fence along the line between this state and Missouri, or by a statute authorizing the cattle of nonresidents which stray into this state to be impounded and kept at the costs of the owners. But to undertake to arrest and fine a resident of Missouri because he does not prevent his cattle from straying into this state would be to assume a jurisdiction over the residents of that state never intended by the statute, and beyond the power of the legislature to confer."

A court whose jurisdiction is limited to offenses occurring within a certain county has jurisdiction of the crime of larceny by a bailee, although the accused was not at the time within the county, where he sent by express money placed in his custody to a bank in such county, with directions by letter to send him a draft payable to himself, which he did for the purpose of appropriating the money to his use, and facilitating his escape with it. *State v. Barnett*, 15 Or. 77, 14 Pac. 737.

And a court has jurisdiction of the offense

run at large and wander into the city, he was arrested and fined in the police court. Thereafter he brought this suit in the circuit court against the city and the police judge, seeking to prohibit them from enforcing the collection of the fine and costs. A general demurrer was sustained to his petition, and he appeals.

The validity of the ordinance is not assailed, but it is insisted that appellant did not commit any offense in the city limits, because he did not in person take his cow into the city and turn her loose; and therefore the police court had no jurisdiction to impose a fine upon him for a violation of the ordinance, although it is conceded that the cow might have been impounded and proceeded against *in rem*, as

it were. In support of the argument that the police court had no jurisdiction over the person of appellant, our attention is called to § 143 of the Constitution, reading: "A police court may be established in each city and town in this state, with jurisdiction in cases of violation of municipal ordinances and by-laws occurring within the corporate limits of the city or town in which it is established, and such criminal jurisdiction within the said limits as justices of the peace have. . . . And § 3051 of the Kentucky Statutes (Russell's Stat. 1862), relating to the class of cities of which Greenville is one, reading: "A police court is hereby established in such city, to be held by the police judge of such city. Said police court shall have

of stealing a watch, although the thief was not at the time within the court's territorial jurisdiction, if he sends the stolen property by railway to an accomplice within such jurisdiction, for the purpose of sale. *Reg. v. Rogers*, 11 Cox, C. C. 38, 37 L. J. Mag. Cas. N. S. 83, L. R. 1 C. C. 136, 18 L. T. N. S. 414, 16 Week. Rep. 733.

Where a promissory note with forged indorsements has been sent by mail from one county to a person in another county, for the purpose of obtaining credit upon it, the offense is complete, and the forger should be tried in the latter county, although he was not personally present there at the time of the offense. *People v. Rathbun*, 21 Wend. 529.

And where one has given to another poison to be taken, and the latter carries the poison away with him into another county, where he swallows it and dies, the courts of the latter county have jurisdiction of the crime of murder thus committed therein by "administering" poison, although the one who gave the poison was not personally present in the latter county at the time. *Robbins v. State*, 8 Ohio St. 131.

In *People v. Wiley*, 10 N. Y. Crim. Rep. 231, 20 N. Y. Supp. 445, although it appeared that the defendant was personally present in the county where he was indicted, aiding and abetting in the commission of a larceny, the court said that even if his participation had been confined to the fact of counseling and inducing its commission while in another county, as, by statute, that made him a principal in the crime, he would have been properly indicted in the county where the crime was committed, although not personally present there.

Under an act to compel parents to maintain their children, expressly providing that the offense of abandonment or neglect of, or refusal to provide for, such children, shall be held to have been committed in any county of the state where they may be when complaint is made, and that the citizenship once acquired in the state of any father of any child living in the state shall be deemed to continue until the child arrives 33 L.R.A. (N.S.)

at the age of sixteen, if he so long continues to live in the state, a nonresident may be prosecuted in the courts of the state for failure to provide for his children living therein, although he was not in the state at the time of the alleged offense. *State v. Sanner*, 81 Ohio St. 393, 26 L.R.A. (N.S.) 1093, 90 N. E. 1007.

And a nonresident who has been found and arrested within a state is amenable to its criminal justice, and may be prosecuted for the crime of embezzlement committed within the state by drawing, as agent, checks on his employers in the state, and obtaining money by means thereof, although he was without the state at the time of the commission of the offense. *Ex parte Hedley*, 31 Cal. 108.

In *Hanks v. State*, 13 Tex. App. 289, it was held that under a statutory provision that persons out of the state may commit, and be liable to indictment and conviction for committing, certain offenses not necessarily requiring a personal presence in the state, the courts of the state have jurisdiction of the offense of forgery of a transfer of a land certificate for land in the state, although the acts constituting the forgery were all committed, and the defendant was at the time present, in another state.

And in *State v. Morrow*, 40 S. C. 221, 18 S. E. 853, 9 Am. Crim. Rep. 28, a prosecution for abortion, although it was held that there was no ground for a plea to the jurisdiction, as there was evidence of acts done by the defendant while personally present within the state, in pursuance of an intention to effect an abortion, the supreme court said that assuming that there was no such evidence, still the court in that state had jurisdiction of the offense, although the defendant was absent from its territorial jurisdiction, if he procured and sent into the state by mail certain drugs intended to produce an abortion within the state, advising their use for the purpose of bringing about an abortion, and an abortion resulted.

So, in *Simpson v. State*, 92 Ga. 41, 22 L.R.A. 248, 44 Am. St. Rep. 75, 17 S. E. 984, it was held that the courts of this

jurisdiction concurrent with the justice's courts of all actions and proceedings, civil and criminal, except that in criminal cases the jurisdiction shall be confined to cases occurring within the city, . . . and shall have exclusive jurisdiction of all actions for the recovery of any fine . . . and of all prosecutions for any violations of any ordinance. . . ." We have no disposition to question the proposition that unless an offense is committed within the city, the police court has no jurisdiction. This being so, the only question presented is: Did appellant, by permitting his cow to run at large and into the city, commit within the city an offense?

As we understand the argument of counsel for appellant, it goes to the extent of insisting that a person cannot commit an offense against an ordinance of a city or town unless he is actually present within the city limits when the offense is committed. But we do not think it necessary

that a person charged with committing an offense against an ordinance should be actually within the city at the time of its violation, if in fact, through its acts or agents, or by or through means or things controlled and directed by him, the offense charged against him is actually committed within the city. Suppose a city had an ordinance prohibiting and punishing the throwing of explosive substances on the streets within the city limits, and a person should stand just outside the corporate boundary and throw an explosive substance within the city limits,—could it be contended that he was exempt from liability and punishment under the ordinance merely because he was outside of the city when he threw the offending article? Or suppose a city had an ordinance prohibiting the bringing into the city of intoxicating liquors for sale, and a person outside of the city sent for sale by his agent intoxicating liquors into the city,—would he

state have jurisdiction of a statutory offense of shooting at another, although the accused, at the time of the shooting, stood in an adjoining state, if his bullet, missing the person shot at, who was in the state, struck within this state, in close proximity to him.

And a nonresident may be prosecuted for murder in the courts of the state where the crime was committed, although he was not personally present within the state at the time, where he stood with his gun just across the state line, some two or three hundred yards distant, ready and near enough to give assistance if necessary, while a band of men of whom he was the leader shot to death certain prisoners whom they had taken from the custody of officers of the law, and after the shooting he administered to each of the band an oath never to reveal the names of any of those implicated. *Hatfield v. Com.* 11 Ky. L. Rep. 468, 12 S. W. 309.

Likewise, a nonresident may be prosecuted in the courts of a state for the illegal sale of lottery tickets, an offense in which there is no accessory, although he was not personally within the state at the time, if he conspired with his agent to sell the tickets in the state, and the agent effected in the state the unlawful object of conspiracy. *Com. v. Gillespie*, 7 Serg. & R. 409, 10 Am. Dec. 475.

And one who in Virginia conspires to promote a scheme of lottery which is to be partly carried on in Virginia and partly in the District of Columbia may be prosecuted in the police court of the District of Columbia, when subsequently arrested within the District, for promoting a lottery scheme there in violation of statute, although he does not actually come into the latter jurisdiction at the time of the offense, but acts therein through agents. *United States v. King*, 9 Mackey, 404. 33 L.R.A.(N.S.)

Where one commits within a certain state, through an innocent agent, the crime of knowingly uttering and publishing as true and genuine a false and forged deed which he has procured to be forged and has mailed from another state, the former state has jurisdiction of the offense of uttering, although the accused was not at the time within the state. *Lindsey v. State*, 38 Ohio St. 507.

And the courts of a state have jurisdiction of the offense of obtaining money by false pretenses, committed within the state by a nonresident, through an innocent agent, although the former was not, at the time of the offense, within the state. *Adams v. People*, 1 N. Y. 173, affirming 3 Denio, 190, 45 Am. Dec. 468.

So, in *Reg. v. Garrett*, 17 Jur. 1060, a prosecution for obtaining money by false pretenses, holding that the facts of the case did not amount to an obtaining of money within the meaning of the statute, *Ld. Campbell, Ch. J.*, said: "I do not proceed upon the ground that the offense was committed beyond the jurisdiction of the court, for if a man employ a conscious or unconscious agent to commit an offense in this country, he is amenable to the laws of England, although at the time the offense was committed he was living beyond the jurisdiction."

And a nonresident may be prosecuted in the courts of the state for the statutory offense of bringing paupers into the state, although he did not personally bring them, and was not himself within the state at the time of the offense, where he sent them into the state under the care of an agent of his. *Barkhamsted v. Parsons*, 3 Conn. 1.

Offense of accessory before the fact.

But one who, out of the state, merely becomes an accessory before the fact to a

not subject himself to the penalty provided by the ordinance? Illustrations like this might be multiplied without number, but it is scarcely necessary to use others, as we think there can be no doubt that when any person violates a valid ordinance in person or by or through things, instrumentalities, or agencies that he owns or controls and directs, he is subject to the punishment imposed. It is the act or thing that is done within the city limits in violation of the ordinance that subjects the doer to the penalty. Where the doer in fact is at the time is a matter of no consequence. Possibly in some cases it might be difficult to get jurisdiction of the person of the offender, so that he might be punished, but this fact would not affect his guilt or his liability to punishment if he could be brought to trial. A person need not himself be within the territorial limits of a city in order to commit a violation of one of its or-

dinances if the act that he commits or the thing that he sets in motion occurs within the city. When appellant permitted his cow to wander at large within the city limits, he as certainly committed an act in violation of its laws as if he had himself driven his cow within the limits and turned her at large. There could be no difference between the legal effect and consequence of appellant's act in standing just outside the city limits, and driving his cow into the city, to run at large, and in leading her into the city, and then turning her loose. In both instances it would be through his agency or conduct that she was at large in the city. The fact that the cow might have been impounded, and subjected in a proper proceeding to any fine imposed against appellant, did not relieve him from liability, nor did it grant the city authority to subject his cow without giving him an opportunity to be heard. *Varden v. Mount*, 78 Ky. 86, 39 Am. Rep. 208;

felony (larceny) committed within the state, cannot be prosecuted in the courts of the state, even under the statutory provision that "every person being without this state, committing or consummating an offense by an agent or means within the state, is liable," etc., as this language must be confined to persons who, without the state, commit a crime which, in legal contemplation, is to be deemed as having been committed within the state under circumstances that will make a person thus committing it a principal in the crime. *Johns v. State*, 19 Ind. 421, 81 Am. Dec. 408.

In *State v. Wyckoff*, 31 N. J. L. 65, however, holding that one who, without the state, becomes accessory before the fact to a felony by inciting and procuring a guilty agent or accomplice to enter the state and commit a larceny, is not guilty of any offense within the jurisdiction of the state, the court said: "It is undoubtedly true that personal presence within the jurisdiction in which the crime is committed is not, in all cases, requisite to confer cognizance over the person of the offender in the tribunals of the government whose laws are violated. In some cases the maxim applies, *Crimen trahit personam*. . . . The rule, therefore, appears to be firmly established and upon very satisfactory grounds, that where the crime is committed by a person absent from the country in which the act is done, through the means of a merely material agency, or by a sentient agent who is innocent, in such cases the offender is punishable where the act is done. The law implies a constructive presence from the necessity of the case; otherwise the anomaly would exist of a crime, but no responsible criminal."

And in *State v. Chapin*, 17 Ark. 561, 65 Am. Dec. 452, holding that an accessory before the fact, in one state, to a felony

(arson) committed by his co-conspirators, the principals in the crime, in another state, is guilty of a crime only in the former state, the court said that if the defendant had been a principal in the offense, instead of an accessory before the fact, he would have been regarded as being present in contemplation of the law where the offense was committed, although he was at the time personally absent from the state, and would have been amenable to the laws of the state where the offense was committed; "it is not necessary in all cases that a man should be actually present in this state to make him amenable to our laws for a crime committed here. If the crime is the immediate result of his act, he may be made to answer for it in our courts, though actually absent from the state at the time he does the act, because he is constructively present, or present in contemplation of law."

And the courts of a state in which the distinction between principal and accessory in felony has been done away with by express statutory provision, and every person who aids and assists in the commission of a crime is made a principal, have jurisdiction to try and convict a defendant who has conspired with others in another state to commit a theft from an express car in a train in the former state, and who has assisted in the initiation of the offense in the other state, although he was not personally present within the state at the time of the commission of the offense, if jurisdiction of his person can be obtained. *State v. Grady*, 34 Conn. 118. In this case, the court further repudiated generally the doctrine held in the last three cases above cited as to the punishment in one state of a person becoming in another state an accessory before the fact to a felony committed in the former state.

A. C. W.

Paducah v. Ragsdale, 122 Ky. 425, 92 S. W. 13. The case of *Earle v. Latonia Agri. Assn.* 127 Ky. 578, 106 S. W. 312, is in no wise in conflict with the conclusion we have reached. In that case it was attempted by ordinance to prohibit and punish the sale of intoxicating liquors outside the limits of the corporation, and it was held that the ordinance, in so far as it attempted the punishment of offenses committed outside of the city limits, was void, and this for the reason that the act that constituted a violation of the ordinance was not committed within the city. Here the act that constituted a violation of the ordinance was committed within the city. It is therefore obvious that there is no similarity between this case and that.

Wherefore the judgment of the lower court is affirmed.

MAINE SUPREME JUDICIAL COURT.

SETH C. GORDON

v.

ROSE A. CONLEY.

JAMES B. O'NEIL

v.

SAME

HERBERT F. TWITCHELL

v.

SAME.

(— Me —, 78 Atl. 365.)

Witness — expert — compensation — amount.

1. Physicians employed without an agreement as to compensation, by a plaintiff in an action to recover for personal injuries, to make a personal examination of his condition in order to qualify as experts, and then to attend court to testify as such experts and assist counsel in meeting expert

evidence from the other side, may recover from him reasonable compensation for their time, and are not limited to the regular witness fees, where they were not summoned, but appeared voluntarily under the agreement.

Appeal — erroneous ruling — materiality.

2. Erroneous rulings of the trial court upon abstract propositions of law will not require a reversal if, upon the law and legal evidence, the result of the trial was right.

(November 5, 1910.)

EXCEPTIONS by defendant to rulings of the Supreme Judicial Court for Cumberland County directing verdicts in plaintiffs' favor in actions brought to recover for professional services as expert witnesses. Overruled.

The facts are sufficiently stated in the opinion.

Mr. Henry J. Conley, for defendant:

When the expert comes into the court without being summoned, he has no greater rights to special compensation than he would have had if he had been duly summoned to appear in the case.

Barrus v. Phaneuf, 166 Mass. 125, 32 L.R.A. 619, 44 N. E. 141; *Ex parte Dement*, 53 Ala. 389, 25 Am. Rep. 611; *Wright v. People*, 112 Ill. 540; *State v. Teipner*, 36 Minn. 535, 32 N. W. 678, *Dodge v. Stiles*, 26 Conn. 463; *Pool v. Boston*, 5 Cush. 219.

Compensation for expert testimony on behalf of the state in a criminal case includes the usual witness fees, unless further provision is made by statute.

Flinn v. Prairie County, 60 Ark. 204, 27 L.R.A. 669, 46 Am. St. Rep. 168, 29 S. W. 459; *Larimer County v. Lee*, 3 Colo. App. 177, 32 Pac. 841; *Ex parte Dement*, 53 Ala. 389, 25 Am. Rep. 611; *Summers v. State*, 5 Tex. App. 374, 32 Am. Rep. 573; *State v. Teipner*, 36 Minn. 535, 32 N. W.

Note. — Compensation of expert witnesses.

Aside from *GORDON v. CONLEY* but two cases in point have been discovered since the note in 25 L.R.A. (N.S.) 1040, on the same subject.

In *Keller v. Harrison*, — Iowa, —, 128 N. W. 851, it was held that a surveyor who made a survey, and investigated one made by the defendant, and testified concerning both, was entitled to additional compensation as an expert, under a Code provision that "witnesses called to testify only to an opinion founded on the special study or experience in any branch of science, or to make scientific or professional examinations and state the result thereof, shall receive additional compensation, to be fixed by the court with reference to the time em-

ployed and the degrees of learning and skill required."

In *Hough v. State*, 68 Misc. 26, 124 N. Y. Supp. 878, the court of claims rejected the claimant's demand for compensation for making an examination and appraisal, preparatory to testifying as an expert for the state, of the plant of the Consolidated Gas Company in New York city, because of his failure to fix the appraisal at a figure substantially below that claimed by the gas company, in accordance with the claimant's understanding of what was wanted, and as agreed. The expert in this case was to have a certain sum as a retainer, and so much per day for the time his services were required, but the court held that the contract was entire, and upon its breach the claimant forfeited not only the stipulated sum per day, but also the retainer. *W. A. S.*

678; *Allegheny County v. Watt*, 3 Pa. 462; *Northampton County v. Innes*, 26 Pa. 156; *Israel v. State*, 8 Ind. 467; *Re Atty. Gen.* 104 Mass. 537; *Smith v. McLaughlin*, 77 Ill. 596; *Wright v. People*, 112 Ill. 540; *Parks v. Brewer*, 14 Pick. 192.

Mr. Joseph B. Reed, for plaintiffs:

If a witness agrees with a party that he will attend and testify, without being summoned, and he is not summoned, any reasonable promise for compensation is good and may be enforced.

Dodge v. Stiles, 26 Conn. 463.

Spear, J., delivered the opinion of the court:

These were three actions of assumpsit on accounts annexed, severally brought by *Seth C. Gordon*, *James B. O'Neil*, and *Herbert F. Twitchell*, all of *Portland*, in said county of *Cumberland*, physicians and surgeons, against *Rose A. Conley* and trustees, to recover for professional services as expert witnesses, three days each in the case of *Dr. Gordon* and *Dr. O'Neil*, and four days in the case of *Dr. Twitchell*; they having, at the request of *Rose A. Conley* and her attorney, *Henry J. Conley*, made a physical examination of the said *Rose A. Conley*, and at the request of her said attorney attended court and gave evidence of their opinion relative to her condition, and the causes that might have produced it, in an action for personal injuries brought by said *Rose A. Conley* against the *Grand Trunk Railway*, tried at the *January* term of the supreme judicial court for *Cumberland* county, *A. D.* 1908.

These three cases present substantially the same conditions of facts, and were tried together at the *December* term of the superior court for *Cumberland* county, *A. D.* 1909.

The jury rendered a verdict for the plaintiffs *Seth C. Gordon* and *James B. O'Neil* each the sum of \$112.50, and for the plaintiff *Herbert F. Twitchell* the sum of \$150. The defendant introduced no testimony. The evidence conclusively shows that the plaintiffs were employed by the defendant or her attorneys to make an examination of her physical condition for the purpose of enabling them to qualify as medical expert witnesses in her case about to be tried in the supreme judicial court against the *Grand Trunk Railway* for injury alleged to have been received by her through the negligence of the railway. While *Dr. O'Neil* was her regular attending physician, he nevertheless was used as an expert upon the witness stand. The evidence of *Judge Foster*, who was counsel for the defendant in her case against the railway, is so conclusive upon the nature of the employment of

the three physicians in case at bar, their required attendance at court during the trial, and the time they spent at court, that the verdict of the jury must be regarded as fully warranted upon this issue if the law permits it to stand. The plaintiffs were not summoned, but appeared voluntarily at the request of the defendant's counsel, but without any agreement as to the compensation they were to receive for their services. Under these conditions, the plaintiffs contend that they were entitled to reasonable compensation instead of the regular witness fee.

But the defendant asserts, admitting the facts as claimed by the plaintiffs, that they are entitled to only the witness fees provided by law. The defendant's own statement of her contention is this: The defendant claims that the compensation of all witnesses, including expert witnesses, is established by § 13 of chapter 117 of the Revised Statutes, as amended by chapter 66 of the Public Laws of 1907, which reads as follows, to wit: "Witnesses in the supreme judicial or superior courts and in the probate courts, and before referees, auditors, or commissioners specially appointed to take testimony, shall receive \$1.50, or before county commissioner, \$1, for each day's attendance, and 6 cents for each mile travel going out or returning home; and before a justice of the peace, a judge of a municipal or police court, 50 cents a day for attendance, and for travel the same as at the court aforesaid."

"As there is no other provision made in our statutes for the payment of witnesses, the courts nor the law cannot distinguish between different classes of witnesses, between 'expert' testimony, so called, and that which is not expert; but must pay them all the same fee, which is the fee established by law."

It will be observed that the question raised is not whether an expert witness can be summoned into court in the regular way, and be required to give in evidence all the knowledge he may have acquired as an expert upon a particular subject under investigation, for the regular witness fee, but whether having been employed by a party to give special attention to the investigation of a matter out of court, and then appear in court, not only to testify as an expert witness, but to remain in court for a specific length of time with loss of regular occupation, not by order of the court, but by request of the party employing, a witness is entitled to receive reasonable compensation beyond the regular witness fee for such services. If a party saw fit to summon an expert witness to testify in court without any

knowledge as to what he might say, whether the witness would be required for the usual fee to give all the expert knowledge he might have upon the subject under investigation does not now arise. That is not the case before us. In the case at bar the plaintiffs, without summons, came into court, not only to testify, but by special request remained in court three days in order to listen to the experts on the other side of the case advise counsel, and testify in rebuttal if necessary; while a witness under subpoena, after testifying for an hour or half an hour, might be excused by the court and enabled to pursue his ordinary occupation, instead of losing three days. He is under no contractual obligation whatever to the party calling him. He cannot even be unwillingly interviewed before testifying. He takes the stand, testifies, and leaves it. This is all he is required by law to do. The court, of course, could require him to remain in attendance, but it is an unusual case in which an expert witness, capable of earning perhaps \$100 per day, would be required to remain at \$1.50 per day for the benefit of private interests. Hence it appears that a witness summoned into court, and for nonappearance subject to contempt, stands in an entirely different relation to the court and the parties from the witness who appears in court without summons, but upon a special agreement not only to prepare and testify, but to remain in court for the special benefit of the party calling him. Such a witness performs services outside the statutory requirement, and is entitled to whatever his services are reasonably worth above the legal fee due to the ordinary witness. This conclusion with respect to the rights of expert witnesses brought into court, without summons, upon agreement to perform services not required by law of a witness summoned in the regular way, seems not only to be reasonable and equitable, but is fully sustained by a strikingly parallel case. *Barrus v. Phaneuf*, 166 Mass. 123, 32 L.R.A. 619, 44 N. E. 141.

It should be here observed that the case at bar is stronger in favor of the doctrine herein promulgated than the Massachusetts case, inasmuch as in the latter the expert was regularly summoned, and accepted without protest the statutory fee, and was not in fact asked questions calling for his opinion as an expert. This case was an action of contract to recover extra compensation as an expert. In stating the case the court says: "The jury must have found upon the evidence that the defendant engaged the plaintiff to go into court at a future day, and testify for him as an expert, in regard to a matter which the plaintiff had examined as a civil engineer. . . . The plain-

tiff agreed to do this and talked over the matter, and went into court and testified, and during the progress of the trial advised the defendant's attorney in regard to questions to be asked to himself and to the other witnesses." It would be difficult to find a state of facts more similar than those disclosed in the case at bar to those in the case quoted. Judge Foster, who assisted in the trial of this case, and "examined all the witnesses of the plaintiffs and cross-examined all the witnesses for the defense, and opened and argued the case," says that he examined all the plaintiffs as expert witnesses, consulted with them relative to their testimony before it was put on, had to have them "in court for the reason that he did not know what the defense was to prove or attempt to prove, and therefore must have their attendance not only during the introduction of the plaintiffs' evidence, but also during the testimony of the defense, in order that they might rebut if it became necessary," and that the nature of the case was such as to render expert testimony very material.

The court in the *Barrus* Case states the application of the law to the existence of the facts there found as follows: "In the present case, we are of opinion that upon the facts in evidence there was sufficient consideration to support a promise to pay a reasonable compensation in addition to the statutory fees, and that the jury was warranted in finding a promise to that effect, or a mutual understanding that the plaintiff was to be so paid. If such promise was made, or such understanding existed, the plaintiff's right to recover would not be taken away or lost by his omission to claim or demand extra compensation, or to notify the defendant that he should make such claim, or by his acceptance of the statutory fee without objection, or by the omission of the defendant at the trial to put any question to him as an expert witness, and the consequent omission of the plaintiff to testify as an expert. All these were merely matters for the consideration of the jury in determining whether any such promise was made, or such understanding existed." We also quote the following paragraph from *Dodge v. Stiles*, 26 Conn. 463, which is precisely applicable to the facts in the case at bar: "If a witness agrees with a party that he will attend and testify without being summoned, and he is not summoned, and so not brought under the order or censure of the court, we suppose any reasonable promise for compensation is good and may be enforced; for the proceeding or service is not under nor in pursuance of the statute." The evidence in the case before us conclusively shows that the plain-

tiffs appeared at court at the request of the defendant, without subpoena, were not under the order of the court, were under no obligation to remain in court, and voluntarily remained for three days, one four, at the special instance of the defendant, as already appears from the testimony of Judge Foster.

It is the opinion of the court that the jury were fully warranted in finding an implied promise on the part of the defendant to pay the plaintiffs whatever their services were reasonably worth, and a sufficient consideration to support it. The plaintiffs rendered a bill of \$50 per day. The jury allowed in their verdict \$37.50 per day. In view of the reputation and skill of the plaintiffs, it would seem that the damages were entirely reasonable.

During the course of the trial, the defendant filed forty-three exceptions to the rulings of the presiding judge. In view of the conclusion of the court upon the motion, it becomes immaterial whether the rulings of the court as abstract principles of law were right or wrong. We shall therefore not undertake to discuss the exceptions. Upon the law and legal evidence, whatever the errors in the rulings of the court, the result of the trial was evidently right. It would seem like trifling with the ends of judicial procedure to say that an erroneous ruling, which did not affect the truth of the result, should be regarded as a sufficient reason for the overturning of a fair and honest judgment. If the court erred, the jury did not. They were right. If the exceptions were sustained and the case retired along the lines of law laid down in the discussion of the motion, the only possible difference in the result would necessarily be confined to the amount of damages a new jury might render. But, as the damages are clearly not excessive, the case should not be sent back for a new speculation upon this question.

In view of our conclusion upon the merits in this case, we have not examined the exceptions for the purpose of determining whether, as abstract principles of law, the rulings of the court were right or wrong. A careful examination of the law and the evidence fully satisfies the court that the case upon its merits has been rightly decided, and that the result should not be disturbed because of abstract errors of law, if they exist, which could not and do not interfere with the truth.

This view of the law with respect to the consideration of exceptions seems to have been established in one of the very first opinions ever announced by the court of Maine. In *Farrar v. Merrill*, 1 Me. 17, at the August term in 1820, the court laid 33 L.R.A. (N.S.)

down the rule of law in precise accord with that stated in the present opinion. The case was a writ of entry, putting in issue the title of a certain tract of land. It seems that a paper apparently bearing upon the question was offered and admitted under objection. The court say that this evidence, "being viewed alone, would seem to be inadmissible as proof. . . . But we consider the question as to the admissibility of the paper as wholly unimportant in the view we have taken of the cause, for we are all of opinion that the facts appearing on the undisputed records of the proprietors, taken in connection with some other facts which have been proved, fully justify the instructions and objections delivered by the judge to the jury, and the verdict which the jury have returned. It is our duty, in deciding on the exceptions, to look to the whole evidence, and not disturb the verdict when the facts proved, independent of the papers objected to, furnish the tenant with a substantial defense." It will also be observed that in *Elliott v. Sawyer*, 107 Me. —, 77 Atl. 782, this doctrine was reiterated. In this case the court did not undertake to determine whether the testimony was erroneously admitted or not, saying: "Exceptions to the erroneous admission of testimony will not be sustained, if the excepting party was not aggrieved by it." Between these two decisions, covering a period coincident with the judicial history of the state, may be found numerous analogous cases by referring to the digest under "New Trial" and "Misdirection." The doctrine, however, is so well established that it is not deemed necessary to cite the cases in detail.

Motion and exceptions overruled.

MINNESOTA SUPREME COURT.

DELIA KEEVER, Admr., etc., of Lewis Eugene Keever, Deceased, Appt.,

v.

CITY OF MANKATO, Respnt.

KATE FLANAGAN, Admr., etc., of F. R. Flanagan, Deceased, Appt.,

v.

SAME, Respnt.

(113 Minn. 55, 129 N. W. 158.)

Municipal corporation — polluted water supply — liability.

A complaint charged that defendant city negligently allowed the supply in its water-works system to become polluted with poisonous substances, and large quantities

Headnote by JAGGARD, J.

of filth and sewage to escape into and saturate its water supply, by reason whereof plaintiffs' intestates contracted typhoid fever and died as a consequence. On demurrer it is held:

(1) The municipality was liable for its negligence in its private or corporate capacity, and was not exempt because it was carrying out a governmental function.

(2) Under § 4503, Rev. Laws 1905, an administrator of a person whose death was due to the wrongful act of a municipality may maintain an action against it for damages consequent thereon.

(December 23, 1910.)

APPEALS by plaintiffs from judgments of the District Court for Blue Earth County in actions brought to recover damages for wrongful deaths caused by negligence of the defendant city in furnishing impure water to plaintiffs' intestates. Reversed.

The facts are stated in the opinion.

Messrs. Chris Carlson and Dunn & Carlson, for appellants:

The city, as to the waterworks system, stands on the same footing as any individual.

Bailey v. New York, 8 Hill. 531, 38 Am. Dec. 669; 1 Dill. Mun. Corp. 3d ed. §§ 66, 67; 5 Thomp. Neg. § 5829; 2 Smith, Modern Law of Mun. Corp. § 802; 3 Abbott, Mun. Corp. § 892; Tiedeman, Mun. Corp. § 327b; 1 Jaggard, Torts, p. 179; 28 Cyc. Law & Proc. p. 1289; Wiltse v. Red Wing, 99 Minn. 255, 109 N. W. 114; Western Sav. Fund Soc. v. Philadelphia, 31 Pa. 185; Aldrich v. Tripp, 11 R. I. 141, 23 Am. Rep. 434; Esberg-Gunst Cigar Co. v. Portland, 34 Or. 282, 43 L.R.A. 435, 75 Am. St. Rep. 651, 55 Pac. 961; Wagner v. Rock Island, 146 Ill. 139, 21 L.R.A. 522, 34 N. E. 545; Illinois Trust & Sav. Bank v. Arkansas City, 34 L.R.A. 518, 22 C. C. A. 171, 40 U. S. App. 257, 76 Fed. 282; Winona v. Botzet, 23 L.R.A. (N.S.) 204, 94 C. C. A. 563, 169 Fed. 321; Judson v. Winsted, 80 Conn. 384, 15 L.R.A. (N.S.) 91, 68 Atl. 999; Brown v. Salt Lake City, 33 Utah, 222, 14 L.R.A. (N.S.) 619, 126 Am. St. Rep. 828, 93 Pac. 570, 14 A. & E. Ann. Cas. 1004; Chicago v. Selz, S. & Co. 202 Ill. 545, 67 N. E. 386; Ottersbach v. Philadelphia, 161 Pa. 111, 28 Atl. 991; Todd v. Crete, 79 Neb. 671, 113 N. W. 172, 115 N. W. 307; Davoust v. Alameda, 149

Cal. 69, 5 L.R.A. (N.S.) 536, 84 Pac. 760; Hill v. Boston, 122 Mass. 344, 23 Am. Rep. 332; Oliver v. Worcester, 102 Mass. 497, 3 Am. Rep. 485; Merrimack River Sav. Bank v. Lowell, 152 Mass. 556, 10 L.R.A. 122, 26 N. E. 97; Lynch v. Springfield, 174 Mass. 430, 54 N. E. 871; Little v. Holyoke, 177 Mass. 114, 52 L.R.A. 417, 58 N. E. 170; Collins v. Greenfield, 172 Mass. 80, 51 N. E. 454.

Minnesota has applied the distinction between the public and governmental functions of a corporation, and those which are in their nature private and proprietary.

Snider v. St. Paul, 51 Minn. 470, 18 L.R.A. 151, 53 N. W. 763; Reed v. Anoka, 85 Minn. 294, 88 N. W. 981; Powell v. Duluth, 91 Minn. 53, 97 N. W. 450; Grand Forks v. Luck, 97 Minn. 373, 6 L.R.A. (N.S.) 198, 107 N. W. 393, 7 A. & E. Ann. Cas. 1015; Wiltse v. Red Wing, 99 Minn. 255, 109 N. W. 114; Gordon v. Doran, 100 Minn. 343, 8 L.R.A. (N.S.) 1049, 111 N. W. 272; State ex rel. Lathaw v. Water & Light Comrs. 105 Minn. 472, 127 Am. St. Rep. 581, 117 N. W. 827; Winona v. Botzet, 23 L.R.A. (N.S.) 204, 94 C. C. A. 563, 169 Fed. 321.

Messrs. John W. Schmitt, Harrison L. Schmitt, Samuel B. Wilson, and Lorin Cray, for respondent:

Cities are not liable in damages for injuries resulting from the negligence of their officers or agents while engaged in the performance or carrying out of so-called government functions.

Schigley v. Waseca, 106 Minn. 94, 19 L.R.A. (N.S.) 689, 118 N. W. 259, 16 A. & E. Ann. Cas. 169; Davoust v. Alameda, 149 Cal. 69, 5 L.R.A. (N.S.) 536, 84 Pac. 760; Richmond v. Long, 17 Gratt. 375, 94 Am. Dec. 461; Claussen v. Luverne, 103 Minn. 491, 15 L.R.A. (N.S.) 698, 115 N. W. 643, 14 A. & E. Ann. Cas. 673; Gullikson v. McDonald, 62 Minn. 278, 64 N. W. 812; Lane v. Minnesota State Agri. Soc. 62 Minn. 175, 29 L.R.A. 708, 64 N. W. 382; Snider v. St. Paul, 51 Minn. 466, 18 L.R.A. 151, 53 N. W. 763; Hill v. Boston, 122 Mass. 344, 23 Am. Rep. 332.

The city, in its ownership and operation of its waterworks system, is exercising and performing governmental functions.

Smith, Modern Law of Mun. Corp. §§ 269-271, 273, 779, 780; 1 Abbott, Mun. Corp. § 146; 3 Abbott, Mun. Corp. § 2226; Elliott, Mun. Corp. §§ 146-306-321; Crawfordville v. Braden, 130 Ind. 149, 14 L.R.A. 268, 30 Am. St. Rep. 214, 28 N. E. 849; Smith v. Nashville, 88 Tenn. 464, 7 L.R.A. 469, 12 S. W. 924; Jacksonville Electric Light Co. v. Jacksonville, 36 Fla. 229, 30 L.R.A. 540, 51 Am. St. Rep. 24, 18 So. 677; Miller v. Minneapolis, 75 Minn. 131, 77 N.

Note.—Cases involving municipal liability for damages caused by pollution of its water supply will be found collected in the note on establishment and regulation of municipal water supply, in 61 L.R.A. 88, and the note on the liability of a municipality for tort in connection with its waterworks system, in 25 L.R.A. (N.S.) 245. 33 L.R.A. (N.S.)

W. 788; Claussen v. Luverne, 103 Minn. 491, 15 L.R.A.(N.S.) 698, 115 N. W. 643, 14 A. & E. Ann. Cas. 673; East Grand Forks v. Luck, 97 Minn. 373, 6 L.R.A.(N.S.) 198, 107 N. W. 393, 7 A. & E. Ann. Cas. 1015; Springfield F. & M. Ins. Co. v. Keeseville, 148 N. Y. 46, 30 L.R.A. 660, 51 Am. St. Rep. 667, 42 N. E. 405; Grube v. St. Paul, 34 Minn. 402, 26 N. W. 228.

It is exercising its police power for and in behalf of the health, safety, and general welfare of its inhabitants and the public generally.

2 Abbott, Mun. Corp. §§ 1142, 1143, note to § 888; Chicago v. Selz, S. & Co. 202 Ill. 545, 67 N. E. 386; Tollefson v. Ottawa, 228 Ill. 134, 11 L.R.A.(N.S.) 990, 81 N. E. 823; Evans v. Kankakee, 231 Ill. 223, 13 L.R.A.(N.S.) 1190, 83 N. E. 223; Prime v. Yonkers, 192 N. Y. 105, 84 N. E. 571; Bryant v. St. Paul, 33 Minn. 289, 53 Am. Rep. 31, 23 N. W. 220; Claussen v. Luverne, 103 Minn. 491, 15 L.R.A.(N.S.) 698, 115 N. W. 643, 14 A. & E. Ann. Cas. 673; 1 Farnham, Waters, § 146; Crawfordville v. Braden, 130 Ind. 149, 14 L.R.A. 268, 30 Am. St. Rep. 214, 28 N. E. 849; Smith v. Nashville, 88 Tenn. 464, 7 L.R.A. 469, 12 S. W. 924; Jacksonville Electric Light Co. v. Jacksonville, 36 Fla. 229, 30 L.R.A. 540, 51 Am. St. Rep. 24, 18 So. 677; Elliott, Mun. Corp. §§ 146, 306, 321; Miller v. Minneapolis, 75 Minn. 131, 77 N. W. 788; Springfield F. & M. Ins. Co. v. Keeseville, 148 N. Y. 46, 30 L.R.A. 660, 51 Am. St. Rep. 667, 42 N. E. 405; Brenham v. Brenham Water Co. 67 Tex. 542, 4 S. W. 143; Green v. Ashland Water Co. 101 Wis. 258, 43 L.R.A. 117, 70 Am. St. Rep. 911, 77 N. W. 722.

It would not be sound policy to open the door, and permit actions for injuries like these.

23 Am. & Eng. Enc. Law, 2d ed. p. 455; Mechem, Pub. Off. 348; Orme v. Kingsley, 73 Minn. 143, 72 Am. St. Rep. 614, 75 N. W. 1123; McNamara v. Gargett, 68 Mich. 454, 13 Am. St. Rep. 355, 36 N. W. 218; Eastman v. Meredith, 36 N. H. 284, 72 Am. Dec. 302; Conway v. Beaumont, 61 Tex. 10; Stewart v. New Orleans, 9 La. Ann. 461, 61 Am. Dec. 218; Dargan v. Mobile, 31 Ala. 469, 70 Am. Dec. 505; Richmond v. Long, 17 Gratt. 375, 94 Am. Dec. 461.

On petition for reargument.

Section 4403, Revised Laws, does not authorize actions of this kind to be maintained against a municipal corporation.

Maylone v. St. Paul, 40 Minn. 406, 42 N. W. 88; Orth v. Belgrade, 87 Minn. 237, 91 N. W. 843; State ex rel. Erickson v. West, 42 Minn. 147, 43 N. W. 845. 33 L.R.A.(N.S.)

Jaggard, J., delivered the opinion of the court:

This is an action for death by wrongful act, occasioned by the negligence of the defendant city. The complaint alleged that defendant, a municipal corporation, negligently allowed waters and the water supply in its waterworks system to become infected and polluted with poisonous substances "and large quantities of filth and sewage, all of which were saturated with the germs of diseases, . . . and did carelessly and negligently . . . permit . . . filthy, foul, and dangerous substances, common sewage, and other filth to escape into and saturate the water supply;" that by reason thereof the water became imminently dangerous to life and health, of which defendant had full notice and knowledge; that plaintiffs intestate, a citizen and resident, used the water, contracted typhoid fever, and died in consequence. The complaint set forth additional facts, as [to] the right of the administrator to recover. Defendant's demurrer to plaintiff's complaint was sustained. From that order the plaintiff appeals. It is to be noted that the complaint in the case at bar set forth not a mere action against the defendant to recover damages because the city failed to provide an adequate supply of pure water. The question here is whether the city is liable for, among other things, recklessly causing dangerous substances, like common sewage and other filth, to saturate its water supply and the wells, mains, and appurtenances thereto.

1. The first essential question is whether the city is exempt because it was carrying out a governmental function, or whether it is liable because it operated the waterworks in its private or corporate function. The defendant naturally insists that it was performing merely a governmental function. There is ambiguity in that term as used in this connection. It may mean that the operation of waterworks by a municipality is *infra vires* as distinguished from *ultra vires*, or it may mean that such function is public as distinguished from private or proprietary, in which capacity the city may voluntarily assume, for business purposes and for its own advantage, to conduct certain operations, and is held responsible for negligence therein, although the work is done ultimately for the benefit of its citizens. Many of the authorities to which defendant refers us properly hold that a city may properly operate waterworks. They have no tendency whatever to determine whether or not the city is or is not exempt in its operation of waterworks.

Defendant also insists that the city can make no profit out of its operation of these

waterworks. Doubtless this is in a general way true. At all events it may be here admitted. But the sequence which defendant seeks to draw does not at all follow, *i. e.*, that therefore it should be exempted from all liability for mismanagement. For the city is liable for neglect in connection with its streets, sidewalks, and sewers, from which, in their very nature, no profit is or can be made. The city operates the waterworks for profit, in the sense that it is voluntarily engaged in the same business which, when conducted by private persons, is operated for profit. The city itself makes a reasonable and varying charge. The undertaking is partly commercial. It is enough that the city is in a profit-making business. The city "is exercising a special privilege for its own benefit and advantage, notwithstanding a portion of the water is used by the city for protection against fire and in promoting the public health." *Hamersley, J.*, in *Hourigan v. Norwich*, 77 Conn. 358, 59 Atl. 487. The English authorities regard cities in such matters as "substitutions on a large scale for individual enterprises." *Mr. Justice Blackburn*, in *Mersey Docks & Harbour Board Trustees v. Gibbs*, L. R. 1 H. L. at page 107, approving *Mr. Justice Mellor* in *Coe v. Wise*, 5 Best & S. 440.

Finally, defendant insists that it would not be sound policy to open the door and permit actions like the present to be maintained, for the reason that as a result the defendant city, as well as any other city, would be liable at any time to have the same misfortune, and would be bankrupted thereby. The assessed valuation of the city is less than \$4,000,000. If the city is not exempted from liability, it is subject to claims of the same nature as the present, amounting to over \$10,000,000. Thus, the very existence of the city is threatened, and the city subjected to total destruction, which could be of no proportionate advantage to the individuals who suffered. It readily suggests itself as an answer to this dark prognostication that the number and nature of these cases does not appear in the record, and is not known to the court; besides, for the purposes of this case, the neglect of defendant is necessarily assumed. To the defendant, under the law, a number of defenses are available. How conclusive they may be in fact is wholly beyond any conjecture which we can recognize. Accordingly, we must regard defendant's figures as purely hypothetical. The question is one of general principles recognized by the law, and not of the private views of court or counsel as to what the convenience or necessity of a particular city may dictate under particular circumstances. The general experience of public and private water-

works is that ordinarily their operation involves no such financial disaster as defendant portrays.

It is obvious that a sound public policy holds a city to a high degree of faithfulness in providing an adequate supply of pure water. Nor does it appear why the citizens should be deprived of the stimulating effects of the fear of liability on the energy and care of its officials; nor why a city should be exempt from liability while a private corporation under the same circumstances should be held responsible for its conduct, and made to contribute to the innocent persons it may have damaged. As *Elliot, J.*, said in *East Grand Forks v. Luck*, 97 Minn. 373, 6 L.R.A.(N.S.) 193, 107 N. W. 393, 7 A. & E. Ann. Cas. 1015: "When the municipality enters the field of ordinary private business, it does not exercise governmental powers. Its purpose is, not to govern the inhabitants, but to make for them and itself private benefit. As far as the nature of the powers exercised is concerned, it is immaterial whether the city owns the plant and sells the water, or contracts with a private corporation to supply the water. It is not in either case exercising a municipal function. . . . When a municipality engages in a private enterprise for profit, it should have the same rights and be subject to the same liabilities as private corporations or individuals." See *Powell v. Duluth*, 91 Minn. 53, 97 N. W. 450; *Gordon v. Doran*, 100 Minn. 343, 8 L.R.A.(N.S.) 1049, 111 N. W. 272; *State ex rel. Latshaw v. Water & Light Comrs.* 105 Minn. 472, 127 Am. St. Rep. 581, 117 N. W. 827. Thus, in *Wiltse v. Red Wing*, 99 Minn. 255, 109 N. W. 114, a city operating the waterworks was held liable for water escaping from an embankment, under the rule in *Rylands v. Fletcher*, L. R. 3 H. L. 330, 6 Mor. Min. Rep. 129, 1 Eng. Rul. Cas. 235, "for," said *Start, Ch. J.*, "although a municipal corporation, it was engaged in the business of supplying water to its inhabitants for profit, an undertaking of a private nature."

This is undoubtedly the general rule. See *Piper v. Madison*, 140 Wis. 311, 25 L.R.A.(N.S.) 239, 133 Am. St. Rep. 1078, 122 N. W. 730; *People ex rel. Park Comrs. v. Detroit*, 28 Mich. 229, 15 Am. Rep. 202; *Bailey v. New York*, 3 Hill, 531, 38 Am. Dec. 669. As to the reasoning of this case, however, see *Darlington v. New York*, 31 N. Y. 164-193, 88 Am. Dec. 248. Cf. *Misano v. New York*, 160 N. Y. 123, 54 N. E. 744; *Aldrich v. Tripp*, 11 R. I. 141, 23 Am. Rep. 434; *Illinois Trust & Sav. Bank v. Arkansas City*, 34 L.R.A. 518, 22 C. C. A. 171, 40 U. S. App. 257, 76 Fed. 271, 282; *Winona v. Botzet*, 23 L.R.A.(N.S.) 204, 94 C. C. A. 563, 169 Fed. 321; *Judson v. Win-*

sted, 80 Conn. 384, 15 L.R.A.(N.S.) 91, 68 Atl. 999; Wagner v. Rock Island, 146 Ill. 139, 21 L.R.A. 522, 34 N. E. 545; Esberg-Gunst Cigar Co. v. Portland, 34 Or. 282, 43 L.R.A. 435, 75 Am. St. Rep. 651, 55 Pac. 961; Brown v. Salt Lake City, 33 Utah, 222, 14 L.R.A.(N.S.) 619, 126 Am. St. Rep. 828, 93 Pac. 570, 14 A. & E. Ann. Cas. 1004; Hourigan v. Norwich, 77 Conn. 358, 59 Atl. 487; Lynch v. Springfield, 174 Mass. 430, 54 N. E. 871; Chicago v. Selz, S. & Co. 202 Ill. 545, 67 N. E. 386; Philadelphia v. Gilmartin, 71 Pa. 141; Springfield F. & M. Ins. Co. v. Keeseville, 148 N. Y. 46, 30 L.R.A. 660, 51 Am. St. Rep. 667, 42 N. E. 405; Asher v. Hutchinson Water, Light & P. Co. 66 Kan. 496, 61 L.R.A. 58, 71 Pac. 813.

The cases in which a city has been held responsible or irresponsible for damages by fire consequent upon an inadequate supply of water are in a class of cases by themselves. The rule holding the city liable for its negligence in this case may not be consistent with the rule there announced. The law does not undertake to achieve the impossible. As was said in Gould v. Winona Gas Co. 100 Minn. 258, at page 264, 10 L.R.A.(N.S.) 889, 111 N. W. 254: "It is evident that the ultimate justification of the inapplicability of the rule [there in question] lies in the controlling regard of the common law, not for doctrine, but for common sense. Its paramount object is to work out substantial, and not metaphysical, justice. Its just claim to distinction is to be found, not in the logical consistency of its applied theories, but in the practical wisdom with which it has adapted its rules to varying subject-matter and conditions."

Defendant also urges that in no case has the city been held liable for negligence in the operation of its waterworks, unless the act involved a trespass, or an invasion of a direct property right. Thus, water escaping from a city reservoir runs onto another's property and does damage; this is trespass, and there is liability. Wiltse v. Red Wing, 99 Minn. 255, 109 N. W. 114. But if the escaping water should do damage to a person and a public highway, there would be no trespass, but the law would recognize liability. Liability of the city is recognized in the case of streets and sidewalks, which cannot properly involve trespass. Nor has defendant shown any reason for imposing liability in the case of trespass or the breach of insurance of safety, which does not logically apply to cases of negligence. On general principles, liability for negligence is more just and more generally recognized, because it is based upon culpability.

33 L.R.A.(N.S.)

2. The question then arises whether, upon the assumption that plaintiff's intestate could have maintained an action against the defendant city, had he lived, can his executor maintain an action under our statutes. Section 4503, Rev. Laws 1905, provides: "When death is caused by the wrongful act or omission of any person or corporation, the personal representative of the decedent may maintain an action therefor, if he might have maintained an action, had he lived, for an injury caused by the same act or omission." Defendant has pressed upon us very earnestly that "corporation," as here used, refers only to private corporations (see § 2839, Rev. Laws 1905), and does not include municipal corporations. The matter is not *de novo* in this state. In Maylone v. St. Paul, 40 Minn. 406, 42 N. W. 88, and in Orth v. Belgrade, 87 Minn. 237, 91 N. W. 843, the administrators of deceased persons were allowed to pursue the statutory action against the city for negligence causing death. Such has been the settled construction in practice for many years. We do not feel at liberty to change that construction.

Reversed.

A petition for rehearing having been filed, Jaggard, J., on February 3, 1911, handed down the following response:

In its motion for reargument defendant contends, in the first place, that the question of the construction of § 4503, Rev. Laws 1905, securing the cause of action in case of death by wrongful act,—that is, the question whether the defendant, a municipal corporation, was a corporation within the meaning of that statute,—is *de novo* in this state, notwithstanding the fact that in Maylone v. St. Paul, 40 Minn. 406, 42 N. W. 88, and in Orth v. Belgrade, 87 Minn. 237, 91 N. W. 843, this court determined that recovery on such a cause of action could be had in this state against a municipality under that statute, and sustained such recovery. It is only by ignoring these two decisions that defendant's argument is tenable. There is neither reason nor authority for so doing. It is entirely obvious that the self contradictory proposition which defendant emphasizes gains no force by its own iteration. No reason accordingly is thereby suggested for changing the original opinion on this point.

Defendant urges, in the second place, that the court erred in assuming that the question of the nonliability of the city on the ground of public policy was not before the court. In point of fact, the court neither so assumed nor so determined. What it said on this point was this: "The question is one of general principles recognized by

the law, and not of the private views of court or counsel as to what the convenience or necessity of a particular city may dictate under particular circumstances." The court did determine that the conjectural hardship of the operation of the rule of liability of a municipal corporation in this particular case was not an exclusive nor controlling consideration. The decision rested in effect upon this supreme consideration, namely, that public policy requires the conservation of human life, the preservation of public health, and the establishment of public sanitation on a firm and certain basis in the law. No reason whatever for changing our opinion as to the soundness of this view of public policy has been suggested.

Defendant urges, in the third place: "The court overlooked what it has repeatedly held, that the cases holding cities in this state responsible for injuries caused by defective streets, in the absence of a statute making cities responsible for such injuries, are 'illogical exceptions' to the general rule, and should therefore not be considered as authority in favor of liability in the case at bar." In point of fact this is not in accordance with the actual record. The court did not overlook this familiar and elementary point. On the contrary, it expressly adverted to the lack of philosophical and metaphysical consistency in the authorities on the question of the immunity or liability of municipal corporations in tort. The court in its opinion did not, however, undertake the equally venturesome and improper feat of ignoring the thousands of decisions on the point whose authority is unquestioned and unquestionable. Defendant contends in this connection, without apparent consciousness of the humor of the situation, that the original conclusion of the liability of the city for its tort was erroneous, because it was held in *Nerlien v. Brooten*, 94 Minn. 361, 102 N. W. 867, that a city could be restrained from using a public building as a place for selling flour. It is perfectly obvious that that decision furnishes no reason, apparent or otherwise, direct or indirect, for holding the city either immune or responsible in this case.

Finally, defendant demonstrates the unsoundness of its position by this argument, namely: "That this conclusion in chief invades the province of the legislature. The legislature alone can give a city the right to furnish itself and its citizens water from a municipal waterworks, and it is for the

legislature, and not for the court, to say under what conditions as to liability such cities may do so. The general rule is that cities are immune from liability resulting from torts." When this controversy was presented to this court, it was the duty of the court to determine it by reference to both precedents and principle. The result was not judicial legislation, but a judicial declaration of what the law was. That declaration made no change in the law; *au contraire*, it would have been judicial legislation if the court had changed the law, and decided this case in accordance with defendant's contention. The many authorities referred to in the opinion in chief, and many others, declare the law to be as this court found it to be. See, for example, 1 Dill. Mun. Corp. 3d ed. §§ 66, 67; 3 Thomp. Neg. § 5829; 2 Smith, Modern Law of Mun. Corp. § 802; 3 Abbott, Mun. Corp. § 892; Tiedeman, Mun. Corp. § 327b; 1 Jaggard, Torts, p. 179; 28 Cyc. Law & Proc. p. 1289. Compare *Ottersbach v. Philadelphia*, 161 Pa. 111, 28 Atl. 991; *Todd v. Crete*, 79 Neb. 671, 113 N. W. 172, 115 N. W. 307; *Davoust v. Alameda*, 149 Cal. 69, 5 L.R.A.(N.S.) 536, 84 Pac. 760, 9 A. & E. Ann. Cas. 847.

The fallacy of inferring that this defendant was not liable from a general rule of immunity is obvious. That general rule is merely this: That sometimes cities are immune, and sometimes they are not. Defendant does not insist that the rule of immunity is universal or invariable; on the contrary, defendant distinctly recognizes exceptions to that rule. Whether this case fell within the rule or the exception was the very point we were called upon to decide. Defendant's argument would have had much more weight if it had referred the court to a single case in which under like circumstances the rule of immunity had been applied. This defendant has failed to do, as we believe for the perfectly good and natural reason that there is no such authority. Certainly *Hughes v. Auburn*, 161 N. Y. 96, 46 L.R.A. 637, 55 N. E. 389, to which defendant now calls our attention, is not an authority; to the contrary. This case did not involve liability in the conduct of waterworks at all. The cases concerning the inadequacy of water supply for fire departments, it is perfectly obvious, involve essentially different circumstances from those presented by the case at bar.

The motion for reargument must therefore be denied.

PENNSYLVANIA SUPREME COURT.

AUGUST THALER et al.

v.

WILHELM GREISSER CONSTRUCTION
COMPANY et al., Appts.

(229 Pa. 512, 79 Atl. 147.)

Building contract — architects' certificate — absence — recovery — bad faith.

1. Where a building contractor, acting as owner, sublets a portion of the work, with the provision that the work is to be done to the satisfaction of its architects, upon whose certificate payments are to be made, recovery may be had in the absence of certificate upon proof that the certificate was not withheld in good faith.

Same — acceptance of work — evidence of compliance.

2. An architect's certificate for work may be found not to have been withheld in good faith, where the work was accepted and used for several years without objection, until an attempt was made to enforce a mechanics' lien upon the property to secure compensation for it.

Judgment — new trial — similar evidence — effect.

3. The effect of a judgment cannot be avoided on the second trial on the theory of a difference in evidence if it is clear that the court, in rendering the first judgment, acted upon the facts substantially as they appear in the newly offered evidence.

(January 3, 1911.)

APPEAL by defendants from a judgment of the Court of Common Pleas for Butler County in plaintiffs' favor in an action to enforce a mechanics' lien. Affirmed.

The facts are stated in the opinion.

Messrs. A. M. Neeper, C. L. McQuis-
tion, and J. R. D. Huston for appellants.

Messrs. John M. Greer, Frank E.
Lord, John B. Greer, Thomas H. Greer,
and John M. Greer & Sons for appellees.

Moschzisker, J., delivered the opinion of the court:

This was a mechanics' lien proceeding in which Thaler Brothers, subcontractors, were plaintiffs, and the Butler Brewing Company, owner, and the Wilhelm Greisser Construc-

tion Company, contractor, were defendants. The verdict was for the plaintiffs for the full amount of their claim, with interest, and the defendants have appealed.

The claim was founded upon a written contract dated September 25, 1902. Throughout this contract the plaintiffs are designated as "the contractor," and the construction company as "the owner;" and it is therein provided: "The contractor, under the direction and to the satisfaction of Wilhelm Greisser Construction Company, architects, acting for the purpose of this contract as agents of the said owner, shall and will provide all the materials and perform all the work mentioned in the specifications and shown on the drawings prepared by the said architects for the eleven (11) pressure tubs for the Butler Brewery, Butler, Pennsylvania, delv. and set up, as per specifications, at above Brewery, which drawings and specifications are identified by the signatures of the parties hereto." It is also provided: "The architects shall furnish to the contractor such further drawings and explanations as may be necessary to detail and illustrate the work to be done;" and "it is hereby mutually agreed . . . that the sum to be paid by the owner to the contractor for said work and material shall be \$2,750. . . . All payments shall be made upon written certificates of the architects to the effect that such payments have become due." Further: "It is . . . agreed . . . that no certificates given or payments made under this contract, except the final certificate or final payment, shall be conclusive evidence of the performance of this contract, either wholly or in part; and that no payment shall be construed to be an acceptance of defective work or improper material."

The plaintiffs claimed that their work had been properly performed and that a balance of \$1,370 was due and unpaid. In addition to a defense that the tubs were deficient in several particulars, which defense was correctly and fairly submitted to the jury, the defendants contended on other grounds that the plaintiffs should not be allowed to recover.

The plaintiffs failed to produce a certificate from the architects that the balance claimed was due them. Their testimony was that while they had received payments on account during the progress of the work, they had never received a certificate from the architects; that upon the completion of the work they made a demand for such a certificate; that the certificate was not given, but at that time the construction company sent them a check for \$500 on account, which check was returned marked "no funds;" and that no fault had been found

Note. — As to the effect of the decision of an architect, engineer, or umpire in case of fraud or mistake, see note to *Edwards v. Hartshorn*, 1 L.R.A. (N.S.) 1050.

As to whether full or substantial performance of a construction contract will excuse, as a matter of law, the failure to secure the architect's or engineer's certificate required by the contract, see note to *Bush v. Jones*, 6 L.R.A. (N.S.) 774. 33 L.R.A. (N.S.)

with their work or material until after the filing of the mechanics' lien. No specific reason appears to have been assigned for the failure or refusal to give the certificate. The plaintiffs showed that after the completion of the work, the head brew master of the brewery expressed satisfaction with the tubs in the presence of Mr. Greisser, a representative of the construction company, and of Mr. Smith, the president of the brewing company, and that Mr. Greisser made no complaint at that time; that in point of fact Mr. Greisser had never made any complaint, although Mr. Smith, in 1904, after the filing of the lien, said for the first time that "the tubs was not good." One of the plaintiffs testified that in 1903, prior to the filing of the lien, in an effort to secure the money due them, he had met Mr. Greisser, and had been referred by him to Mr. Smith, who said he would not "pay out money until Mr. Greisser gets through completely," but found no fault with the work, and offered the witness "two \$1,000 second-mortgage bonds for the brewery for our amount that was due the Greisser Construction Company;" that at a later date subsequent to the filing of the lien, when the brewery was running and the tubs were in use, the witness again saw Mr. Smith, who told him "that he had \$2,700, holding back from the Greisser Construction Company, and said that I would have to get the money from them, and that they would pay Mr. Greisser just as soon as he got through with the buildings and the contractors." Smith then for the first time said that "some of the tubs down there had worm holes in them." The tubs are still in use at the brewery, and one of the witnesses for the defense stated that they had not had any material trouble with them for the last three years. The trial judge instructed the jury that, if the declaration of dissatisfaction by the construction company was made in good faith, it was a sufficient defense, and the plaintiffs could not recover; on the other hand, if it was not made in good faith, but was merely an arbitrary expression of dissatisfaction for the purpose of avoiding payment of the balance due on the contract, then it would not be a good defense.

In considering these instructions, it is to be borne in mind that the lien was not filed under a contract between the brewing company, the real owner, and the construction company, the main contractor, but under a contract between the latter company and the plaintiffs, in which the brewing company is nowhere referred to as the owner. On the contrary, the construction company is expressly designated as owner, and it is provided that the work shall be

done "under the direction and to the satisfaction of Wilhelm Greisser Construction Company, architects, acting for the purpose of this contract as agents of said owner." In other words, for the purposes of the contract, the construction company was the owner, the agent of the owner, and the architect.

In Pennsylvania two classes of cases involving contracts requiring satisfactory performance have given rise to two lines of decisions, the first of which is most aptly illustrated by *Singerly v. Thayer*, 108 Pa. 291, 56 Am. Rep. 207, 2 Atl. 230, and the other by *Payne v. Roberts*, 214 Pa. 568, 64 Atl. 86. The former of these cases lays down the rule to be applied where the work or material is to be satisfactory to the party acquiring it, and the latter where it must be satisfactory to a third party designated as arbitrator. Under the first rule, the question for determination is not as to whether or not the one complaining ought to be satisfied, but solely as to the good faith of the dissatisfaction alleged. "To justify a refusal to accept . . . on the ground that it is not satisfactory, the objection should be made in good faith. It must not be merely capricious." *Singerly v. Thayer*, 108 Pa. 291, 56 Am. Rep. 207, 2 Atl. 230, followed in *Krum v. Mersher*, 116 Pa. 17, 9 Atl. 334, 15 Mor. Min. Rep. 415; *Seeley v. Welles*, 120 Pa. 69, 13 Atl. 736; *Sidney School Furniture Co. v. Warsaw School Dist.* 130 Pa. 76, 18 Atl. 604; *Howard v. Smedley*, 140 Pa. 81, 21 Atl. 253; *Adams Radiator & Boiler Works v. Schnader*, 155 Pa. 394, 35 Am. St. Rep. 893, 26 Atl. 745. Under the second rule, it is not a question of the good faith of the dissatisfaction alleged; there, in order to maintain the action, the claimant must show that the expression of dissatisfaction was the result of fraudulent collusion between the arbitrator and the owner. *Payne v. Roberts*, 214 Pa. 568, 64 Atl. 86. Also, see *Pittsburg Terra-Cotta Lumber Co. v. Sharp*, 190 Pa. 256, 42 Atl. 685; *Brown v. Decker*, 142 Pa. 640, 21 Atl. 903; *Hostetter v. Pittsburgh*, 107 Pa. 419; *Reynolds v. Caldwell*, 51 Pa. 298; *McNally v. Montour R. Co.* 33 Pa. Super Ct. 51.

In the present case, while the mere fact that the construction company had a direct interest in the matter in controversy would not debar it from acting as a designated arbitrator (*Monongahela Nav. Co. v. Fenlon*, 4 Watts & S. 205), the fact that it was the owner for the purposes of the contract, and the architect who was to act as the arbitrator and issue the certificates, coupled with the circumstance that it was the party with whom the plaintiffs were actually contracting, makes this an instance where the first rule is applicable rather than the second.

Owing to the different relations in which the construction company stood toward the plaintiffs, the character of its alleged dissatisfaction and the failure to give the certificate were bound together as one question, the determination of which turned upon the finding of the jury as to the company's good faith in withholding its approval of the tubs; and that issue was fairly and properly submitted to the jury.

It only remains to determine whether there was sufficient evidence to sustain the jury's finding in favor of the plaintiffs. While much of the evidence to which we have heretofore referred was denied by the defendants, yet the credibility of the witnesses was for the jury, who had a right to draw their own inferences. We cannot say that there was not sufficient evidence to justify the conclusions that the dissatisfaction alleged was feigned for the purpose of avoiding payment under the contract, and that the certificate was arbitrarily withheld. The physical production of the final certificate was not an absolute prerequisite to the right of recovery. *Hunn v. Pennsylvania Institution*, 221 Pa. 403, 18 L.R.A. (N.S.) 1248, 70 Atl. 812. Although there was testimony introduced on both sides concerning the alleged defects in the tubs, the defendants made no claim for reduction of damages, as in *Stutz v. Loyalhanna Coal & Coke Co.* 131 Pa. 267, 18 Atl. 875, and *Loeper v. Haas*, 24 Pa. Super. Ct. 184. The defense was placed upon the issues already disposed of and upon one other ground, which we shall now consider.

The defendants contended that the notice of the lien and the lien itself were invalid owing to the absence of certain specifications. This question was raised on a former trial and adjudged in favor of the defendants; but on appeal to the superior court, the judgment was reversed. *Thaler v. Greisser Constr. Co.* 40 Pa. Super. Ct. 331. The defendants insist that the decision of the superior court was not based on the facts as they now appear in the case. They contend that the specifications that should have been attached to the notice and to the lien were not those specially referred to in the contract, but were certain other specifications contained in a letter written by the construction company to the plaintiffs.

It is true that on cross-examination one of the plaintiffs was made to refer to the contents of this letter as the specifications. Upon this testimony the defendants rest practically their whole contention that the judgment of the superior court on the point in question should not have been taken as a controlling guide by the trial judge. However, when we look at the opinion, it is clear that the superior court had the facts

substantially as they appear before us, and that they fully understood the existence of this letter and the use to which it had been put. Furthermore, in the affidavit of defense which was offered in evidence, the only complaint concerning the absence of specifications alludes specifically to those referred to in the contract, a copy of which specifications the defendants annexed to the affidavit; the defendants offered this contract in evidence, calling special attention to the provision that the materials were to be furnished and the work done as per the specifications mentioned therein; and we find upon the record a motion to strike off the lien because of the absence of these particular specifications. It appears as if the claim that the contents of this letter comprised the specifications must have come to the defendants as an afterthought. However this may be, we feel that the trial judge committed no error in treating the matter as finally disposed of on the former appeal.

On a careful consideration of the entire record we find no reversible error. The assignments are all overruled, and the judgment is affirmed.

UTAH SUPREME COURT.

RE ESTATE OF GEORGE SHEARN, Deceased.

GEORGE SAXTON, Exr., etc., of George Shearn, Deceased, Appt.,

v.

FRANK B. DINDORFF, Resp't.

(— Utah, —, 114 Pac. 131.)

Tenant — amount of rent — boarding landlord.

A tenant of property for a term of years who is to pay a monthly rental and furnish the lessor with the reasonable comforts of life, including room and board, cannot be required upon death of the lessor to pay more than the specified amount during the remainder of the term, although the rental value of the property amounts to such sum plus the value of the room and board.

(February 9, 1911.)

Note. — Liability of lessee for rent during part of term remaining after death of person whom he agreed to support.

There are but few cases in which the question at issue in *RE SHEARN* has arisen. In *Re Williams*, 1 Misc. 35, 22 N. Y. Supp. 906, it appeared that a lease for twelve years provided as rent the boarding, clothing, taking care of, and supporting the

A PPEAL by plaintiff from a judgment of the District Court for Salt Lake County in defendant's favor in an action brought to recover a portion of rent alleged to be owing by defendant as tenant of deceased under the terms of a certain lease. Affirmed.

The facts are stated in the opinion.

Mr. C. S. Patterson, for appellant:

Where the performance of a contract becomes impossible subsequent to its making, the promisor is not therefore discharged.

Paradine v. Jane, Aley, 26; 9 Cyc. Law & Proc. p. 627; Cassady v. Clarke, 7 Ark. 123; Worthington v. Charter Oak L. Ins. Co. 41 Conn. 401, 19 Am. Rep. 495; Schwartz v. Saunders, 46 Ill. 18; Union v. Smith, 39 Iowa, 9, 18 Am. Rep. 39; Wells v. Calnan, 107 Mass. 514, 9 Am. Rep. 65; Stees v. Leonard, 20 Minn. 494, Gil. 448; Sherman v. Bates, 15 Neb. 18, 16 N. W. 831; Public Schools v. Bennett, 27 N. J. L. 513; Booth v. Spuyten Duyvil Rolling Mill Co. 60 N. Y. 487; Dermott v. Jones (Ingle v. Jones) 2 Wall. 1, 17 L. ed. 762.

Mr. H. A. Smith for respondent.

lessor "during said term of twelve years." The lessor died during the term, and it was held that the maintenance of the lessor during his life was a full performance on the part of the lessee.

In *Oliver v. Moore*, 53 Hun, 472, 6 N. Y. Supp. 413, reviewed in *RE SHEARN*, the court said, in holding that the lessor's recovery should be lessened by what the actual expense to her of boarding the lessee would have been: "The plaintiff insists that the contract entitles her to recover the whole amount specified therein, less what she has already received, inasmuch as she was at all times prepared and willing to furnish board to two persons up to the end of the term. But the persons thus to be boarded were particularly designated in the agreement, and Harriet Gross, one of them, was expressly named therein. It could not have been within the contemplation of the parties that the undertaking to furnish board would become applicable to some other person in the event of her death. . . . As the agreement was to board Miss Gross personally, I think her death operated to lessen the amount recoverable by the plaintiff under the lease, to the extent of the actual cost of boarding the tenant during the balance of the term." The court having already expressly ruled that the agreement was a lease, it is not clear how the rent could be reduced by striking out so much of it as would have been expended by the landlord in providing for board of the tenant had she lived.

In *Nine's Estate*, 2 Woodw. Dec. 403, under a lease for a year, by which the lessee covenanted *inter alia* to board the lessor and her sister during the term for \$150, the lessor having died before the commence-

Frick, Ch. J., delivered the opinion of the court:

This was an action by appellant, as executor of the last will of one George Shearn, deceased, to recover a portion of the rent alleged to be owing by respondent as a tenant of said decedent under the terms of a certain lease, the material parts of which are that on the 17th day of August, 1908, said decedent, as lessor, leased to respondent, as lessee, a certain house, known as the "Shearn house, . . . from the 1st day of September, A. D. 1908, for and during and until the 1st day of September, A. D. 1913, a term of five years." He also agreed to pay "as rental for said premises the sum of fifteen hundred (1500) dollars, payable in sums of twenty-five (25) dollars per month, monthly, in advance." The lessee, at the end of the term, agreed to deliver up possession of said premises in good condition, and further covenanted that "if said rent above reserved or any part thereof shall be unpaid for fifteen days after the same become due, or if default be made in any of the covenants here-

ment of the term and the sister having been boarded during the term, an allowance to the lessee of \$75 against the estate of the lessor was upheld, there being apparently no claim on account of the board agreed to be furnished the lessor.

In *Shouse v. Krusor*, 24 Mo. App. 279, the liability of the lessee for use and occupation during the nine months he remained in possession of property after the death of his mother, under a letting from year to year, in consideration of his agreement to support her, was not decided, the case being disposed of upon the ground that, if there was any liability, it belonged to the heir, and not to the administrator.

In *Willington v. West Boylston*, 4 Peck. 101, it was held that the death of a pauper a few days after the commencement of the year prevented recovery upon an express contract to support him for a year at \$1 per week, but that there might be a recovery on an implied promise for the part performance. Whether or not the recovery should be limited to a *pro rata* compensation was not decided.

In *Varney v. Bradford*, 86 Me. 510, 30 Atl. 115, it was held that the death of the mother shortly after the commencement of the term did not deprive the lessee of the right to subsequent instalments of the \$100 under a lease for a year by which the lessee covenanted, "in consideration of this lease and the sum of \$100 payable in amounts of 8½ dollars monthly," to board the lessor's mother, and improve the property and keep it in good condition, there being a stipulation that the lease should not terminate in case of her death, but no provision as to the \$100 in that event.

B. B. B.

in contained," the lessor may re-enter and repossess himself of said premises. It is also provided that the lessee will "pay all water rates, plumbing bills, gas and electric light charges," and "that the rent and charges above reserved shall be a first lien on the furniture, fixtures, and personal property of said lessee." Then follows the following provisions which constitute the bone of contention in this case, namely: "It is further agreed and understood that said lessee, his heirs and assigns, shall keep said lessor during the life of this lease, with the reasonable comforts of life, including board and room." The court also found that said George Shearn died on the 21st day of April, 1909, and that up to the time of his death respondent had "furnished him with the comforts of life, including board and room, in accordance with the terms of said agreement," and that, since the death of said decedent, respondent had paid to appellant as executor the sum of \$25 per month as rent, as the same accrued. The court, upon the request of appellant, also found that the rental value of said premises when the lease was entered into was \$45 per month, and that the value of board and room for one person was \$20 per month. At the request of respondent, the court found that for six months preceding the death of the lessor he was in a helpless condition physically, and that the lessee and his wife during that time were required to and did bestow upon the decedent "almost constant attention, both day and night." Upon the foregoing findings, the court made his conclusions of law that the appellant was not entitled to receive any sum in excess of the said \$ 25 per month as rent for said premises, and entered judgment accordingly. From the conclusions and judgment aforesaid, this appeal is prosecuted.

Appellant contends that the court erred in not entering a judgment to the effect that respondent, after the death of the lessor, should have been required to pay the \$25 plus the value of the board and room, amounting to \$20 per month, as the monthly rent for said premises. In other words, that respondent should be required to pay the sum of \$45 per month as rent. Upon the other hand, respondent contends that he has complied with all the conditions and covenants of the lease, and hence should not be required to do more. The rights of the lessor, as well as the obligations of the lessee, must be found in and determined from the contract they entered into. What are those terms? It will be observed that the rent respondent agreed to pay, and the time and manner of payment, are in express terms provided for

in the lease itself. The rent the lessee agreed to pay is fixed at a sum of money in gross for the entire term, namely, the sum of \$1,500. This sum is made payable in instalments of \$25 each, payable monthly, in advance. That the amount stated in the lease was considered to be all that the lessee should be required to pay as rent for the premises is, we think, made clear by other provisions in the lease. For instance, the lessor reserved the right to enforce a forfeiture and of re-entering the premises only upon the condition that "the rent above reserved or any part thereof shall be unpaid." The "rent above reserved" clearly referred to the \$1,500, and nothing else. Language could not well have made it plainer. Again, when a lien is provided for in the lease, such lien is given only for the rent and charges "above reserved." What are those charges which are included with the rent? Here, again, there can be no doubt with respect to what the parties intended, because the charges referred to are expressly enumerated to be the "water rates, plumbing bills, gas and electric light charges." These charges and the \$1,500 thus constituted the "rent and charges above reserved," for which the lien on the furniture, fixtures, and personal property of the lessee was given. To our minds it is clear, therefore, that the "reasonable comforts of life, including board and room," were by neither party considered as falling within either the term rent or charges. If the parties had considered the comforts and board and room provided for as constituting either rent or charges, they would not in express terms have limited the lien and forfeiture as we have indicated. Moreover, from the language employed in the lease, it would seem that the "reasonable comforts of life" were the principal thing the parties had in mind, since in their view the board and room were to be included in what they termed the reasonable comforts of life. It seems to us, therefore, that both the lessor and the lessee must have regarded the things that the lessee obligated himself to do for the lessor in the nature of a personal trust which it was intended the lessee should discharge personally. It is true that in the lease it is said that the "lessee, his heirs or assigns," should discharge the duties imposed, but this provision, when taken in connection with the covenant that the lessee shall not "let or underlet" the premises without the written consent of the lessor, is not controlling. Indeed, the provision that the heirs or assigns might discharge the obligation could not become effective without the lessor's consent. This, in view of the covenant not to let or under-

let, is too plain to require argument. But covenants for support are almost universally regarded as personal and unassignable without the express consent of the beneficiary. *Bethlehem v. Annis*, 40 N. H. 42, 77 Am. Dec. 700; *Flanders v. Lamphear*, 9 N. H. 201; *Eastman v. Batchelder*, 36 N. H. 141, 72 Am. Dec. 295; *Clinton v. Fly*, 10 Me. 292. We are of the opinion, therefore, that the "reasonable comforts of life, including board and room," were not to be treated as part of the rent as such, which the lessor had the right to receive in the form of money if he so elected.

It is quite clear that the lessee could not have absolved himself from the obligation by offering to pay the lessor a sum equal to the value of the room and board. No doubt, if the respondent as lessee had refused or neglected to comply with the obligation, the lessor could have recovered the money value of the thing stipulated for, because that is just what he would have been compelled to pay to some one else, and would have been the only way to enforce the contractual obligation assumed by the lessee. It would have been the only method known to the law to make compensation for a breach of the contract. Upon the other hand, we think the respondent as lessee had the undoubted right to discharge the obligation assumed by him in the precise manner stipulated for. Suppose the lessor had elected that he did not want the reasonable comforts of life or the board and room any longer, but would rather have the money value thereof, could he have gone to Europe or any other place and legally have demanded the money value of the comforts and the board and room from the respondents so long as respondent was able, ready, and willing to comply with the obligation he had assumed in that regard? We think no one would so contend. Upon what legal principle, therefore, is the appellant, as the legal representative of the lessor, placed in a better position to recover the money value of the comforts and board and room as a part of the rental for the demised premises, than the decedent in his lifetime would have been? Wherein has the respondent failed to comply with any obligation assumed by him? In what part of the lease has he agreed to pay any sum as rent in addition to the \$1,500? The court cannot change the terms and conditions of the contract merely because one of the parties thereto dies. The appellant, as the legal representative of the decedent, can only enforce the provisions of the contract that the latter could have enforced under the same conditions. We are of the opinion, therefore, that, so long as the respondent as lessee was able,

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ready, and willing to provide for the lessor during his lifetime, as respondent had agreed to do, the lessor could not have sustained an action for the money value of the comforts and board and room. Neither do we think that the mere fact that the lessor has died, and hence can no longer receive the comforts stipulated for, changes the obligation imposed on respondent. It is a case where the lessor no longer requires the personal care and attention, and hence, in the absence of an express stipulation providing for such an emergency, we know of no power in the courts whereby the law can supply the defect for the benefit of the estate. Moreover, the promise of the respondent was not to, nor for the benefit of, the estate, but for the personal benefit of the decedent only. In view of the death of the lessor, and of the circumstances of this case, we think that, from a legal point of view, respondent must be held to be relieved from any obligation except the payment of the money rent agreed to be paid by him at the times and in the manner provided for by the terms of the lease. This in our judgment is also the view taken by the authorities upon the subject. In 13 Am. & Eng. Enc. Law, 2d ed. p. 274, it is said: "Where the rent to be rendered is the support of the lessor, no other rent can be demanded if the lessee is willing to supply such support; and upon the death of the lessor during the term demised, the tenant cannot be held for a money rent." The foregoing doctrine is stated in similar language in 24 Cyc. Law & Proc. p. 1190. The case of *Re Williams*, 1 Misc. 35, 22 N. Y. Supp. 906, is a case precisely in point. It was there held that the administrator of the lessor could not recover the money value of the support after the death of the lessor, which was agreed to be provided for him in the lease. To the same effect is *Shouse v. Krusor*, 24 Mo. App. 279.

Appellant's counsel cites one case which he insists lays down a contrary doctrine, namely, *Oliver v. Moore*, 53 Hun. 472, 6 N. Y. Supp. 413. In that case the party bringing the action had agreed to furnish board to the tenant and her maid. The lessor had let to the lessee two rooms in one of the upper stories of a large building in New York city, —to a certain woman and her maid, for the term of eight and one-half months at the rate of \$2,725, to be paid in instalments of \$75 each, payable weekly. The lessor, for the consideration aforesaid, however, had also agreed to furnish suitable board for the lessee and her maid during the period of time mentioned in the lease. The lessee, therefore, agreed to pay the sum of \$2,725 in weekly instalments of \$75, for room rent and board

for herself and her maid. It seems that the board was as much a part of the consideration as the rent. The lessee died, and after her death the lessor sued the executor of the lessee to recover the whole sum as rent. The court held that the lessor could recover rent for the entire term, but was required to deduct from the amount stipulated to be paid in the lease, the "expense to which she (the lessor) would have been put if she had been obliged to provide board for the decedent during the whole term." The lessor was thus not allowed to recover the value of the board she had not furnished, but she was permitted to recover the difference between the cost or "expense" of furnishing board and the price the lessee had agreed to pay for it. In other words, she was allowed her profits on the board the same as she would have been if the lessee had lived, but had refused or failed to receive and pay for the board. In such a case there is no personal trust or confidence involved. Nor is there any way to enforce the terms of such a contract, except in the manner it was done by the New York court. If, under the contract in question, respondent were required to pay what appellant demands, we would not enforce the provisions of the contract, but, upon the contrary, we would ignore them. Under the express terms of the contract, respondent was required to pay only \$25 monthly as rent for the premises, but in addition had agreed to give something for the personal benefit of the lessor. This latter obligation, however, respondent had the right to discharge from day to day personally, and no agreement was entered into, either expressly or by implication, that in case the lessor should no longer wish or require the personal attention and board, the respondent should pay the equivalent thereof in money either to the lessor or to his estate. The death of the lessor, so far as respondent's obligation is concerned, is, in legal effect, the same as though the lessor in his lifetime, without cause therefor, had refused to occupy the room and receive the board and comforts provided for in the lease. Had he so refused, he could not recover their money value, unless he established some agreement to pay them in that form, or some breach thereof on the part of the respondent. Nor can appellant recover unless he shows that respondent has failed in what he obligated himself to do.

The judgment is clearly right; hence is affirmed, with costs to respondent.

McCarty, J., concurs.
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Straup, J.:

I am of the same opinion. The covenant in the lease requiring the lessee to board and room the lessor during the life of the lease was personal. The rights of the lessor under it were unassignable. They ended with his death, and hence did not pass to his heirs or legal representatives.

WASHINGTON SUPREME COURT.

THOMAS B. YARBROUGH, Appt.,

v.

F. K. PUGH, Sheriff, etc., et al., Resp'ts.

(— Wash. —, 114 Pac. 918.)

Writ — service on partnership — treating as corporation.

1. Service of summons by publication and mailing upon a foreign partnership in the partnership name as upon a corporation is not sufficient to give jurisdiction over the partners individually or collectively, at least where the firm name does not contain the full name of either partner.

Same — mailing — wrong address.

2. Mailing a summons directed to a partnership in which the full name of neither partner appears is not mailing directed to defendant as required by statute, and will therefore not give jurisdiction over the individual partners.

(April 14, 1911.)

APPEAL by plaintiff from a judgment of the Superior Court for Spokane County in defendants' favor in an action brought to recover certain property in possession of the sheriff under an alleged writ of attachment. Reversed.

The facts are stated in the opinion.

Messrs. Danson & Williams, for appellant:

The action and the attachment being against the Hefley-Coleman Company, a corporation, no jurisdiction could be obtained over W. J. Hefley and W. L. Coleman, or the partnership. Especially is this true when neither member of the partnership was served with process nor entered any appearance.

Perry-Rice Grocery Co. v. W. E. Craddock Grocery Co. 34 Tex. Civ. App. 442, 78 S. W. 966; Sinsabaugh v. Dun, 214 Ill. 70.

Note. — The general question whether a partnership may sue or be sued in the firm name is considered in the note to Spaulding Mfg. Co. v. Godbold, 29 L.R.A. (N.S.) 282; and the question as to the validity of constructive service upon a partnership in the firm name, in the note to Ord v. Neiswanger, 29 L.R.A. (N.S.) 287.

73 N. E. 390; *Likens v. McCormick*, 39 Wis. 313.

Jurisdiction *in personam* could not be acquired by a publication of summons, nor where service was made outside of the state, unless there was a general appearance.

Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565; *Paxton v. Daniell*, 1 Wash. 19, 23 Pac. 441; *Hays v. Peavey*, 54 Wash. 78, 102 Pac. 889.

In order for the court to acquire jurisdiction *in rem* by the publication of summons, it is necessary that the summons should state that property had been attached which the plaintiff was asking the court to subject to its claim.

Ballew v. Young, — Okla. —, 23 L.R.A. (N.S.) 1084, 103 Pac. 623; *Cackley v. Smith*, 38 Kan. 450, 17 Pac. 156; *Drake v. Hale*, 38 Mo. 346; *Wescott v. Archer*, 12 Neb. 345, 11 N. W. 491, 577; *Riley v. Nichols*, 1 Heisk. 1; *Hays v. Peavey*, 54 Wash. 78, 102 Pac. 889.

No summons having been served, or publication of summons having been commenced, against Hefley or Coleman, the court had lost jurisdiction of the case.

Savage v. Sternberg, 19 Wash. 679, 67 Am. St. Rep. 751, 54 Pac. 611; *State ex rel. Reed v. Gormley*, 40 Wash. 601, 3 L.R.A.(N.S.) 256, 82 Pac. 929, 5 A. & E. Ann. Cas. 856; *Tacoma Grocery Co. v. Drahm*, 8 Wash. 263, 40 Am. St. Rep. 907, 36 Pac. 31; *Beatty v. Davenport*, 45 Wash. 555, 122 Am. St. Rep. 937, 88 Pac. 1109, 13 A. & E. Ann. Cas. 585; *Dittenhoefer v. Coeur d'Alene Clothing Co.* 4 Wash. 519, 30 Pac. 660; *Wick v. Rea*, 54 Wash. 424, 103 Pac. 462.

Messrs. Cannon, Ferris, Swan, & Lally for respondents.

Parker, J., delivered the opinion of the court:

This is a proceeding to recover personal property under chapter 4, tit. 4, Rem. & Bal. Code, relating to adverse claims to property levied upon. While the property was in the possession of the sheriff, under a writ of attachment in an action commenced in the superior court for Spokane county by the Manufacturers' Furniture & Bedding Company, a corporation, against the Hefley-Coleman Company, a corporation, the plaintiff in this proceeding, claiming to be the owner, demanded possession thereof from the sheriff, at the same time delivering to him proper affidavit and bond under § 573, Rem. & Bal. Code. The sheriff thereupon delivered possession of the property to the plaintiff. A trial before the court without a jury, upon the question of the plaintiff's right to the property, re-

sulted in findings and judgment against him, from which he has appealed.

The facts upon which the rights of the parties depend are not in dispute, and may be briefly stated as follows: On and prior to November 11, 1909, there was in storage with the Sheehorn Transfer Company of Spokane, 50 bales of cotton linters, the property of the Hefley-Coleman Company, a copartnership consisting of W. J. Hefley and W. L. Coleman, of Ft. Worth, Texas. On November 11, 1909, there was commenced in the superior court for Spokane county an action by the Manufacturers' Furniture & Bedding Company, a corporation, against the Hefley-Coleman Company, a corporation, to recover damages in the sum of \$2,632.50. On the same day the plaintiff in that action caused a writ of attachment to issue therein; its president making the usual affidavit and stating as grounds for the attachment that "said defendant is a foreign corporation." Thereupon a writ of attachment was issued and placed in the hands of the sheriff, when he levied upon and seized the 50 bales of cotton linters as the property of the Hefley-Coleman Company, a corporation, defendant in that action. Thereafter, for the purpose of obtaining constructive service upon the defendant in that action, one of the attorneys for the plaintiff therein, on December 27, 1909, made and filed in the cause his affidavit, stating upon information and belief that the defendant is a corporation under the laws of Texas, "with its principal office and place of business located in the city of Ft. Worth, state of Texas," and that he deposited in the United States postoffice at Spokane on that day a true copy of the summons and complaint, securely sealed in an envelope, with postage thereon prepaid, "addressed to the above-named defendant at the address above given." Thereafter, commencing on January 1, 1910, the summons was published in a newspaper in Spokane county. The evidence in this proceeding renders it plain that no other service of the summons, of any nature, was ever made in that case than as shown by the affidavit of mailing as above quoted, and the affidavit of publication in the newspaper. Neither the summons nor complaint referred to any attachment. On February 26, 1910, the defendant, "the Hefley-Coleman Company, a corporation," appeared by its attorneys specially in that action, and moved to quash the summons and the service thereof on several different grounds. None of which grounds, however, related to any question of misnaming the defendant. There was nothing in that appearance by which it could be construed to be an appearance, special or general, of the

partnership consisting of W. J. Hefley and W. L. Coleman, or of any member thereof. That motion to quash was denied; and on March 28, 1910, judgment by default was rendered in that action against "the Hefley-Coleman Company, a corporation." On February 21, 1910, "the Hefley-Coleman Company," the partnership consisting of W. J. Hefley and W. L. Coleman, sold the 50 bales of cotton linters here involved to appellant, who thereafter on March 12, 1910, commenced this proceeding to recover the same.

The question for our determination is, Was the action of Manufacturers' Furniture & Bedding Company, a corporation, against the Hefley-Coleman Company, a corporation, and the judgment rendered therein in fact and in law against W. J. Hefley and W. L. Coleman as partners, under the name of "the Hefley-Coleman Company," and did the superior court in that action acquire jurisdiction over the members of that partnership. In our discussion of this question, we will not concern ourselves with the jurisdiction which the court may have acquired over "the Hefley-Coleman Company, a corporation." We are not advised by this record as to whether or not there is such a corporation, other than as it so appears in the record of that case, which was introduced in evidence in this case. Learned counsel for respondents insist, that this question is only one of misnomer, which does not affect the court's jurisdiction over the party actually served with process, and that the partnership was in this case actually so served, and was in fact the real defendant. In support of this contention our attention is called to a number of decisions of the courts, holding that the defendant actually served with process is bound to respond as defendant, or suffer judgment to go against him, even though he be erroneously named in the process. Counsel cite the following: *Orman v. Salvo*, 54 C. C. A. 265, 117 Fed. 233; *Davis v. Jennings*, 78 Neb. 462, 111 N. W. 128; *Nisbet v. Clio Min. Co.* 2 Cal. App. 436, 83 Pac. 1077; *Lafayette Ins. Co. v. French*, 18 How. 404, 15 L. ed. 451; *Foshier v. Narver*, 24 Or. 441, 41 Am. St. Rep. 874, 34 Pac. 21; *Whitlsey v. Frantz*, 74 N. Y. 456; *Hoffield v. Board of Education*, 33 Kan. 644, 7 Pac. 216; *Kingen v. Stroh*, 136 Ind. 610, 36 N. E. 519; *Pond v. Ennis*, 69 Ill. 341; *Bloomfield R. Co. v. Burrass*, 82 Ind. 83; *Ueland v. Johnson*, 77 Minn. 543, 77 Am. St. Rep. 698, 80 N. W. 700. In none of these cases does it appear that the jurisdiction of the court depended upon other than personal service of summons, save in *Nisbet v. Clio Min. Co.*, and in that case the jurisdiction was materially aided by a

liberal statute relating to the misnomer of corporations; nor was there any partnership there involved. It might well be argued that the failure to correctly name a defendant in a case where the jurisdiction of the court depends upon constructive service is a matter of much more seriousness than where a defendant is personally served with process. A personal service is made by an officer or some person making actual delivery of the process to the person to be served, and such officer or person so serving is supposed to know who the person is who is intended to be sued. A constructive service depends almost entirely upon the correctness of the name in the process, of the person to be served, for its coming to the notice of such person. This is especially so where the constructive service consists only of publication and mailing, though it might not be so where there is personal service out of the state.

In this case we have no service save by publication and mailing. However, we are here confronted with another question which we regard as decisive of this case. Now, the service depended upon here is the service which under the law may be made upon a corporation. Let us suppose for the sake of argument that it was sufficient to give jurisdiction over a corporation. Let us even go farther and suppose that it would give jurisdiction over a corporation, even though there was a misnomer as to the defendant in the process. This is not a question of acquiring jurisdiction over a corporation; but of acquiring jurisdiction over the members of a partnership. So, the real question is as to whether or not this service has resulted in the court acquiring jurisdiction over W. J. Hefley and W. L. Coleman, or either of them, as members of the partnership known as "the Hefley-Coleman Company." If a corporation and a partnership could, under the law, be sued in the same manner as to naming each, and each could be served with process in the same manner as to the persons to be served, jurisdiction might have been acquired over the partnership in this case, assuming that the matter of misnomer, as affected by the fact of constructive service only, created no obstacle to the jurisdiction. If the case of *Manufacturers' Furniture & Bedding Company*, a corporation, against the Hefley-Coleman Company a corporation can be said to be in any sense a suit against this partnership or its members, it is in no event any more than a suit and process against it in its partnership name. It is not pretended that the names of these partners appear anywhere in a single file or record of that suit. It is not pretended that any mem-

ber of the partnership was served with process therein, personally or constructively. The nearest approach thereto was the mailing of the summons and complaint, as stated in the affidavit of one of the attorneys in that case, which statement, taken literally, means that such mailing was to "the Hefley-Coleman Company, a corporation," though, for the sake of argument, we will assume that the words "a corporation" were not used in the mailing.

In the absence of statute providing otherwise, a partnership cannot sue or be sued apart from its members. The rule is stated in the text of 15 Enc. Pl. & Pr. p. 839, as follows: "At common law a partnership or firm is not regarded as a legal entity apart from its members, and as it is a general rule that actions can only be brought by and against persons, natural or artificial, and partnerships are not considered persons, it is almost universally held that, in the absence of express statutory authority, all actions and suits involving partnership claims or liabilities must be brought by or against the persons individually who compose the firm." 30 Cyc. Law & Proc. p. 565. This was recognized as the law in this state in *Olson v. Veazie*, 9 Wash. 481, 482, 43 Am. St. Rep. 855, 37 Pac. 677. We have no statute in this state changing this rule. We have, however, statutes which evidently were enacted in recognition of this rule. Section 8366, Rem. & Bal. Code, provides that actions against limited partnerships "shall be prosecuted by and against the general partners only." And § 8369, Rem. & Bal. Code, provides for the filing of certificates with the county auditor by persons conducting business under other than their true names, and stating therein their true names. These statutes clearly recognized the necessity of partnerships suing and being sued in the name of the individual partners, and that the partnership does not exist in law apart from the individuals composing it. We are not called upon here to determine any doubtful question as to whether or not these partners were sued as individuals, such as might arise where only the name of the partnership appears as defendant in a title to an action, and the individual names appeared elsewhere in the record, showing they were being proceeded against as individuals, as in *Olson v. Veazie*, supra. Nor where there is a personal service upon one or more of the partners. We are left with the single question, Has jurisdiction been acquired over them, waiving the question of misnomer, by constructive service in the partnership name only?

In the case of *Moses P. Johnson Machin-*
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ery Co. v. Watson, 57 Mo. App. 629, the court had under consideration' this exact question. The *Magnolia Lumber Company*, a partnership of Arkansas, was sued in Missouri, in the firm name only. One of its creditors was garnished, and paid, in compliance with an order of the court, the amount of the debt toward a judgment rendered in the action against the *Magnolia Lumber Company*. The service upon which that judgment was based was constructive and in the firm name only. It was held that the judgment against the *Magnolia Lumber Company* was a nullity, it not having appeared, and was no protection to the garnishee. At page 633 the court said: "Making application of the law to the conceded facts, it is very evident that the judgment against the appellant as garnishee in the *Luking Case* was a nullity, for the reason that the justice rendering the judgment did not, as against the owners, acquire the right to dispose of the fund. In the absence of a statute authorizing it, a firm can only be sued in the individual names of its members. This rule rests on the principle that a firm has no legal existence apart from its members. It is a mere ideal entity. *Moore v. Burns*, 60 Ala. 269; *Halliday v. Doggett*, 6 Pick. 359; *Cushing v. Marston*, 12 Cush. 431; *Mexican Mill v. Yellow Jacket Silver Min. Co.* 4 Nev. 40, 97 Am. Dec. 510, 11 Mor. Min. Rep. 175; *Rohrbough v. Reed Bros.* 57 Mo. 292; *Fowler v. Williams*, 62 Mo. 403; *House v. Duncan*, 50 Mo. 453; *Beattie v. Hill*, 60 Mo. 72; *Conrades v. Spink*, 38 Mo. App. 309."

In the case of *Perry-Rice Grocery Co. v. W. E. Craddock Grocery Co.* 34 Tex. Civ. App. 442, 78 S. W. 966, we have a situation much like that here involved. Action was commenced against *Arbuckle Brothers*, alleging it to be a corporation under the laws of New York. Service was made personally in New York by delivering process to one John Arbuckle, who appeared to be a member of a partnership called *Arbuckle Brothers*. Garnishment was issued and served upon *Perry-Rice Grocery Company*, a creditor of the partnership, in Texas. There was an attempt to amend the complaint by alleging that *Arbuckle Brothers* was a partnership composed of John Arbuckle and others, but without notice of such amendment to any of the partners. They did not appear. Judgments against *Arbuckle Brothers* and the garnishee were removed by the garnishee by writ of error to the court of civil appeals, contending that the judgment against *Arbuckle Brothers* as a partnership was a nullity for want of jurisdiction. In sustaining this contention the court said: "The original

petition, of which Arbuckle Brothers had notice, presented an action against them as a corporation, and by amendment the capacity in which they were sued was changed from that of corporation to a partnership. This was equivalent to the institution of a new suit, and, defendants not having pleaded thereto, before a valid judgment can be rendered therein against them, service of such amendment must be had upon them. The seizure of a defendant's property by a writ of attachment or garnishment does not obviate the necessity of service of citation as provided by law in ordinary suits. It has been held in this state that the mere change of parties, such as an amendment which strikes out one of the plaintiffs or corrects the Christian name, is not such a change in the character of the suit as would give the defendant the benefit of limitation. It has also been held that the mere addition of the name of one of the partners of a firm sued, whose name had been omitted in the original petition, the other plaintiffs remaining the same, or, where suit is brought in the name of a nominal plaintiff for the use of another person, the substitution by amendment of the person for whose benefit the suit was originally brought, would not require the service of notice thereof on the adverse party. *Roberson v. McIlhenny*, 59 Tex. 615; *Martel v. Somers*, 26 Tex. 551; *Price v. Wiley*, 19 Tex. 142, 70 Am. Dec. 323. But where there is an entire change in the names of the plaintiffs, or the capacity in which the defendant is sued, service of such an amendment must be made upon the other party, or else judgment taken against such new party will, in the absence of a voluntary appearance and answer thereto, be void." *Sinsabaugh v. Dun*, 214 Ill. 70, 73 N. E. 390; *Smith v. Hoover*, 39 Ohio St. 249; *Likens v. McCormick*, 39 Wis. 313. The case last cited, because of the peculiar situation involved, did not present a question of jurisdiction; but we infer from the opinion of the court that, had such question been involved, the judgment would have been held void for want of jurisdiction. The only case coming to our attention which we regard as being opposed to this view, upon this precise question, is that of *Neiswanger v. Ord*, 81 Kan. 63, 29 L.R.A.(N.S.) 287, 105 Pac. 17. In that case, however, the full name of one of the partners appeared in the name of the defendant firm, thus showing there was at least one defendant having legal capacity to sue or be sued. Cases dealing with the question as one of jurisdiction are collected in a note to that case in 29 L.R.A.(N.S.) 287.

It is elementary that, in order to ac-
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quire jurisdiction by constructive service, the statute permitting such service must be strictly followed. *Wick v. Rea*, 54 Wash. 424, 428, 103 Pac. 462. And the mailing of process prescribed by such a statute "is as indispensable as any other step in the service, and without it the court can acquire no jurisdiction." 17 Enc. Pl. & Pr. p. 102. The mailing of process addressed to the partnership, in the partnership name only, which at most is all that was done in this case, is not a mailing "directed to the defendant," as required by § 228, Rem. & Bal. Code, since the partnership is in no event the defendant. It could as well be said that the return of an officer, to the effect that he personally served a process upon a partnership by delivering it to the partnership, without naming the person to whom he delivered it, would show a service sufficient to support jurisdiction.

We are of the opinion that in the suit of *Manufacturers' Furniture & Bedding Company*, a corporation, against the *Hefley-Coleman Company*, a corporation, the superior court acquired no jurisdiction over the partnership consisting of *W. J. Hefley* and *W. L. Coleman*, and that therefore their property could not be subjected to seizure or sale in that cause.

The judgment is reversed, with directions to render judgment in favor of appellant, awarding him the property involved.

Gose, Fullerton, and Mount, JJ., con-
cur.

WISCONSIN SUPREME COURT.

THOMAS P. HANNA, Resp't.,
v.

KELSEY REALTY COMPANY, Impleaded,
etc., Appt.

(145 Wis. 276, 129 N. W. 1080.)

Foreign corporation — purchasing real estate — unrecorded liens.

1. Title to real estate taken by a foreign corporation without complying with the provisions of the local statute necessary to entitle it to do business in the state is subject to an unrecorded mortgage lien for unpaid purchase money in favor of a prior

Note.—Who may take advantage of statute rendering foreign corporation incapable of taking title to real property.

As to the right of a foreign corporation in general to own real property, see note to *Lancaster & A. Improv. Co.* 24 L.R.A. 322.

As to the right of a private person in general to contest the power of a corporation to take or hold property, see note to

vendor, where the statute provides that every contract in relation to real estate made by a corporation under such circumstances shall be wholly void.

Estoppel — leaving mortgage off record — subsequent purchase.

2. Failure of the holder of an unrecorded purchase money mortgage on real estate to give notice thereof does not estop him from setting it up to defeat the title of a foreign corporation which purchased the property without complying with the provisions of the local statute necessary to enable it to do business in the state, under which circumstances the statute provides that its contract shall be wholly void.

(February 21, 1911.)

A PPEAL by defendant from a judgment of the Circuit Court for Polk County in plaintiff's favor in action for the enforce-

Hanson v. Little Sisters of the Poor, 32 L.R.A. 293.

The decided weight of authority is to the effect that the state alone can raise the objection that a foreign corporation is holding real estate in violation of a statutory inhibition.

Thus, in *Gilbert v. Hole*, 2 S. D. 164, 49 N. W. 1, in holding that where a foreign corporation is authorized for some purposes, or to a limited extent, to take a conveyance of and hold real estate, a deed of land for other purposes or beyond the limit allowed is not absolutely void, but passes the title as between the parties, subject only to be inquired into in a direct proceeding by the state, the court said: "The rule is general that when the corporation has capacity to take title under certain conditions, it cannot be the subject of inquiry between third parties whether in any case the requisite conditions were met, or the title made to depend upon proofs as to whether in such case the corporation was acting within its power in taking or attempting to take such title. It is a question of the power of the corporation to receive the title, not a question of the conditions under which such power may be exercised. If the power exists, the state only can question the manner of its exercise."

And in *Oregon Mortg. Co. v. Carstens*, 16 Wash. 165, 35 L.R.A. 841, 47 Pac. 421, it was held that a deed of land by an alien corporation conveys a title indefeasible at the suit of an individual, notwithstanding the land was acquired in evasion of a constitutional provision, if the state has not undertaken by a direct proceeding to have the conveyance set aside.

And in *Summet v. City Realty & Brokerage Co.* 208 Mo. 501, 106 S. W. 614, it was held that the fact that a foreign insurance company had held land in violation of the Missouri Constitution was a matter which did not concern any individual, and could be raised by the state alone.

So, in *Atlantic Coast Line R. Co. v. Ep-* 33 L.R.A. (N.S.)

ment of a mortgage lien for a certain sum and interest, on premises purchased by defendant. Affirmed.

Statement by Barnes, J.:

The plaintiff was the owner of several parcels of land in Polk county on the 8th day of April, 1908, which lands were encumbered by a mortgage on which there was due the sum of \$3,100. Prior to said date, the plaintiff and the defendant Johnson entered into a verbal agreement by which plaintiff agreed to convey by warranty deed to said Johnson, subject to said mortgage, the lands referred to. Said Johnson agreed to execute a mortgage back to the plaintiff for the sum of \$3,450 to secure his note, which was to be taken as part payment for the purchase price of said lands. Johnson also agreed to convey

person, 85 S. C. 134, 67 S. E. 235, it was held that an individual cannot question the right of a foreign corporation to bring suit to recover possession of a part of its right of way which was occupied by defendant, by contending that it had no right to own property in the state as it had failed to comply with local laws. And in *Chicago, B. & Q. R. Co. v. Lewis*, 53 Iowa, 101, 4 N. W. 842, in arriving at a similar conclusion, the court said that "this is a question between the corporation and the government, and is one which does not concern the defendants."

And in *Myers v. McGavock*, 39 Neb. 843, 42 Am. St. Rep. 627, 58 N. W. 522, it was held that an individual cannot recover property from a railroad corporation organized under the laws of Congress, although the corporation under the state Constitution is incompetent to take title, the ground being that the title of the corporation is valid against everyone but the state, by which alone it can be divested by direct proceedings brought for that purpose. The court said: "The Union Pacific Railway Company, because it took title to his property in violation of the Constitution, did not thereby become an outlaw; nor does the fact of its incompetency to be a grantee of such property authorize anyone to appropriate the property who may see fit to bring a suit for that purpose. The citizen has no right, title, or claim, as such, to property attempted to be acquired in contravention of law, whether the person attempting such acquisition be an English lord, a Turkish pasha, or an ordinary foreign railroad company. It would be a monstrous construction of this Constitution to say that if A should, for a valuable consideration, convey his real estate to B, that, because B was incompetent under the law to take such conveyance, that therefore the title should revert to A." To the same effect, see *Hannon v. Union P. R. Co.* 40 Neb. 52, 58 N. W. 590.

In *Reorganized Church of Jesus Christ,*

to the plaintiff certain real estate in St. Cloud, Minnesota. Pursuant to such agreement, the plaintiff and his wife executed a deed of the Polk county property to Johnson, and Johnson executed a mortgage to the plaintiff covering the same property, and also a deed of the St. Cloud property. The conveyances were delivered on the 8th day of April, and immediately thereafter Johnson requested the plaintiff to permit him to examine the note and mortgage which he had given to plaintiff. The mortgage was handed to Johnson, who thereupon said that there were some back taxes against the lands conveyed, and that he would hold the note and mortgage until such time as they were paid. It was thereupon agreed between the parties that Johnson should hold the mortgage until the taxes were taken care of, and that neither the deed nor the mortgage should in the

meantime be placed on record. The plaintiff at various times demanded the surrender of the note and of the mortgage which was given to secure such note, which demands were refused; Johnson endeavoring to induce the plaintiff to take in lieu thereof some corporate stock of small or uncertain value which he owned. In the meantime Johnson recorded his deed and conveyed the lands to one Bart. J. Goodwin of Minneapolis; the name of the grantee in the deed being left blank. Thereafter Goodwin inserted the name of one Maggie M. Finlay as grantee, and on August 26, 1908, recorded the deed in the office of the register of deeds of Polk county. No consideration was paid by said Maggie M. Finlay for the deed, she permitting her name to be used as grantee therein at the request of Goodwin. The court found on sufficient evidence that

L. D. S. v. Church of Christ, 60 Fed. 937, it is held that the question whether a foreign corporation has attempted to acquire more land than it is allowed by local statute to hold is one which can be determined only in a direct proceeding by the state.

And in *Reed v. Todd*, — S. D. —, 127 N. W. 527, it was held that a foreign corporation may acquire title to real property within the state without having complied with the law as to holding property therein, subject only to a direct proceeding by the state to prevent it from continuing to exercise its franchise.

The general rule is also recognized in *Plummer v. Chesapeake & O. R. Co.* post, —, and in *Schwab Clothing Co. v. Claunch*, — Tex. Civ. App. —, 29 S. W. 922.

In *Fritts v. Palmer*, 132 U. S. 282, 33 L. ed. 317, 10 Sup. Ct. Rep. 93, where the statute relating to the holding of property by foreign corporations provided that no foreign corporation should purchase or hold real estate except as provided for, which provision required the filing of certain papers, but the only penalty provided for carrying on business without the right to do so was that its officers and agents were made personally liable upon its contracts made before such a right had been acquired, it was held that a conveyance to it of real property was not void, but only voidable, and that the sovereign alone could question its rights, the court saying that such question cannot be raised collaterally by private persons, unless authorized to do so by statute. Mr. Justice Miller earnestly dissented on the ground that the statutory provision above set out rendered the conveyance to the corporation absolutely void, and that such invalidity could be raised by an interested private citizen.

And in *Chattanooga, R. & C. R. Co. v. Evans*, 14 C. C. A. 116, 31 U. S. App. 432, 66 Fed. 809, where a foreign railroad corporation sold its lines which extended into Tennessee to another foreign corporation, which, under the laws of Tennessee, was in-

capable of doing business therein, but which did take possession and operate the road, it was held that a creditor of the selling corporation could not, in a suit against such corporation to subject seized railroad property to the payment of his debt, question the validity of the transfer or the right of the purchaser to the use and possession of the purchased property, the court saying that the state alone can take advantage of the want of capacity of a foreign corporation under an executed contract to take and hold real property, where the state merely subjects the corporation violating it to a fine, and nowhere declares that the conveyance by which the offending corporation acquired the property should be inoperative to pass the title out of the grantor.

And under acts forbidding foreign corporations to acquire and hold the real estate except upon specified conditions, which provide that all corporations holding in violation of such acts shall escheat to the commonwealth, it is held that a deed of conveyance of land to such a corporation is not "void," and that the commonwealth alone can object to the legal capacity of the corporation to hold the real estate. *Runyan v. Coster*, 14 Pet. 122, 10 L. ed. 382; *Re Palmer Window Glass Co.* 183 Fed. 902; *Hickory Farm Oil Co. v. Buffalo, N. Y. & P. R. Co.* 32 Fed. 22.

In *McDiarmid v. Hughes*, 16 Ont. Rep. 570, it was held that a conveyance of lands to a foreign corporation which could not, under the statutes of mortmain, hold land in the province of Ontario, was voidable only, and could be forfeited only by the Crown. It was also held that where a foreign corporation holds property beyond the period allowed by statute, the Crown alone can take advantage of the unlawful holding, and that it is not a defense to an action of ejectment that the lands were acquired by plaintiff from the corporation after the expiration of the statutory period during which the corporation could lawfully hold them.

Goodwin was not a purchaser in good faith, but took the title with full knowledge of the fraud that Johnson was attempting to perpetrate upon the plaintiff. Thereafter Goodwin sold the lands to the defendant, the Kelsey Realty Company, a corporation organized under the laws of the state of Minnesota, and authorized by its articles of incorporation to deal in real property, and caused the lands to be deeded to that company by Maggie M. Finlay. The court found that the Kelsey Realty Company was a purchaser in good faith for a valuable consideration, but that said corporation failed to comply with the provisions of § 1770b, Stat. 1898, and that it was not authorized or licensed to transact any business in Wisconsin prior to October 26,

1909. The deed to the Kelsey Realty Company was dated September 7, 1908, and was delivered on September 16, and recorded October 9, 1908, in the office of the register of deeds of Polk county. The plaintiff did not learn that the deed from Johnson to Finlay had been placed on record or that any other transactions in reference to the land had taken place, until September 25, 1908, and on the 29th day of that month he tendered to Johnson all taxes due against the same and demanded the note and mortgage, which Johnson refused to deliver, and which he had in fact destroyed during the month of August. The evidence tends to show that plaintiff knew that Johnson had placed the deed to him on record as early as April 28th. The plain-

So, in *Bone v. Delaware & H. Canal Co.* 2 Sadler (Pa.) 55, 18 W. N. C. 125, 5 Atl. 751, it was held that in an action of ejectment brought by a foreign corporation, the defendant cannot set up a want of authority in the corporation to hold the property, as such authority can only be questioned by the commonwealth in a direct proceeding.

And in *Galveston Land & Improv. Co. v. Perkins*, — Tex. Civ. App. —, 26 S. W. 256, it was held that the capacity of a foreign corporation which by its charter is authorized to hold real estate in a manner not authorized in Texas, to hold any particular piece of property, can be attacked only by the state, and not by a private litigant in trespass to try title.

And in *War Eagle Consol. Min. Co. v. Dickie*, 14 Idaho, 534, 94 Pac. 1034, it was held that even if the title of a foreign corporation was declared forfeited by a statute providing that foreign corporations cannot hold title to property in the state prior to compliance with certain other statutory conditions, the forfeiture would be to the state, and could not be raised by the individual claiming some interest in the property, in an action by such corporation to quiet title to such property.

So, in *Rachels v. Stecher Cooperage Works*, — Ark. —, 128 S. W. 348, it was held that an individual claiming title to land as to which a foreign corporation was seeking to quiet title cannot have the deeds, which had been delivered to the corporation upon payment of the price, declared void under a statute prohibiting foreign corporations doing business in the state, under penalty of no right to sue on any demand arising out of contract or tort.

And in *Miller v. Williams*, 27 Colo. 34, 59 Pac. 740, it was held in an action to quiet title to real estate, that the grantee in a quitclaim deed cannot maintain, as against a purchaser at foreclosure sale under a deed of trust given a foreign corporation to secure certain notes prior to the execution of the quitclaim deed, that the foreign corporation had not complied with

certain statutory conditions which must be met to entitle it to do business in the state.

And in *American Mortg. Co. v. Tennille*, 87 Ga. 28, 12 L.R.A. 529, 13 S. E. 161, it was held that the maker of a note and deed to secure same could not raise, by affidavit of illegality, the question of the right of a foreign corporation to whom the land had been conveyed, and which had sued the note to judgment and had execution issued, to hold the land, because the acreage was greater than the statute allowed without having become incorporated in the state as required by statute, it being said that the state alone can question the right of foreign corporations to hold lands in excess of the amount limited by statute.

In *Carlow v. Aultmann*, 28 Neb. 672, 44 N. W. 873, it was held that a mortgagor could not maintain an action to have a sheriff's deed executed on foreclosure sale set aside, on the ground that the purchaser was a foreign corporation incapable under the laws of the state of acquiring or holding real property, the court saying that the title is valid against everyone but the state, and that it can be divested only by proceeding brought by the state for that purpose.

And in *McKinley-Lanning Loan & T. Co. v. Gordon*, 113 Iowa, 481, 85 N. W. 816, it was said that where a foreign corporation claims a note and mortgage which it is seeking to foreclose, as a part payment for land sold defendant, the latter cannot maintain that the foreign corporation has no title to the land sold, because it could not hold land under the laws of the state, that defense being held available to the state alone.

And in *Diefenbach v. Vaughan*, 116 Ala. 150, 23 So. 88, it was held that one who has executed a mortgage to a foreign corporation which has not complied with the statute regulating its right to do business in the state cannot attack either the validity of the mortgage or the right of the mortgagee to purchase the property on foreclosure, where the contract has become executed by foreclosure, in an action for

tiff commenced an action to enforce his lien for the sum of \$3,450 and interest against the premises conveyed to Johnson, and to have the title of Johnson's grantee decreed to be subsequent and subject to his mortgage.

The summons and complaint in this action were filed in the office of the circuit court for Polk county on October 30, 1908, and notice of *lis pendens* was apparently filed on the same day. Maggie M. Finlay executed a quitclaim deed of the lands in controversy under date of November 6th to the Kelsey Realty Company. The circuit court found that the deed first executed to the Kelsey Realty Company was void because of the failure of that company to comply with the provisions of § 1770b, Stat.

possession brought by the purchaser at foreclosure.

In *Grant v. Henry Clay Coal Co.* 80 Pa. 208, it was held that the defendant in a suit for the price of coal sold by a foreign corporation owning local mining leases could not raise the question of the plaintiff's right to hold such leases, and that such an inquiry could be made only by the commonwealth.

In *Omnium Invest. Co. v. North American Trust Co.* 65 Kan. 50, 68 Pac. 1089, it was held that one who, with knowledge and without giving any consideration, takes title to real estate from an agent of a foreign corporation who had wrongfully taken title in his own name, could not defeat an action brought by the corporation to compel the conveyance to it of the title, by proof that the foreign corporation was not entitled to hold real estate under a statute providing that such corporation shall be incapable of taking or holding title, and directing that real estate so held shall be forfeited to the state, it being said that the state is the only one that can insist upon such a forfeiture.

So, in *Seymour v. Slide & S. Gold Mines*, 153 U. S. 523, 38 L. ed. 807, 14 Sup. Ct. Rep. 847, it was held that an agent of a foreign corporation when sued by such corporation to recover land held by him, but to which it was entitled, could raise the question of the right of the corporation so to hold title, even if such title was held in violation of the laws of the state, as in such case the state alone could challenge the corporation's right.

And in *Rogers v. Nashville, C. & St. L. R. Co.* 33 C. C. A. 534, 62 U. S. App. 49, 697, 91 Fed. 299, it is held that a stockholder bringing action to set aside a contract by which his corporation leased a railroad line from a foreign corporation cannot raise therein the question of the power of the lessor corporation to acquire the ownership of the leased line by purchase, where the purchase has been executed and the title vested, as in such case the question can only be raised by the state in direct proceeding for the purpose. The deci-

1898, and that by the subsequent deed of November 6th the corporation acquired the interest of Johnson in said lands, subject to the mortgage lien of the plaintiff. It was provided by the judgment that unless the Kelsey Realty Company should elect on or before July 1, 1910, to pay to the plaintiff the sum of \$3,450 with interest at 6 per cent per annum from April 8, 1908, plaintiff might apply to the court for an order for foreclosure of plaintiff's lien upon the property. From a judgment entered in pursuance of the order of the court, defendant prosecutes this appeal.

Mr. W. N. M. Crawford, with Mr. Frank B. Dorothy, for appellant.

sion in *Rothchild v. Memphis & C. R. Co.* 51 C. C. A. 310, 113 Fed. 476, writ of certiorari denied in 188 U. S. 740, 47 L. ed. 677, 23 Sup. Ct. Rep. 848, is to the same effect.

In *Whitman Gold & S. Min. Co. v. Baker*, 3 Nev. 386, it was held that a foreign mining corporation limited by the laws of Nevada to such quantity of land as may be necessary for the purposes of the corporation is not estopped by the fact that it holds more than it is entitled to, from demanding protection from trespassers. The court said: "If they [the foreign corporation] have violated the law in taking a greater quantity of land than is allowable, then they have committed a wrong, not against any particular individual, but against the whole community, and this wrong can only be inquired into by a proceeding on the part of the state. Their deed to the land, if they buy it from one having title, or their possession if they only derive title from occupation, gives them a right to hold against all the world except the state."

And in *Louisville Property Co. v. Nashville*, 114 Tenn. 213, 84 S. W. 810, it was held that noncompliance on the part of a foreign corporation, with a statute which did not absolutely prohibit foreign corporations from purchasing or holding real property, did not permit the defendant to defend against an otherwise just claim for damages to plaintiff's property, upon the ground that the plaintiff corporation had failed to comply with the statutory regulations as to acquiring title to property within the state before taking title to the damaged property.

But where the statute renders any conveyance made in defiance of a prohibiting statute absolutely void, there would seem to be, as is stated in *HANNA v. KELSEY REALTY Co.*, no reason why an individual affected by a foreign corporation acquiring or holding real property in violation of such a statute may not show that fact, and take advantage of it. See also dissenting opinion in *Fritts v. Palmer*, 132 U. S. 282, 33 L. ed. 317, 10 Sup. Ct. Rep. 93, as set out supra.

Messrs. Morris E. Yager and Walter L. Chapin for respondent.

Barnes, J., delivered the opinion of the court:

It is urged by the appellant (1) that the court was in error in holding that the Kelsey Realty Company acquired no title to the lands involved because § 1770b of our statutes (Stat. 1898) had not been complied with; and (2) that the plaintiff is estopped from setting up any such defense to the action. Some other errors are assigned, but the contentions of the appellant in reference thereto are either untenable or immaterial in view of the conclusion reached, and they will not be discussed.

The appellant was a foreign corporation amenable to the provisions of § 1770b, provided it saw fit to extend its activities to the state of Wisconsin, and to do any of the things which such corporations are forbidden to do without compliance with the statute. By subd. 2 of the law it is provided that no foreign corporation "shall transact business or acquire, hold, or dispose of property" in the state, unless it shall have first complied with the requirements of the statute, and by subd. 10 of the law every contract relating to property within this state before compliance with the requirements of the law is declared to be "wholly void" on the part of the corporation making it. It must be conceded that the appellant attempted to acquire property within the state, and did so, unless the statute we are considering provides otherwise, and that there was no element of

interstate commerce involved in the transaction which takes it outside of the statute. The claim of the appellant is that the statute does not render the transaction void, but voidable only, at the election of the state, and that the state only can question the validity of its title and decree a forfeiture.

In support of his contention counsel for appellant invites our attention to a number of cases, which for convenience may be divided into three classes. The first class comprehends those wherein it is held that, although aliens are disabled by the common law from acquiring, owning, or holding real estate within a state, yet if an alien does acquire property by grant or descent, the transaction is not void, but is voidable only, at the election of the state. Such were the cases of *Craig v. Radford*, 3 Wheat. 594, 599, 4 L. ed. 467, 468, and *Doe ex dem. Gouverneur v. Robertson*, 11 Wheat. 332, 351, 6 L. ed. 488, 493, as well as other cases that might be cited. The second class comprehends those cases where a corporation acquires real estate without being authorized so to do by its charter or its articles of incorporation, and where, therefore, its act in this behalf is *ultra vires*. In such a situation it is generally held that the right at least of a foreign corporation to hold property can only be questioned by persons directly interested in the corporation, or by the state whose charter and franchises are being exceeded or abused. Such was the holding in *Illinois Steel Co. v. Waras*, 141 Wis. 119, 123 N. W. 656, and in the cases cited on page 126, of the opinion. To the same effect is

And for a case in which the question under discussion arises, but which does not involve a controversy as to a right of property, see *Plummer v. Chesapeake & O. R. Co.* post, 362, in which the question as to the effect of a conveyance by a public service corporation to a foreign corporation incapable of taking, upon the continued duty and liability of the former to members of the public, is discussed.

The question whether an heir may question the right of a foreign corporation to take land devised seems to rest upon somewhat different principles than do the preceding cases.

Thus, in *Proctor v. Methodist Episcopal Church South*, 225 Mo. 51, 123 S. W. 862, it was held that the heirs may question the right of a foreign corporation to take under local laws property which has been devised to it, and that in so doing they do not infringe upon the right of the sovereign state to question the legality of the defendant corporation's existence. The court said that if the question concerned the forfeiture of the charter of the corporation, there would be no question but what the state 33 L.R.A. (N.S.)

alone would be the proper party to intervene, but that where the question was simply one of title to the property, and since, if the corporation was incapable of holding it, the title would vest in the heirs, and as there was no question of a contract nature nor of estoppel, there was nothing to preclude the heirs from setting up any legal bar to the right of the foreign corporation to take title to the property as devised.

And in *Boyce v. St. Louis*, 29 Barb. 650, 18 How. Pr. 125, it was held that the heirs, in an action for partition of devised real estate, could defeat the taking of title by a foreign corporation to a portion of the real property devised to it, by proof that under the laws of New York the foreign corporation was incapable of taking by devise.

As to the right to question the power of a corporation to take by will property in excess of its charter authority, see notes to *Hubbard v. Worcester Art Museum*, 9 L.R.A. (N.S.) 689, and to *Hanson v. Little Sisters of the Poor*, 32 L.R.A. 293.

G. J. Q.

Cowell v. Colorado Springs Co. 100 U. S. 55, 60, 25 L. ed. 547, 549. It should be noted, however, that the rule in Illinois Steel Co. v. Warras is expressly limited to cases where there is no statutory prohibition against the holding of the property involved. The third class of cases pertains generally to statutes akin to our § 1770b, although in most instances differing therefrom in some respects. Some courts hold that under such a statute the conveyance is voidable only, at the election of the state. It was so held in Carlow v. Aultman, 28 Neb. 672, 44 N. W. 873, and in Reed v. Todd — S. D. —, 127 N. W. 527, two of the five judges dissenting; also in Hickory Farm Oil Co. v. Buffalo, N. Y. & P. R. Co. (C. C.) 32 Fed. 22. The case of McKinley-Lanning Loan & T. Co. v. Gordon, 113 Iowa, 481, 85 N. W. 816, can hardly be said to be authority on the proposition, as the suit involved a contract relating to Nebraska real estate, and the Iowa court construed the contract in accordance with the law of Nebraska as announced in Carlow v. Aultman, supra.

Other courts have held that where there is a valid statute expressly prohibiting a corporation for acquiring real estate, and declaring any conveyance made in defiance of the law to be void, such a conveyance should not be held voidable merely, and that any party in interest might take the benefit of the statute. Such was the conclusion of the New York court in the elaborately considered case entitled *Re McGraw*, 111 N. Y. 66, 96, 2 L.R.A. 387, 19 N. E. 233, which decision was affirmed on appeal to the Supreme Court of the United States, although the decision of that court is not particularly valuable, inasmuch as it followed the construction of the New York statutes placed thereon by its court of appeals. Other cases where the view of the New York court is upheld are *Wunderle v. Wunderle*, 144 Ill. 40, 64, 19 L.R.A. 84, 33 N. E. 195; *Hanchey v. Southern Home Bldg. & L. Assn.* 140 Ala. 245, 37 So. 272. The same doctrine by inference is found in *Chicago Title & T. Co. v. Bashford*, 120 Wis. 281, 97 N. W. 940, although that case did not necessarily involve a decision of the question. The New York court differentiates between an act of a corporation which is merely *ultra vires* and one which is in contravention of a positive statute, holding that, while the former may be voidable merely, at the election of the state, the other is void, and may be taken advantage of by any party in interest. This court has had before it a number of cases arising out of business transactions by foreign corporations in the state, where the statute had not been complied with, as

well as cases involving contracts made in the state by such corporations, and has uniformly held that parties in interest might assert the benefit of the statute. See *International Textbook Co. v. Peterson*, 133 Wis. 302, 113 N. W. 730, 14 A. & E. Ann. Cas. 965; *Southwestern Slate Co. v. Stephens*, 139 Wis. 616, 626, 29 L.R.A. (N. S.) 92, 131 Am. St. Rep. 1074, 120 N. W. 408; *Duluth Music Co. v. Clancy*, 139 Wis. 189, 131 Am. St. Rep. 1051, 120 N. W. 854; *Ashland Lumber Co. v. Detroit Salt Co.*, 114 Wis. 66, 89 N. W. 904.

No good reason suggests itself why a party who is affected by a foreign corporation doing business or making a contract in the state in violation of the statute may take advantage of it, while one who is affected by the corporation acquiring or holding property may not do so. All these prohibitions occur in the same sentence in the statute, and the penalty is precisely the same as to the violation of each of them. But more convincing is the fact that this court has unequivocally held that the words "wholly void" as used in the statute "mean just what they say," and that is, "absolutely void and a nullity." *Ashland Lumber Co. v. Detroit Salt Co.* supra. In adopting such construction the court followed the decision in *Land, Log & Lumber Co. v. McIntyre*, 100 Wis. 245, 69 Am. St. Rep. 915, 75 N. W. 964, wherein the word "void" as used in § 692, Stat., was given a like construction. So, unless we overrule our former decisions, it naturally follows that we cannot adopt for our guidance the pronouncements of courts that elect to construe the word "void" as meaning simply "voidable" in such a statute. It therefore appears that the real question in issue has already been decided, as it would hardly be contended that, if the deed to the appellant was "absolutely void and a mere nullity," the plaintiff could not show that fact, and take the benefit of it. If its deed was void, the appellant took nothing under it, and has no right or title to assert by virtue of such deed.

The statute is, in fact, plain and unambiguous on the question we are considering, and leaves little room for construction. Drastic and harsh in its penalties it may be, but the legislature undoubtedly knew that cases involving great hardships might arise because of the statute. The state evidently intended to make the consequences of violating the law so great as to enforce obedience to it. It was within the legislative province to prescribe those penalties, and this court cannot soften or mitigate them without violating the law. *Ashland Lumber Co. v. Detroit Salt Co.* supra, and cases cited on page 78 of 114 Wis. If the

construction contended for by the appellant should prevail, the statute, in so far as it relates to the acquiring or holding of property in this state, would be practically nullified. Even if the state should attempt to assert its right, it might be utterly impossible for it to get any service upon the foreign corporation so as to commence any action or proceeding in the courts of this state. It is no great hardship in the present case to hold that the appellant must comply with § 1770b before it can take the benefit of our recording statute, § 2241, Stat. (1898), under and by virtue of which it claims priority over the plaintiff. We hold, therefore, that the conveyance first made to the appellant was not simply voidable, but was void, and that the plaintiff may show that fact, and take the benefit and advantage of it. The ground of estoppel relied on is failure on the part of the plaintiff to take the necessary steps to appraise parties of his rights, who might be induced to purchase the real estate. There is no claim that the plaintiff ever had any communication with the appellant in reference to the lands, directly, or indirectly, or even that he knew of the corporation. Inasmuch as the appellant could not lawfully acquire the lands until it had complied with the law, and the transaction by which they were acquired was void, the plaintiff did not owe to the appellant the duty of more promptly beginning his action and filing a notice of *lis pendens*. Constructive notice is intended to protect innocent parties who are about to engage in lawful transactions.

Judgment affirmed.

Vinje, J., took no part.

KENTUCKY COURT OF APPEALS.

L. P. PLUMMER, Appt.,

v.

CHESAPEAKE & OHIO RAILWAY COMPANY OF KENTUCKY et al.

(143 Ky. 102, 136 S. W. 162.)

Foreign corporation — acquisition of railroad right of way — constitutional provision.

1. A constitutional provision that no foreign railroad company shall have power to acquire a right of way or real estate for a depot or other uses, until it shall have become a domestic corporation, applies to the purchase of existing lines as well as to the construction of new ones.

Same — conflicting statutes — construction — purchase or operation of railroad.

2. A foreign railroad company wishing

to purchase a railroad line within the state must comply with the statute applicable to such corporations which wish to purchase and hold lands for depot, tracks, and other purposes and compliance with the statute applicable to those wishing to possess, control, maintain, or operate a railway within the state is not sufficient.

Commerce — interference — requiring domestication of railroads.

3. Requiring foreign corporations to become domesticated before they shall be permitted to own or operate railroads in the state does not unconstitutionally interfere with interstate commerce.

Foreign corporation — operation of railroad — compulsory domestication.

4. A state has power to require foreign railroad companies to become domesticated as a condition to acquiring and operating railroads within the state.

Same — right to question power to own real estate.

5. One seeking damages for personal injuries from a domestic railroad company,

Note. — Conveyance by public service corporation to foreign corporation incapable of taking title, continued duty and liability of former to members of public.

An extended search discloses no case in addition to *PLUMMER v. CHESAPEAKE & O. R. Co.* in which the question as stated has arisen. This decision, while recognizing the general rule that no person except the state can raise an objection that a foreign corporation is holding real estate in violation of local statute, establishes a seemingly well founded exception to such rule, in holding that where there is no controversy as to title, and therefore no property rights involved, an individual to whom a duty is owed as a member of the public may take advantage of the statute, when a public service corporation attempts to excuse itself from liability for a wrongful act by pleading that it had disposed of the property.

For a discussion of the general question as to who may take advantage of a statute rendering foreign corporations incapable of taking title to real property, see *Hanna v. Kelsey Realty Co.* ante, 355, and note appended thereto.

As to the right of a foreign corporation in general to own real property, see note to *Lancaster v. Amsterdam Improv. Co.* 24 L.R.A. 322.

As to the right of a private person in general to contest the power of a corporation to take or hold title, see note to *Hanson v. Little Sisters of the Poor*, 32 L.R.A. 293.

As to the right to question the power of a corporation to take by will property in excess of its charter authority, see note to *Hubbard v. Worcester Art Museum*, 9 L.R.A. (N.S.) 689.

G. J. C.

which denies liability on the ground that it had conveyed its property to a foreign corporation, may question the right of the latter to take the title, for the purpose of showing that defendant had not relieved itself from responsibility for the operation of the road.

Railroad — liability for injury — transfer of property — unauthorized grantee.

6. A domestic railroad company cannot, by conveying its property to a foreign corporation which has no authority to own it, relieve itself of liability to persons injured in the operation of the road, which the state imposes upon it as a condition to its right to construct and operate the road.

(April 12, 1911.)

APPEAL by plaintiff from a judgment of the Circuit Court for Lewis County in favor of defendant, the Kentucky corporation, in an action brought to recover damages for personal injuries alleged to have been caused by the negligence of defendants' servants. Reversed.

The facts are stated in the opinion.

Messrs. Allen D. Cole, S. J. Pugh, and A. R. Campbell for appellant.

Messrs. Worthington, Cochran, & Browning for appellee.

Carroll, J., delivered the opinion of the court:

The appellant, Plummer, while engaged for a shipper in loading a railroad car with tan bark, was injured by the negligence of the train men in moving, without notice to him, the car in which he was at work. To recover damages for the injuries thus sustained, he brought suit against the Chesapeake & Ohio Railway Company, a Virginia corporation, and the Chesapeake & Ohio Railway Company of Kentucky, a Kentucky corporation. The lower court directed the jury to return a verdict in favor of the Chesapeake & Ohio Railway Company of Kentucky, and from the judgment upon this verdict, this appeal is prosecuted.

It appears from the admitted facts: That for several years prior to July 1, 1907, the railway and its appurtenances were owned by the Chesapeake & Ohio Railway Company of Kentucky, and that during this period the railway was operated by the Chesapeake & Ohio Railway Company as lessee. That on July 1, 1907, the Chesapeake & Ohio Railway Company of Kentucky executed and delivered to the Chesapeake & Ohio Railway Company a deed of conveyance, by which it transferred and conveyed to it in fee simple the railway, with all the rights, privileges, and appurtenances appertaining thereto, and all property, real and personal, possessed or

used in connection therewith. That the Chesapeake & Ohio Railway Company of Virginia, in 1893, when it first undertook as lessee to operate the Kentucky railway, complied with § 841 of the Kentucky Statutes (Russell's Stat. § 5391), hereinafter copied, but has made no attempt to comply with § 765, of the Kentucky Statutes (Russell's Stat. § 5365), hereinafter set forth. Its contention, which was sustained by the lower court, being that, as it had, while operating the road as lessee, complied with § 841, this act relieved it from the necessity of complying with § 765 when it became the purchaser of the railway. The correctness of the ruling of the trial court depends primarily upon the question whether or not this compliance with § 841 of the Kentucky Statutes was sufficient under the laws of this state to authorize the Chesapeake & Ohio Railway Company to purchase, own, and operate the railway in this state, and to enable the Kentucky corporation to divest itself of title by the conveyance. If it was, the appellee, Chesapeake & Ohio Railway Company of Kentucky, was not answerable in damages to the appellant, because the injury to him happened after the conveyance was made. On the other hand, if the compliance with § 841 of the Kentucky Statutes was not sufficient to authorize the Chesapeake & Ohio Railway Company to purchase, own, and operate the railway, and to enable the Kentucky corporation to divest itself of title by the conveyance, then the Chesapeake & Ohio Railway Company of Kentucky was jointly and severally liable with it, as it sustained at the time of the injury the relation of lessor to the Chesapeake & Ohio Railway Company, and consequently was responsible to persons not employees of the operating company, for injuries sustained by them on account of the negligence of the operating company. *McCabe v. Maysville & B. S. R. Co.* 112 Ky. 861, 66 S. W. 1054; *Illinois C. R. Co. v. Sheegog*, 126 Ky. 252, 103 S. W. 323.

Only two questions are presented by the record for decision: (1) Was the purchase and conveyance made on July 1, 1907, made and executed in accordance with the Constitution and laws of this state, and therefore sufficient to divest the selling corporation of title? (2) Assuming that it was not, can the validity of the purchase and conveyance be questioned by any person other than the state of Kentucky? Taking up the first question, its solution renders it necessary that we should construe § 211 of the Constitution of the state, reading as follows: "No railroad corporation organized under the laws of any other state, or of the United States,

and doing business, or proposing to do business, in this state, shall be entitled to the benefit of the right of eminent domain, or have power to acquire the right of way or real estate for depot or other uses, until it shall have become a body corporate pursuant to and in accordance with the laws of this commonwealth." Section 765 of the Kentucky Statutes, which provides that "no railroad corporation organized or created by or under the laws of any other state shall have the right to condemn land for, or acquire the right of way for, or purchase or hold land for, its depots, tracks, or other purposes, until it shall have first filed in the office of the secretary of state of this state, in the manner provided in the 1st article of this chapter, its acceptance of the Constitution of this state, and shall have become organized as a corporation under the laws of this state, which it may do by filing in the offices of the secretary of state and the railroad commission articles of incorporation in the manner and form provided in § 763 of this article." And § 841 of the Kentucky Statutes, reading: "No company, association, or corporation created by, or organized under, the laws or authority of any state or country other than this state, shall possess, control, maintain, or operate any railway or part thereof in this state, until, by incorporation under the laws of the state, the same shall have become a corporation, citizen, and resident of this state. Any such company, association, or corporation may, for the purpose of possessing, controlling, maintaining, or operating a railway or part thereof in this state, become a corporation, citizen, and resident of this state by being incorporated in the manner following, namely: By filing in the office of the secretary of state, and in the office of the railroad commission, a copy of the charter or articles of incorporation of such company, association, or corporation, authenticated by its seal and by the attestation of its president and secretary, and thereupon, and by virtue thereof, such company, association, or corporation shall at once become and be a corporation, citizen, and resident of this state. The secretary of state shall issue to such corporation a certificate of such incorporation."

In the consideration of the case before us, it is not necessary to consider or discuss the power of the state to directly prohibit a foreign railway corporation from owning property or doing business within its territory, or its power to impose such restrictions and conditions as would virtually amount to a denial of this right, as neither the Constitution nor the statute

attempt to prohibit a foreign railway corporation from purchasing a domestic railway corporation, nor do they place any unreasonable restrictions or limitations upon the right so to do. The conditions annexed to the right of a foreign railway corporation to come into this state, and purchase a domestic railway corporation and operate the same, are neither prohibitory nor unreasonably restrictive. The only terms imposed are that, before the foreign railway corporation purchases or undertakes to operate a railway in this state, it must comply with our laws enacted for the purpose of placing foreign and domestic corporations upon the same footing. Section 211 of the Constitution, before quoted, as well as § 202, reading, "No corporation organized outside the limits of this state shall be allowed to transact business within this state on more favorable conditions than are prescribed by law to similar corporations organized under the laws of this commonwealth," and the statutes enacted in pursuance thereof were not designed to and do not impose upon foreign corporations any limitations or burdens not put upon home corporations. They were only intended to place as near as may be foreign and domestic corporations upon an equality under the law. The foreign corporation is not discriminated against, nor is it extended by the state any favors not granted to domestic corporations. If a foreign corporation wishes to purchase, own, or operate a railway in this state, it may come here under the protection of our laws, and enjoy all the privileges and rights that are allowed to home corporations, and, in addition, those guaranteed by the Federal Constitution and laws. There is no reason why it should be granted any greater, or why any distinction or discrimination should be made by the state between corporations engaged in the same line of business, whether they be foreign or domestic. One should not be allowed, so far as the operation and effect of state laws are concerned, to do business upon more favorable conditions than the other. As § 202 of the Constitution merely declares a general principle that shall be observed in the legislative treatment of corporations, we do not think it worth while to further allude to it; but § 211 relates directly to the matter in hand, and requires more careful consideration. This section provides that a foreign railway corporation shall not be entitled "to the benefit of the right of eminent domain, or have power to acquire the right of way or real estate for depot or other uses, until it shall have become a body corporate pursuant to and in accordance with the laws of this common-

wealth." We think it clear this language should not be limited in its application to a foreign railway corporation that desires to come into this state for the purpose of constructing a line of railway. This narrow view of the meaning of this section would exclude from its operation a foreign railway corporation that purchased outright an existing domestic railway corporation. It would impose upon corporations desiring to build a line of railway, and seeking to acquire under the right of eminent domain real estate or right of way for such purpose, the duty of becoming incorporated under the laws of this state, and exempt from this duty a foreign corporation that acquired by purchase from another corporation all the real estate and rights of way that it needed in the conduct of its business. There seems no reason why a distinction like this should be permitted. We are unable to perceive why one corporation under the conditions stated should be allowed greater privileges than another. If one corporation cannot, except by observing certain requirements, acquire rights of way for the purpose of building a road and operating it, neither should another be permitted to purchase a road already built for the purpose of operating it, without complying with such requirements. A construction that made a distinction like this would defeat in part the purpose of the Constitution, and create inequality and discrimination that should not exist. We are therefore of the opinion that § 211 of the Constitution applies to every foreign railway corporation that owns and operates a railway in this state, whether the railway so owned and operated was constructed by the foreign corporation, or purchased by it from a domestic or other foreign corporation.

The next question is: How is a foreign railway corporation that desires to purchase, hold, and operate a line of railway in this state to become a body corporate under the laws of this commonwealth? The answer to this question is found in § 765 of the Kentucky Statutes, which points out the manner in which the constitutional provision may be complied with. This section was enacted for the purpose of furnishing a means by which foreign railway corporations desiring to purchase, hold, and operate railways in this state might become, in the language of the section, "a body corporate pursuant to and in accordance with the laws of this commonwealth." As the legislature has pointed out in § 765 the manner in which a foreign railway corporation desiring to purchase, hold, and operate a railway in this state may become incorporated in this state, this method must be pursued to the 33 L.R.A. (N.S.)

exclusion of all others. A compliance with this section is a condition precedent to its right to engage in this character of business in this state. Until it has done this, it may operate and control, but it cannot purchase or own, any railway in this state. We think the legislature had the unquestioned authority to prescribe the terms upon which foreign railway companies should be permitted to "acquire the right of way for, or purchase or hold land for, its depots, tracks, or other purposes," and, as it has pointed out the terms, their observance is an indispensable prerequisite to the exercise of the privilege. This section was not intended to provide a means by which foreign railway corporations that operated under lease or contract lines of railway might become incorporated. The incorporation of such companies is provided for in § 841 of the Kentucky Statutes. Under this last-mentioned section, a method is provided by which foreign railway corporations that "possess, control, maintain, or operate any railway or part thereof in this state, may become incorporated." There is no conflict between these sections. They were enacted for different purposes and to meet different conditions. One refers to foreign corporations that own the title to and operate railways in this state; the other to foreign corporations that lease lines of railway in this state for the purpose of controlling, possessing, maintaining, or operating the same, the title remaining in the lessor corporation. It is manifest from the language of § 765 that it was not intended to embrace the mere conduct or operation of a railway. Therefore it became necessary to enact § 841 to provide the manner in which a foreign corporation might obtain under lease or contract the right to control, maintain, and operate a railway in this state. In making provision for the incorporation of lessee corporations, the legislature saw proper to prescribe a different method from that adopted to apply to foreign corporations that desired to actually purchase and own a railway in this state. Why this distinction was made, it is not essential, in the consideration of the question before us, to inquire. As the Chesapeake & Ohio Railway Company did not become incorporated in the only manner provided by law for its incorporation as a purchaser of a railway, the conveyance made to it was not valid or effectual to invest it with title to the railway it attempted to purchase. Its compliance with § 841 did not leave it in any better or other position than it would have been if it had made no attempt to observe the requirements of that section.

But it is insisted by counsel that such

a construction as we have put upon these sections and the corresponding duty imposed upon foreign railway companies has the effect of rendering § 765 unconstitutional, in that it is an attempted regulation of and interference with interstate commerce. It is said that the result of this construction is that no corporation except one created under and brought into existence by the laws of this state will be authorized to operate a railroad in this state or to engage in interstate commerce therein. But we are not ready to agree with counsel in their interpretation of the effect of the construction we have given these sections. The requirement that a foreign railway corporation, before it is permitted to purchase, own, and operate a railway in this state, must become incorporated in the manner provided by the laws of this state is not an interference with or regulation of interstate commerce. It does not conflict with the Federal Constitution or any laws made in pursuance thereof. Nor does it follow that the incorporation of a foreign railway company in this state will deplete it of its original citizenship or deprive it of any rights or privileges it enjoys as a foreign corporation. What these rights and privileges are or may be it would be outside the scope of the question before us to undertake to define, and we shall not attempt to do so. We are only concerned with the single question,—whether or not it is within the power of the state to impose the reasonable terms that our Constitution and statute do upon foreign railway corporations as a condition precedent to their coming into this state and acquiring by purchase lines of railway therein. Upon this point we have not been furnished with any authority in conflict with the views expressed. The Chesapeake & Ohio Railway Company of Virginia before its purchase of the Kentucky corporation was engaged in interstate commerce as the lessee of the Kentucky corporation. While the Virginia corporation was holding and operating the Kentucky corporation as such lessee, by its compliance with § 841 of the Kentucky Statutes, it became, in the language of that section, “a corporation, citizen, and resident of this state.” If, upon its purchase of the Kentucky corporation, it had complied with § 765 of the Kentucky Statutes, it would have become “organized as a corporation under the laws of this state.” It would therefore seem that, so far as our laws can affect the question, the corporation that has complied with § 841 is to the same extent a Kentucky corporation as is a foreign corporation that complies with § 765. The only difference between the two sections is in the means or

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method by which the foreign corporation is converted into or becomes a Kentucky corporation. If a forced compliance with one is an interference with or regulation of interstate commerce, so is a forced compliance with the other. If one section is invalid because it places a burden upon interstate commerce, so is the other. The question then comes to this: Can the state impose upon a foreign railway corporation, as a condition precedent to its right to purchase, own, or hold and operate a railway in this state, the duty of becoming in any manner or for any purpose a corporation and citizen of this state? If it can, then both §§ 765 and 841 are valid exercises of power. If a foreign corporation desires to lease a railway in this state, it must perform the conditions imposed by § 841; and if it desires to purchase a railway in this state, it must observe the conditions imposed by § 765. So far as the principle involved is concerned, the requirements imposed by one section cannot be distinguished from those imposed by the other. In *St. Louis & S. F. R. Co. v. James*, 161 U. S. 545, 40 L. ed. 802, 16 Sup. Ct. Rep. 621, the Supreme Court had before it a question in some respects similar to that involved in this case. After saying that “it must be regarded, to begin with, as finally settled by repeated decisions of this court that, for the purpose of jurisdiction in the Federal courts, a state corporation is deemed to be indisputably composed of citizens of such state,” the court in the course of the opinion proceeded to say: “It is competent for a railroad corporation organized under the laws of one state, when authorized so to do by the consent of the state which created it, to accept authority from another state to extend its railroad into such state, and to receive a grant of powers to own and control by lease or purchase railroads therein, and to subject itself to such rules and regulations as may be prescribed by the second state. Such legislation on the part of two or more states is not, in the absence of inhibitory legislation by Congress, regarded as within the constitutional prohibition of agreements or compacts between states. Such corporations may be treated by each of the states whose legislative grants they accept as domestic corporations. The presumption that a corporation is composed of citizens of the state which created it accompanies such corporation when it does business in another state, and it may sue or be sued in the Federal courts in such other state as a citizen of the state of its original creation.” In *Louisville, N. A. & C. R. Co. v. Louisville Trust Co.* 174 U. S. 552, 43 L. ed. 1081, 19 Sup. Ct. Rep. 817,

the Supreme Court again said: "This court has often recognized that a corporation of one state may be made a corporation of another state by the legislature of that state, in regard to property and acts within its territorial jurisdiction." Again, in *Southern R. Co. v. Allison*, 190 U. S. 326, 47 L. ed. 1078, 23 Sup. Ct. Rep. 713, it appears that the state of North Carolina enacted a statute containing some of the features of both §§ 765 and 841 of our statute, providing a means by which foreign railway corporations desiring to own property and carry on business in that state might become domestic corporations. In compliance with this statute, the Southern Railway Company, a Virginia corporation, became a North Carolina corporation, and the question presented to the court was whether or not this compliance operated to divest the corporation of the right to remove to the Federal court a suit brought against it in a state court of North Carolina. In the course of the opinion holding that it did not, the court said: "So it seems that a corporation may be made what is termed a domestic corporation, or in form a domestic corporation, of a state in compliance with the legislation thereof, by filing a copy of its charter and by-laws with the secretary of state, yet such fact does not affect the character of the original corporation. It does not thereby become a citizen of the state in which a copy of its charter is filed, so far as to affect the jurisdiction of the Federal courts upon a question of diverse citizenship." In each of these cases the court had before it legislation in substance similar to ours, but in neither did the court hold that the legislation was invalid. On the contrary, its validity was impliedly at least recognized. Without further extending the opinion upon this branch of the case, we are of the opinion that a compliance by the Virginia corporation with § 765 of the Kentucky Statutes was essential to its purchase and ownership of the Kentucky corporation, and, as it did not do this, it cannot be treated in this state as the owner of the Kentucky corporation. It follows from this that the lower court erred in directing a dismissal of the action as to the Kentucky corporation, unless it be that the appellant could not attack the validity of the purchase and conveyance, or that, notwithstanding the failure of the purchasing corporation to comply with the statute, the title passed out of the grantor and to it by the conveyance. If either of these questions should be answered adversely to the appellant, the ruling of the lower court must be sustained. It is insisted by counsel for the appellee corporation that the

purchase and conveyance in question is good as against all persons until assailed by the state of Kentucky in a direct proceeding instituted by it for that purpose; and, this being so, the appellant, Plummer, could not attack its validity, or set up in avoidance of its plea the fact that the purchaser had failed to comply with the laws of this state necessary to make valid the purchase and conveyance. It is undoubtedly well settled that no person except the state can raise the objection that a corporation is holding real estate in excess of its corporate power. *Louisville School Board v. King*, 127 Ky. 824, 15 L.R.A.(N.S.) 379, 107 S. W. 247; *Fritts v. Palmer*, 132 U. S. 282, 33 L. ed. 317, 10 Sup. Ct. Rep. 93; 1 Beach, *Priv. Corp.* § 378; 5 *Thomp. Priv. Corp.* 2d ed. § 2391.

But no attempt is made in this proceeding to forfeit the property of the appellee railway company, or to divest the purchasing corporation of any estate acquired by its purchase. The only question presented is, Did the appellant, Plummer, have the legal right, in avoidance of the defense made by the appellee corporation, to assert and establish that the defense relied upon was not authorized by law? In other words, the appellee corporation when sued set up a complete defense to the action that, previous to the accrual of the cause of action asserted, it had parted with its title to the railway. In avoidance of this plea, the appellant, Plummer, insisted below, and insists here, that it had not done this. We think he had the right to make this issue, and to put the appellee corporation upon proof of the sufficiency of this defense. But, if this be conceded, the question yet remains,—Did the conveyance made by it divest it of title to the property? It is not to be doubted that the Kentucky corporation had the right to sell its railway and to execute a conveyance that would divest it of all title to it. Neither the Constitution nor the statute forbids a domestic railway corporation from disposing of its property and franchises, nor do they prescribe any terms that must be complied with by the selling corporation before it can make a conveyance. The duty of complying with the statute is imposed alone upon the purchasing corporation.

We have then sharply presented the further question whether or not a domestic railway corporation can, by making a conveyance to a foreign corporation not authorized to purchase, own, or hold the property conveyed, relieve itself of the obligations imposed upon it by the state of Kentucky as a condition to its right to acquire a railway in this state. We think considerations of public policy forbid the legal-

ity of a transaction like this. A railway corporation created and organized under the laws of this state, given authority to exercise the right of eminent domain and to enjoy the other privileges and benefits conferred upon railway corporations, owes to the state in consideration of these privileges certain duties that it should not be allowed to divest itself of by disposing of its property to a corporation not authorized to purchase or hold it. If this course of conduct be legalized, then it would not be necessary for any railway corporation to become or remain a domestic corporation or citizen of this state longer than was necessary for it to acquire such rights of way and privileges as it desired. When it had received from the state all the benefits the state could confer, it could dispose of its property to some foreign corporation not authorized by our laws to purchase or hold it, and the result would be that we would soon have no domestic railway corporations if a more agreeable place of abode could be found. The statute does not impose any penalty upon a foreign railway corporation for purchasing or operating a railway without a compliance with our laws, and the only method by which a corporation could be forced to acknowledge the laws of this state would be by an appropriate action on the part of the state, to dispossess it of its rights under the purchase. But we are not disposed to concede that a domestic railway corporation may trifle with the authority of the state by disposing of its holdings to a corporation not authorized to acquire them, or to consent that a foreign railway corporation may acquire title to property in violation of our laws, and hold the same until the state sees proper to take suitable action against it. The Constitution and statute prohibit a foreign railway corporation from purchasing a railway in this state, until it shall have complied with the laws of this state; but it is manifest that if, notwithstanding these provisions of the law, a foreign corporation may acquire by purchase a line of railway in this state, their efficiency would be greatly impaired and for a time at least virtually nullified. In view of the public nature of railway corporations, and the duties they are under to the people and the state, we do not believe that a domestic railway corporation can divest itself of title or make a valid conveyance to a corporation not authorized by the laws of this state to acquire the property. It is true that it is held in many cases that, although the grantee in a conveyance may not be authorized to purchase the property conveyed, yet a conveyance to it by a grantor authorized to convey will divest it of title, and lodge the

title in the grantee. But we have not found any case in which this doctrine was attempted to be applied to conditions such as exist in the case before us. In *Fritts v. Palmer*, 132 U. S. 282, 33 L. ed. 317, 10 Sup. Ct. Rep. 93, the facts were that one Groshom conveyed certain mining property in the state of Colorado to the Comstock Mining Company, a Missouri corporation. The mining company had not at the time of its purchase, and did not afterwards, comply with the laws of Colorado prescribing the terms and conditions upon which a foreign corporation might do business in that state. After the conveyance to the mining company by Groshom, he disposed of the property to other persons, and in a contract between them and the vendees of the mining company the question was raised that the conveyance to the mining company was void, because it had no authority to acquire property in that state. But in denying this claim, the Supreme Court of the United States said: "It is not for the judiciary, at the instance or for the benefit of private parties claiming under deeds executed by the person who had previously conveyed to the corporation, according to the forms prescribed for passing title to real estate, to inflict the additional and harsh penalty of forfeiting, for the benefit of such parties, the estate thus conveyed to the corporation and by it conveyed to others. . . . If the legislature had intended to declare that no title should pass under a conveyance to a foreign corporation purchasing real estate, before it acquires the right to engage in business in the state, and that such a conveyance should be an absolute nullity as between the grantor and grantee, leaving the grantor to deal with the property as if he had never sold it, that intention would have been clearly manifested. If the construction placed by the plaintiff upon the Constitution and statutes of Colorado be sound, there would be some ground to say that a foreign corporation taking a conveyance of real estate for purposes of its business in Colorado, before it had acquired the right to do business there, would have no standing in the courts of that state for the purpose of having the estate so acquired protected against trespasses upon it. . . . Where a corporation is incompetent by its charter to take a title to real estate, a conveyance to it is not void, but only voidable, and the sovereign alone can object. It is valid until assailed in a direct proceeding instituted for that purpose." To the same effect is *Chattanooga, R. & C. R. Co. v. Evans*, 14 C. C. A. 116, 31 U. S. App. 432, 66 Fed. 809, and many other cases cited in the authorities mentioned.

But the question here does not involve a controversy as to the title to property between contending claimants. The right of property is not in any manner presented by the record. It is a case between a Kentucky corporation and one of the public to whom the Kentucky corporation owed a duty that it seeks to avoid by the plea that it had disposed of the property. We think there is, and should be, a broad distinction between cases like this, and cases in which the title to the property attempted to be conveyed is drawn in question, and that the rule laid down in the cases cited should not be extended to railway corporations. In short, our conclusion is that a conveyance made by a domestic railway corporation to a foreign corporation that has not complied with the laws of this state is void and of no effect in a controversy between the domestic corporation and a party to whom as such domestic corporation it owed duties. As the conveyance was void and of no effect, it did not present any defense to a cause of action that might have been maintained against it if the conveyance had not been made.

Wherefore the judgment is reversed, with directions for a new trial in conformity with this opinion.

NEBRASKA SUPREME COURT.

JULIUS HELPHAND, Appt.,
v.

INDEPENDENT TELEPHONE COMPANY
OF OMAHA et al.

(88 Neb. 542, 130 N. W. 111.)

Surface water — diversion — contributory negligence.

Where damage is caused by surface water negligently collected in a ditch or trench

Headnote by BARNES, J.

Note. — Failure to protect property against surface water wrongfully or negligently collected or diverted by another as contributory negligence.

General rule.

It seems to be well settled, as illustrated in *HELPHAND v. INDEPENDENT TELEPH. CO.*, that a property owner, while bound to exercise reasonable care to protect his property against known dangers, is under no duty to anticipate and guard against negligent or wrongful acts of others whereby his property may be injured by surface water.

Thus, where a city has negligently allowed an alley to become obstructed so that surface water that should properly flow along the alley is gathered and caused to flood a building on an abutting lot, there is 33 L.R.A. (N.S.)

dug through a public alley, and thence allowed to soak through a sewer connection previously constructed, into a basement of an adjacent building, the fact that the owner or occupant of the building in making his sewer connection failed to tamp the earth replaced therein sufficiently to render it impervious to water does not constitute contributory negligence.

(Sedgwick, J., dissents.)

(February 28, 1911.)

APPEAL by plaintiff from a judgment of the District Court for Douglas County in defendants' favor in an action to recover damages for injury to plaintiff's stock of goods by surface water, alleged to have been caused by defendants' negligence. Reversed.

The facts are stated in the opinion.

Messrs. H. C. Brome and Clinton Brome for appellant.

Mr. Benjamin S. Baker for appellees.

Barnes, J., delivered the opinion of the court:

Action for damages to a stock of goods by surface water alleged to have been negligently collected in a ditch dug by defendants, and thence thrown into the basement of a building occupied by the plaintiff. It appears that plaintiff was the owner of a stock of gents' furnishing goods, a part of which were stored in the basement of a building situated in the city of Omaha and occupied by him; that in the month of August, 1907, defendants, in constructing certain telephone lines in that city, dug a ditch or trench to be used as a conduit for its wires, through a public alley adjacent and in close proximity to the plaintiff's building, and left it in such a condition that the heavy rains which fell in that season of the year were collected therein, and thence escaped into the base-

no contributory negligence in the fact that the lot owner allowed his yard drain to become so that at times it would clog with gravel. *Bowen v. Kansas City*, 140 Mo. App. 695, 128 S. W. 790. The court said: "That drain was not to carry off the water that should properly flow along the streets. Though one's premises may become out of repair in any way, that will not justify nor tend in the least to excuse another in doing such premises an injury, and when called to account, to answer: If your place had been in repair by wrongful conduct would not have harmed it."

And where a city has negligently permitted a culvert to become and remain obstructed, whereby surface water is diverted onto private premises, injuring the foundations of a house, the owner, while bound to exercise ordinary care in repairing and

ment and damaged plaintiff's goods. There was no dispute as to the foregoing facts. Defendants, to defeat a recovery, claimed that when they were digging the ditch in question, their workmen discovered that at some prior time a sewer connection extending from the basement of plaintiff's building across the alley had been made, either by the plaintiff or his grantor; that the earth replaced in the sewer trench had not been sufficiently tamped to render it impervious to water, and by reason thereof the surface water collected in the ditch soaked through the sewer trench into the plaintiff's basement, and caused the damage of which he complains. It was therefore contended that the plaintiff was guilty of contributory negligence.

It appears that the trial court, after correctly instructing the jury as to the defendants' legal duties and liabilities, by another instruction, submitted the question of contributory negligence to the jury. The giving of that instruction is assigned as error, which plaintiff strenuously contends entitled him to a new trial. The argument of the defendants in support of the instruction is that both parties had an equal right to the use of the public alley in which their conduit was being constructed, and therefore the plaintiff owed them the duty to so construct the sewer connection as to render it impervious to the water which they collected and allowed to flow into their ditch, and by failing to do so he was guilty of contributory negligence. Counsel has

strengthening his walls, is not required to anticipate and provide against similar negligence on the part of the city in the future, and his failure to provide stronger walls and to dig trenches around them, while it may increase the damage occasioned by a future overflow from the street, is not such contributory negligence as will preclude a recovery for the city's negligence in permitting it. *Johnson v. Cincinnati*, 20 Ohio C. C. 657, 11 Ohio C. D. 318.

So, where an abutting owner, for his own benefit, has made an excavation in a public street in front of his own and the adjoining premises, into which excavation surface water flows and thence into the basement of the adjoining building, it is immaterial that some of it goes through holes in the side wall of such adjoining building, as the owners thereof are under no obligation to make the wall impervious to water wrongfully thrown upon their premises. *Mairs v. Manhattan Real Estate Assn.* 89 N. Y. 498.

It is no part of the duty of the owner of a building to protect it against surface water from higher premises near by, collected into the sewer or other artificial channel and wrongfully cast against it. *Bonte v. Postel*, 109 Ky. 64, 51 L.R.A. 187, 58 S. W. 536.

And in *Paddock v. Somes*, 102 Mo. 226, 10 L.R.A. 254, 14 S. W. 746, it is held that one who has wrongfully discharged surface water from his premises onto the premises of another, through an artificial drain, is not exonerated from liability; nor is the injured property owner debarred from recovery by reason of the fact that he could have prevented the injury by reasonable exertion, and at trifling expense. "The law of contributory negligence has no more place in an action of this sort than has the law of self-defense."

The owner of a city lot below the established grade of an adjacent street must protect himself against the accumulation of surface water from other directions, by filling his lot to grade, or by constructing sewers and sluices, if possible, to drain the lot; and the city is not liable for stopping the flow of surface water off from the lot by

making improvements on the street. *Gilfeather v. Council Bluffs*, 69 Iowa, 310, 28 N. W. 610.

But where a city, in grading and paving certain streets, has raised the grade of the streets higher than adjoining lands, and has laid an insufficient sewer in an alley in the rear of such lands, and has stopped the catch basin at the mouth of the sewer, whereby surface water is discharged upon such premises, the owner, while it may have been his duty under all the circumstances to incur a moderate expense to protect himself from damages, cannot, as a matter of law, be said to have been guilty of such contributory negligence, by failing to raise his premises to the grade of the streets at a cost of \$500, so as to prevent an overflow, as will bar his recovery against the city, under a constitutional provision that no person's property shall be "taken, damaged, or destroyed" for public use without compensation. *Cooper v. Dallas*, 83 Tex. 239, 29 Am. St. Rep. 645, 18 S. W. 565, later appeal, — Tex. Civ. App. —, 34 S. W. 321.

Nor is it his duty, as a matter of law, to unstop the catch basin, though he should use ordinary and reasonable care and means to prevent injury, and can recover only for such damage as could not by such care and means have been avoided. *Dallas v. Cooper*, — Tex. Civ. App. —, 34 S. W. 321.

An owner of a properly constructed store building in a city is not guilty of contributory negligence in storing in his cellar goods likely to be damaged by an inundation caused by the wrongful or negligent collection and diversion of surface water by the city by means of an embankment constructed along the street in front of the building as the owner has a right to make a reasonable use of his own premises in such way as will prove most profitable to him, and the city has no right by its wrongful act to deprive him of the use of his property; he cannot be required to forego the enjoyment of his cellar throughout a year, because the wrongful or negligent act of the city has placed it in a position that its use may be attended with loss. *Damour v. Lyons City*, 44 Iowa, 276.

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cited no authorities to support this argument, and we doubt if any can be found by which it can be sustained.

On the other hand, the plaintiff asserts that the evidence shows conclusively that when the earth was replaced in the sewer excavation, and the paving replaced thereon, the alley was left in a safe, suitable, and proper condition for the public use; that no surface water had thereafter penetrated the basement of his building; and he therefore insists that, having done all that was required of him, both for the protection of the public and his own property, he owed no additional duty to the defendants, and could not be said to have been guilty of contributory negligence. This contention seems to be well founded. It appears

that when the sewer connection was made, neither the plaintiff nor his grantor owed any duty to the defendants, and, when defendants entered upon the construction of their conduit, it was their duty to so construct the ditch as not to injure the property of the plaintiff, who was an abutting lot owner.

In the case of *Cook v. Champlain Transp. Co.* 1 Denio, 91, it was said: "Where one, in the lawful use of his own property, exposes it to accidental injury from the lawful acts of others, he does not thereby lose his remedy for an injury caused by the culpable negligence of such other persons." The rule is to so use one's own as not to injure others, and not, as the defendants contend, to use your own so that another

But, under the duty of a property owner to use reasonable care to prevent injury to his property where a city, in improving a street, has wrongfully diverted surface water, so that it flows in large quantities onto certain private premises with every storm, negligence of the owner of the premises in so placing personal property thereon that it is injured by the water, and his failure to use reasonable care to prevent the injury, while not such contributory negligence as will defeat an action against the city, as it does not operate to cause the injury, but merely adds to the resulting damage, will go in mitigation of the damages,—the portion thereof directly attributable to the plaintiff's failure to exercise ordinary care and diligence in preserving his property, after he has knowledge of the wrong, being deductible from the damages as a whole. *Cromer v. Logansport*, 38 Ind. App. 661, 78 N. E. 1045.

And in *Emry v. Raleigh & G. R. Co.* 109 N. C. 589, 15 L.R.A. 332, 14 S. E. 352, it was held that a landowner who, with knowledge that his land for many years has been flooded in times of freshet, on an average of four years out of five, by a backwater from an insufficient culvert where a railroad crosses a stream, places and keeps a brickyard and brick kilns upon such land, is guilty of contributory negligence which will defeat a recovery for injuries thereto by such flooding.

Negligence of property owner operating to cause injury.

Where negligence on the part of the property owner directly contributes to cause the injury, he is, of course, barred from recovery against another on account of such injury. Thus, although a city has allowed surface water flowing along the gutters in a street to run over an adjacent piece of ground owned by it, which was formerly a stone quarry, but has been filled with loose earth to support the street, whence earth is washed into an excavation on adjoining private property, causing damage, the owner of such property cannot recover against 33 L.R.A. (N.S.)

the city, if the damage was done by reason of the negligent way in which he excavated under the existing circumstances, and would not have occurred but for his taking away the lateral support of the city's property. *Curry v. Cincinnati*, 12 Ohio C. C. 736, 4 Ohio C. D. 545.

And where the fee of city streets, including the sidewalks, is in a municipality, and an abutting owner, for his own benefit, has made an excavation under the sidewalk in front of his building, which excavation tends to allow water flowing over the sidewalk to flow into his cellar, he is thereby guilty of such contributory negligence as will prevent a recovery against the city on account of its negligence in failing to construct a sufficient sewer to carry off a usually hard rain, by reason whereof water accumulates and flows through the excavation under the sidewalk and floods the basement of the building, which it would not have done had the excavation not been made. *Guthrie v. Nix*, 5 Okla. 555, 49 Pac. 917.

So, in *Peoria v. Adams*, 72 Ill. App. 662, reversing a judgment in favor of a servant of the occupant of a building in a city, for personal injury sustained by him in consequence of the collapse of the building in which he was working, alleged to have been caused by the weakening and softening of its walls and foundations by surface water flowing from the street into the cellar of the building, through open gratings left in the sidewalk and maintained for the use and benefit of the owners and occupants of the building, where it did not appear that any considerable quantity of water would have flowed into the cellar but for these open gratings, through which it found its only passage, the court said: "Certainly the city would not be liable to the owner or occupant of the building for damages occasioned by the flowage of water through these gratings, maintained by them for their own benefit, and the appellee [plaintiff] would stand in no better position in that regard than they would."

shall not injure your property. In other words, one cannot lawfully use his own property or exercise his rights in such a manner as to increase the risk or danger of injury to another's property. In *Miles v. Postal Teleg. Cable Co.* 55 S. C. 403, 415, 33 S. E. 493, 498, it was said: "On the contrary, it behooves a telegraph company, in its legal use of a way or road, or even

a highway or post road, to guard such use so that no injury shall result to the property of its owner which may be located opposite such telegraph lines, through its negligence or want of due care." Speaking of the rule of contributory negligence, it is said in 29 Cyc. Law & Proc. p. 516: "This rule is subject to the exception that, as a person is entitled to use his own prem-

Duty to mitigate damages.

Similarly, where property is being injured by surface water, it is the duty of the owner to use reasonable efforts to mitigate the damage. Thus, although a city may be liable in damages to a lot owner because of its negligence in permitting a drain or culvert to be so obstructed as not to carry away the surface water from his lot, he is charged with the duty of caring for and protecting his property as far as he may be able, and the city is not liable for the consequences of his failure to do so. *Macon v. Dannenberg*, 113 Ga. 1111, 39 S. E. 446.

So, in *Louisville & N. R. Co. v. Moore*, 31 Ky. L. Rep. 141, 10 L.R.A. (N.S.) 679, 101 S. W. 934, where it appeared that a railroad company had turned surface water onto land, where it has made a pond which stood until it dried up, and also that all the water might have been taken off and trouble avoided by plowing a short furrow through the land from the railroad to a nearby creek, it was held that it was the duty of the occupant of the land to exercise ordinary care to protect his property from the water; and that no damages should be allowed for injury which might have been avoided by the exercise of ordinary care on his part.

But a farm tenant, having only a temporary and qualified interest in the land, is not bound to dig a ditch and drain the land in order to mitigate damages resulting to his crops from an overflow of surface water caused by a railroad embankment and ditches. *Kankakee & S. R. Co. v. Horan*, 23 Ill. App. 259.

And a property owner is not required to commit a trespass in order to mitigate damages to his property from surface water. Thus, the owner of a mining claim is not bound to commit a trespass by pulling off a board from a flume of a water company running across his claim, in order to protect his property against water pouring over the sides of the flume by reason of a severe snowstorm. *Wolf v. St. Louis Independent Water Co.* 15 Cal. 319, 10 Mor. Min. Rep. 653.

And where an irrigation company constructed an embankment for an irrigation canal across a natural drain, with only a small culvert, insufficient to carry off the surface water in times of freshet, so that adjacent lands were entirely inundated by the surplus water, and so remained until the owner cut the canal embankment and drained them, he is not guilty of contributory negligence in not having sooner com-

mitted the trespass by cutting the embankment, and thus prevented much of the damage, as it was not his duty to commit such trespass at all, although "the rule in cases of this character is that an injured person must use ordinary and reasonable care and means to prevent an injury and the consequences of it, and that he can only recover damages for such losses as could not by such care and means be avoided." *Barstow Irrig. Co. v. Black*, 39 Tex. Civ. App. 80, 86 S. W. 1036.

So, a landowner whose property has been injured by an overflow of water caused by the construction of a railroad and culvert, while bound to use ordinary care to render future injuries as light as possible, is not guilty of such contributory negligence as will bar recovery for future injuries from the same source, merely by reason of his failure to prevent the overflow by cutting a ditch on the line of his land where the water strikes it, at a cost which he is able to pay and which is much less than the probable amount of the damages to his property in the absence of such ditch, unless it is further shown that he has a right to make such ditch without detriment to neighboring lands. *Austin & N. W. R. Co. v. Anderson*, 85 Tex. 88, 19 S. W. 1035.

In *Klopp v. Chicago, M. & St. P. R. Co.* 142 Iowa, 483, 119 N. W. 377, a condemnation proceeding for an additional right of way contiguous to defendant's former right of way, in which one item of the damages claimed by plaintiff was for the overflow of his land by surface water caused by an embankment constructed by the company on the new right of way, it was held that, although the damage from this cause could have been prevented by making a ditch or channel along one side of the right of way for a short distance, carrying the water into a water way, instead of discharging it onto the plaintiff's land, the plaintiff had no right and was under no duty to enter upon the defendant's right of way, and dig such ditch or channel for the protection of his property.

And where a city has discharged into a ravine in one body surface water from a large territory, a lot owner through whose land it flows is not bound to protect his lot against an overflow caused by an obstruction below his premises, not attributable to any act of his or for which he is responsible, and in a place over which he has no control, by removing or causing the removal of the obstruction. *Noonan v. Albany*, 79 N. Y. 470, 35 Am. Rep. 540.

A. C. W.

ises for any lawful purpose, his failure to protect it from the negligence of another will not be contributory negligence." The text above quoted is well supported by the following authorities: *Werner v. Cincinnati*, 23 Ohio C. C. 475; *Yik Hon v. Spring Valley Waterworks*, 65 Cal. 619, 4 Pac. 666; *Martin v. North Star Iron Works*, 31 Minn. 407, 18 N. W. 109; *Stone v. Hunt*, 114 Mo. 66, 21 S. W. 454; and many others.

We are therefore of opinion that the question of contributory negligence does not arise in this case, and the trial court in submitting that question to the jury by the instruction of which the plaintiff complains.

The judgment of the District Court is therefore reversed, and the cause is remanded for further proceedings.

Sedgwick, J., dissenting:

It is said in the majority opinion that "the trial court, after correctly instructing the jury as to the defendants' legal duties and liabilities, by another instruction, submitted the question of contributory negligence to the jury," and that this was erroneous, requiring a reversal. If, after correctly instructing as to defendants' legal duties and liabilities, it is erroneous to submit the question of contributory negligence to the jury, it must be that no matter how negligent the plaintiff may have been in constructing its part of the trench which caused the damage, and however careful and diligent the defendants have been in constructing their part, and in seeking to prevent the ordinary effects of plaintiff's own negligence, the defendants are still liable for damages. This cannot be the law. The defendants argued that the plaintiff or his grantor in making the sewer connection owed the duty to the defendants, as well as others, to properly construct the same so as to prevent water from running into his (the plaintiff's) own basement. This argument is a little misleading. The plaintiff owed the duty to the defendants and others to construct the sewer connection so as not to injure the defendants or others who rightfully used the alley, but upon the point involved in this case the duty which the plaintiff owed was not so much to the defendants as it was to himself. He owed a duty to himself to make his sewer connection so that water from the alley would not flood his basement. Suppose that both trenches had been dug at the same time; that the plaintiff had dug the sewer trench and the defendants the trench for the telephone cable, and both trenches had been negligently dug and negligently filled, would it be true that, if the jury should find that, if the plaintiff

had filled his part of the trench properly, there would have been no damage, still the plaintiff could have recovered? Of course, if the defendants in digging their trench and filling it found that the plaintiff's sewer trench was imperfectly filled, and that damage was liable to ensue on that account, then the defendants should have been the more careful to avoid damage, since the sewer trench had been made a long time before, and the plaintiff might probably not be aware of its condition. If the defendants disregarded the danger of damages that might be caused from the conditions which they found in making their trench, they might still be liable for damages notwithstanding the imperfect conditions of the plaintiff's trench. But this point was fully and carefully guarded by the court in its instruction No. 5. The court instructed the jury to the effect that, when the defendants found that the plaintiff's part of the trench was not properly constructed, it would be the duty of the defendants to use correspondingly greater precaution to prevent damage to plaintiff's property, and that if, in constructing their part of the trench, the defendants "came upon a previously constructed sewer ditch leading to the basement of said building, the exposed condition of which was of such a nature as it was known to defendants, or should have been known to them in the exercise of ordinary care, that there was danger that surface water flowing into or upon defendants' trench would the more readily flow into and through said sewer trench and into plaintiff's building, then defendants would be required to exercise such a degree of care to prevent such accident as would be commensurate with the increased danger and circumstances surrounding the situation."

A similar instruction was requested by the defendants, and the correct theory upon which the case was tried appears to be that, if the plaintiff negligently constructed his part of the trenches in question, when there would have been no damage if he had properly constructed the same, and the defendants, when they discovered the faulty condition of the plaintiff's trench, used such reasonable and proper precautions as an ordinarily prudent man would use to prevent the defects in the plaintiff's own trench from causing him damage, the defendants would not be liable. The questions tried were: First, were the defendants negligent in constructing their part of the trench? Second, did the plaintiff negligently construct his trench? Third, if the plaintiff's trench was negligently constructed, did the defendants, when that fact was discovered, use all reasonable pre-

cautions to prevent damage as the result of the plaintiff's own negligence? The last two propositions were determined in favor of the defendants by the jury upon "correct instruction as to the defendants' legal duties and liabilities," as said in the majority opinion, and, if so, their verdict ought to settle the matter.

ALABAMA SUPREME COURT.

BASS, HEARD, & HOWLE, Appt.,
v.

INTERNATIONAL HARVESTER COMPANY.
NY.

(— Ala. —, 53 So. 1014.)

Conditional sale — use of property by purchaser — right of vendees.

A manufacturer who places goods for sale with a retailer, retaining title by a conditional bill of sale, which is not recorded as required by statute to become notice to purchasers, cannot recover the property from a corporation to which the retailer turns over his stock in trade in satisfaction of a subscription to stock of the corporation, where the corporation had no notice of the rights of the manufacturer.

(November 15, 1910.)

APPEAL by defendant from a judgment of the Circuit Court for Calhoun County in plaintiff's favor in an action brought to recover certain property purchased by defendant without notice of the plaintiff's claim or title thereto. Reversed.

Plaintiff manufactured the Weber wagons and sold them to merchants and dealers in vehicles for resale. The Shelnut Mercantile Company, a partnership composed of Bryant Shelnut and Ewell Howles, doing a general mercantile business in Anniston, Alabama, gave an order in October, 1906, to the plaintiff for thirty Weber wagons, which were shipped to them and placed with their stock for sale. Two of the wagons were sold by the company, and in January the mercantile company was dissolved, Shelnut selling to Howle his interest in the business, which was conducted by Howle as the Howle Mercantile Company. In February, Bass, Heard, and Howle formed a corporation, and in payment of his subscription thereto, Howle conveyed to it all the stock of goods which had

formerly belonged to the Shelnut Company, including twenty-seven or twenty-eight of the wagons. He did not disclose to the corporation that plaintiff had any claims to the wagons, and the defendant corporation had no knowledge of it at the time of the conveyance. He parted with his stock before notice came to the corporation of plaintiff's alleged claim to the wagons. A demand was made on the corporation by an agent of the plaintiff, and at the time it was made eighteen of the wagons were delivered to said agent; the other nine or ten having been sold to customers of the defendant corporation without notice of plaintiff's claim.

The contract of sale was as follows:

Anniston, Ala., Oct. 20, 1906.

International Harvester Company of America, Chicago, Ill.

Gentlemen:—

Please ship to us on or about at early date as possible, or as soon as possible thereafter, on conditions named herein and hereon, the following goods at prices specified herein: . . . Should we fail to give you settlement as herein provided for, or fail to pay at maturity any obligations due you, or should we become or apparently become financially embarrassed, all our indebtedness to you shall immediately become due and subject to sight draft, and, if necessary to be put in hands of attorney for collection or settlement, we will pay all expenses and fees incurred by your so doing. The title and ownership of all goods you ship us, and their proceeds, of whatever nature, shall remain in you until you have been fully paid in money.

Messrs. Lapsley & Arnold for appellant.

Messrs. H. D. McCarty and E. H. Hanna for appellee.

Anderson, J., delivered the opinion of the court:

The defendant was a purchaser of the wagons in question for value and without notice of the plaintiff's claim or title to same. Howle may have, and, of course, did have, notice of the plaintiff's title, and subsequently became connected with the defendant corporation; but at the time of the sale he was representing himself as the successor to or owner of the Shelnut Mercantile Company, and notice to him cannot be imputed to the defendant corporation. *Frenkel v. Hudson*, 82 Ala. 158, 60 Am. Rep. 736, 2 So. 758. If, therefore, the instrument under which the purchase was made is a mortgage, the failure to record same would give the defendant protection under the statute of registration. And

Note.—As to respective rights of the conditional vendor of personal property and one who acquires the same from the vendee on the supposition that he is the owner, see note to *Davis v. First Nat. Bank*, 25 L.R.A. (N.F.) 766.
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§ 3394 of the Code of 1907 applies the same results for a failure to register, to conditional sales as does the statute as to the registration of mortgages; but said § 3394 does not apply to the instrument in question, if a conditional sale, as Calhoun county was excepted from the influence of said § 3394 when the sale was made. Acts 1900-1, p. 1516.

The said instrument is unlike the one construed in the case of *Dowdell v. Empire Furniture & Lumber Co.* 84 Ala. 316, 4 So. 31. And we may concede that it is a conditional sale, and not a mortgage, for the purpose of deciding this case, as the result will be the same as applied to the facts contained in the record. It is well settled, in this and other states, that where the vendor retains title to the thing sold until the price is paid, the title does not pass, the transaction being a mere conditional sale; "and that a bona fide purchaser of such property acquires only the conditional title of his vendor, and cannot be protected against recovery on suit brought by the original vendor and owner of the legal title. The fact that the first purchaser, or second vendor, was at the time of sale in possession of the property, does not change the principle. It is a question of right, and not notice, and the maxim of *caveat emptor* applies with as much force as in cases of ordinary bailments. The principle, of course, does not obtain where the condition has been expressly or impliedly waived by the vendor, or he has done or suffered anything by reason of which the purchaser from the vendee has been misled." *Sumner v. Woods*, 67 Ala. 139, 42 Am. Rep. 104. "When the owner, by his own act or consent, has given another such evidence of the right to sell or otherwise dispose of his goods as, according to the customs of trade or the common understanding of the world, usually accompanied the authority of sale or disposition, as where a manufacturer delivers property, retaining title, to a retail dealer for the purposes of sale by the latter, a sale by the person thus intrusted with the possession of the goods, and with the *indicia* of ownership or of authority to sell or otherwise dispose of them, in violation of his duty to the owner, to an innocent purchaser for value, will prevail against the reserved title of the owner." *Bent v. Jenkins*, 112 Ala. 485, 20 So. 655; *Leigh Bros. v. Mobile & O. R. Co.* 58 Ala. 165; *Lawrence v. Owens*, 39 Mo. App. 325; *Winchester Wagon Works & Mfg. Co. v. Carman*, 109 Ind. 31, 58 Am. Rep. 382, 9 N. E. 707; 6 Am. & Eng. Enc. Law, p. 483, and cases cited in note 1.

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A few cases confine the protection of purchasers only from a retailer in the due or ordinary course of trade, and not to one who buys the whole stock in bulk or by wholesale from a retailer. *Burbank v. Crocker*, 7 Gray, 158, 66 Am. Dec. 470; *Pratt v. Burhans*, 84 Mich. 489, 22 Am. St. Rep. 703, 47 N. W. 1064. The weight of authority, however, and among which are our own cases of *Bent v. Jenkins* and *Leigh Bros. v. Mobile & O. R. Co.* supra, do not confine the waiver or estoppel in favor of purchasers in retail or the ordinary course of trade alone, but extend it to all innocent purchasers for value. They hold that, notwithstanding goods be sold, with title reserved, to a retailer to dispose of only in the ordinary course of trade, an innocent purchaser from him will be protected, although he exceeded his authority in making the sale. If he sold only in the customary way, he would not exceed his authority, or breach of his duty to the owner, and the expression that protection will be awarded an innocent purchaser, although the second vendor exceeds his authority, and breaches his duty to the owner in making the sale, was needless if the rule was confined to retail sales; for if a retailer sells only in the usual or customary manner, he would not exceed the authority given him as a retailer. The case of *Lawrence v. Owens*, 39 Mo. App. 325, cited approvingly in the case of *Bent v. Jenkins*, supra, involved a purchase in bulk.

The facts in the case at bar show that the wagons were sold to the Shelnut Mercantile Company, a retailer, with authority to sell or dispose of same in the ordinary course of business. If the said company breached a duty to the plaintiff in making the sale, the said plaintiff gave them the *indicia* of ownership and authority to sell, and is estopped from claiming under a reserved title as against this defendant, who was an innocent purchaser for value, and who was not charged with the Shelnut Company's breach of duty to the plaintiff as to the manner of making the sale.

The trial court erred in rendering judgment for the plaintiff, and the judgment must be reversed; and, as the case was tried by the court without a jury, under the practice act for the Circuit Court of Calhoun County (Acts 1907, p. 397), a judgment will be here rendered for the defendant.

Dowdell, Ch. J., and Sayre and Evans, JJ., concur.

Petition for rehearing denied December 22, 1910.

ARKANSAS SUPREME COURT.

STATE OF ARKANSAS, Appt.,
v.
ARKANSAS BRICK & MANUFACTURING COMPANY.

(— Ark. —, 135 S. W. 843.)

Contract — to furnish laborers — breach — waiver.

1. Merely paying monthly accounts for laborers furnished under a contract to furnish a certain number of hands per day does not waive a claim for damages for a shortage, where the full number of hands was at all times demanded.

Counterclaim — supplanting recoupment — preservation by statute.

2. Although the statute has substituted

a counterclaim in most cases for the former recoupment, yet the right to use the latter is preserved by a grant of the right to plead new matter constituting a defense to the action.

Same — suit by state — right to use.

3. In a suit by the state to recover the contract price for the services of convicts which it has leased to a contractor, he may recoup to the amount of the claim a demand for damages for failure to furnish the number of convicts called for by the contract.

Same — claim for overtime — recoupment for failure to comply with contract.

4. Where the state which has contracted to furnish a contractor a certain number of convicts per day sues for the amount due under the contract, and for the value of the

Note. — Right of set-off, counterclaim, or recoupment in action by state.

In some instances the decisions upon the question under discussion depend upon the differences in meaning which attach in the various jurisdictions to the particular words involved. For purposes of clarification it may be well to note briefly the meaning of, and distinction between, the terms set-off, counterclaim, and recoupment. Both set-off, which originally was an equitable defense, and counterclaim, which was not known to the common law, are now the creatures of statute, and are generally used interchangeably, although by some statutes the term set-off implies a right even broader than counterclaim, it being provided that any counterclaim or demand may be used as such. Usually, however, they are both defined as any claim or demand arising out of debt, duty, or contract existing at the time of the commencement of the action, and matured at the time of their offer as a set-off or counterclaim. On the other hand, recoupment is in nature of a common-law defense, and differs from set-off and counterclaim mainly in that the claim must grow out of the very same transaction which furnishes the plaintiff's cause of action, and, being in the nature of a claim of right to reduce the amount demanded, can be had only to an extent sufficient to satisfy the plaintiff's claim. In other words, recoupment goes to the justice of plaintiff's claim, and no affirmative judgment can be had thereon; while set-off is not necessarily confined to the justice of such particular claim, and an affirmative judgment may be had for any amount to which defendant establishes his right over and above the amount to which plaintiff has proved he is entitled. But what was defined as recoupment is now included in the broader terms counterclaim and set-off, and for this reason is seldom discussed as such, although, as is explained in *STATE v. ARKANSAS BRICK & MFG. CO.*, there might still be reason for invocation of the old common-law right of recoupment.
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Where the attaching of any particular meaning to the terms under discussion renders a knowledge thereof necessary, the definition has been set out in connection with the note of the case.

The weight of authority denies any right of set-off or counterclaim against the state except as granted by statute, on the ground that the state is sovereign, and that it cannot be sued in its own court. Some courts contend, however, that the state, by submitting to the jurisdiction of its judicial tribunals, waives any right to plead its immunity, at least to the extent of its own claim; but few courts have gone to the extent of holding that the defendant may have an affirmative judgment for any amount in excess of the state's claim. Other decisions which recognize the right of set-off rest upon the ground that it would be unjust to refuse to allow as a set-off a claim to which the defendant was equitably entitled; while other decisions are to the effect that a counterclaim or set-off may be allowed in a suit by the state only where the claims are connected with and rise out of the same transaction, thus, in effect, holding that recoupment may be had.

A diversity of opinion obtains as to whether general statutes permitting a plea of set-off or counterclaim apply to actions in which the state appears as plaintiff, with the weight of authority again in favor of the state, and to the effect that it is not within the terms of the statute unless expressly included.

In taxation cases somewhat different rules apply, it being almost universally held that a claim against the state cannot be set off or counterclaimed in an action by the state to recover taxes. In one or two instances a set-off has been allowed against a contractor suing on a lien for assessments for local improvements, but such cases are readily distinguishable, and cannot be regarded as conflicting with the direct tax decisions.

This note, of course, does not involve the merits of the claim to set-off, counterclaim, or recoupment, except in so far as

services of convicts left after the expiration of the contract period, the two claims are not separable, so as to prevent the contractor from recouping against both a claim for failure to furnish the number of hands called for by the contract.

Same — claim against — failure to present to auditor — effect.

5. Where a state auditor has no authority to undertake the liquidation of claims, failure to present to him a claim against the state for damages for failure to furnish convicts according to contract will not prevent its use by way of recoupment, in a suit to recover the contract price for those furnished.

(McCulloch, Ch. J., and Frauenthal, J., dissent from proposition 4.)

(March 6, 1911.)

that question is involved in a determination of the question whether in any case such a remedy is available against the state.

In general.

In *State v. Northern C. R. Co.* 18 Md. 193, it was held that there is no principle of discount, set-off, or recoupment which would authorize the allowance of a claim of a defendant for damages, liquidated or unliquidated, against the claim of a state. And in the following cases it is held that there can be no set-off against the claims of the state, unless expressly authorized by statute: *People v. Miles*, 56 Cal. 401; *State v. —*, 2 N. C. (1 Hayw.) 221; *Borden v. Houston*, 2 Tex. 594; *Chevallier v. State*, 10 Tex. 315.

In *Com. v. Rodes*, 5 T. B. Mon. 318, it was held that a defense of set-off cannot be made to suits of the state against an official for fees collected by him. The decision was upon the ground that the statutory provisions as to the method of obtaining discharge for revenue collected were exclusive. Chief Justice Bibb, however, delivered a dissenting opinion in which he strongly urged the court to recognize a right in the collector to set off his claim against the claim of the state.

In *People v. Corner*, 59 Hun, 299, 12 N. Y. Supp. 936, affirmed without opinion in 128 N. Y. 640, 29 N. E. 147, where the state sought to recover for material sold, and the defendant interposed a counterclaim for damages for breach of the state's contract to continue to furnish such materials, it was held that the defendant was not entitled to set off such loss, the ground being that to allow such a claim would be a violation of the prerogative of the state; and that the defendant's proper remedy was to invoke the jurisdiction of the court of claims, which the state had established for the purpose of ascertaining the damages in such and other cases. To the same effect, see *People ex rel. Western U. Teleg. Co. v. Roberts*, 30 App. Div. 78, 51 N. Y. Supp. 747, affirmed on opinion below in 166 N. Y. 33 L.R.A. (N.S.)

A PPEAL by the State from a decree of the Pulaski Chancery Court dismissing a suit brought to recover the contract price for the services of state convicts. Affirmed.

Statement by Norton, Special Judge:

This action was instituted by the state to recover from the defendant \$17,726.55, claimed to be due from the defendant for convict labor. On the 31st day of July, 1899, the state entered into a contract with the defendant, by which it agreed for a term of ten years, beginning January 1, 1900, to furnish the defendant 300 able-bodied men per day, on demand. For this labor the defendant undertook to pay 50 cents per day for each convict. After the

693, 51 N. E. 1093; and *People v. Miles*, 56 Cal. 401.

Where a set-off is allowed only to avoid circuity of action, it cannot be entertained as a defense to an action by the state, as an individual cannot bring suit against the state. *Battle v. Thompson*, 65 N. C. 406.

And where a counterclaim or set-off is a suit, an individual can interpose neither in an action brought against him by the state. *Ibid.*; *State v. Baldwin*, 14 S. C. 135; *State v. Corbin*, 16 S. C. 533 (in this case it was suggested that to do justice it would be wise for the legislature to enact a remedy for such cases); *Moore v. Tate*, 87 Tenn. 725, 10 Am. St. Rep. 712, 11 S. W. 935; *Bates v. Texas*, 2 Tex. 616.

And in Maryland it is held that the right of set-off, which is in the nature of a cross-suit, does not exist in actions instituted by the state, which, being sovereign, cannot be sued, unless expressly allowed by statute. *State v. Baltimore & O. R. Co.* 34 Md. 344.

And the rule that a state cannot be sued without her consent was held, in *State v. Gaines*, 46 La. Ann. 431, 15 So. 174, to apply to a demand in reconviction set up in an action to recover certain state bonds which were alleged to have been unlawfully sold by the state treasurer.

In Minnesota the question of the allowance of a counterclaim or set-off in a suit by the state depends upon whether the claims are connected with and arise out of the same transaction. Thus, in *State ex rel. Young v. Holgate*, 107 Minn. 71, 119 N. W. 792, the court, in a suit by the state to compel the payment over of collected taxes, in holding that a county treasurer could not plead by way of set-off or counterclaim that other money had been lost through the failure of certain banks, and that such amount had been paid to the state in the expectation that the loss would be made good by the banks and bondsmen, as the matter sought to be asserted had no connection with the matter referred to in the plaintiff's suit, said; "The state cannot be sued without its own consent, and

expiration of the ten years, a number of convicts were allowed to remain with the defendant for a short time, and the complaint states that of the amount sued for, \$12,898.65 was for a balance due for convicts furnished during the life of the contract, and \$4,827.90 for such as were furnished after the expiration of the ten years mentioned in the contract. The charge by the state for the first of these items was at the contract price of 50 cents per day, but for the second item, the charge was for the reasonable value of the services of the convicts. The answer admits that after the 1st day of January, 1909, the date of the expiration of the contract, the labor of certain convicts was furnished to the defendant by the plaintiff; and the an-

swer alleges that this labor was furnished under and pursuant to the contract, or, as contended on the trial, to make up in part for the failure to furnish the full number. The answer also denies the indebtedness, and, by a counterclaim, sets up damages sustained by reason of the failure of the state to furnish 300 convicts per day. The damages claimed by the defendant in the counterclaim exceed the amount claimed by the state in the original complaint. During the ten years, and until the last month or two before the expiration of the contract, the defendant paid the state each month what it owed for the convicts furnished. It is also shown that during the ten years, the defendant, from time to time, demanded that the state

the assertion of this claim as a set-off or counterclaim is in effect a suit against the state. When the state institutes a suit in its own behalf, it to a certain extent subjects itself to the same rules which apply to ordinary suitors in its courts. When it institutes an equitable action, whatever may properly affect the relief demanded may be urged against it, and in an action brought by it to recover money, the defendant may in defense assert any claims which are connected with and arise out of the same transaction; that is, in such an action the defendant is 'entitled to plead and prove any and all matters properly defensive, including credits and set-offs, so far as the latter are dependent on, connected with, or grow out of, the transaction which constituted the subject-matter of the suit.' . . . 'Of course, she is only bound *quoad* the matter submitted by her in her suit.' . . . But all claims and demands arising out of independent transactions are considered as suits against the state."

And in Mississippi a distinction is drawn between set-off and recoupment, resulting in a conclusion similar to that announced in the preceding case, it being held in *Raymond v. State*, 54 Miss. 562, 28 Am. Rep. 382, that a set-off (here defined as a counter demand arising out of a transaction extrinsic of the plaintiff's cause of action) cannot be held against the state's claim, but that defenses to suits brought by the state against individuals, growing out of recoupment (distinguished from set-off, in that it arises out of matters connected with the transaction or contract on which the plaintiff's cause of action is founded), are not governed by the same rule. See also to the same effect, *Battle v. Thompson*, 65 N. C. 406, and *Moore v. Tate*, 87 Tenn. 725, 10 Am. St. Rep. 712, 11 S. W. 935.

So, in England the rule seems to be that where a sovereign power submits to the jurisdiction of the courts, it does so as to matters properly raisable in an action as a defense, but that a counterclaim foreign to the subject-matter of the action cannot be interposed. *South African Re-* 33 L.R.A. (N.S.)

public v. La Compagnie Franco-Belge, [1898] 1 Ch. 190, 67 L. J. Ch. N. S. 92, 77 L. T. N. S. 555, 46 Week. Rep. 151, same case, 66 L. J. Ch. N. S. 747 [1897] 2 Ch. 487, 77 L. T. N. S. 241, 46 Week. Rep. 67, (per Lindley, L. J.) *Brunswick v. Hanover*, 13 L. J. Ch. N. S. 107, 6 Beav. 1; 8 Jur. 253, affirmed in 2 H. L. Cas. 1; *Strousberg v. Costa Rica*, 44 L. T. N. S. 199, 29 Week. Rep. 125; *Rothschild v. Portugal*, 3 Younge & C. Exch. 594; *United States v. Prioleau*, 36 L. J. Ch. N. S. 36, L. R. 2 Eq. 659, 12 Jur. N. S. 724, 14 L. T. N. S. 700, 14 Week. Rep. 1012.

And that one sued by the state may counterclaim when the claims arise out of the same transactions, see *McCandlish v. Com.* 76 Va. 1002. And that claims which raise a distinct cause of action cannot be raised in a suit by the state, since to allow such an inquiry would in effect be to sustain a suit against the state, see *Com. v. Philadelphia County*, 157 Pa. 531, 27 Atl. 546.

In *Rowan v. Sharps' Rifle Mfg. Co.* 29 Conn. 282, it was said that it would be inequitable to refuse to allow as a set-off a claim essentially founded on contract, against an equitable demand of the British government, even though the British government as a foreign sovereignty could not be sued in our courts.

And in Kentucky it is held, "upon the broad principle of justice which allows everyone who is sued to show, as matter of law, that he does not owe the demand for which he is sued," that when one is sued by the commonwealth he may defeat recovery by set-off or counterclaim, even though there is no legislative authority therefor, it being said that by itself suing, the sovereign gives its consent to have the equities determined. *Com. v. Todd*, 9 Bush, 708; *Com. v. Owensboro & N. R. Co.* 81 Ky. 572; *Com. v. Barker*, 126 Ky. 200, 103 S. W. 303.

So, in *Powers v. Central Bank*, 18 Ga. 658, it was held that a state official might set off a claim for services in an action to recover money collected and held by him in his official capacity, although there was

should perform its undertaking and furnish convicts to the number of 300 per day.

Messrs. Hal L. Norwood, Attorney General, J. H. Harrod, F. T. Vaughan, and George Vaughan, for the State:

The allegations of the answer were not a set-off, because unliquidated damages cannot be claimed as a set-off.

Gerson v. Slemons, 30 Ark. 50.

The allegations of the answer constitute a counterclaim, and nothing more or less.

Ramsey v. Capshaw, 71 Ark. 408, 75 S. W. 479; Gibney v. Turner, 52 Ark. 117, 12 S. W. 201; Ames Iron Works v. Rea, 56 Ark. 450, 19 S. W. 1063; St. Louis, A. & T. R. Co. v. Beard, 60 Ark. 151, 29 S. W. 146; Martin v. Roesch, 57 Ark. 474,

21 S. W. 881; Cole v. White County, 32 Ark. 45; Board of Improvement v. School Dist. 56 Ark. 365, 16 L.R.A. 418, 35 Am. St. Rep. 108, 19 S. W. 969.

The state's demand not only became an account stated, but the right of the brick company to contest or dispute their liability was waived when it paid its account in full.

1 Cyc. Law & Proc. p. 372.

Messrs. Coleman & Lewis for appellee.

Norton, Special Judge, delivered the opinion of the court:

It is not contended on the part of the state that it performed its agreement to furnish the 300 convicts, but it is insisted for the state that by defendant's course of

no statute conferring any such right. The court, however, recommended the passage of an act similar to the Federal act of March 3, 1797, although it was said that such act did not impliedly confer the right. See also *United States v. Mann*, as set out *infra*.

And in the following cases, in which no authority or reasons were given, the right to set off private claims against governmental claims in actions by the government was recognized: *Mumford v. United States*, 31 Ct. Cl. 210; *United States v. Barker*, 1 Paine, 156, Fed. Cas. No. 14,517; *United States v. Smith*, 1 Bond, 68, Fed. Cas. No. 16,321; *Bank of United States v. United States*, 2 How. 711, 11 L. ed. 439; *The Siren (The Siren v. United States)* 7 Wall. 152, 19 L. ed. 129; *United States v. Warren*, 12 Okla. 350, 71 Pac. 685. And in *State v. Franklin Bank*, 10 Ohio, 91, and in *State v. Gaillard*, 1 Bay, 500, it was held generally that the defendant when sued by the state may set off to the amount of its claim.

In *People v. Brandreth*, 36 N. Y. 191, Hunt, J., in discussing the question whether in equitable actions brought by the people, counterclaims or set-offs might be interposed by the defendant, which question the majority of the court did not think necessarily involved, said: "Although a state cannot be sued, I think it is subject to a set-off, like individuals, when it comes into court as a plaintiff, and this, both upon principle and authority. When it becomes a suitor, it waives, for the time, its dignity as a sovereign. It lays aside its strong arm, by which it can at once enforce its own claims, and submits itself to the arbitration of the courts, and to its practice and its proceedings. For this purpose, it is like an individual or an inferior corporation, and becoming voluntarily a party to a suit, no good reason can be given why it should not be bound by the same rules that are applicable to other parties in the same position. . . . To the same effect is the statute (2 Rev. Stat. 553) which enacts that when suits are

brought in the name of the people, they 'shall be subject to all the provisions of law respecting similar suits and proceedings when instituted in the name of any citizen, except when provision is or shall be otherwise expressly made by statute; and in all such suits, the people shall be liable to be nonsuited and to have judgment of *non pros.* or discontinuance entered against them, in the same cases and in like manner and with the same effect as in suits brought by citizens, except that no execution shall issue thereon.' . . . I have no doubt that this statute does, and was intended to, subject the state to a set-off, where a set-off would exist against an individual plaintiff." But see *People v. Corner*, as set out *supra*.

In *Sinking Fund Comrs. v. Northern Bank*, 1 Met. (Ky.) 174, it was held that defendant in a suit by the state for the purchase money of property sold him could retain a sum sufficient to remove an encumbrance which the state in equity was bound to remove, although no action could be brought directly against the state, the court saying that rights of the parties should be settled and determined according to the equity and justice of the case.

By statute.

As before stated the question has also arisen as to whether general statutes permitting a set-off or counterclaim apply to suits by the state where the statute is not expressly mentioned.

Thus, in *White v. The Governor*, 18 Ala. 767, it was held that in the absence of statutory provision a defendant has no right to set off a cross demand against the complaining state, and that actions brought by the state were not within the purview of a general statute providing that in all cases where there are mutual debts between the plaintiff and the defendant, the one may be set off against the other, and that judgment may be awarded against the plaintiff when the defendant's set-off shall exceed the plaintiff's demand for the amount of ex-

dealing—settling monthly for such number of convicts as it had—the defendant waived its right to full compliance by the state. It is also contended for the state that a cross demand of counterclaim or recoupment cannot be made against the state, as that would, in a sense, be permitting the state to be made a defendant; and it is further contended in behalf of the state that, even if counterclaim or recoupment can be allowed at all in this case, it must be confined to so much of the cause of action as is due for labor furnished under the contract, and that labor furnished after the expiration of the contract is not sufficiently connected with the plaintiff's cause of action to be made subject to the

cross demand of counterclaim or recoupment.

The contention on the part of the state that defendant waived its right to the full number of men mentioned in the contract we do not find supported by the testimony. While the defendant, with the exceptions mentioned, paid monthly for such convicts as were furnished, it is, on the other hand, proved that it at all times demanded the full number of men from the state. In this respect, as in others, the findings of fact by the chancellor are well supported by the testimony. The findings of fact by the chancellor include the failure of the state to furnish the convicts as agreed, and a damage sustained by the defendant in a sum in excess of the amount claimed by

cess, the court saying that it could not have been the intention of the legislature to embrace the state by the general language used.

And in *Alabama Girls' Industrial School v. Reynolds*, 143 Ala. 579, 42 So. 114, it was held that a constitutional provision that "all corporations shall have the right to sue, and shall be subject to be sued, in all courts in like manner as natural persons," did not permit the state to be subjected to suit by allowing a cross bill in a suit by a corporation which it had created merely to discharge one of its governmental functions, it being said that the sovereign is not bound by general words restrictive of prerogative rights unless expressly named.

So in *Raymond v. State*, 54 Miss. 562, 28 Am. Rep. 382, it was held that the general words of a statute permitting a set-off or counterclaim do not embrace the state or affect its rights, unless it is specially named or clearly intended to be included.

And in *People v. Dennison*, 84 N. Y. 272, it is said that authority to render a judgment against the state cannot be inferred from general laws in which the state is not expressly mentioned.

But in *Arapahoe County v. Denver*, 30 Colo. 13, 69 Pac. 586, it was held that a county could counterclaim for registration books and booths in an action for penalties and interests which the county treasurer, acting as agent for both, had wrongfully paid to the county, under a statute (Civil Code, §§ 56, 57) providing that in an action on contract any other cause of action also arising upon contract, and existing at the commencement of the action, may be pleaded as a counterclaim or defense. The decision, however, was expressly limited to actions in which revenue questions were not involved, it being intimated that no counterclaim could be interposed in such cases.

And in *The Newbattle*, L. R. 10 Prob. Div. 33, 54 L. J. Prob. N. S. 16, 52 L. T. N. S. 15, 33 Week. Rep. 318, 5 Asp. Mar. L. Cas. 356, it was held that the English Admiralty court act, 1861, § 34 (24 Vict. Chap. 10, § 34), which provides that "the high court of admiralty may, on the application 33 L.R.A.(N.S.)

of the defendant in cause of damage, and on his instituting a cross cause for the damage sustained by him in respect of the same collision, direct that the principal and the cross cause be heard at the same time and on the same evidence," etc., is applicable to an action by a foreign sovereign, the court saying that "when a government comes in as a suitor, it submits to the jurisdiction of the court and to all orders which may properly be made."

In the Federal cases next cited, it is apparently assumed or conceded that no set-off or cross demand can be maintained against the United States, without a congressional enactment to sustain and authorize it, and expressly so declared in *Tillou v. United States*, 1 Ct. Cl. 220, reversed on other grounds in 6 Wall. 485, 18 L. ed. 920; but see *United States v. Mann*, as set out *infra*. As to the right to counterclaim, credit, or set-off in suits by the United States government, it has been held that such a right is implied by the act of March 3, 1797 (1 Stat. at L. 514, chap. 20), which provides that in suits between the United States and individuals, no claim for credit shall be admitted upon trial except such as appears to have been presented to the accounting officers of the treasury for their examination, and to have been by them disallowed in whole or in part, etc. *United States v. Prentice*, 6 McLean, 65, Fed. Cas. No. 16,083; *Reeside v. United States*, Dev. Ct. Cl. §§ 458, 459; *Adams v. United States*, 3 Ct. Cl. 312; *United States v. Buchanan*, Crabble, 563, Fed. Cas. No. 14,678; *United States v. Collier*, 3 Blatchf. 325, Fed. Cas. No. 14,833; *United States v. Giles*, 9 Cranch, 212, 3 L. ed. 708; *United States v. Wilkins*, 6 Wheat. 135, 5 L. ed. 225 (wherein it was held that the defendant is entitled at the trial to the full benefit of any credit in his favor, whether arising out of the particular transaction for which he was sued, or out of distinct and independent transactions which would constitute a legal or equitable set-off in whole or in part of the debt sued for by the United States); *United States v. Macdaniel*, 7 Pet. 1, 8 L. ed. 587 (holding that the de-

the state. With the facts in this way determined, the remaining question is one of applying law.

That a counterclaim could not be maintained against the state for any balance the defendant might be entitled to over and above the amount of the state's claim is conceded. But counsel for the state go further and contend that even to allow recoupment to the amount of the state's claim is equally prohibited. The right of the state to be held exempt from the recovery of judgments against it is no clearer than the right of a defendant, in a suit by the state, to avail himself of all and every character of defensive pleas, except limitation. *State v. Morgan*, 52 Ark. 150, 12 S. W. 243. He cannot by a cross action

have an affirmative judgment against the state for any excess he may be entitled to over and above the state's claim; but this is the extent of his disadvantage from having dealt with the sovereign.

The law of recoupment requires some consideration, and a distinguishing of it from the idea usually conveyed by the word "counterclaim." Counterclaim and recoupment are alike in the sense that each must grow out of, or be connected with, the transaction upon which the plaintiff sues. Recoupment was allowed at common law (*Desha v. Robinson*, 17 Ark. 245), but a counterclaim was not. Recoupment was considered a defense, and, prior to the adoption of the Code, if the defendant's cross demand against the plaintiff exceeded

defendant's right to a set-off cannot be limited to strictly legal claims); *United States v. Ripley*, 7 Pet. 18, 8 L. ed. 593 (holding that both legal and equitable claims should be allowed by way of set-off against the government's claim); *United States v. Fillebrown*, 7 Pet. 34, 8 L. ed. 599; *United States v. Robeson*, 9 Pet. 319, 9 L. ed. 142 (holding that an equitable claim for services may be set up as a credit in a suit by the United States against the claimant); *United States v. Hawkins*, 10 Pet. 125, 9 L. ed. 369; *Gratiot v. United States*, 15 Pet. 336, 10 L. ed. 759; *United States v. Bank of Metropolis*, 15 Pet. 377, 10 L. ed. 774; *Ware v. United States*, 4 Wall. 617, 18 L. ed. 389; *United States v. Eckford* (*United States v. Tillou*) 6 Wall. 484, 18 L. ed. 920, reversing upon other grounds 1 Ct. Cl. 220; *United States v. Gilmore*, 7 Wall. 491, 19 L. ed. 282; *Watkins v. United States*, 9 Wall. 759, 19 L. ed. 820; *Hall v. United States*, 91 U. S. 559, 23 L. ed. 446; *United States v. Kimball*, 101 U. S. 726, 25 L. ed. 835.

And under §§ 951, 957, of the U. S. Rev. Stat., U. S. Comp. Stat. 1901, pp. 695, 698, which originated in, and is to the same effect as, the act of March 3, 1797, the decisions are to the same effect. See *Alexander v. United States*, 6 C. C. A. 602, 15 U. S. App. 158, 57 Fed. 828; *United States v. Patrick*, 20 C. C. A. 11, 36 U. S. App. 645, 73 Fed. 800, writ of error dismissed in 42 L. ed. 1216, 18 Sup. Ct. Rep. 949; *United States v. North American Commercial Co.* 74 Fed. 145, reversed on other grounds in 171 U. S. 110, 43 L. ed. 98, 18 Sup. Ct. Rep. 817; *United States v. Wade*, 75 Fed. 261; *Yates v. United States*, 32 C. C. A. 507, 61 U. S. App. 124, 90 Fed. 57; *United States v. Patterson*, 91 Fed. 854; *United States v. Gillies*, 144 Fed. 991; *United States v. Pierson*, 76 C. C. A. 390, 145 Fed. 814; *Western Union R. Co. v. United States*, 101 U. S. 543, 25 L. ed. 1068; *United States v. Flanders*, 112 U. S. 88, 28 L. ed. 630, 5 Sup. Ct. Rep. 67; *United States v. Hart*, 2 Ariz. 415, 19 Pac. 4; *United States v. Lamson*, 3 MacArth. 204.

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it should be noted, however, that in *United States v. Mann*, 2 Brock. 9, Fed. Cas. No. 16,716, Chief Justice Marshall said that this statute apparently gave no right whatever, but recognized a pre-existing right, and held that an officer, independently of any statute, had a right to set off a claim for services in an action by the government to recover government moneys held by him. In commenting on the application of rules of set-off between individuals to actions in which the government was a party, it was said: "The argument is the stronger if the creditor, from any cause, cannot be coerced to pay this demand."

And the Arkansas statute (Dig. chap. 23, § 13, p. 203), which evidently was copied from the Federal statute, has been held to permit a set-off against the state as to claims falling within the provisions of the statute. *Biscoe v. State*, 19 Ark. 559.

And the same is true of the Florida statute (*Thomp. Dig.* 417, §§ 3, 4). *Frier v. State*, 11 Fla. 300.

Right to affirmative relief.

As to the obtaining of an affirmative judgment on a counterclaim or set-off, it has been held that there is nothing in the act of March 3, 1797 (1 Stat. at L. 514, chap. 20), allowing credits or set-offs against the United States, which prohibits the officer in an action against him by the United States from having allowed to him by way of set-off a larger sum than the United States are seeking to recover. *Reeside v. United States*, Dev. Ct. Cl. § 460. But on the other hand, many decisions hold, and with better reason (no set-off against United States except by statute, and therefore to authorize an affirmative judgment, a positive enactment so permitting would be necessary), that the defendant cannot be allowed a larger sum than the government's claim. *Adams v. United States*, 3 Ct. Cl. 312; *United States v. Gillies*, 144 Fed. 991; *Pennsylvania v. Matlack*, 4 Dall. 303, 1 L. ed. 843 (wherein it was said that the defendant could not indirectly recover from the state a substantive, independent claim by way of set-off

the plaintiff's demand, the defendant could use his demand in recoupment only by sustaining a loss of the excess. Hence, prior to the Code, the defendant could recover on his cross demand to the full extent only by an independent action. The Code, to prevent a multiplicity of suits, provided for the counterclaim, and that the defendant might recover on it in the same suit any balance that the plaintiff owed him over and above the plaintiff's demand. The counterclaim thus became an affirmative cross action, which ordinarily will cover all purposes of recoupment, but not always. A right left to the defendant to be worked out through the doctrine of recoupment, which could not be had through a counterclaim, is to use defensively a cause of ac-

tion which, as a counterclaim, would be barred by lapse of time. A counterclaim must be an existing cause of action, but recoupment is a right to reduce the plaintiff's claim, and this right exists as long as the plaintiff's cause of action exists. A breach by the plaintiff, though barred as an independent cause of action, continues to exist for defensive purposes, available to the defendant, so long as the plaintiff may sue upon any breach by defendant. *Williams v. Neely*, 69 L.R.A. 232, 67 C. C. A. 171, 134 Fed. 1; *Beecher v. Baldwin*, 55 Conn. 419, 3 Am. St. Rep. 57, 12 Atl. 401; *C. Aultman & Co. v. Torrey*, 55 Minn. 492, 57 N. W. 211; *Wood, Limitations*, 3d ed. § 282; *Conner v. Smith*, 88 Ala. 300,

any more than he could directly recover a debt due from the state by bringing an action against it); *Reeside v. Walker*, 11 How. 272, 13 L. ed. 693 (wherein it was said that to sanction an affirmative judgment under a plea of set-off would virtually be allowing the United States to be sued, which the courts do not allow); *De Grott v. United States*, 5 Wall. 419, 18 L. ed. 700; *United States v. Eckford* (*United States v. Tillou*) 6 Wall. 484, 18 L. ed. 920 (wherein the rule was announced in most positive terms); *Schaumburg v. United States*, 103 U. S. 667, 26 L. ed. 599 (in this case, however, it was said that under some circumstances it might be proper to permit the jury to certify to any balance they found to be due from the government, but that a refusal to do so could not be reviewed by the United States Supreme Court); *People v. Dennison*, 84 N. Y. 272; *United States v. Warren*, 12 Okla. 350, 71 Pac. 685.

And where the decisions allowing a set-off are upon the broad ground that the rights of the parties should be adjusted according to the equities, it is generally held that the defendant's claim may be adjudicated only to the extent that it is asserted as a defense. *Com. v. Todd*, 9 Bush, 708; *Com. v. Owensboro & N. R. Co.* 81 Ky. 572; *State v. Franklin Bank*, 10 Ohio, 91; *State v. Gaillard*, 1 Bay, 500; *Moore v. Tate*, 87 Tenn. 725, 10 Am. St. Rep. 712, 11 S. W. 935.

And in New York it has been held that 2 Rev. Stat. 552, § 13 (3 Rev. Stat. 6th ed. 860, § 13), which provided that civil suits brought by the state "shall be subject to all the provisions of law respecting similar suits and proceedings when instituted by or in the name of any citizen," except when otherwise expressly provided, and providing that the people have judgment of *non pros.* or discontinuance instituted against them the same as in suits brought by individuals, except that no execution should issue therein, does not authorize an affirmative judgment, the ground being that such a judgment could be had only when expressly authorized. *People v. Dennison*, 84 N. Y. 33 L.R.A. (N.S.)

272, affirming 8 Abb. N. C. 128, 59 How. Pr. 157.

And in Alabama it is held that the constitutional prohibition against making the state a defendant in any court of law applies to a cross bill seeking affirmative relief against the state. *Holmes v. State*, 100 Ala. 291, 14 So. 51; *Alabama Girls' Industrial School v. Reynolds*, 143 Ala. 579, 42 So. 114.

Miscellaneous.

In New York it has been held that the rule that a set-off cannot be had in an action by the state does not apply to political divisions of the state. Thus, in *Taylor v. New York*, 82 N. Y. 10, it is held, on the ground that it is not inherent in the nature or the authority of a county that it cannot be sued, and that any exemption must be by statute, that where a county seeks to recover a debt by judicial process, a demand may be allowed against it as a set-off, although such demand, because of a statutory provision, could not have formed the basis of an independent action.

It has also been said that in actions between governmental entities, the law of set-off is the same as if the controversy were between individuals. *Louisiana v. United States*, 22 Ct. Cl. 284, affirmed on other grounds in 123 U. S. 32, 31 L. ed. 69, 8 Sup. Ct. Rep. 17 (an action by the state against the general government).

Taxation cases.

The general law is well settled that no set-off is admissible against demands for taxes levied for general or local governmental purposes. *Scobey v. Decatur County*, 72 Ind. 551; *Morgan v. Pueblo & A. Valley R. Co.* 6 Colo. 478; *Finnegan v. Fernandina*, 15 Fla. 379, 21 Am. Rep. 292.

In *Gatling v. Carteret County*, 92 N. C. 536, 53 Am. Rep. 432, in holding that an indebtedness of a municipal corporation cannot be set off against an amount owed for taxes, either in law or equity, the court said: "To accord to the courts of chancery

7 So. 150; *Soudan Planting Co. v. Stevenson*, 94 Ark. 599, 128 S. W. 574.

We refer to this right to use barred cross demands, not because the question is involved in this case, but to show the defensive character of the plea of recoupment, and that it is a common-law right which the Code makers could not have intended to abolish or in any wise impair. The whole spirit and plan of the Code was to liberalize the procedure, and to extend, instead of curtailing, remedial rights. If express warrant for recoupment in the letter of the Code should be contended for, it can well be found in the right to plead "new matter constituting a defense." Kirby's Dig. § 6098, subd. 3.

The question which has most concerned

the power to interfere with taxation by interposing to set off the indebtedness of the government against the taxes might greatly embarrass the operation of its machinery, if not clog its very wheels. The courts of chancery are therefore not clothed with any such power." And in *Anderson v. Mayfield*, 93 Ky. 230, 19 S. W. 598, and in *Cobb v. Elizabeth City*, 75 N. C. 1, both of which involved similar facts, the same conclusion was reached.

And in *Camden v. Allen*, 26 N. J. L. 398, in holding that a tax was not liable to set-off, the court said that to permit such set-off "would be utterly subversive of the power of government, and destructive of the very end of taxation."

And in *Newport & C. Bridge Co. v. Douglass*, 12 Bush, 673, in holding that an alleged indebtedness for transportation of troops for the government could not be set off against the taxes levied by the state for the support of its government, the court said: "In the imposition of taxes, the state acts in its sovereign character; and where it finds it necessary or convenient to resort to the courts to enforce the performance of the public duty, or the satisfaction of the public burden resting on the taxpayer, it cannot be met and defeated by an ordinary plea of set-off. This public duty is absolute and imperative. The tax is not a mere debt due from the citizen to the government, and the courts have no power to treat it as a debt, without the express sanction of the legislature."

And in *McCracken v. Elder*, 34 Pa. 239, it was held that a claim for damages arising out of a breach of contract could not be set off against school taxes in an action to recover such taxes.

So, a claim for the use of a railroad during war cannot be set off in an equitable suit by the United States to recover taxes assessed against the railroad company. *United States v. Pacific R. Co.* 4 Dill. 66, Fed. Cas. No. 15,983.

Nor can a claim for services rendered be set off against a borough in an action by it to recover from a tax collector the balance 33 L.R.A. (N.S.)

the court is whether or not there is sufficient connection between the two claims made by the state,—one under the contract, the other for labor furnished after the date of its expiration,—to make both subject to the defendant's plea of recoupment. The testimony shows that the convicts were simply allowed to remain. It is not claimed that any new contract was made about them; and the defendant considered they were allowed to remain to make up some of the state's deficit in men furnished. The chancellor found that all the men furnished by the state were furnished under the contract. A majority of the court are of the opinion that the state's claim for labor furnished after the expiration of the contract cannot be separated from what had

of a school tax. *Wilson v. Lewistown*, 1 Watts & S. 428.

In *Aplin v. Van Tassel*, 73 Mich. 28, 40 N. W. 847, it was held that the county treasurer could not counterclaim a county claim against the state in a suit by it to compel him to pay over taxes collected by him, especially as the statutory duty of the treasurer was absolute and specific as to paying over public moneys, although the board of supervisors of the county had attempted to authorize him to pay over no money until the county was credited with the amount claimed. The court said that the county treasurer was acting directly for the state, and that a set-off was as direct an exercise of an affirmative jurisdiction as a suit, and could not be pleaded when not authorized by statute. *Aplin v. Grand Traverse County*, 73 Mich. 182, 16 Am. St. Rep. 576, 41 N. W. 223; *Auditor General v. Bay County*, 106 Mich. 662, 64 N. W. 570; and *The Treasurers v. Cleary*, 3 Rich. L. 372, are to the same effect.

In *State v. Leckie*, 14 La. Ann. 651, it was held that a surety when sued on a tax collector's bond could not set up a personal claim against the state in compensation of its demand, the ground being that the state could not be sued, even indirectly, as by way of a reconvention demand set up in the answer. And the same conclusion was reached as to a claim of the tax collector for traveling expenses. *State v. Floyd*, 28 La. Ann. 553. And the same is true of other expenses of the office. *State v. Bradley*, 37 La. Ann. 623.

So, it is held that a taxpayer will not be allowed to offset the collector's personal indebtedness to him against state, county, or district taxes. *Humphreys v. Patton*, 21 W. Va. 223; *Elliott v. Miller*, 8 Mich. 132. And this is true even though the collector has settled with the state treasurer for such taxes. *Miller v. Wisener*, 45 W. Va. 59, 30 S. E. 237.

But in *New Orleans v. Orleans Waterworks Co.* 36 La. Ann. 432, where the city brought an action to recover taxes assessed for a period during which the defendant had

gone before, in a way to limit the defendant's plea of recoupment, which was sufficiently "connected with the subject of the action." *Wyman v. Herard*, 9 Okla. 35, 59 Pac. 1009; *Tinsley v. Tinsley*, 15 B. Mon. 454.

The case last cited comes with especial force, as it arose in Kentucky after her adoption of a Code which was subsequently adopted by Arkansas. When one state adopts the laws of another state, it is quite generally held that constructions of the adopted law go along with it. Without such aid, however, in this case, we would hold the law to be as here expressed.

The New York cases to which our attention has been called (*People v. Denison*, 59 How. Pr. 157, and *People v. Dennison*, 84 N. Y. 272) are to be distinguished from the case here. They deal with an affirmative judgment against the state on a counterclaim, and hold that it could not be allowed to stand. In the course of the opinions it can likely be gathered as the judgment of the court that, even for purely defensive purposes, a claim against the state could not be used, unless first presented to the state board of audit. This was said, however, of a claim for work and materials furnished the state, under contract. It is not likely that the state board of audit would have been held authorized to entertain a claim for unliquidated damages. In any event, we are of the opinion that § 3404 of Kirby's Digest

would not authorize the auditor of the state of Arkansas to undertake the liquidation and settlement of a claim for damages. To illustrate, if in this case the brick company had exhibited its claim to the auditor, and he had allowed it, his act would have been treated as idle.

We cannot hold that the right to recoup in this case was in any way affected by the failure of the brick company to first exhibit its claim to the auditor of the state. The cause must be affirmed.

McCulloch, Ch. J., and Frauenthal, J., concur in part of the judgment and dissent as to part.

McCulloch, Ch. J., dissenting:

This court held, in the case of *McConnell v. Arkansas Brick & Mfg. Co.* 70 Ark. 568, 69 S. W. 559, that defendant's contract with the state was an enforceable one, and that decision is the law of this case with respect to defendant's rights under the contract; this though the *McConnell Case* has since been overruled. *Pitcock v. State*, 91 Ark. 527, 134 Am. St. Rep. 88, 121 S. W. 742.

I am of the opinion that the right of recoupment as a defense has not been abolished by the Code, and that it can be asserted in this case brought by the state to recover the amount due under the contract. I reach that conclusion, however, on somewhat different reasons than that

furnished water to the city in consideration of a void exemption from taxation, it was held that the defendant could reconvene for water furnished, to the extent that the exemption was the consideration of defendant's application to supply free water.

In *Louisville & N. R. Co. v. Com.* 17 Ky. L. Rep. 136, 30 S. W. 624, it was held that a railroad company which by mistake had paid an excess of taxes could plead such excess as a set-off in an action against it to recover taxes, it being said that the court, having jurisdiction, should exercise it to the extent of doing complete justice to each party.

On the other hand, it has been held that overpayment of taxes made by a debtor cannot be set off against the taxes of the following year, as taxes, for reasons of public policy, are not such demands as admit of pleas in compensation. *New Orleans v. Davidson*, 30 La. Ann. 541, 31 Am. Rep. 228, s. c. subsequent appeal, 30 La. Ann. 554.

So, in *McVeigh v. Lanier*, 50 Ark. 384, 8 S. W. 141, it was held that an overpayment of taxes cannot be made a set-off in favor of the landowner against subsequent taxes.

And in *Wayne v. Savannah*, 56 Ga. 448, it was held that property holders who have paid, whether voluntarily or by coercion, 33 L.R.A. (N.S.)

illegal taxes in former years, have no right to set off such payments against executions issued for the taxes of later years.

And in *Hawkins v. Sumter County*, 57 Ga. 166, it was said that a municipal or county corporation must be allowed to collect its revenues for local government upon principles of public policy, and that the courts will not favor any interruption of such collection by affidavit of illegality claiming set-off. See also, to the effect that illegal taxes paid by mistake cannot be set off against unpaid taxes, *People ex rel. Graff v. Chicago & A. R. Co.* 247 Ill. 373, 93 N. E. 424, and *People ex rel. Graff v. Chicago & A. R. Co.* 247 Ill. 340, 93 N. E. 422.

Another class of cases which support the general rule is based upon the principle that taxes are not in the nature of contracts between party and party, but grow out of a duty to and are the positive acts of the government, to the making and enforcing of which their personal consent individually is not required. *Apperson v. Memphis*, 2 Flipp. 363, Fed. Cas. No. 497; *Anderson v. Mayfield*, 93 Ky. 230, 19 S. W. 598; *Trenholm v. Charleston*, 3 S. C. 347, 16 Am. Rep. 732; *Keep v. Frazier*, 4 Wis. 224.

And in *Charlotte v. Keon*, 128 N. Y. Supp. 80, it was held that in an action by a village for delinquent taxes, a counterclaim

expressed in the opinion of the majority. The remedy of recoupment finds no express recognition in the Code, and one of the sections provides that "all statutes and laws heretofore in force in this state in any case provided for by the Code, and inconsistent with its provisions, are repealed and abrogated." Kirby's Dig. § 7818. I have had grave doubts whether that section abolished the remedy of recoupment, but after some hesitation I have concluded that, as the Code was not designed to destroy rights or to alter principles of the law (Baylies, Code Pl. & Pr. p. 3), but only to formulate remedies, the provision in question should not be construed to repeal the law giving a remedy under circumstances where no other is provided under the Code. Recoupment is included in counterclaim, except that it is used only as a defense, but to that extent it is not provided for in the Code, and is not inconsistent therewith; so it is not abolished.

I concur with the majority, therefore, in holding that the decree should be affirmed so far as it concerns the state's claim for the price of convict labor furnished under the contract. I dissent from the view that defendant has a right to recoup against the claim for the price of labor furnished after the contract expired. Recoupment, like a counterclaim, must be a cause of action "arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's

claim, or connected with the subject of the action." The contract with the state, the alleged violation of which forms the basis of defendant's claim for damages, expired and was at an end. The state's suit to recover for the price of labor used after that time was not based on that contract; therefore the claim for damages did not arise out of the contract or transaction set forth in the complaint. The fact that the two transactions closely approximated in point of time does not make them the same transaction. They are as distinct as though they had been far removed in point of time. I think this view is fully sustained by decisions of this court. *Barry-Wehmiller Machinery Co. v. Thompson*, 83 Ark. 283, 104 S. W. 137, and cases therein cited. The following decisions of the New York courts also fully sustain that view. *People v. Denison*, 59 How. Pr. 157; *People v. Dennison*, 84 N. Y. 272.

The fact that the action is for the price of convict labor, the same as under the contract, does not make it "connected with the subject of the action" so as to allow recoupment. On the whole, I am of the opinion that the state should recover the fair value of the labor of the convicts after the expiration of the contract. Defendant received the benefit of the labor, and should be compelled to pay the state for it. Under principles which, I think, are well settled, defendant should not be permitted to recoup, so as to extinguish this item of the state's claim, damage alleged to have been

for a debt due from the village is not available, it being said that the action is brought by the village in its governmental capacity rather than as an individual upon a contract.

Public improvement cases.

The general rule is that a demand for damages caused in improving a street cannot be set up as a counterclaim in a suit by the municipality on the improvement assessment, unless expressly so authorized by statute, as that would divert the tax from its special purpose. *Himmelman v. Spanagel*, 39 Cal. 389; *Hornung v. McCarthy*, 126 Cal. 17, 58 Pac. 303; *Dawson v. Hipkind*, 173 Ind. 216, 89 N. E. 863; *Lux & T. Stone Co. v. Donaldson*, 162 Ind. 481, 68 N. E. 1014; *Laverty v. State*, 109 Ind. 217, 9 N. E. 774; *Indianapolis & C. Gravel Road Co. v. State*, 105 Ind. 37, 4 N. E. 316; *Burlington v. Palmer*, 67 Iowa, 681, 25 N. W. 877; *Hedge v. Des Moines*, 141 Iowa, 4, 119 N. W. 276; *Whiting v. Boston*, 106 Mass. 89; *Mack v. Cincinnati*, 7 Ohio Dec. Reprint, 49.

And in *Pittsburgh v. Harrison*, 91 Pa. 206, it was held that a property owner has no set-off against the city claim for an assessment for improvements, and that in a suit for such assessment the equities between the owner and contractor cannot be adjusted.

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But in *Bodley v. Finley*, 111 Ky. 618, 64 S. W. 439, it was held that a set-off or counterclaim for damages caused in making a street improvement may be pleaded against the claim of a contractor for the cost of the improvement, although the governmental power of taxation was exercised in favor of the contractor by the assessment of the cost and the giving of a statutory lien for enforcement of the claim, the decision being upon the ground that the claim is not one by the government or by the municipality.

And in *Frankfort v. Brislan*, 126 Ky. 477, 104 S. W. 311, where the action was brought by the city, it was expressly held that damages to the property could be set up as a counterclaim in an action to enforce a lien for the improvements.

And in *Kansas* use of *Coates v. Ridenour*, 84 Mo. 253, where the statutes gave the contractor a certified tax bill against the improved property, with power to enforce same in the name of the city by ordinary process of law, it was held that the owner could set off a debt due himself from the owner of the tax bill, it being said that such case differed from that of a tax for general purposes, in that the interests of the public ended as soon as the tax bills were delivered.

G. J. C.

sustained by reason of the failure to furnish the requisite number of convicts specified in the contract.

It is clear that the defendant had no right to hold and continue to work the convicts under the contract after the specified date of expiration. The fact that the state had failed to furnish the stipulated number of convicts did not serve to extend the period of the contract, for the contract was primarily one to provide for the convicts during a given period of time, and not merely to contract away the labor of the convicts like chattels or slaves. The specified period was therefore of the essence of the contract, and could not have been extended, except by making a new contract in the manner provided by statute.

Frauenthal, J., concurs.

COLORADO SUPREME COURT.

WARREN F. BLEECKER, Plff. in Err.,
v.

COLORADO & SOUTHERN RAILWAY
COMPANY.

(— Colo. —, 114 Pac. 481.)

Carrier — insults by conductor — mental suffering — liability.

1. A carrier is answerable in damages for

Note. — Liability of carrier for mental suffering of passenger from mere verbal abuse, unaccompanied by other breach of duty.

The earlier cases upon this question are collected in a note appended to *St. Louis, I. M. & S. R. Co. v. Taylor*, 13 L.R.A. (N.S.) 159.

It is shown in that note that a large majority of the cases have adopted the rule which is followed in *BLEECKER v. COLORADO & S. R. Co.*, that mental suffering resulting from verbal abuse of a passenger by the carrier's employee is sufficient to sustain an action without being accompanied by any other breach of duty.

This rule is further supported by *Georgia S. & F. R. Co. v. Ransom*, 8 Ga. App. 277, 68 S. E. 943, in which a verdict for such injury was set aside as being excessive under the circumstances, the right to recover some damage not being denied.

And by *Yazoo & M. Valley R. Co. v. Fitzgerald*, — Miss. —, 50 So. 631, in which both compensatory and punitive damages were allowed for the use, by a conductor, of insulting language in a dispute over the validity of mileage offered by the passenger.

The doctrine that verbal abuse unaccompanied by other breach of duty will not support an action for damages is sustained by two additional cases, — *Chicago, R. I. & P. R. Co. v. Moss*, 89 Ark. 187, 116 S. W. 192, and *Pierce v. St. Louis, I. M. & S. R. Co.* 94 Ark. 489, 127 S. W. 707, — which 33 L.R.A. (N.S.)

mental suffering inflicted upon a passenger by insulting language addressed to him by the conductor without provocation, which is of a character calculated to humiliate, mortify, and disgrace him.

Same — authorization or ratification — necessity.

2. A carrier cannot escape liability for insults addressed by its conductor to a passenger, on the ground that it did not authorize or ratify them.

(January 3, 1911.)

ERROR to the District Court for Boulder County to review a judgment dismissing the complaint on demurrer in a suit to recover damages alleged to have been caused by the use of insulting language by defendant's servant to plaintiff while a passenger on its train. Reversed.

The facts are stated in the opinion.

Mr. A. R. Morrison, for plaintiff in error:

A carrier is liable absolutely as an insurer for the protection of the passenger against assaults and insults at the hands of its own servants.

Thomp. Neg. § 3186; Dwinelle v. New York C. & H. R. R. Co. 120 N. Y. 117, 8 L.R.A. 224, 17 Am. St. Rep. 611, 24 N. E. 319; *Knoxville Traction Co. v. Lane*, 103

follow *St. Louis, I. M. & S. R. Co. v. Taylor*, 84 Ark. 42, 13 L.R.A. (N.S.) 159, 104 S. W. 551.

In the latter case the court said: "We prefer to adhere to the rule, as a sound one, that mental suffering alone, unaccompanied with physical injury or any other element of recoverable damages, cannot be made the subject of an independent action for damages;" and in *Chicago, R. I. & P. R. Co. v. Moss*, the expression, "any other element of damages," was explained and qualified by pointing out that by it was meant only some element of damage so closely connected with the mental injury that both must be considered because of the difficulty of separating them, such as duress without actual physical restraint or force; and that it was not intended to permit mental suffering to be attached to any disconnected recoverable element of damages. For instance, in the *Moss* Case the abusive and insulting language was used by the conductor in refusing to put off the passenger's baggage at his destination, and it was held that the injury resulting from the failure to put off the baggage could not be connected with and made the basis for recovery of damages for the mental suffering caused by the abusive language.

As to liability of a carrier for insult to a passenger by suggesting that he belongs in a car or compartment set apart for the use of the other race, see *May v. Shreveport Traction Co.* 32 L.R.A. (N.S.) 206, and note.

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Tenn. 376, 46 L.R.A. 549, 53 S. W. 557; Goddard v. Grand Trunk R. Co. 57 Me. 202, 2 Am. Rep. 39; Hayne v. Union Street R. Co. 189 Mass. 551, 3 L.R.A.(N.S.) 605, 109 Am. St. Rep. 655, 76 N. E. 219; Cincinnati, N. O. & T. P. R. Co. v. Harris, 115 Tenn. 501, 5 L.R.A.(N.S.) 779, 91 S. W. 211; McQuerry v. Metropolitan Street R. Co. 117 Mo. App. 255, 92 S. W. 912; Cole v. Atlanta & W. Pt. R. Co. 102 Ga. 474, 31 S. E. 107; New Jersey S. B. Co. v. Brockett, 121 U. S. 637, 30 L. ed. 1049, 7 Sup. Ct. Rep. 1039.

Damages may be recovered for mental suffering, independent of any physical injury or impact.

Chamberlain v. Chandler, 3 Mason, 242, Fed. Cas. No. 2,575; Head v. Georgia P. R. Co. 79 Ga. 360, 11 Am. St. Rep. 434, 7 S. E. 217; Snyder v. Wabash R. Co. 85 Mo. App. 495; Trigg v. St. Louis, K. C. & N. R. Co. 74 Mo. 147, 41 Am. Rep. 305; Randolph v. Hannibal & St. J. R. Co. 18 Mo. App. 609; Dorrah v. Illinois C. R. Co. 65 Miss. 14, 7 Am. St. Rep. 629, 3 So. 36; Houston, E. & W. T. R. Co. v. Perkins, 21 Tex. Civ. App. 508, 52 S. W. 124; Shepard v. Chicago, R. I. & P. R. Co. 77 Iowa, 54, 41 N. W. 564; Fetter, Carr. Pass. 1327; Mabry v. City Electric R. Co. 116 Ga. 624, 59 L.R.A. 590, 94 Am. St. Rep. 147, 42 S. E. 1025; Texas & P. R. Co. v. Tarkington, 27 Tex. Civ. App. 353, 66 S. W. 137.

Mr. E. E. Whitted, for defendant in error:

The defendant railway should not be held for the alleged acts of its conductor, even if mental suffering furnished a ground of action.

Ristine v. Blocker, 15 Colo. App. 224, 61 Pac. 486.

Mental suffering alone, unaccompanied by physical injury or any other element of recoverable damages, cannot be made the subject of an independent action for damages.

Diamond Rubber Co. v. Harryman, 41 Colo. 415, 15 L.R.A.(N.S.) 775, 92 Pac. 922; St. Louis, I. M. & S. R. Co. v. Taylor, 84 Ark. 42, 13 L.R.A.(N.S.) 159, 104 S. W. 551; Little Rock R. & Electric Co. v. Putsche, 84 Ark. 623, 104 S. W. 554; Davis v. Richardson, 76 Ark. 348, 89 S. W. 318; Chapman v. Western U. Teleg. Co. 88 Ga. 763, 17 L.R.A. 430, 30 Am. St. Rep. 183, 15 S. E. 901; Wilcox v. Richmond & D. R. Co. 17 L.R.A. 804, 3 C. C. A. 73, 8 U. S. App. 118, 52 Fed. 264; Spohn v. Missouri P. R. Co. 116 Mo. 617, 22 S. W. 960; Walsh v. Chicago, M. & St. P. R. Co. 42 Wis. 23, 24 Am. Rep. 376; Gatzow v. Buening, 106 Wis. 1, 49 L.R.A. 475, 80 Am. St. Rep. 17, 81 N. W. 1003; Johnson v. Wells, F. & Co. 6 Nev. 224, 3 Am. Rep. 245; Taylor v. 33 L.R.A.(N.S.)

Atlantic Coast Line R. Co. 78 S. C. 552, 59 S. E. 641; Strange v. Missouri P. R. Co. 61 Mo. App. 586; Ewing v. Pittsburgh, C. C. & St. L. R. Co. 147 Pa. 40, 14 L.R.A. 666, 30 Am. St. Rep. 709, 23 Atl. 340; Mitchell v. Rochester R. Co. 151 N. Y. 107, 34 L.R.A. 781, 56 Am. St. Rep. 604, 45 N. E. 354; Indianapolis & St. L. R. Co. v. Stables, 62 Ill. 313; Wood's Mayne, Damages, 75; Lynch v. Knight, 9 H. L. Cas. 577, 5 L. T. N. S. 291, 8 Eng. Rul. Cas. 382; 4 Sutherland, Damages, § 1245; Western U. Teleg. Co. v. Rogers, 68 Miss. 748, 13 L.R.A. 859, 24 Am. St. Rep. 300, 9 So. 823; Summerfield v. Western U. Teleg. Co. 87 Wis. 1, 41 Am. St. Rep. 17, 57 N. W. 973; Wadsworth v. Western U. Teleg. Co. 86 Tenn. 695, 6 Am. St. Rep. 864, 8 S. W. 574; Connell v. Western U. Teleg. Co. 116 Mo. 34, 20 L.R.A. 172, 38 Am. St. Rep. 575, 22 S. W. 345.

Messrs. P. H. Holme and R. H. Widdicombe also for defendant in error.

Gabbert, J., delivered the opinion of the court:

Plaintiff in error brought suit against defendant in error to recover damages claimed to have been sustained as the result of the alleged use, by one of the employees of defendant, of insulting language and remarks directed to and of and concerning plaintiff. The complaint as originally filed and amended alleged that defendant was a common carrier, carrying passengers for hire between the city of Boulder and the city of Colorado Springs, in this state; that plaintiff purchased from defendant a ticket good for transportation between these points; that he became a passenger on one of the defendant's trains upon which he was entitled to ride by the terms of that ticket. It is then alleged that while plaintiff was a passenger on such train, and conducting himself in all respects with propriety, he "was grossly, repeatedly, wilfully, and maliciously insulted, in loud, profane, and indecent language, containing threats, insults, and abuse, by an agent and servant of the defendant company, to wit, by the conductor in charge of said train, while in the act of collecting said ticket from this plaintiff, in the presence of a large number of his fellow passengers; and held up in ridicule, humiliation, and disgrace; that said insults, threats, and indecent language used by the said conductor towards this plaintiff consisted of gruff demands upon the plaintiff that he should bring to the conductor, in the front part of the car, the tickets held by the plaintiff for himself and party, and that, if plaintiff did not bring to the conductor the tickets held by

the plaintiff, he would put the plaintiff and his party off the train; that when the plaintiff herein refused to bring to the conductor the tickets, and after he had told the conductor that he, the plaintiff, had the tickets, and would give them to the conductor when the conductor came for them, said conductor further insulted the plaintiff by saying to him that he, the plaintiff, had been used to having people get down on their knees to him, by asking him why he did not act like a gentleman when he was asked to do anything, instead of acting like a damn little cur, by saying to the plaintiff that he was not a gentleman, that he was nothing but a cur, and by other gruff, rude, and humiliating remarks to and of this plaintiff; that on the whole of said trip, and when the said insults were given, the plaintiff was, and ever since hitherto, and still is, a teacher in the State Preparatory School at the county of Boulder aforesaid, and was on said trip accompanied by a large number of the students of said institution, some of them being under his own tuition at said institution, he having charge of said students on said trip, and all of them being present and necessarily hearing and observing the language used and the insults and abuse given, all of which tended to the greater pain, mortification, and humiliation of the plaintiff, from the fact that the abuse and insults were in the presence of those whom he daily met and associated with, and tended to lessen the respect with which he should be by said students regarded; that by reason of the premises, and of such language, insults, and abuse, plaintiff necessarily and in fact suffered great mental pain and mortification, to his damage in the sum of \$5,000." To this complaint the defendant interposed a general demurrer, which was sustained. Plaintiff elected to stand by his complaint, and his action was dismissed. From this judgment, plaintiff has brought the case here for review on error.

The sole question presented is whether the complaint states a cause of action. In determining this question, the proposition is: Can a passenger lawfully upon a railroad train, conducting himself with propriety, recover damages from the railroad company for mental suffering caused by insulting language of the conductor of the train, directed to and of and concerning the passenger, of a character calculated to humiliate, mortify, and disgrace him? The contract of carriage, as evidenced by a railroad ticket, not only requires the carrier to exercise legal care in conveying the passenger to his agreed destination, but, in addition, the law imposes upon the carrier the obligation to absolutely protect

the passenger against the misconduct of those employed to execute such contract. In other words, the contract evidenced by such ticket not only calls for safe carriage, but for respectful and decorous treatment at the hands of the employees of the carrier acting within the general scope of their employment. *Thomp. Neg.* §§ 3185, 3186; *New Jersey S. B. Co. v. Brockett*, 121 U. S. 637, 30 L. ed. 1049, 7 Sup. Ct. Rep. 1039. Unquestionably, then, it is the duty of a railroad company to protect a passenger against insult from the conductor of the train upon which the passenger is lawfully riding; and, this being so, the unprovoked use by the conductor to the passenger of opprobrious words and abusive language, tending to humiliate or subject him to mortification, gives him a right of action against the company for compensatory damages. *Cole v. Atlanta & W. P. R. Co.* 102 Ga. 474, 31 S. E. 107; *Shepard v. Chicago, R. I. & P. R. Co.* 77 Iowa, 54, 41 N. W. 564; *Mabry v. City Electric R. Co.* 116 Ga. 624, 59 L.R.A. 590, 94 Am. St. Rep. 141, 42 S. E. 1025; *Texas & P. R. Co. v. Tarkington*, 27 Tex. Civ. App. 353, 66 S. W. 137; *Gillespie v. Brooklyn Heights R. Co.* 178 N. Y. 347, 66 L.R.A. 618, 102 Am. St. Rep. 503, 70 N. E. 857; *Hutchinson, Carr.* 3d ed. §§ 1093, 1094; *Moore, Carr.* p. 636; 5 Am. & Eng. Enc. Law, 2d ed. p. 550; *Cooley, Torts*, 3d ed. p. 1367; *Beach, Railways*, § 1001; *Lafitte v. New Orleans City & Lake R. Co.* 43 La. Ann. 34, 12 L.R.A. 337, 8 So. 701; *Knoxville Traction Co. v. Lane*, 103 Tenn. 376, 46 L.R.A. 549, 53 S. W. 557; *Wolfe v. Georgia R. & Electric Co.* 2 Ga. App. 499, 58 S. E. 899; *Cincinnati, N. O. & T. P. R. Co. v. Harris*, 115 Tenn. 501, 5 L.R.A.(N.S.) 779, 91 S. W. 211; *Illinois C. R. Co. v. Winslow*, 119 Ky. 877, 84 S. W. 1175; *Davis v. Tacoma R. & P. Co.* 35 Wash. 203, 66 L.R.A. 802, 77 Pac. 209; *Haver v. Central R. Co.* 62 N. J. L. 282, 43 L.R.A. 84, 72 Am. St. Rep. 647, 41 Atl. 916.

Counsel for defendant contend that "mental suffering alone, unaccompanied by physical injury or any other element of recoverable damages, cannot be made the subject of an independent action for damages." In some of the cases above cited, elements of damage other than insulting language were present; but the decisions did not turn on this feature. In some of these cases it is expressly held that insulting language of a character calculated to humiliate and mortify was sufficient. This is particularly true of *Texas & P. R. Co. v. Tarkington*, an action for damages for insulting language alone, which it was held could be maintained even though the language employed was not actionable *per se*;

it being sufficient to give a right of action when it was insulting and calculated to humiliate and mortify. Such, in effect, is the holding in *Davis v. Tacoma R. & P. Co.* That words used were of themselves defamatory would be proper, however, to consider on the question of damages. It should be borne in mind that actions of the character under consideration, based upon insulting language alone, are not for defamation, but for behavior on the part of the employees of the carrier in violation of the express terms of its contract. There are authorities cited by counsel for defendant which support their contention; but we shall not undertake to analyze them, or point out wherein they may be, or are, distinguishable from the case at bar. Some of them are based upon the theory that an action for wrongful conduct of the conductor in the particulars involved is one of tort; others, that an action will not lie against the railroad company for such conduct unless the conductor would also be responsible, which would not be the case where language employed was not actionable *per se*; while others are based upon the ground that mental suffering, unaccompanied by physical injury or some other element of recoverable damages, is not regarded as sufficient upon which to maintain an action for damages, for the reason that it is too remote, uncertain, and difficult of ascertainment. The cases holding that, upon one or other of these grounds, the passenger is without remedy against the railroad company for insulting language used by the conductor, fail to give sufficient consideration to the proposition that a passenger holding a ticket which entitles him to transportation by means of the train he is on is not there by sufferance, but by right; that a railroad company is a common carrier, upon which is imposed certain duties and obligations to passengers by operation of law; that the relation between carrier and passenger is contractual; that, independent of the terms of the ticket purchased by the passenger, the law imposes upon the carrier, as part of the agreement of carriage, respectful, decent, and decorous treatment at the hands of those intrusted with the execution of its contract; that the unprovoked use of opprobrious and insulting language by a conductor to a passenger is a breach of that contract; that the carrier selects the conductor and intrusts him with the fulfillment of its contract of carriage, and should, therefore, be responsible for his conduct; that passengers are peculiarly under the control of the conductor, and are practically helpless when compelled to defend themselves against his abuse; that, while it is true that damages

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resulting from mental suffering caused by the use of insulting language by a conductor to a passenger are difficult of ascertainment, the same is true, in a greater or less degree, in all actions brought to recover unliquidated damages; that for a breach of contract there should be a remedy; and that, unless the carrier is held responsible for the act of the conductor in using opprobrious and insulting language to a passenger conducting himself properly, the latter is practically without a remedy.

For a breach of the contract of carriage as the result of a conductor assaulting a passenger without provocation, the authorities are practically unanimous in holding that for insulting language used in connection with the assault, damages for mental suffering caused thereby may be recovered. If damages are recoverable for a breach of the contract in one instance, there is no good reason why a breach of such contract as the result of using insulting language should not give a right of action independent of other acts which may constitute a breach. Wounding a man's feelings by the use of opprobrious language in circumstances constituting a breach of the contract of carriage is as much actual damages as assaulting him. The difference is that by the breach in one instance mental suffering only is caused, while in the other it is physical; but this is the result of the difference in the means employed in committing an injury which constitutes a breach of the contract between the carrier and the passenger. To deny the passenger a remedy where, without justification, the conductor assails him with abusive and insulting language, would, in effect, abrogate an important element of the contract of carriage, render it a nullity, and permit the carrier to violate it with impunity. That a new field of litigation may be opened, where the damages claimed will be difficult of ascertainment, is not a reason why the carrier should be relieved from fulfilling its contract for decorous and respectful treatment of its passengers. In the case of *St. Louis, I. M. & S. R. Co. v. Taylor*, 84 Ark. 42, 13 L.R.A.(N.S.) 159, 104 S. W. 551, in which the majority of the court held that mental suffering alone, unaccompanied by physical injury or other element of recoverable damages, cannot be made the subject of independent action against a carrier for damages, Mr. Justice Wood, in dissenting from this conclusion, aptly remarked: "We are utterly unable to appreciate the fine distinctions necessary to be made in order to allow damages for mental anguish in cases of breach of contract, where there has been a physical injury, however slight, produced by the wil-

ful and malicious act of the employee or carrier, and yet to deny them where there has been no physical injury, but where the only injury is mental suffering. According to the rule announced, the weight of the finger laid on in anger, or any other frivolous assault, will let in all the damages for mental anguish, while if there is no such trivial physical injury, there can be no recovery for the mental agony, although that may be of the most intense, humiliating, and crushing character. I will not indulge a figment of the imagination or fiction of the law that will enable common carriers of passengers to violate the plain terms of their contract, and yet leave their passengers remediless."

One of the early cases on the subject of damages for mental suffering caused by offensive conduct, but not involving physical injury, is *Chamberlain v. Chandler*, 3 Mason, 242, Fed. Cas. No. 2,575, decided by Mr. Justice Story, in 1823, then an associate justice of the Supreme Court of the United States. The action was by passengers against the master of a ship for what appears to have been extremely unseemly conduct on the part of the master, in the way of obscenity, harsh threats, and immodest demeanor towards the passengers, although no physical violence was committed. In speaking of the duties of the master, the learned judge said: "In respect to passengers, the case of the master is one of peculiar responsibility and delicacy. Their contract with him is not for mere ship room and personal existence on board, but for reasonable food, comforts, necessities, and kindness. It is a stipulation, not for toleration merely, but for respectful treatment." Then, after reciting the facts upon which the cause of action was based, being, as we have said, unseemly conduct only, he proceeded to consider the proposition as to whether an action would lie in the absence of physical violence, regarding which he said: "It is intimated that all these acts, though wrong in morals, are yet acts which the law does not punish; that if the person is untouched, if the acts do not amount to an assault and battery, they are not to be redressed. The law looks on them as unworthy of cognizance. The master is at liberty to inflict the most severe mental sufferings in the most tyrannical manner, and yet, if he withholds a blow, the victim may be crushed by his unkindness. He commits nothing within the reach of civil jurisprudence. My opinion is that the law involves no such absurdity. It is rational and just. It gives compensation for mental sufferings occasioned by acts of wanton injustice, equally, whether they operate by

way of direct or of consequential injuries. In each case the contract of the passengers for the voyage is, in substance, violated, and the wrong is to be redressed as a cause of damage."

It is also suggested by counsel for defendant that the complaint is insufficient for the reason that it is not alleged the defendant instructed its conductor in advance to act towards plaintiff in the manner asserted, nor that the defendant afterwards ratified these acts. The position is not tenable. It is well settled that in all cases where the master owes a contractual duty to third persons, he cannot shirk or evade it by committing its performance to another, but is bound to perform the duty, and is liable for a failure to do it in any respect whereby injury results to another, whether such failure results from negligence or from the improper conduct of the agent to whom the duty is committed. Being bound to do the act or perform the duty, if he does it by another, the master is treated as having done it himself, and the fact that his agent acted contrary to his instructions, without his consent, or that he did not subsequently ratify the wrongful act, does not excuse him. *Diamond Rubber Co. v. Harryman*, 41 Colo. 415, 15 L.R.A.(N.S.) 775, 92 Pac. 922, is cited by counsel for defendant in support of their contention that a cause of action is not stated in the complaint. That case is entirely different from the one at bar. The relation between the parties is not the same, and the mental suffering, for which it was said damages were not recoverable, relates to circumstances in nowise similar to the case under consideration.

We conclude that the use by a conductor, to a passenger lawfully upon a train, and conducting himself with propriety, of language calculated to humiliate, mortify, or disgrace the passenger, gives the passenger a right of action against the railroad company for compensatory damages for the mental pain thus occasioned. The judgment of the District Court is reversed, and the cause remanded, with directions to overrule the demurrer to the complaint.

Campbell, Ch. J., and Hill, J., concur.

A petition for rehearing having been filed, Gabbert, J., on April 3, 1911, handed down the following additional opinion:

The petition for rehearing is based upon the ground that damages for mental suffering, unaccompanied by physical injury or any other element of recoverable damages, cannot be made the subject of an

independent action for damages. This question is the vital one in the case, and we held that the complaint stated a cause of action upon the ground that for a wilful breach of the contract of carriage, as alleged in the complaint, damages were recoverable for the mental suffering thus occasioned. No reason is now advanced in support of the petition for rehearing that was not urged upon our attention in the briefs and on oral argument at the original hearing.

We must concede, of course, that there are authorities sustaining the contention of counsel for the railroad company; but there are also cases sustaining our conclusion. We think the latter are the more logical. When there is a wilful, tortious breach of the contract of carriage by those engaged in serving the public, it is certainly illogical to say that the person whose rights are thus infringed is without remedy for mental suffering thus caused, unless such breach is accompanied by some other element of damage. Such a conclusion would permit railroad companies to violate one of the most important elements of such contract; render it a nullity, and leave the passenger without remedy. Many cases are cited by counsel in the brief in support of the petition for rehearing; but, outside of those directly in point, they are in the main distinguishable from the case at bar. Take, for instance, our own decisions on the measure of damages in an action under § 1509, Mills's Annotated Statutes. Damages for mental suffering caused by grief are not recoverable; but this conclusion is based upon the ground that damages recoverable by the statute are limited to the net pecuniary benefit which the plaintiff might reasonably have expected to receive from the deceased.

The remaining cases cited, which hold that damages are not recoverable for mental suffering alone, are distinguishable from the one at bar in that they relate to cases brought under a statute not similar to our own, or where contractual relations did not exist between the parties, or where there was a mere passive breach of a contract,—that is to say, if there had been a violation of the contract, it was not occasioned by wilful, tortious conduct,—or where for simple negligence, or where the mental suffering was not the direct result of a tort, but remote; or the defendant was not engaged in a business quasi public. It may be true that cases like the one at bar should be reached by some statutory action on the part of the legislature; but until such a remedy is supplied, we have no right to withhold the remedy which the law now affords. Should excessive damages be awarded by a jury in a given case, 33 L.R.A. (N.S.)

the trial court, or this court on review, can and should set aside such a verdict.

The petition for a rehearing is denied.

Campbell, Ch. J., and Hill, J., concur.

KANSAS SUPREME COURT.

A. W. SCHENBERGER

v.

UNION PACIFIC RAILROAD COMPANY,
App't.

(— Kan. —, 113 Pac. 433.)

Interstate commerce — quoting rate — mistake — liability.

The plaintiff made inquiry at the defendant's station at Wakefield, Kansas, for the freight rate on wheat in carload lots from Wakefield to New Braunfels, Texas, and told the agent that this information was desired in order to fix the price to a customer at New Braunfels. In answer to the inquiry, the plaintiff was informed that the rate was 31 cents per hundredweight. Relying upon this information the plaintiff fixed the price, and sold two carloads of wheat and shipped it over the defendant's line to New Braunfels, when an additional charge of 12½ cents per hundredweight was made and collected, making 43½ cents per hundredweight on the shipment, which was the regular tariff rate on file with the Interstate Commerce Commission. The mistake in quoting the rate was unintentional, and not fraudulent. It is held that the provisions of the interstate commerce act govern the transaction, and that the plaintiff cannot recover.

(West, J., dissents.)

(February 11, 1911.)

Headnote by BENSON, J.

Note. — Right of shipper where carrier negligently misquotes rate which has been filed or published as required by statute.

As to the effect of provisions of the interstate commerce act against rebates upon contracts prescribing rates less than those established in accordance with the act, see note to *Armour Packing Co. v. United States*, 14 L.R.A. (N.S.) 400, from which it appears to be the "general, though not universal, rule, that agreements for the transportation of goods by railroad at less than the established rates will be held invalid because in violation of the interstate commerce act, regardless of how the less rate came to be made, or the grounds upon which it is sought to enforce the contract therefor."

And the same rule seems to obtain in the case of contracts prescribing rates less than those established in accordance with state

A PPEAL by defendant from a judgment of the District Court for Clay County in plaintiff's favor in an action brought to recover damages alleged to have been suffered by him by reason of the false and fraudulent statement of defendant's agent as to the rate for an interstate shipment of wheat. Reversed.

The facts are stated in the opinion.

Messrs. R. W. Blair, H. A. Scandrett, and B. W. Scandrett, for appellant:

A contract to ship goods at a rate prohibited by the interstate commerce act cannot be enforced, even though the rate was offered through a mistake of the carrier's agent.

Chicago, R. I. & P. R. Co. v. Hubbell, 54 Kan. 232, 5 Inters. Com. Rep. 241, 38 Pac. 266; Texas & P. R. Co. v. Mugg, 202 U. S. 242, 50 L. ed. 1011, 26 Sup. Ct. Rep. 628; Southern R. Co. v. Harrison, 119 Ala. 539, 43 L.R.A. 385, 72 Am. St. Rep. 936, 24 So. 552; Gulf, C. & S. F. R. Co. v. Hefley, 158 U. S. 98, 39 L. ed. 910, 15 Sup. Ct. Rep. 802; Texas & P. R. Co. v. Abeline Cotton Oil Co. 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 A. & E. Ann. Cas. 1075; Armour Packing Co. v. United States, 209 U. S. 56, 52 L. ed. 681, 28 Sup. Ct. Rep. 428; Missouri, K. & T. R. Co. v. New Era Mill. Co. 80 Kan. 141, 101 Pac. 1011.

Messrs. F. B. Dawes and R. C. Miller for appellee.

statutes. Central R. Co. v. Willingham, 8 Ga. App. 817, 70 S. E. 199; New York C. & H. R. Co. v. Smith, 62 Misc. 526, 115 N. Y. Supp. 838.

Upon the precise question involved in SCHENBERGER v. UNION P. R. Co., and which it is the purpose of this note to consider, as to the liability of a carrier for a mistake in quoting a rate, upon the ground of negligence, where the shipper, without relying upon any contract for a lower rate, pays the duly established rate for transportation, but thereby suffers loss by reason of having previously acted in reliance upon the lower rate quoted, few cases have arisen; but the rights of the shipper in such cases seem to be determined upon the same consideration as his rights under a contract for a lower rate than allowed, and it seems well settled that he cannot recover, as damages for the loss suffered, the difference between the rate which he pays and the rate as negligently misquoted, upon the basis of which he may have bought and sold the commodity shipped.

Thus, in A. J. Poor Grain Co. v. Chicago, B. & Q. R. Co. 12 Inters. Com. Rep. 418, rehearing denied in 12 Inters. Com. Rep. 469, the Interstate Commerce Commission said: "The question of the liability of carriers for the mistakes of their agents in quoting freight rates to shippers seems not to be open to further discussion. . . . While shippers rely largely upon the rates 33 L.R.A.(N.S.)

Benson, J., delivered the opinion of the court:

This is an action to recover damages alleged to have been suffered by the plaintiff by reason of the false and fraudulent statements of its freight agents that the rate for the transportation of wheat in carload lots from Wakefield, Kansas, to New Braunfels, Texas, was 31 cents per hundredweight, when in fact the regular rate was 43½ cents per hundredweight, whereby the plaintiff suffered damages in the sum of \$150.25, being the difference between the rate quoted and the regular rate charged upon two cars of wheat sold and shipped in reliance upon the truth of the statement of the defendant's agent that the rate was 31 cents per hundredweight. The case was tried upon an agreed statement of facts, from which it appears that the plaintiff inquired of the defendant's agent at Wakefield, Kansas, for the freight rate on wheat in carload lots from that station to New Braunfels, Texas, and informed the agent that he desired to know the rate in order to fix the price of wheat which he had an opportunity to sell at New Braunfels. The agent said that he could not give the rate, but would obtain it. Shortly afterwards the agent received a letter from a general freight agent of the company advising him that the rate inquired about was 31 cents per hundredweight, and so stated to the plaintiff. Re-

quoted by freight agents and billing clerks, the law charges them with knowledge of the lawful rates. And they will not be heard before this Commission to claim the benefit of a lower than the lawful rate on the ground that some railroad clerk has made a mistake in quoting a lower rate for a particular shipment. To permit shippers to impute negligence to carriers in quoting rates, and on that ground to enjoy the rate quoted instead of paying the lawfully published rate, would open a broad and ample way for the payment of rebates, and for other unlawful practices, and might, in its practical results, work a repeal of the essential feature of this legislation." It was accordingly held that where a grain dealer desiring to purchase wheat at points along the line of a certain railroad, for shipment to and sale at certain points in other states, inquired of the carrier's freight agents as to the rate between such points, and the agents negligently quoted a rate lower than the rate duly published in accordance with the interstate commerce act, and the dealer purchased and sold wheat on the basis of the quoted rate, he cannot recover against the carrier, on the ground of the negligence of its agents in misquoting the rates, the loss caused him by his having to pay a higher rate than that on the basis of which he purchased and sold.

So, in Forster Bros. Co. v. Duluth, South Shore & A. R. Co. 14 Inters. Com. Rep. 232,

lying upon the information so obtained, the plaintiff fixed the price to his customer and sold to him two carloads of wheat, which were then shipped over the defendant's line to New Braunfels, and the plaintiff paid or offered to pay the rate named, *viz.*, 31 cents per hundredweight. When the wheat arrived at the place of destination, an additional charge of 12½ cents per hundredweight was made and collected, making 43½ cents per hundredweight on the shipment, which was the correct rate on file with the Interstate Commerce Commission, being 12½ cents from Wakefield to Kansas City, and 31 cents from Kansas City to New Braunfels. The mistake in quoting the rate was unintentional, and was made without fraudulent intent. Judgment was rendered for plaintiff as prayed for, and the defendant appeals.

The defendant relies upon the provisions of the interstate commerce act; its tariffs of freight rates between the places named having been filed with the Interstate Commerce Commission. It was held in *Missouri, K. & T. R. Co. v. New Era Mill. R. Co.* 80 Kan. 141, 101 Pac. 1011, and in *Atchison, T. & S. F. R. Co. v. Superior Ref. Co.* 83 Kan. 732, 112 Pac. 604, that the schedule of rates published and filed with the Interstate Commerce Commission must govern. Any claim that such rate is unjust must be presented to that tribunal.

where it appeared that a shipper had assembled certain property at certain stations for shipment, in reliance upon information had from representatives of the carrier as to the rate to be applied on such shipments, and that subsequently he was notified that this rate did not apply, the Commission said: "It is unfortunate that shippers should be misled to their injury by erroneous information furnished by representatives of carriers as to the rate in effect. It is, of course, the duty of carriers' agents to furnish correct information as to the proper application of the lawful established rates. However, the law requires that tariffs shall be open to public inspection, and therefore shippers are themselves charged with notice of the rate lawfully applicable. The Commission cannot consider an erroneous rate quotation made by an agent of a carrier as the basis for an award of reparation to a shipper who thereby suffers damage. Collusion between the carrier and a shipper which it desired to favor, for protection of other than the tariff rates, would be rendered too easy of accomplishment."

And in *Texas & P. R. Co. v. Mugg*, 202 U. S. 242, 50 L. ed. 1011, 26 Sup. Ct. Rep. 628, it was held, reversing 98 Tex. 352, 107 Am. St. Rep. 633, 83 S. W. 800, that where a carrier has negligently made and quoted to a shipper rates on interstate shipments of coal, upon which he has relied in contracting for the coal, and has sold at

This is not disputed by the plaintiff, but it is insisted that the claim is not based upon a contract for less than the regular schedule rates, but upon a misrepresentation of such rates, and that the interstate commerce act does not relieve a carrier from damages caused by its negligence and false representations in such matters, and that the action is not upon contract, but in tort. Can the plaintiff recover damages for a misrepresentation of the rate when he could not have recovered upon an express agreement for that rate? It is not necessary to inquire into the purposes and scope of the interstate commerce act. They have been elaborately considered and stated in decisions of the Federal Supreme Court. The interpretation of the law by that tribunal appears to be decisive of this controversy. *Gulf, C. & S. F. R. Co. v. Hefley*, 158 U. S. 98, 39 L. ed. 910, 15 Sup. Ct. Rep. 802; *Texas & P. R. Co. v. Mugg*, 202 U. S. 242, 50 L. ed. 1011, 26 Sup. Ct. Rep. 628; *Texas & P. R. Co. v. Abilene Cotton Oil Co.* 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 A. & E. Ann. Cas. 1075; *Armour Packing Co. v. United States*, 209 U. S. 56, 52 L. ed. 681, 28 Sup. Ct. Rep. 428.

In the *Mugg* Case the action was to recover damages by reason of negligence in the misquotation of the rates for carrying coal on an interstate shipment, on which rates the plaintiff in that suit had relied,

prices based on such rates, which were lower than the rates which had been duly published, printed, and posted, as required by the interstate commerce act, and the carrier, as required by the act, collects the prescribed rates, the shipper cannot recover against the carrier for damages occasioned by its misrepresentation of the rate.

Somewhat similarly, one who has contracted with a carrier for an interstate shipment at a rate lower than that shown by the schedules filed with the Interstate Commerce Commission in compliance with the interstate commerce law, which lower rate was inserted in the bill of lading by mistake, cannot obtain possession of the goods from the carrier without payment of the correct schedule rate. *Gerber v. Wabash R. Co.* 63 Mo. App. 145.

But in *Atlanta, K. & N. R. Co. v. Horne*, 106 Tenn. 73, 59 S. W. 134, it was held that where an initial carrier has negligently misquoted a through rate on an interstate shipment, approved by the Interstate Commerce Commission, the shipper is entitled to a delivery of the goods from the connecting carrier at the point of destination upon payment or tender of the rate quoted, in the absence of proof by the latter carrier that it has published the approved rate in the manner directed by the Commission, so as to bring it to the attention of the public.

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and had sold the coal at a price based on the rate so given. The carrier collected freight charges according to the established rate as filed. The shipper sued, expressly alleging negligence in giving the rate as his ground of action. The supreme court of Texas ordered judgment for the plaintiff, but this was reversed, and it was held that, under the interpretation of the interstate commerce act by earlier decisions of the court, then reviewed and followed, there could be no recovery.

It was held in the case of the Armour Packing Company, in a prosecution for rebating, that, although a contract for carriage of goods at a stipulated rate was valid when made, being the same as the tariff rate, yet it was a violation of the law to carry the goods at that rate after it had been superseded by a higher one, made and filed as provided in the interstate commerce act. The court said that "neither shipper nor carrier may vary from the duly filed and published rate without incurring the penalty of the law." Referring to the effect of the decision upon contracts for future delivery, the court said (209 U. S. at page 81): "It may be, as urged by petitioner, that this construction renders impossible the making of contracts for the future delivery of such merchandise as the petitioner deals in, and that the instability of the rate introduces a factor of uncertainty, destructive of contract rights heretofore enjoyed in such property. This feature of the law, it is insisted, puts the shipper in many kinds of trade at the mercy of the carrier, who may arbitrarily change a rate upon the faith of which contracts have been entered into. But the right to make such regulations is inherent in the power of Congress to legislate respecting interstate commerce, and such considerations of inconvenience or hardship address themselves to the lawmaking branch of the government."

The judgment is reversed, with directions to enter judgment for the defendant upon the agreed statement of facts.

Johnston, Ch. J., and Burch, Mason, Smith, and Porter, JJ., concurring:

West, J., dissenting:

But for national legislation this action could be maintained. Such legislation has declared that all questions involving the propriety of an interstate rate must be presented to a Federal tribunal. But has it in terms or by intendment prohibited the recovery of damages for loss on a shipment caused by a negligent misquotation of the tariff rate? True, it happens in this case that the damages asked equal the dif-

ference between the quoted and the tariff rates, but it is not sought either in terms or in fact to recover such damages as a difference, but to recover for a loss on the wheat shipped, caused by the careless misquotation of the rate. Had the prayer of the petition been broader and the evidence sufficient, the allegations would support a verdict for punitive damages in an ordinary common-law action. Recovery was not sought upon any contract, or for the breach of any contract, for it is conceded that the law forbade a contract of shipment at the quoted rate. There was no payment of the tariff rate under protest; no attempt to clear the shipment of the carrier's lien; no complaint as to the legality or propriety of the tariff rate which was paid. Does the Mugg Case control? That action was begun in justice court where one is not held to orthodox strictness in pleading, but it sought to recover damages caused by reason of a misquotation, and by being forced to pay and paying the full rate under protest in order to obtain and deliver the coal. The bill alleged: "That plaintiffs' loss and damage in the sum aforesaid were occasioned by defendant's negligence in making and quoting to plaintiffs the said rates, on which rate quoted defendant knew plaintiffs relied and based their sales of the said three cars of coal shipped and sold thereafter, and then forcing plaintiffs to pay a greater rate, amounting in the aggregate to the sum of \$140.18 on said three cars of coal, thereby causing plaintiffs' loss and damage in the said sum." The Mugg Case was not argued in Supreme Court for the plaintiff, and the decision merely and only adopts and applies that in the Hefley Case, and holds that it (the Mugg Case) is ruled thereby. The Hefley Case by the Mugg decision is expressly given this effect, and this only so far as applicable here: "The clear effect of the decision was to declare that one who has obtained from a common carrier transportation of goods from one state to another, at a rate specified in the bill of lading less than the published schedule rates filed with and approved by the Interstate Commerce Commission, and in force at the time, whether or not he knew that the rate obtained was less than the schedule rate, is not entitled to recover the goods, or damages for their detention, upon the tender of payment of the amount of charges named in the bill of lading, or of any sum less than the schedule charges; in other words, that whatever may be the rate agreed upon, the carrier's lien on the goods is, by force of the act of Congress, for the amount fixed by the published schedule of rates and charges, and this lien can be discharged, and the consignee can become entitled to

the goods, only by the payment or tender of payment of such amount."

The object of the legislation in question is to prevent favoritism and discrimination, and to bind shipper and carrier alike by the schedule rate, but it is not apparent that its further object is to bar action for damages caused by negligent misquotation. It is suggested that to permit recovery would in effect give the shipper transportation at less than the tariff rate. Logically this may be true in a sense, but it is not legally true, for he has already paid the full rate, and makes no complaint whatever concerning it. He is not seeking to recover back because wrongfully extorted, but, having obeyed the law by paying the legal rate without protest, he now seeks to recoup his loss on the wheat which the negligent misquotation caused. He was careful and inquired the rate, stating that it would be his selling basis. Had it been correctly given he would not have lost; and because of this loss, caused by this carelessness, he sues. It is no previously planned scheme to circumvent the national law, but a bona fide attempt to make good for an actual loss suffered while obeying that very law. He is not complaining that he paid or had to pay the full rate, or seeking to recover any portion of it back, but he is complaining that his proper obedience to the law still left him damaged by the carrier's negligence. Congress evidently intended that both shipper and carrier should know the rate, and the latter is required to keep it posted so the shipper may know it. Not having done so, it was proper for the shipper to apply to the proper source for information, and under the circumstances it seems but common sense and common fairness to say that he had a right to rely thereon, provided such relying in no way involved an infraction of the law; and no decision thus far found makes it clear that, having complied with the Federal statutes, he is restricted to a complaint under or concerning them in a national tribunal. His recovery cannot be construed into a judicial invitation to bring similar actions, for we must presume that only in rare instances will such circumstances arise, but if they should, that is no reason why redress should be denied.

Finally, it is urged that § 9 of the act of Feb. 4, 1887, chap. 104, 24 Stat. at L. 382, U. S. Comp. Stat. 1901, p. 3159, withholds jurisdiction from state courts. This section provides that one claiming to be damaged by any common carrier may either make complaint to the Interstate Commerce Commission or sue in any district or circuit court of the United States of competent jurisdiction, but he may not do both. But 33 L.R.A. (N.S.)

the preceding section provides that for any act wilfully done or omitted, in violation of the statute in question, the party damaged may recover the full amount of damages sustained, together with a reasonable counsel or attorneys' fee, and that the two sections together show that it is for such damages only that one must resort to the Federal tribunals. Nothing in the entire act makes the negligent but unintentional quotation of a rate unlawful; only the wilful violation being penalized.

Finding nothing in the statutes or in the decisions prohibiting the maintenance of this action, I believe the judgment should be affirmed.

COLORADO SUPREME COURT.

CITY AND COUNTY OF DENVER et al.,
Plffs. in Err.,

v.

STATE INVESTMENT COMPANY et al.

(— Colo. —, 112 Pac. 789.)

Tax — special assessment — hearing — necessity of power to afford relief.

1. The hearing required by the constitutional provision for due process of law is not afforded by a municipality to which is delegated power to assess the cost of public improvements on property benefited thereby, where the body charged with the duty of conducting the hearing receives written protests and hears oral arguments, but refuses to take testimony, on the theory that it has no power to afford relief.

Same — lien — setting aside assessment — effect.

2. The lien upon property for the cost of a public improvement falls with the setting aside of the assessment for invalidity.

Same — illegal assessment — suit to attack — tender.

3. One is not bound to make a tender of any amount as a condition of instituting a suit to set aside an assessment for a public improvement, which is invalid *in toto*.

Same — tax not due — effect.

4. Tender of a portion of an assessment for a public improvement is not a prerequisite to the institution of a suit to set it aside for illegality, if no part of the assessment is due and payable when the suit is instituted.

(January 3, 1911.)

Note. — The question involved in *DENVER v. STATE INVEST. Co.*, as to the right of the landowner to notice and hearing, was treated in division xviii. of the note on Assessments for improvements by the front-foot rule, appended to *Chicago, M. & St. P. R. Co. v. Janeville*, 28 L.R.A. (N.S.) 1195.

ERROR to the District Court for the City and County of Denver to review a judgment in plaintiffs' favor in a suit to set aside a street improvement assessment. Affirmed.

The facts are stated in the opinion.

Messrs. H. A. Lindsley and H. L. Ritter, for plaintiffs in error:

There was no tender of the amount admitted to be due. This was fatal.

Denver v. Kennedy, 33 Colo. 80, 80 Pac. 126, 467; Spalding v. Denver, 33 Colo. 172, 80 Pac. 128; Denver v. Londoner, 33 Colo. 104, 80 Pac. 120; Breeze v. Haley, 11 Colo. 351, 18 Pac. 551; Insurance Co. of N. A. v. Bonner, 24 Colo. 220, 49 Pac. 366; Hallett v. United States Secur. & Bond Co. 40 Colo. 281, 90 Pac. 683; People's Nat. Bank v. Marye, 191 U. S. 272, 48 L. ed. 180, 24 Sup. Ct. Rep. 68; State Railroad Tax Cases, 92 U. S. 575, 23 L. ed. 663; Merrill v. Humphrey, 24 Mich. 170; Morrison v. Hershire, 32 Iowa, 271; Denver v. Hallett, 45 Colo. 132, 100 Pac. 408.

Mr. Charles R. Brock also for plaintiffs in error.

Mr. Arthur Ponsford, with Mr. Joshua Grozier, for defendants in error:

The action on the part of the council was arbitrary and illegal, and constituted a taking of plaintiffs' property in violation of both the state and Federal Constitutions.

Iowa Pipe & Tile Co. v. Callanan, 125 Iowa, 358, 67 L.R.A. 408, 106 Am. St. Rep. 311, 101 N. W. 141, 3 A. & E. Ann. Cas. 7; Cone v. Wood, 108 Iowa, 260, 75 Am. St. Rep. 223, 79 N. W. 86; White v. Tacoma, 109 Fed. 32; Dumars v. Denver, 16 Colo. App. 375, 65 Pac. 580; Windsor v. McVeigh, 93 U. S. 274, 23 L. ed. 914; Ogden City v. Armstrong, 168 U. S. 234, 42 L. ed. 450, 18 Sup. Ct. Rep. 98; Norwood v. Baker, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187; Louisville v. Bitzer, 115 Ky. 363, 61 L.R.A. 434, 73 S. W. 1116; Frantz v. Jacob, 88 Ky. 532, 11 S. W. 654; Preston v. Rudd, 84 Ky. 156; Atlanta v. Hamlein, 96 Ga. 384, 23 S. E. 408; Denver v. Kennedy, 33 Colo. 81, 80 Pac. 122, 467; Chamberlain v. Cleveland, 34 Ohio St. 561; Walah v. Barron, 61 Ohio St. 23; 76 Am. St. Rep. 354, 55 N. E. 164; Elliott, Roads & Streets, § 547; Denver v. Knowles, 17 Colo. 208, 17 L.R.A. 135, 30 Pac. 1041; Norwood v. Baker, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187; French v. Barber Asphalt Co. 181 U. S. 345, 45 L. ed. 890, 21 Sup. Ct. Rep. 625; Lathrop v. Racine, 119 Wis. 475, 97 N. W. 192; White v. Gove, 183 Mass. 334, 67 N. E. 359; White v. Tacoma, 109 Fed. 32; Cain v. Omaha, 42 Neb. 122, 60 N. W. 368; Allen v. Drew, 44 Vt. 188; Platte & D. Canal 33 L.R.A. (N.S.)

& Mill Co. v. Lee, 2 Colo. App. 184, 29 Pac. 1036.

If the charter does not provide for change of the assessment, it is unconstitutional and violative of the due process of law clause of the 14th Amendment.

Londoner v. Denver, 210 U. S. 380, 52 L. ed. 1110, 28 Sup. Ct. Rep. 708; Pueblo v. Colorado Realty Co. 44 Colo. 590, 99 Pac. 318; Brown v. Denver, 7 Colo. 311, 3 Pac. 455; Lathrop v. Racine, 119 Wis. 461, 97 N. W. 192; Norfolk v. Young, 97 Va. 729, 47 L.R.A. 574, 34 S. E. 886; Scott v. Toledo, 1 L.R.A. 688, 36 Fed. 396.

The refusal of the city council to exercise its power of altering the proposed apportionments according to special benefits, and prevent confiscation, by disclaiming its power to take testimony or grant any "proper" relief, was a taking of property without due process of law.

Brannon, 14th Amendment, 251; McVeigh v. United States, 11 Wall. 261, 20 L. ed. 81; Underwood v. McVeigh, 23 Gratt. 409; Windsor v. McVeigh, 93 U. S. 274, 23 L. ed. 914; Hovey v. Elliott, 167 U. S. 409, 42 L. ed. 215, 17 Sup. St. Rep. 841; Yentzer v. Thayer, 10 Colo. 64, 3 Am. St. Rep. 563, 14 Pac. 53; Clarkson v. Shanks, 46 Colo. 353, 104 Pac. 400; Gale v. Statler, 47 Colo. 72, 105 Pac. 858.

The tribunal appointed by law to hear the complaining property owners must not only possess, but know they possess, and in proper cases exercise, the power to grant adequate relief.

Raymond v. Chicago Union Traction Co. 207 U. S. 35, 52 L. ed. 87, 28 Sup. Ct. Rep. 7, 12 A. & E. Ann. Cas. 757; Brown v. Denver, 7 Colo. 312, 3 Pac. 455; Denver & R. G. R. Co. v. Outcalt, 2 Colo. App. 404, 31 Pac. 177; State ex rel. Haughey v. Ryan, 182 Mo. 349, 81 S. W. 435; Brannon, 14th Amendment, 251; Norwood v. Baker, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187; Ex parte Caldwell, 138 Fed. 487; reversed in 200 U. S. 293, 50 L. ed. 488, 26 Sup. Ct. Rep. 264; Roller v. Holly, 176 U. S. 398, 44 L. ed. 520, 20 Sup. Ct. Rep. 410.

A hearing, in its very essence, demands that he who is entitled to it shall have the right to support his allegations by argument, however brief, and if need be by proof, however informal.

Londoner v. Denver, 210 U. S. 384, 52 L. ed. 1112, 28 Sup. Ct. Rep. 708; Pittsburgh, C. C. & St. L. R. Co. v. Backus, 154 U. S. 426, 38 L. ed. 1036, 14 Sup. Ct. Rep. 1114; Central R. Co. v. Wright, 207 U. S. 130, 52 L. ed. 141, 28 Sup. Ct. Rep. 47; Fallbrook Irrig. Dist. v. Bradley, 164 U. S. 171, 41 L. ed. 393, 17 Sup. Ct. Rep. 56; Gray, Limitations of Taxing Power,

§§ 1158-1168; *Wheeler v. Chicago*, 57 Ill. 415; *Meyers v. Shields*, 61 Fed. 718; *McGavock v. Omaha*, 40 Neb. 76, 58 N. W. 543.

In levying special assessments for benefits received, the record (i. e., the assessing ordinance) must affirmatively show a compliance with all essential conditions to a valid exercise of the taxing power, that the assessment does not exceed the benefits, and any omission of (any) such facts will not be supplied by presumptions.

Hamilton, Special Assessments, §§ 480, 464; *People ex rel. Atty. Gen. v. Brown*, 23 Colo. 425, 48 Pac. 661; *Tracey v. People*, 6 Colo. 151; *O'Rear v. Lazarus*, 8 Colo. 608, 9 Pac. 621; *Roberts v. Roberts*, 3 Colo. App. 6, 31 Pac. 941; *Rustin v. Merchants' & M. Tunnel Co.* 23 Colo. 351, 47 Pac. 300; *Lambert v. Shumway*, 36 Colo. 350, 85 Pac. 89; *Carnahan v. Sieber Cattle Co.* 34 Colo. 258, 82 Pac. 592; *Rich v. Mentz*, 134 U. S. 632, 33 L. ed. 1074, 10 Sup. Ct. Rep. 610; *Smith v. Omaha*, 49 Neb. 883, 69 N. W. 402; *Liebermann v. Milwaukee*, 89 Wis. 336, 61 N. W. 1112; *Mitchell v. Portland*, — Or. —, 99 Pac. 881, s. c. 53 Or. 547, 101 Pac. 388; *Hughes v. Portland*, 53 Or. 370, 100 Pac. 942.

White, J., delivered the opinion of the court:

Defendants in error, as plaintiffs in the district court, prosecuted a suit against plaintiffs in error, as defendants, to relieve lands owned by the former from the assessment of a tax for the cost of paving a street upon which the lands abutted, in Colfax avenue paving district No. 3, in the city of Denver. The tax or assessment was imposed, or the attempt thereto made, under the law known as the 1893 charter of the city of Denver. The provisions of the charter regulating the exercise of the power, and the procedure thereunder essential to a valid assessment, are sufficiently set forth in *Londoner v. Denver*, 210 U. S. 373, 52 L. ed. 1103, 28 Sup. Ct. Rep. 708, and it is unnecessary to embody them herein.

Upon the trial of the cause it was admitted, or the undisputed evidence showed, each plaintiff to be the owner of a lot, or fractional part thereof, abutting upon the street paved; that the paving tax assessed on each of these lots was from two to five times the value of the lot, including the improvement, and from six to fourteen times the value of the special benefit. The court found and decreed that the assessment exceeded the special benefits to the respective lands or lots of plaintiffs, fixed the amount of the benefit as to each tract, and, after the same had been paid into court, can-

celed the balance of the assessment, and relieved the lots of the lien. To reverse that judgment, the defendants have brought the controversy here.

The principal contention of plaintiffs as to the invalidity of the tax assessment was (1) that the charter under which the improvements were made contained no adequate provisions for hearing and determining the objections of property owners to the assessments for public improvements, before the board of public works or the city council; (2) that there was in fact no notice to the property owners of a time for hearing, or hearing had upon their objections in writing properly made to such assessments; (3) that the assessments made against the property of the respective plaintiffs exceeded the special benefits thereto accruing from the paving, and to the extent of such excess the assessments were invalid.

The defendants contend (1) that the hearings provided for by the charter, either expressly or by implication, were adequate, and, if the procedure was followed, were in accordance with due process of law; (2) that plaintiffs had adequate notice and hearings in all matters of which complaint was made; (3) that the plaintiffs failed to make a tender, before the bringing of the suit, of an amount which, in their judgment, equaled the special benefits to their respective properties by reason of the pavement, and are therefore precluded from questioning the validity of any portion of such assessments.

1. That the charter under which the assessments were made contained, either expressly or by implication, adequate provisions for the hearing and determination of the objections interposed by the property owners to the proposed assessments, and in all respects complied with the constitutional requirements and the principles embodied in what is called "due process of law," has been heretofore determined by this court, and approved by the Supreme Court of the United States, as appears from the authorities herein cited.

Under the charter the lien upon the abutting land for the cost of the improvement is initiated by, and finds its support in, the assessment. Before the assessment can be legally fixed, the cost of the work and its provisional apportionment must be certified to the city council, and the landowners affected be afforded an opportunity to be heard before the city council, sitting as a board of equalization, upon the validity and amount of the assessment. Not only must the property owners, as required by statute, be given a notice, and have time in which to file complaints and objections

to the proposed assessment, but, under the implied power vested in the city by the charter, the city authorities must fix the specific time for hearing and give notice thereof, or in some proper way afford the property owners the opportunity to be heard, and likewise "hear the parties complaining, and such testimony as they may offer in support of their complaints and objections as would be competent and relevant." *Denver v. Dumars*, 33 Colo. 94, 80 Pac. 114; *Denver v. Kennedy*, 33 Colo. 80, 80 Pac. 122, 467; *Denver v. Londoner*, 33 Colo. 104, 80 Pac. 117; *Londoner v. Denver*, 210 U. S. 373, 52 L. ed. 1103, 28 Sup. Ct. Rep. 708.

2. In the case at bar, after the paving was completed, a statement of the cost thereof, and an apportionment of it to the lots or land abutting upon the street, was certified to the city clerk, who thereupon, in compliance with the provisions of the charter, published a notice to the effect that the written complaints or objections of the owners, if any, should be filed within thirty days, and that before the passage of an ordinance assessing the costs of said improvements, "the city council, sitting as a board of equalization, shall hear and determine all such complaints and objections." This notice complied with the express statutory requirements, but it is not so certain that it fixed the time for hearing with any certainty, and therefore probably failed in one of the essential requirements, without which, or a waiver thereof, no valid assessment could have been made. The city authorities, under the implied powers vested in them by the charter, should have given a notice of the time and place of hearing. The notice given seems to be no different in substance and effect from the notice under consideration in the *Londoner* Case, *supra*, and, as therein said, "the notice purported only to fix the time for filing the complaints and objections, and to inform those who should file them that they would be heard before action," and "did not fix the time for hearing."

However, should we be mistaken in our view of the effect of the notice given, and it could be held to properly mean that immediately after the expiration of the thirty days in which objections could be filed, the council, sitting as a board of equalization, would hear and determine such objections, yet the city authorities had no power to impose the lien for the assessment upon the lands benefited, unless the property owners by some act waived their right to have, or actually had, a hearing upon their objections to the assessment.

Defendants contend, in effect, that the property owners in fact had a hearing as 33 L.R.A. (N.S.)

contemplated by the charter; that, after filing their written complaints and objections to the assessment, they appeared before the city council, sitting as a board of equalization, either in person or by attorney, and orally presented their testimony and views concerning the assessment. As declared by the Supreme Court of the United States in the *Londoner* Case, *supra*: "Many requirements essential in strictly judicial proceedings may be dispensed with in proceedings of this nature." If, after filing their complaints and objections to the assessment, the parties, without further notice, appeared before the tribunal authorized to act, and assuming to exercise the power, and were permitted to present their testimony and other evidence competent and relevant to the matter under consideration, and to support their contentions by argument, it may be, though as to that we do not determine, such procedure was "a hearing within the meaning of the law." The very essence of a hearing, however, is the right, not simply the privilege, "to support one's contention or position by argument, however brief, and if need be by proof, however informal," before a tribunal authorized to act and willing and ready to do so. *Stuart v. Palmer*, 74 N. Y. 183, 30 Am. Rep. 239.

We are unable to agree with counsel that plaintiffs appeared and had a hearing. The complaint alleges that without hearing, or opportunity for hearing, though requested, none of the plaintiffs were afforded or given any opportunity to present any testimony or evidence whatsoever; but, on the contrary, the written protests were, without hearing thereon, disregarded, and the confiscatory assessments made without due process of law. A fair interpretation of the evidence seems to support and establish these allegations, and the court in its decrees found "that the allegations of the complaint are, and each of them is, true." A recitation of some of the evidence of the property owners will disclose the nature of the alleged hearing, to wit: "The board of equalization permitted me to talk, as they also did Col. Swallow and possibly one or two other property owners present, but refused to take any testimony, and no testimony under oath or otherwise was taken or hearing had. . . . This permission to talk was granted as a matter of favor, and not as a matter of right. . . . Several members of the board of equalization also spoke," and said "they had no such power (to make any change in the amount of the assessment as fixed by the board of public works), and gave that as a reason for declining to take testimony."

The conclusions most favorable to defend-

ants' contention as to what occurred are that plaintiffs, or some of them, appeared before the council in response to a notice from that body to present in writing any objections or complaints they might have to the assessment, and then and there claimed that the proposed assessment was confiscation of their property; that there was an informal talk or protest made by the plaintiffs, or in their behalf, against the assessment; that the council, from its own membership, appointed a committee to examine the property; that such committee, or some member thereof, made a verbal report to the effect that the lots, including the benefit thereto by the paving, were worth about one half of the amount of the assessment on such lots, respectively, and the council took the position that neither it, nor the members thereof, sitting as a board of equalization, had the power to in any manner change the assessment as certified by the board of public works; that while recognizing it would be just and proper to grant the relief to plaintiffs, the board of equalization and the city council were powerless to act in the premises, as it would invalidate the assessment in the entire district, and there was no reason for hearing evidence thereon. It is certain that such procedure did not constitute a hearing within the meaning of the law. The record discloses that then, and for some time prior thereto, the general impression maintained, and such is said to have been the holding of the nisi prius courts, that the provisions of the charter rendered the city and the city council, as a board of equalization, powerless to do otherwise than assess the entire cost of a public improvement made thereunder upon the property benefited, as directed by the board of public works, without change, and not otherwise. It is clear that it was this mistaken view of the power of the council that prevented that body from hearing evidence and argument, and granting the relief demanded by the plaintiffs.

It was essential, in order to uphold the constitutionality of the assessment provisions of the charter, and the Supreme Court of the United States so held in the *Londoner Case*, *supra*, that there be vested in the city council implied power to not only fix the time and place for a hearing and notify the complaining property owners thereof, but likewise implied power vested in such body to alter the apportionment and grant proper relief in the premises.

Unless the law authorizing the assessment, expressly or by implication, provides for notice to the owner of the property to be affected, and gives him an opportunity to be heard at a specified time and place,

before a board or tribunal competent and ready to administer proper relief, concerning the correctness of the charge, before it is made conclusive, the constitutional guaranty that no person's property shall be taken without due process of law has been infringed. *Brown v. Denver*, 7 Colo. 305, 3 Pac. 455. Notice or citation of the time and place for hearing, or possibly a waiver thereof by the property owner, was therefore essential to vest in the council the power to create a valid lien for the cost of the improvement, and it was likewise essential that the hearing be before a tribunal competent to act. The denial to a party in such a case of the right to appear and to be fully heard is, in legal effect, a recall of the citation to him. *Windsor v. McVeigh*, 93 U. S. 274, 23 L. ed. 914. And to notice or cite a party to appear, or the appearance of such party, before a tribunal competent to administer proper relief, but which assumes that it does not possess the power,—that though it be commanded by law to hear, it is by the same law rendered deaf to the appeals of justice, and refuses to take evidence and act,—is in no sense affording the party a hearing within the meaning of the charter, and is not a compliance with the constitutional requirement of "due process of law." It is, in effect, saying to a person, "Appear, and you shall be heard," and when he has appeared, saying, "Your appearance shall not be recognized, and you shall not be heard." A judgment, finding, or decree rendered under such circumstances is an arbitrary edict without the sanction of law. As stated by Brannon, in his work on the 14th Amendment, page 251: "Though there be service of process, yet, if the defendant is not allowed to make his defense, it is a withdrawal of the summons, 'a denial of the benefit of a notice, and would in effect be to deny that he was entitled to notice at all, and the sham and deceptive proceeding had better be omitted altogether,' because judgment without hearing is void."

The city council admitted, and the defendants concede, the assessment amounted to confiscation of the property of plaintiffs, and that the owners were entitled to a reduction of the assessment, and the council "stated they would like to remedy it, but did not know how they could do so without themselves violating the charter assessment provisions." It certainly cannot be said that a party has had a hearing when he has been called to appear, or appears, before a tribunal with power to act and grant relief, and which recognizes that such party is entitled to the relief for which he prays, yet disclaims in itself power and authority in the premises, and refuses to

hear evidence and act upon the matter. The right to property, and the guaranty that it shall not be taken without due process of law, does not rest upon a basis so unsubstantial.

3. As the lien rests upon the assessment, and the latter, as we have seen, is invalid, the lien must necessarily fall. And as there can be no obligation to pay until there is a legal assessment, the doctrine of tender before suit brought has no application. No one is under obligation to pay, or tender payment, until there be something due. This is not a case where the procedure was lawfully followed, and the authority exceeded by an excessive assessment, but it is a case showing such a departure from the prescribed procedure that the assessment attempted to be made had no validity as against the property of plaintiffs. The language of the court in *Norwood v. Baker*, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187, is peculiarly applicable to this case. It is there said: "The present case is not one in which—as in most of the cases brought to enjoin the collection of taxes or the enforcement of special assessments, it can be plainly or clearly seen, from the showing made by the pleadings, that a particular amount, if no more, is due from the plaintiff, and which amount should be paid or tendered before equity would interfere. It is rather a case in which the entire assessment is illegal. In such a case it was not necessary to tender, as a condition of relief being granted to the plaintiff, any sum as representing what she supposed, or might guess, or was willing to concede, was the excess of cost over any benefits accruing to the property. She was entitled, without making such a tender, to ask a court of equity to enjoin the enforcement of a rule of assessment that infringed upon her constitutional rights."

We have never held that a tender of the amount of the special benefit was a condition precedent to a property owner maintaining a suit in equity, to relieve his property from an alleged lien arising out of a void assessment. On the contrary, in *Denver v. Londoner*, supra, and other cases herein cited, the owners of the property upon which the assessments were made were held not to be entitled to relief in the suit instituted by them, because the assessment against their property was merely erroneous by being excessive, and they had not, prior to bringing the suit, tendered to the proper authorities the amount due, which would have been a valid assessment against their property; and it is therein expressly pointed out that the assessment was not void, but merely erroneous. The Supreme 33 L.R.A. (N.S.)

Court of the United States, to which that case was carried, and hereinbefore cited as *Londoner v. Denver*, determined that a hearing, or an opportunity therefor, to the property owners, had not been allowed, and that the assessment was therefore void, and the property owners were entitled to a decree discharging their lands from a lien on account of it, notwithstanding they had made no tender of the amount of the special benefits accruing to their property by reason of the improvement.

The trial court held that the testimony showed that the plaintiffs, either by themselves or their representatives, made protest to the city authorities against the excessive assessment, but were informed that the front footage plan had been recommended by the board of public works, and that the city authorities had no authority to change it, and were unable to render any relief whatever by way of decreasing the amount of assessment contemplated, and, under the circumstances, a tender would have been useless, and, as the parties had offered to do equity by paying into court the amount of benefits which the court should adjudge reasonable, there was a sufficient tender to meet the requirements of law and equity. Whether this view was correct is not necessary to determine, as the assessment was void for the lack of hearing.

Furthermore, it is apparent there was no necessity upon the part of plaintiffs, at or prior to the institution of this suit, to make a tender, even though we were to assume that the assessment was merely erroneous, and not void. While it has been held by this court that where property is excessively assessed for public improvements, but the procedure in making the assessment was regular, the owners, in order to maintain an action to annul the excessive part of the assessment, must first tender to the proper authorities the amount that should have been assessed, we do not understand that such tender should be of any greater sum than is then due and payable. In the case at bar, the record discloses that no part of the assessment was due, nor could any portion thereof presently become due, except by action of the property owners exercised under the provisions of the charter. Section 34. The assessing ordinance went into effect on the 29th day of August, and the suit for relief was filed on the 31st day thereof. Plaintiffs in their complaint, while denying the validity of the entire assessment, nevertheless alleged their willingness to pay any part thereof that was properly chargeable, or was a special benefit accruing, to their property by reason of the improvement, and

further "offers and tenders the same to said defendant, . . . or into court at any time, and to keep said tender and offer good whenever the same shall be ascertained, or on demand, and to do equity in the premises." Plaintiffs thereafter paid into court, for the defendants, the full amount which the latter could justly have established as a lien upon the former's property, and, under the circumstances, sufficiently complied with all the rules of equity to entitle them to maintain their suit for relief.

The judgment of the court was manifestly just and proper, and we can perceive no reason why it should be disturbed. It is therefore affirmed.

MASSACHUSETTS SUPREME JUDICIAL COURT.

COMMONWEALTH OF MASSACHUSETTS

v.

WILLIAM W. DREW.

(208 Mass. 493, 94 N. E. 682.)

Health — sale of milk — prescribing receptacles.

Statutory authority to examine into nuisances, sources of filth, and causes of sickness, and remove or prevent the same, and

Note. — *Right to prohibit sale of milk except in bottles.*

No other case has been found involving the precise question decided in *Com. v. Drew*.

In *Klopfers v. Dayton Bd. of Health*, 20 Ohio S. & C. P. Dec. 384, 9 Ohio N. P. N. S. 33, the court upheld a regulation of a city board of health requiring that all milk or cream sold, kept, or offered for sale, to be kept in tightly closed and capped bottles or receptacles approved by the board, but excepting milk sold for consumption on the premises, and milk sold in wholesale quantities. The statutes which were held to confer power upon the board to adopt such regulation purported to give municipal boards of health general power to make such orders and regulations as should be necessary for the prevention or restriction of diseases, and specifically empowered them to make such orders as they might deem necessary to prevent the sale of "impure, adulterated, and unwholesome milk, or milk liable to carry disease." It will be observed that the regulation in this case was sufficiently broad to cover a sale under the circumstances appearing in *Com. v. Drew*. As a matter of fact, however, the party complaining of the regulation in the *Klopfers* Case was one who sold and delivered milk to customers from a wagon;

make regulations for the public health relative thereto, and relative to articles which are capable of containing or conveying infection or contagion, or of creating sickness, which are brought into or conveyed from the town, does not empower a board of health to require the selling of milk only in tightly closed bottles or receptacles, to the exclusion of sales in small quantities from a wholesome receptacle kept under hygienic conditions.

(April 4, 1911.)

R EPORT by the Superior Court for Suffolk County for the opinion of the Supreme Judicial Court of questions of law arising at a trial in which defendant was convicted of violating a health regulation in regard to the sale of milk. Verdict set aside.

The facts are stated in the opinion.

Mr. Michael J. Dwyer, for the Commonwealth:

The regulation is a reasonable and lawful exercise of the powers of the board of health.

Nelson v. State Bd. of Health, 186 Mass. 330, 71 N. E. 693; *Welch v. Swasey*, 193 Mass. 364, 23 L.R.A. (N.S.) 1160, 118 Am. St. Rep. 523, 79 N. E. 745; *Com. v. Mulhall*, 162 Mass. 496, 44 Am. St. Rep. 387, 39 N. E. 183; *Com. v. Wheeler*, 205 Mass. 384, 91 N. E. 415, 18 A. & E. Ann. Cas. 319; *Com. v. Pear*, 183 Mass. 242, 67 L.R.A. 935, 66 N. E. 719; *Staas v. State*, 81 Ohio St. 497,

and in passing upon the reasonableness of the regulation, the court referred to the danger of contamination of milk in a can continually opened in a public highway, whereas there was much less danger of contamination incident to the mode of sale shown in the *DREW CASE*. Moreover, it will be observed that the statute involved in the *Klopfers* Case was more specific than that involved in the *DREW CASE*. It is stated in a note to the *Klopfers* Case that the judgment affirmed without opinion in *Staas v. State*, 81 Ohio St. 497, 91 N. E. 1139, was of like nature.

As to police regulations prescribing standard of quality of milk, see note to *St. Louis v. Liessing*, 1 L.R.A. (N.S.) 918.

As to particular test or analysis of milk prescribed by police regulations, see note to *St. Louis v. Grafeman Dairy Co.* 1 L.R.A. (N.S.) 926.

As to prohibition of adulteration or addition of other substance to milk, see note to *St. Louis v. Schuler*, 1 L.R.A. (N.S.) 928.

As to police regulations as to food for milch cows, see note to *Sanders v. Com.* 1 L.R.A. (N.S.) 932.

As to requirement of license for sale of milk, see notes to *St. Louis v. Grafeman Dairy*, 1 L.R.A. (N.S.) 936, and *Bear v. Cedar Rapids*, 27 L.R.A. (N.S.) 1161.

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91 N. E. 1130; *Klopfert v. Board of Health*, 9 Ohio N. P. N. S. 33, note.

The preservation of the purity of the milk supply of the community is not only a proper, but an important, object of the police regulation.

Com. v. Wheeler, 205 Mass. 384, 91 N. E. 415, 18 A. & E. Ann. Cas. 319; *Com. v. Vieth*, 155 Mass. 442, 29 N. E. 577; *Com. v. Carter*, 132 Mass. 12; *Com. v. Evans*, 132 Mass. 11; *Com. v. Waite*, 11 Allen, 264, 87 Am. Dec. 711; *New York ex rel. Lieberman v. Van De Carr*, 199 U. S. 552, 50 L. ed. 305, 26 Sup. Ct. Rep. 144.

If the clause of the regulation which requires that the receptacle shall be approved by the board of health is open to objection, that clause may be ignored without impairing the validity and effect of the remainder of the regulation.

Com. v. Hitchings, 5 Gray, 482; *Sullivan v. Adams*, 3 Gray, 476; *Com. v. Farmers' & M. Bank*, 21 Pick. 542, 32 Am. Dec. 290; *Com. v. Clapp*, 5 Gray, 97; *Com. v. Petranich*, 183 Mass. 217, 66 N. E. 807; *Com. v. Anselvich*, 186 Mass. 376, 104 Am. St. Rep. 590, 71 N. E. 790.

Mr. M. J. Sughrue for defendant.

Knowlton, Ch. J., delivered the opinion of the court:

This is a complaint against the defendant for the violation of a regulation of the board of health of the city of Boston, relative to the sale of milk. The material part of the regulation is as follows: "No person or corporation shall sell or offer, expose, or keep for sale in any shop, store, or other place where goods and merchandise are sold, milk or cream, unless the same is sold or offered, exposed, or kept for sale in tightly closed or capped bottles or receptacles which have been approved by the board of health." It was agreed that milk was kept for sale by the defendant in a vessel contained in a covered cooler, in his store; that it was always kept at a temperature less than fifty degrees Fahrenheit, and that none of it was allowed to stand outside of the cooler except while a sale of milk was being made; that the cooler was always kept properly drained and cared for and tightly closed, except during such interval as was necessary for the introduction or removal of milk or ice, and was kept in such location and under such conditions as were approved by the board of health. The milk was wholesome milk of standard quality, was taken from a clean, new tin cylinder or vessel, set in a clean, new ice chest, surrounded by clean, wholesome ice. The vessel had a removable cover which was new and clean, and the measure which was used by the defendant in retailing the milk was

new and clean, and hung inside the tin cylinder so that it was not exposed to the air. The cylinder was simple in shape, is easily cleaned, and was susceptible of perfect sterilization. The sales were made in any quantities desired by customers from 1 cent's worth upward. The defendant's store was in a district in which many poor people live, and facts were agreed tending to show that such people often went to purchase a quantity less than the quantity contained in the smallest bottles used, and would be put to inconvenience by the enforcement of the regulation.

We do not consider the question whether this regulation is beyond the constitutional power of the legislature to enact as a statute, or to authorize the board of health to establish locally. For we are of opinion that the statute under which the board assumed to act is not broad enough to give them this authority. It is as follows: "The board of health shall examine into all nuisances, sources of filth, and causes of sickness within its town, or on board of vessels within the harbor of such town, which may in its opinion be injurious to the public health; shall destroy, remove, or prevent the same, as the case may require, and shall make regulations for the public health and safety relative thereto, and relative to articles which are capable of containing or conveying infection or contagion, or of creating sickness, which are brought into or conveyed from its town, or into or from any vessel." [Rev. Laws, 1902, chap. 75, § 65.] By § 140 of this chapter the section is made applicable to cities.

This statute does not give the board power to make regulations as to all matters affecting the public health. If the board should be certain that the smoking of cigarettes by boys affects their health injuriously, it would have no power to make a regulation forbidding the smoking of them by boys under a certain age, or the sale of them to such boys. It has no power to make general regulations as to conduct or practices injurious to health, which, if indulged in by many persons, affect the health of the public. The statute above quoted gives the board jurisdiction to deal with "nuisances, sources of filth, and causes of sickness within its town." Plainly the milk in question was not a nuisance or a source of filth. In determining the meaning of the words "causes of sickness," the doctrine of *noscitur a sociis* is to be applied. It is a little broader term than the two terms that precede it, but it is of the same general character. Primarily it refers to something local, and the board is directed "to destroy, remove, or prevent the same." In § 67 we have another indication of the meaning of

these words in the requirement that the board shall order the owner or occupant of private premises to remove any "nuisance, source of filth, or cause of sickness found thereon." So, under § 74 he may obtain a warrant directed to an officer or to a member of the board, commanding him to destroy, remove, or prevent any "nuisance, source of filth, or cause of sickness," in reference to which they have made complaint to a magistrate. We are of opinion that, within the meaning of the language in these sections, milk kept in a vessel, as this was kept by the defendant, was not a "nuisance, source of filth, or cause of sickness," which gave the board of health jurisdiction to take any action or make any regulation under Rev. Laws, chap. 75, § 65.

The latter portion of this section gives the board jurisdiction to make regulations "relative to articles which are capable of containing or conveying infection or contagion, or of creating sickness, which are brought into or conveyed from its town, or into or from any vessel." This has reference to the bringing into the town or conveying away of articles capable of containing or conveying infection, in such a way as to affect injuriously the public health or safety. The legislation is found in Rev. Stat. chap. 21, § 6, in which the language is "when such articles shall be brought into or conveyed from their town, or into or from any vessel." In Gen. Stat. chap. 26, § 5, the words "when such articles shall be" are omitted, and the section reads in this part, "brought into or conveyed from its town, or into or from any vessel." In Pub. Stat. chap. 80, § 18, the language is the same. We are of opinion that this part of the section relates to articles of such a kind as to be dangerous in reference to their capability of containing or conveying infection or contagion, or of creating sickness, in connection with their removal from one town to another. The case of *Train v. Boston Disinfecting Co.* 144 Mass. 523, 59 Am. Rep. 113, 11 N. E. 929, relative to the disinfecting of rags, furnishes an illustration of what is meant by the statute.

The regulation in the present case has no reference to property in connection with its removal from one city or town to another. Nor is pure milk such an article as is referred to in the statute. We are of opinion that this part of the section does not authorize a regulation as to the sale of milk kept and sold in the manner that is disclosed in this case.

We have no occasion to consider the objection to the regulation in that part which subjects the business to an absolute determination of the board as to whether they

will approve of the bottles or receptacles used in making sales. See *Com. v. Maletsky*, 203 Mass. 241, 24 L.R.A.(N.S.) 1168, 89 N. E. 245.

Verdict set aside.

NEBRASKA SUPREME COURT.

ALEX SCHULTZ, Plff. in Err.,
v.

STATE OF NEBRASKA.

(— Neb. —, 130 N. W. 972.)

Indictment — sufficiency — manslaughter.

1. Substance of the information stated in the opinion, and held sufficient to charge the defendant with the crime of manslaughter by carelessly, recklessly, unlawfully, and wilfully driving his automobile on the public streets and highways of the city of Omaha, thereby causing the death of another.

Homicide — reckless driving of automobile.

2. One who drives an automobile wilfully, recklessly, carelessly, and negligently, and at a rate of speed forbidden by the statute,

Headnotes by BARNES, J.

Note. — Homicide by negligent operation of automobile.

This subject is treated in the note to *State v. Goetz*, 30 L.R.A.(N.S.) 458, since the time of which one case in point, aside from *SCHULTZ v. STATE*, has been reported.

In *People v. Darragh*, 141 App. Div. 408, 126 N. Y. Supp. 522, where a chauffeur testing a new sixty-horse power automobile drove along a city street at a speed of from 35 to 40 miles an hour, in violation of a statute making it a misdemeanor to exceed a speed of 15 miles an hour, and, charging down upon a group of boys whom he saw at a distance of at least a full block, within which he could have stopped his machine, hit and killed one of them, it was held that he was properly indicted for murder in the first degree, under a statute providing that the killing of a human being, unless excusable or justifiable, is murder in the first degree when committed by an act imminently dangerous to others, and evincing a depraved mind, regardless of human life, although without a premeditated design to effect the death of any individual; and that the evidence sustained a verdict of guilty of manslaughter in the first degree under a statute providing that homicide, unless excusable or justifiable, is manslaughter in the first degree when committed without a design to effect death, by a person engaged in committing or attempting to commit a misdemeanor affecting the person or property either of the person killed or of another.

A. C. W.

upon the public streets or highways of this state, and thereby causes the death of another, is guilty of criminal homicide.

Trial — instructions — definition.

3. On the trial of a person charged with such crime, it is permissible for the court to define an unlawful rate of speed in the language of the statute regulating the use of motor vehicles upon the public streets and highways of this state.

Highway — speed of automobile — who to determine rate.

4. Ordinarily, the courts will not substitute their opinions for the judgment of the legislature as to the reasonableness of an act fixing the rate of speed at which motor vehicles may be lawfully driven.

Trial — repeating instructions.

5. Where the substance of an instruction requested by the defendant has been given by the court upon his own motion, he is not required to repeat it because of such request.

Same — lack of evidence.

6. Where there is no evidence upon which to predicate a requested instruction, it is proper for the court to refuse to give it.

Homicide — contributory negligence — effect.

7. Where a person wilfully, recklessly, carelessly, and negligently, and at an unlawful rate of speed, as defined by the statute, drives his automobile upon the public streets and highways (of this state) and thereby kills another, negligence of the driver of another car in which the deceased was riding when he was killed cannot be invoked, under ordinary circumstances, to relieve such person of criminal liability.

(April 8, 1911.)

ERROR to the District Court for Douglas County to review a judgment convicting defendant of manslaughter. Affirmed.

The facts are stated in the opinion.

Messrs. John W. Battin and W. W. Slabaugh, for plaintiff in error:

The information does not charge a crime.

Com. v. Adams, 114 Mass. 323, 19 Am. Rep. 362; Johnson v. State, 66 Ohio St. 59, 61 L.R.A. 277, 90 Am. St. Rep. 564, 63 N. E. 607; Gee Wo v. State, 36 Neb. 241, 54 N. W. 513.

Mere operating of an automobile in excess of the speed limit fixed by law is not the "commission of an unlawful act," as contemplated in the law of manslaughter.

Com. v. Adams, 114 Mass. 323, 19 Am. Rep. 363; Estell v. State, 51 N. J. L. 182, 17 Atl. 118, 8 Am. Crim. Rep. 514; State v. Horton, 139 N. C. 588, 1 L.R.A. (N.S.) 991, 111 Am. St. Rep. 818, 51 S. E. 945, 4 A. & E. Ann. Cas. 797; Potter v. State, 162 Ind. 213, 64 L.R.A. 942, 102 Am. St. Rep. 108, 70 N. E. 129, 1 A. & E. Ann. Cas. 32; Robbins v. State, 8 Ohio St. 138; Clark, Am. Crim. Law, 2d ed. 205; 1 Bishop, New 33 L.R.A. (N.S.)

Crim. Law, 8th ed. § 314; 2 Bishop, New Crim. Law, §§ 688, 689, 737.

A conviction of manslaughter cannot be had and maintained because of violation of a speed limit fixed by law. As a rule the cases are brought on the ground of negligent or reckless and dangerous driving, and speed is considered simply as an element of negligence, as it is held to be frequently in civil suits.

1 Bishop, New Crim. Law, 8th ed. § 314; Clark, Crim. Law, 2d ed. § 25; Estell v. State, 51 N. J. L. 182, 17 Atl. 118; People v. Pearne, 118 Cal. 154, 50 Pac. 376; Potter v. State, 162 Ind. 213, 64 L.R.A. 942, 102 Am. St. Rep. 198, 70 N. E. 129, 1 A. & E. Ann. Cas. 32; State v. Watson, 216 Mo. 420, 115 S. W. 1011; State v. Stentz, 33 Wash. 444, 74 Pac. 588; State v. Horton, 139 N. C. 588, 1 L.R.A. (N.S.) 991, 111 Am. St. Rep. 818, 51 S. E. 945, 4 A. & E. Ann. Cas. 797; State v. Moore, 129 Iowa, 514, 106 N. W. 17.

Mr. S. F. Neble also for plaintiff in error.

Messrs. Grant G. Martin, Attorney General, and Frank E. Edgerton, for the State:

One who wilfully drives an automobile in a public street of this state at a rate of speed or in a manner expressly forbidden by statute, thereby causing the death of another, or one who, with reckless disregard for the safety of others, so negligently drives an automobile in a public street as to cause the death of another, is guilty of criminal homicide.

State v. Campbell, 82 Conn. 677, 135 Am. St. Rep. 293, 74 Atl. 927, 8 A. & E. Ann. Cas. 236.

The decision as to whether or not Schultz was driving at an unlawful rate of speed was properly left to the jury.

Johnson v. Coey, 237 Ill. 91, 21 L.R.A. (N.S.) 81, 86 N. E. 678.

Defendant is guilty of manslaughter, if death of some other person is the result.

Ford v. State, 71 Neb. 247, 115 Am. St. Rep. 591, 98 N. W. 807; Flinn v. State, 24 Ind. 286; Bias v. United States, 3 Ind. Terr. 27, 53 S. W. 471; Adams v. State, 65 Ind. 565; Thompson v. State, 131 Ala. 20, 31 So. 725; Irwin v. Judge, 81 Conn. 501, 71 Atl. 572; State v. Watson, 216 Mo. 421, 115 S. W. 1011.

Barnes, J., delivered the opinion of the court:

Alex Schultz, hereafter called the defendant, was prosecuted in the district court of Douglas county on a charge of manslaughter. His trial resulted in a conviction, and he was sentenced to serve a term of three years in the state penitentiary.

From that judgment he has brought the case here by a petition in error.

1. Defendant's first contention is that the information on which he was tried does not charge a crime, in that it fails to state that defendant committed an assault. The charging part of the information reads as follows: "That on the 21st day of June, in the year of our Lord 1910, Alex Schultz, late of the county of Douglas aforesaid, in the county of Douglas and state of Nebraska aforesaid, then and there being in said county, and then and there being upon a public highway, to wit, at the intersection or crossing of Thirty-Fourth and Leavenworth streets in the city of Omaha, which said streets are public highways, and the said Thirty-Fourth street at the point aforesaid being a part of the boulevard system of said city, and the said intersection or crossing being a place at which there is much traffic, did then and there negligently, carelessly, recklessly, unlawfully, and feloniously drive, propel, and operate a motor vehicle, commonly called an automobile, upon said public streets and highways and at said crossing or intersection aforesaid, at a rate of speed greater than was reasonable and proper, having regard to the traffic and use of said streets and highways at the place aforesaid, and having regard to the safety of the public, and did then and there so drive, propel, and operate said automobile at a rate of speed so as to endanger the life and limb of persons using and traveling said streets and highways at the point aforesaid, and at a rate of speed in excess of the rate permitted by law, and then and there, while so negligently, carelessly, and unlawfully propelling, driving, and operating said automobile, did in and upon one William Krug make an assault, and the said automobile which he, the said Alex Schultz, was then and there, upon said streets and public highways, and at said intersection and crossing, so negligently, carelessly, and unlawfully propelling, driving, and operating, in and against the said William Krug, unlawfully and maliciously did force and drive, and him, the said William Krug, did then and there throw to and upon the ground, curbstone, and pavement, and did then and there thereby give to the said William Krug, in and upon the upper part of the body and head of him, the said William Krug, certain contusions, fractures, and mortal wounds, of which the said William Krug, on said 21st day of June, 1910, in said county and state, did die; and so the said Alex Schultz, him, the said William Krug, in the manner aforesaid, and unintentionally while in the commission of said unlawful act, did then and there unlawfully and feloniously kill and slay,—
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contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the state of Nebraska." It thus appears that the information not only charges an assault, but contains every element necessary to constitute the crime of manslaughter. The record also discloses that the defendant fully understood the nature of the charge against him, and conducted his defense in such a manner as to have exonerated himself from criminal liability had the jury believed his evidence. A like question was before the supreme court of Missouri in *State v. Watson*, 216 Mo. 420, 115 S. W. 1011, upon a similar information, in which the defendant was charged with killing a pedestrian while carelessly, recklessly, and negligently running his automobile over and upon a certain street in the city of St. Louis. Speaking of the information in that case, the court said: "This in our opinion is a sufficient charge, and fully informed the defendant of the nature and character of the offense he was called upon to answer. It was not in our judgment essential that the information should undertake to set out in detail in what such carelessness, recklessness, and culpable negligence consisted, but the charge that he operated and propelled this automobile along a public street carelessly, recklessly, and with culpable negligence, was in effect notifying the defendant that he was not using, operating, or propelling his automobile in accordance with the law or the ordinances of the city regulating the use and operation of such machines." From the foregoing we are of opinion that the information in this case was sufficient in all respects to charge the defendant with the offense of which he was convicted.

2. Defendant's second and third assignments of error will be considered together. They each, in a different form, raise the question of the rate of speed at which automobiles may be operated upon the public streets and highways of this state. By § 147, chap. 78, Comp. Stat. 1907, it is provided that "no person shall operate a motor vehicle on a public highway at a rate of speed greater than is reasonable and proper, having regard to the traffic and use of the highway, or so as to endanger the life or limb of any person; or in any event in the close built-up portions of a city, town, or village at a greater rate than one (1) mile in six (6) minutes, or elsewhere in a city, town, or village at a greater rate than one (1) mile in four (4) minutes, or elsewhere outside of the city, town, or village, at a greater rate than 20 miles per hour; . . . and in no event greater than is reasonable and proper, having regard to the traffic then on such highways

and the safety of the public." The trial court, by paragraph 5 of his instructions, charged the jury, in substance, that, in order to convict the defendant, they must find from the evidence beyond a reasonable doubt that William Krug was alive June 21, 1910; that on the same day he was killed, and his death was the result of an unlawful act on the part of Alex Schultz; that such killing occurred on the streets of Omaha; that it was the result of a collision between the automobile driven by Schultz at an unlawful rate of speed and the automobile in which Krug at that time was riding. In defining an unlawful rate of speed, the court's instruction No. 6 stated the substance of the section of the statute above quoted. The giving of those instructions is jointly assigned as error, and it is argued that the conviction cannot be maintained solely because of a violation of the speed limit fixed by law. It will be observed that this case is not prosecuted solely for a violation of the speed limit fixed by the statute, but is based in fact on the negligent, reckless, careless, and dangerous driving of his automobile by the defendant. In a recent case in Connecticut the defendant was found guilty of manslaughter in negligently and recklessly driving his automobile over a man named Morgan. In that case the court took occasion to read to the jury the automobile act of that state, which is quite similar to the statutes of Nebraska regulating the use of automobiles on public streets and highways. It was claimed that it was error to read those statutes and apply them in that case, but the supreme court of Connecticut found no error in the instruction. It was there said: "One who wilfully drives an automobile in a public street of this state at a rate of speed or in a manner expressly forbidden by statute, and thereby causes the death of another; or one who, with reckless disregard for the safety of others, so negligently drives an automobile in a public street as to cause the death of another, is guilty of criminal homicide." *State v. Campbell*, 82 Conn. 671, 135 Am. St. Rep. 293, 74 Atl. 927, 8 A. & E. Ann. Cas. 236.

It will be observed that by instruction No. 5 the court told the jury that to find the defendant guilty they must find from the evidence beyond a reasonable doubt that he operated his machine at an unlawful rate of speed. This is explained in instruction No. 6, as a speed greater than is reasonable and proper, having regard to the traffic and the use of the highway, or so as to injure the life or limb of any person, as defined by the words of the statute; and it was thereupon properly left to the jury to determine whether or not the 33 L.R.A. (N.S.)

defendant was driving his automobile at an unlawful rate of speed when the collision occurred. We find no error in the instructions complained of.

It is argued that the act regulating the speed of motor vehicles is unconstitutional and void, because it is unreasonable. No authorities are cited in support of this argument, and we doubt if any authority can be found to sustain it. The act seems to be a proper exercise of the police power of the state. The legislature no doubt was aware of this new method of public travel, and, recognizing the fact that the automobile furnishes a means of transportation by which a speed may be attained greater than by any other vehicle in common use, deemed it necessary to regulate its use in such a manner as to prevent collisions and accidents like the one in the case at bar, and, having due regard to the safety of life and limb of all persons rightfully upon our public streets and highways, passed the act in question defining the methods of operation and the rate of speed which would in their judgment best subserve the public interest. In such case the courts should not under ordinary circumstances substitute their opinions for the judgment of the legislative branch of the government, as to the reasonableness of such regulation.

3. Error is assigned because of the refusal of the trial court to give instructions 17, 24, and 26, requested by the defendant. By No. 17 the court was asked to instruct the jury that if they had any reasonable doubt that the death of William Krug was the natural and probable result of the collision, they should find the defendant not guilty. It appears that the substance of that instruction was given by the court on his own motion, and it was unnecessary to repeat it at the request of the defendant.

By instruction No. 24 the court was asked to charge the jury that if they had any reasonable doubt as to whether or not William Krug was thrown from the gray car because of the plunge forward by the gray car, and that as a result of being thrown from said car he was killed, and that such plunge forward was made by the driver of the gray car, then they should find the defendant not guilty. That instruction was properly refused, because there was no evidence upon which to predicate such a defense, as we shall presently see. Instruction 26 was in substance a repetition of instruction 24, and was therefore properly refused.

4. Error is assigned for giving instruction No. 7 by the court on his own motion, and the refusal to give instruction No. 25 requested by the defendant. By instruction No. 25 the court was requested to instruct

the jury on the law of contributory negligence, to wit, negligence on the part of the driver of the car in which Krug was riding. In support of this contention defendant cites *State v. Stentz*, 33 Wash. 444, 74 Pac. 588. In that case the jury were informed that if they should find from the evidence that the deceased came to his death by the mutual mistake of the deceased and the defendant in the honest endeavor to avoid a collision, both on the part of the deceased and the defendant, then in that event such killing would be accidental, and not criminal, and their verdict should be not guilty. But in the same paragraph it was further said: "Gentlemen of the jury, I instruct you that if the defendant was, at the time alleged in this information, engaged in an unlawful act, to wit, the act of driving horses and a wagon upon the public highway in such a manner as to endanger the lives and persons of others, and such unlawful act resulted in the killing of the person named in the information mentioned, it would then be immaterial whether the killing was accidental or intentional. The defendant would be guilty." It will thus be seen that the case cited does not support the defendant's contention. On the other hand, in *State v. Campbell*, supra, the court said: "Contributory negligence as such is not available as a defense in a criminal prosecution for a homicide caused by the gross and reckless misconduct of the accused, although the decedent's behavior is admissible in evidence, and may have a material bearing upon the question of the defendant's guilt. If, however, the culpable negligence of the accused is found to be the cause of the decedent's death, the former is responsible under the criminal law, whether the decedent's failure to use due care contributed to his injury or not." The rule of law concerning contributory negligence by the injured person as a defense in civil actions for damages for personal injuries had no application to this case. The state was required to prove the alleged unlawful act of the accused and its consequences, but not that the deceased exercised due care to avoid the consequences of the unlawful act. The authorities are not in conflict as to this question. Uniformly the courts have said a man will not be excused for killing another, even though his victim was negligent. While contributory negligence is a complete defense to an action for private injury resulting from homicide, it is no defense to a prosecution for a public wrong. 21 Am. & Eng. Enc. Law, 2d ed. p. 195. We think the refusal of this instruction was clearly right for the further reason that the evidence disclosed

no theory upon which such an instruction could be predicated.

It is also contended that there is a distinction between offenses *mala prohibita* and *mala in se*. The distinction, if any, is not accounted of much practical consequence by the text writers. 21 Am. & Eng. Enc. Law, 2d ed. p. 190; 1 Bishop, New Criminal Law, § 333. In *State v. Stanton*, 37 Conn. 421, it was said: "Where a man was knowingly engaged in a criminal act, and unintentionally committed a greater offense than the one intended, proof of an intent was not essential to a conviction for the latter crime. We perceive no error in this part of the charge. The defendant claims that the proposition of the court, though correct when applied to crimes which are *mala in se*, is not correct when applied to crimes which are *mala prohibita*. We do not recognize the distinction as law. The cases cited by the defendant's counsel are all cases where the prisoner was engaged in doing a lawful act, and the offense was committed through carelessness." There seems to be no conflict in the decisions where the defendant is violating some statute, and where his manner is negligent and careless. The courts in such cases uniformly say that he is guilty of manslaughter if the death of some other person is the result. *Ford v. State*, 71 Neb. 246, 115 Am. St. Rep. 591, 98 N. W. 807; *Flinn v. State*, 24 Ind. 286; *Bias v. United States*, 3 Ind. Terr. 27, 53 S. W. 471; *Adams v. State*, 65 Ind. 565; *Thompson v. State*, 131 Ala. 18, 31 So. 725; *Irwin v. Judge*, 81 Conn. 492, 71 Atl. 572; *State v. Watson*, 216 Mo. 420, 115 S. W. 1011.

5. It is contended that the verdict is not supported by sufficient evidence. This question is not discussed in the defendant's brief. We deem it proper, however, to state the facts as they appear from the record. On the morning of June 21, 1910, the deceased and his friend McCormick were riding in an automobile driven by one William H. Wallace. They were going north on what is called Central boulevard, which is one of the principal streets of the city of Omaha. As they approached the intersection of the boulevard with Leavenworth street, which is also one of the principal thoroughfares of that city, they were driving at the rate of from 8 to 10 miles an hour. The south-east corner of Leavenworth street, where it crosses the boulevard, is what is called a blind corner. It appears that trees and shrubs were growing on the east side of the boulevard clear up to its intersection with Leavenworth street, so that persons approaching from the east on that street were unable to see

vehicles approaching from the south on the boulevard until they reached the intersection. While the car in which the deceased was riding was crossing Leavenworth street, the automobile driven by the defendant approached the intersection from the east at an excessive rate of speed, and struck it with such force as to cause the death of Mr. Krug. The state produced five or six persons, some of whom were within 100 feet of where the collision occurred, and saw the entire transaction, who without substantial variance testified that the defendant's car as it approached the intersection, and up to the very instant of the collision, was running at a speed of between 30 and 50 miles an hour. It appears that Central boulevard at the place where it crosses Leavenworth street is one of the main traveled streets in the city of Omaha, and is extensively used by persons driving automobiles; that Leavenworth street is also used by them as well as by all other kinds of conveyances. A number of the witnesses who resided within a few hundred feet of that intersection testified that there was no time of the day during business hours that both of those streets were not occupied by automobiles and other vehicles. It appears that, as the defendant's car approached the intersection, he discovered the presence of the automobile in which the deceased was riding; that he saw a collision was imminent, and, in order to avoid it, he turned his automobile to the left so as to pass behind the one in which the deceased was riding. This was the proper course for him to pursue, and accorded in all respects with the rules of the road. It also appears that when the driver of the car in which the deceased was riding, which was proceeding at a rate of speed not exceeding 8 to 12 miles an hour, discovered the approach of the defendant's machine, he applied additional power in an attempt to get out of the way and avoid a collision. This was the proper course for him to pursue, and in all respects accorded with the rules of the road. Notwithstanding all of this, the speed of the defendant's car was so great that, although he discovered the presence of the other car when he was from 150 to 200 feet distant from it, he was unable to avoid the collision, and struck the Wallace automobile at about the right hind wheel with such tremendous force that it was lifted off from the pavement, thrown into the air several feet, and while it was going north when the collision occurred, when it again struck the pavement it was facing south. It was thrown from 20 to 25 feet in a northwesterly direction and landed against a telephone pole at the edge

of the curb, while the machine in which the defendant was riding, although it had a wheel broken by the impact of the collision, could not be stopped until it ran a distance of 152 feet, jumped over the curb which was from 10 inches to a foot in height, went across the sidewalk, and hung on the edge of a hole in a vacant lot on the left-hand side of the street. At least two of the witnesses who were looking directly at the cars when the collision occurred testified that the deceased, who was a man weighing over 200 pounds, was thrown into the air from 10 to 15 feet, and a distance of from 25 to 30 feet, and struck on his head on the pavement or curbstone, receiving such injuries that he almost instantly died.

It thus appears that the excessive, unlawful, negligent, and reckless rate of speed at which the defendant was driving his car as he approached the intersection of the boulevard and Leavenworth street was the sole cause of the collision which resulted in the death of William Krug. It was claimed by the defendant that Wallace, who drove the car in which the deceased was riding, was guilty of contributory negligence in applying his extra power; or, in other words, in attempting to speed up as some of the witnesses designated it at the time of the collision. There is no merit in this contention, for the evidence is clear that Wallace, recognizing the danger, attempted in a proper manner to avoid it, and, if he had not applied his extra power in order to move out of the way, the defendant's machine would have struck his automobile about the center, instead of striking it at or about the right hind wheel. At least two of the witnesses for the state, who lived in the immediate vicinity of the intersection in question, testified that they had observed the passing and running of automobiles upon both the boulevard and Leavenworth street for many years, and that in all that time they had never seen an automobile running as fast as the one which the defendant was driving at the time the collision occurred. It is true that the defendant and some of those who were riding in the car with him testified that they were driving at a rate of speed not exceeding 12 to 20 miles per hour. But this testimony must give way to the physical facts shown by the result of the collision. It is utterly inconsistent with such results. Each of the machines with its load weighed something like 5,000 pounds, and the speed at which the automobile driven by the defendant was going was so great, and the impact was so powerful, as to lift the automobile in which the deceased was riding bodily into the air and

hurl it a distance of from 20 to 25 feet; not only this, but to completely reverse its direction so that when it landed against the telephone pole it was facing south, while at the time of the collision it was moving and facing north. The testimony of the defendant and those riding with him serves but to illustrate the axiom of the law of evidence that officers and crews of respective vessels or vehicles where collisions have occurred will defend the vessels to which they are attached. It seems to be a curious psychological fact that when passengers are aboard of a vessel or other means of conveyance they appear to be controlled by the same bias. 2 Moore, Facts, § 1110.

6. Finally, it is contended that the court erred in excluding the evidence offered by the defendant to prove that McCormick, the friend of the deceased, who sat at his left side in the rear seat of the Wallace car, said within a minute or so after the collision: "I told the damn fool to look out." It is claimed that this was a part of the *res gestæ*, and was therefore admissible as tending to prove that the driver of the car in which Krug was riding was guilty of contributory negligence. What we have heretofore said in regard to that question is a sufficient answer to this assignment.

We are aware of the importance of our decision of this case, both to the defendant and to the public. The questions presented by the record are before us for the first time, and we have examined them with great care. We recognize the necessity, utility, and convenience of the automobile as a means of travel, and it is neither our purpose nor our desire to unnecessarily hamper or restrict its reasonable use. On the other hand, we deem it our duty to hold the persons who make use of such machines to that degree of care necessary for the protection of the lives of all persons who are rightfully upon the public highways and streets of our state. The statute regulating the use of such machines was passed solely for that purpose, and amounts to a valid exercise of the police power of the state. This view accords with the great weight of authority. In Berry, Law of Automobiles, § 159, it is said: "One may be criminally responsible for the negligent operation of an automobile. A person is guilty of criminal negligence when he does some act or omits some duty under circumstances showing an actual intent to injure, or when the breach of duty is so flagrant as to warrant an implication that the resulting injury was intended; that is, when his negligent conduct is incompatible with a proper regard for human life. Negligence is the gist of the offense, and, in the absence of recklessness or of want of 33 L.R.A.(N.S.)

due caution, there is no criminal liability. Actual intent is not an essential element of the offense. It is enough if there is shown a negligent and reckless indifference of the lives and safety of others." The evidence contained in the record conclusively establishes a case of negligent and reckless indifference to the lives and safety of others on the part of the defendant, sufficient to sustain his conviction and justify the judgment of which he complains.

We find no reversible error, and the judgment of the District Court is affirmed.

SOUTH CAROLINA SUPREME COURT.

C. H. PEAKE, Master for Union County,
Appt.,
v.

JOHN RENWICK et al., Resp'ts.

(86 S. C. 226, 68 S. E. 531.)

Mortgage — failure of suit to foreclose — restoration of parties.

1. Upon failure of a suit to foreclose a mortgage for unpaid purchase money upon a partition sale, because of failure of title to the property, the suit should not be dismissed, but the parties should be restored to their original condition.

Partition — sale — misrepresentation — relief.

2. In case of reliance by the purchaser at a sale for partition, upon an innocent misrepresentation that an improved parcel of land was included in the sale, he may be relieved from his contract where such representation was a principal inducement to the purchase and a *pro tanto* reduction of the purchase money would result inequitably to the other parties.

(July 4, 1910.)

Note. — Applicability of rule of caveat emptor to sales for partition.

Doctrine that rule of caveat emptor applies.

In many jurisdictions the rule prevails that on a sale of land in proceedings for partition, the court does not undertake to sell more than the title of the parties to the suit, and the doctrine of *caveat emptor* applies to such a sale, the purchaser taking at his own risk as to the title, in the absence of any express warranty or representation. Bassett v. Lockard, 60 Ill. 164; Hall v. Gabbert, 213 Ill. 208, 72 N. E. 806; Owsley v. Smith, 14 Mo. 153; Schwartz v. Dryden, 25 Mo. 572; Cashion v. Faina, 47 Mo. 133.

In Bassett v. Lockard, the court said that the general rule is that there is no warranty of title at a judicial sale, but the rule of *caveat emptor* applies, and the purchaser takes at his own risk as to title and that

APPEAL by plaintiff from a judgment of the Common Pleas Circuit Court for Union County dismissing an action brought to foreclose a certain real estate mortgage. Reversed.

The facts are stated in the opinion.

Messrs. Wallace & Barron, for appellant:

Failure to announce that the Dolly Ann Hawkins inclosure was not included in the lot to be sold was not a misrepresentation which misled, for the purchasers already knew the contrary.

Aultman v. Utsey, 34 S. C. 559, 13 S. E. 848.

As there was no value proved as to the part as to which defendants claimed the title had failed, the judge would have erred

in allowing any discount; and did err in not giving judgment for the full amount claimed by plaintiff.

Equity Comrs. v. Smith, 9 Rich. L. 521; Mitchell v. Pinckney, 13 S. C. 203; Latimer v. Wharton, 41 S. C. 511, 44 Am. St. Rep. 739, 19 S. E. 855.

Messrs. Townsend & Townsend, for respondents:

When an untrue statement is made in the honest belief of its truth, so that 'it is the result of an innocent error, and the truth is afterwards discovered by the person who has made the incorrect representation, if he then suffers the other party to continue in error, and to act on the belief that no mistake has been made, this, from the time of the discovery, becomes in

this doctrine equally applies to a sale for partition.

In Owsley v. Smith, 14 Mo. 153, the court said that the law does not intend that parties to a partition proceeding shall be responsible for the title, where the real estate partitioned is directed to be sold, the whole object of the statute being to enable parties who have an undivided interest in land to divide that interest whatever it may be, and when a sale is made, no warranty attends the sale, nor is any authorized.

Sales in partition suits stand on the same footing as execution sales,—the purchaser buys at his peril, and must beware of his title. He cannot be excused from completing the transaction on the ground of a defect in the title to the premises purchased. McNamee v. Cole, 134 Mo. App. 266, 114 S. W. 46.

The doctrine that the maxim *caveat emptor* applies to a sale in partition is not affected by the fact that the purchaser at such sale is a part owner of the property, such doctrine applying equally there as where the purchaser is a stranger. Stephens v. Ellis, 65 Mo. 456.

But where a partition sale is voidable because one of the parties thereto is an infant, it is proper after such infant arrives at his majority, to settle the validity of the sale in a proceeding against the purchaser upon a purchase price note given by him, and such matter should be settled before compelling him to pay the same. Fulbright v. Cannefox, 30 Mo. 425.

While the rule of *caveat emptor* applies in judicial sales, including sales for partition, and hence it cannot be said that in a partition sale there is any warranty of title which would make an adverse title subsequently acquired by the plaintiff in the partition inure to the benefit of the purchaser at such sale, nevertheless, such plaintiff is estopped from claiming that the partition sale is void as to the title to one half the property, when she accepted and appropriated the proceeds from the sale of that portion. Gruenewald v. Neu, 215 Ill. 132, 74 N. E. 101.
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A purchaser of real estate in proceedings for partition, to which the widow and children of the deceased owner are parties, cannot recover from such widow and children the amount he is required thereafter to pay to prevent the sale of the land for the decedent's debts. The case is not analogous to the right of the purchaser at execution sale of property to which the title is defective, to recover the amount paid by him from the judgment debtor, on the theory of money paid for his benefit. Weakley v. Conradt, 56 Ind. 430.

In some jurisdictions it is held that the doctrine of *caveat emptor* does not apply to sales in partition, (see *infra*, "Doctrine that purchaser need not complete purchase if title is defective"), while in other jurisdictions, although it is asserted that the doctrine of *caveat emptor* applies to partition sales, yet this general rule is subject to the qualification that while the proceeds of the sale are yet in court, if the purchaser is disturbed in his possession, or expects to be so disturbed, by one having a clear title to the estate, which title was entirely unknown to the purchaser at the time of the sale, he will be relieved from the purchase. This is the doctrine in Maryland. Scarlett v. Robinson, 112 Md. 202, 76 Atl. 181; Glenn v. Clapp, 11 Gill & J. 10.

And the court, will not hold the purchaser at a partition sale to his contract of purchase, and compel him to take the title, where it is apparent upon the face of the proceeding that he is liable to be thereafter disturbed by innocent parties to the proceeding, for defects in the proceeding manifest on their face. Earle v. Turton, 26 Md. 23.

So, a purchaser at a partition sale may intervene in the partition proceedings, and except to the ratification of the sale, upon the ground that some necessary parties were omitted in the proceeding, and that no clear or good title to the property can be conveyed. Handy v. Waxter, 75 Md. 517, 23 Atl. 1035.

In Holt v. Love, — Tex. Civ. App. —, 131 S. W. 857. the doctrine is asserted that the rule of *caveat emptor* applies to this

equity a fraudulent representation, even though it was not so originally.

2 Pom. Eq. Jur. 888, 891, 895; Eaton, Eq. Jur. 298, 299.

Where one has been in possession a long time without claim of title, and then acquires one, but without any change in the mode and character of his occupancy, such possession is not notice to a subsequent purchaser of any right acquired since the first entry, for the first entry determines the character and equity of the possession.

16 Am. & Eng. Enc. Law, p. 803.

There is no implied warranty at sales made by public officers.

Latimer v. Wharton, 41 S. C. 508, 44 Am. St. Rep. 739, 19 S. E. 855; Bolivar v. Zeigler, 9 S. C. 287; Equity Comrs. v. Smith,

9 Rich. L. 515; Barkley v. Barkley, Harp. L. (S. C.) 441; People's Bank v. Bramlett, 58 S. C. 478, 79 Am. St. Rep. 855, 36 S. E. 912.

Hydrick, J., delivered the opinion of the court:

This was an action to foreclose a mortgage given by defendants to plaintiff, as master, for the credit portion of the purchase price of a lot in the town of Union, sold under order of court for partition amongst the heirs of C. C. Culp. By mistake, the lot, as described in the complaint, in the advertisement for sale, and in the master's deed to defendants and their mortgage to him, included a lot which had been sold by Mr. Culp some years before his

class of judicial sales, as well as to those made under execution, and the purchaser must exercise a certain degree of diligence for his own protection, but he has a right to rely upon the record title. The court added, "He takes such title as he would acquire through a conveyance made by the defendant in execution, or the parties who claim the property and participate in the proceeds of the sale. It has been held that one who purchases at an execution sale can claim the protection of an innocent purchaser for value, and that such an one has a right superior to those claiming the property through an undisclosed trust."

We see no good reason why that rule should not be extended to judicial sales such as are here under consideration, as well as to execution sales." But while the rule of *caveat emptor* in some sense applies to this character of sales, it is not applied as rigidly as it is to sales under execution and other sales *in invitum*.

And a court of equity, when its action is invoked to effect a sale for partition, will endeavor to see that a purchaser under its process gets a good title, and on application by the purchaser before completion of the purchase, he may be relieved from his bid if he shows that the title purchased by him is worthless. He cannot, however, be relieved from his purchase on the ground of an outstanding paramount adverse title, where he does not seek to rescind until some time after having completed the purchase. Buetell v. Courand, 9 Tex. Civ. App. 564, 29 S. W. 1146.

—effect of fraud or misrepresentation as to title.

Where there is fraud or misrepresentation in a sale in partition, or where the purchaser has been led into mistake as to the title by the conduct of the seller, the court has ample authority at all events previous to a confirmation of the report, to set aside the sale. Schwartz v. Dryden, 25 Mo. 572.

While in Owsley v. Smith, 14 Mo. 153, the rule of *caveat emptor* was held applicable to sales in partition, it was said: 33 L.R.A. (N.S.)

"Undoubtedly the courts will not permit a fraud to be committed. If the parties whose interests are ordered to be sold are guilty of any fraudulent concealment or misrepresentation, or choose voluntarily to guarantee the title, the purchaser at the sale would occupy a different position from the present complainants."

But false representations or fraud by one of several joint owners of land does not affect the validity of the sale in partition proceedings, and such false representation cannot be relied upon by a purchaser in an action to recover the amount of his bid. Matlock v. Bigbee, 34 Mo. 354.

If trustees for the sale of land in partition represent to the purchaser that he is to get a clear, fee simple title to the land sold, he will be entitled to have the property free from the liens of mortgages by having the same deducted from the purchase money, or be released from the purchase. Brillhart v. Mish, 99 Md. 447, 58 Atl. 28.

Doctrine that purchaser need not complete purchase if title is defective.

In New York, the rule of *caveat emptor* does not apply to purchasers at judicial sales generally, neither does it apply to purchasers at partition sales. The purchaser at such sale has the right to demand a marketable title, free from reasonable doubt as to its validity. He bids on the assumption that there are no undisclosed defects in the title, and the seller receives a consideration regulated in view of this implied condition. Hence a purchaser cannot be required to complete his purchase unless a title free from reasonable doubt is tendered him. Crouter v. Crouter, 133 N. Y. 55, 30 N. E. 726; Cambrelleng v. Purton, 125 N. Y. 610, 26 N. E. 907; Miller v. Wright, 109 N. Y. 194, 16 N. E. 205; Rice v. Barrett, 102 N. Y. 161, 6 N. E. 898; Fleming v. Burnham, 100 N. Y. 1, 2 N. E. 905; People v. Open Board S. B. Bldg. Co. 92 N. Y. 98; Jordan v. Poillon, 77 N. Y. 518; Parish v. Parish, 77 App. Div. 287, 78 N. Y. Supp. 1089, reversed in 175 N. Y. 181, 67 N. E. 298, on the ground that the title was good;

death to Dolly Ann Hawkins, upon which there were valuable improvements, including a dwelling house, well, orchard, and vineyard. The defendants knew that Dolly Ann Hawkins was, at the time of the sale, and for many years prior thereto had been, in possession of a part of the lot covered by the description, but allege that they believed, nevertheless, that they were buying all the land included within the boundaries given, and, before complying with their bid, they called the attention of the master to the fact that she was in possession of a part of the lot, and were assured by him that they would get all the land covered by the description, and that, relying upon his assurance, they completed the purchase by paying the cash portion of their bid and executing the bond and mortgage. Having failed to get possession of the Hawkins lot, they refused to pay the bond given for the balance of the purchase price, and to the complaint herein they

pleaded failure of consideration. The circuit judge found that, on account of the mistake in the description, the master thought he was selling, and the defendants thought they were buying, the Hawkins lot, together with the adjacent vacant lot, which alone was intended to be sold; that the minds of the parties did not meet, and therefore no contract was made, and he dismissed the complaint. It was error to dismiss the complaint. The decree should at least have restored the parties to their original condition.

The rule of *caveat emptor* does not apply to judicial sales of property for partition. The officer making such sales is the agent of the parties to the action, and his representations are binding upon them. *Tunno v. Fludd*, 1 M'Cord L. 121; *People's Bank v. Bramlett*, 58 S. C. 477, 79 Am. St. Rep. 855, 36 S. E. 912.

While the court will not lend too ready ears to defenses by which parties seek to

Bowler v. Ennis, 46 App. Div. 309, 61 N. Y. Supp. 686; *O'Toole v. O'Toole*, 39 App. Div. 302, 56 N. Y. Supp. 963; *Recor v. Blackburn*, 71 Hun, 54, 24 N. Y. Supp. 692; *Kopp v. Kopp*, 48 Hun, 532, 1 N. Y. Supp. 261; *Re Cavanagh*, 14 Abb. Pr. 258; *McGowan v. Wilkins*, 1 Paige, 120.

The rule is thus stated in *Jordan v. Poillon*, 77 N. Y. 518, "A purchaser on a partition or foreclosure sale has a right to expect that he will acquire a good title; the law presumes that he bids with that object in view. He should not be left upon receiving a deed, to the uncertainty of a doubtful title, or the hazard of a contest with other parties, which may seriously affect the value of the property if he desires to sell the same. It is easy to see how a claim of this kind might impair the value of the real estate sold by casting a cloud over the title, or by subjecting the purchaser to the risks of a contest at law. From such a result he is entitled to protection, and the case should be very plain which would authorize a court to decide a question arising on motion to compel a party to take a conveyance, and then it should be determined only with the consent of such purchaser."

In *McGowan v. Wilkins*, 1 Paige, 120, the court said that for the purpose of obtaining a fair price for the premises on such sales, it is important that the purchaser shall know that, if he pays a fair price for the property and it is sold without reserve, he will be protected by the court, and will not be compelled to accept an encumbered or worthless title.

If the partition proceedings are of doubtful validity, the purchaser cannot be compelled to complete his purchase. *Re Cavanagh*, 14 Abb. Pr. 258.

Neither is a purchaser bound to complete the sale, unless he can be put into possession

under the decree of sale. *Kopp v. Kopp*, 48 Hun, 532, 1 N. Y. Supp. 261.

While a purchaser will not be required to take a doubtful title, yet, if the alleged defect depends upon a very remote or improbable contingency, it will not be sufficient to excuse him from completing his purchase. *Cambrelleng v. Purton*, 125 N. Y. 610, 26 N. E. 907.

In *Smith v. Brittain*, 38 N. C. (3 Ired. Eq.) 347, 42 Am. Dec. 175, it is asserted that a partition sale is but a mode of sale by the parties themselves, that it is not merely a sale by the law *in invitum* of such interest as the party has or may have, in which the rule is *caveat emptor*, but it professes to be the sale of a particular estate, stated in the pleadings to be vested in the party and to be disposed of for the purpose of partition only. Therefore, if there be no such title, the purchaser has the same equity against being compelled to go on with his purchase as if the contract had been made without the intervention of the court, for, in truth, the title has never been judicially passed on between persons contesting it. Hence, if a purchaser pays his money on such a sale, and discovers a defect in the title at any time before a conveyance is executed, he may recover it back.

In South Carolina, it is held that the rule of *caveat emptor* does not apply to partition sales, and the purchaser at such a sale cannot be compelled to comply with his bid, unless a reasonably clear and marketable title is tendered him. *McMichael v. McMichael*, 51 S. C. 555, 29 S. E. 403; *Fuller v. Missroon*, 35 S. C. 314, 14 S. E. 714; *Bolivar v. Zeigler*, 9 S. C. 287.

In the latter case, in considering the reason for this rule, the court said: "Whatever doubts may have once been entertained as to whether the doctrine of *caveat emptor*

get rid of the obligation of contracts solemnly entered into, especially as in cases like this, the court will afford reasonable opportunity for investigation of the titles to property sold under its order, and will even order a reference to ascertain whether they be good; still, where it appears that a purchaser at such sale has been imposed upon by fraud or misrepresentation, even when the misrepresentation was innocently made, as it was in this case, and where it further appears that he relied not upon his own investigation and judgment, but upon such misrepresentation, and that it was a principal inducement to the purchase, he is entitled, in an action brought against him for the purchase money, to relief, which may, according to the circumstances, consist either in a *pro tanto* abatement of the purchase price, or in a total rescission of the contract. Means v. Brickell, 2 Hill, L. 657, and Latimer v. Wharton, 41 S. C. 508,

applied to sales made by the commissioner in equity, those doubts were finally settled by the principles established in the case of Equity. Comrs. v. Smith, 9 Rich. L. 515, and there can be now no doubt that this maxim does not apply to such sales, and, therefore, that the defense here set up, if established on the trial, will be a sufficient defense to the action. For, although the sale in this case was made by the sheriff, yet it was not a compulsory sale under process of execution, where the rule of *caveat emptor* does apply, but a sale for partition at the instance of the parties, and must be governed by the same principles as applied to such sales when made by the commissioner in equity."

A purchaser may defend a bond given to a sheriff at such a sale, on the ground that the parties to the action for partition had no title. Bolivar v. Zeigler, 9 S. C. 287.

But there being no implied warranty in a sale of land in partition proceedings, the purchaser at such a sale, from whom the land is recovered by a title paramount before the purchase money has been paid over by the ordinary conducting the sale, to the parties thereto, is not entitled to recover the same from the ordinary. Evans v. Dendy, 2 Speers, L. (S. C.) 9, 42 Am. Dec. 356.

At such a sale there is no implied warranty as to the quantity of land sold, and no deduction will be allowed for a deficiency unless it amounts to a failure of consideration, or defeats the great object of the purchaser, or is sufficient as evidence of a total mistake in the character of the land. Equity Comrs. v. Thompson, 4 M'Cord, L. 434.

A purchaser at a judicial sale who, before paying the price or entering into possession of the property purchased, discovered an

44 Am. St. Rep. 739, 19 S. E. 855, and the cases cited therein.

In this case, as the Hawkins lot is improved, and the lot which was intended to be sold is not improved, a *pro tanto* reduction of the purchase price would probably result inequitably to the heirs of Mr. Culp, who, according to the testimony, thought that only the vacant lot was being sold, and made it bring a price with which they were satisfied. Therefore, the sale should be wholly rescinded, and the original status of the parties restored, unless the defendants are now willing to confirm the purchase and pay the bond and mortgage sued on, and take that portion of the lot covered by the description of their deed, exclusive of the Hawkins lot.

Judgment reversed.

Mr. Justice Woods did not sit in this case.

illegality in the proceedings which led up to the sale, calculated to throw a cloud upon his title, may refuse to execute the purchase. Gassen v. Palfrey, 9 La. Ann. 560.

Ordinarily a purchaser at a judicial sale need not look beyond the order of the sale. This rule, however, applies only where the court has jurisdiction of the subject-matter and exercises powers vested in it by law. Hence, where a probate court cannot validly exercise its powers in connection with the disposal of the property of a minor, by one having no authority to represent the minor and receive the price in case of a sale, the purchaser at the sale is bound, at his risk and peril, to look behind the order of sale to ascertain whether the power exercised is one which could have been legally exercised. James v. Meyer, 41 La. Ann. 1100, 7 So. 618.

Where real estate at the time of its sale on partition proceedings was encumbered by two judgments which were of record, and would have been known to the purchaser before the sale but for his carelessness, and he apparently purchased the property subject to the judgments, he cannot thereafter restrain the enforcement of the judgments out of the property, or have the same paid from the money derived from the sale in the partition proceedings. Wood v. Winings, 58 Ind. 322.

But where a conveyance by commissioners of real estate, made by virtue of an order of the court in a suit for partition, passes no title to the purchaser because the land at the time of the sale was in the adverse possession of a third person, a note under seal given by such purchaser for the purchase price may be defended by him on the ground that it is not supported by valid consideration. Martin v. Pace, 6 Blackf. 99.

A. G. S.

KANSAS SUPREME COURT.

MARY J. LOSEY, Appt.,

v.

ATCHISON, TOPEKA, & SANTA FE
RAILWAY COMPANY.

(— Kan. —, 114 Pac. 198.)

Carrier — duty to shipper in yard.

1. Evidence that, at a railroad station where cattle in shipment were frequently detained at night, it was customary for persons accompanying live stock in transit to walk back and forth over the yards between their cars and the depot, is sufficient to justify a finding that the company owed a duty to such persons so engaged to give a warning of the approach of a train.

Same — contributory negligence — walking near tracks.

2. One who is accompanying live stock in shipment, and has occasion to walk at night between his train and a depot, cannot be said, as a matter of law, to be guilty of negligence if, in attempting to walk in the safe space between two tracks, he inadvertently gets close enough to one of them so that he is struck by an approaching train.

Same — failure of shipper to carry light — effect — proximate cause.

3. Where under such circumstances a shipper is killed by being struck, while walking near a track, by a freight train running backward without a sufficient watch being maintained at the rear, and without a whistle or bell being sounded, the fact that he was not carrying a lantern, although his shipping contract required him to do so, does not, as a matter of law, bar a recovery of damages on account of his death, since it does not conclusively prove that if he had carried a lantern he would have escaped injury.

Evidence — form of expression — effect.

4. The ordinary presumption is that a witness who uses the expression "I think" means that his observation was indistinct, or his recollection uncertain, regarding the matter testified to, rather than that he is without personal information on the subject.

(Burch and Porter, JJ., dissent.)

(March 11, 1911.)

APPEAL by plaintiff from a judgment of the District Court for Clay County sustaining a demurrer to her evidence in

Headnotes by MASON, J.

Note. — As to duty of carrier to care taker accompanying shipment of live stock, see note to *Otto v. Chicago, B. & Q. R. Co.* 31 L.R.A.(N.S.) 632.

As to liability of carrier of live stock to owner's care taker for condition of stock 33 L.R.A.(N.S.)

an action brought to recover damages for the death of her husband alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Messrs. F. B. Dawes, R. C. Miller, and C. P. Rutherford, for appellant:

Plaintiff's husband and the men with him, having a right to be where they were, and sustaining a contractual relation with the company, being bound to attend to the stock, had a right to rely upon the company doing its duty by sounding a warning before running its trains through the yards where they were liable to be.

Stanley v. Durham & N. R. Co. 120 N. C. 514, 27 S. E. 27; *Schierhold v. North Beach & M. R. Co.* 40 Cal. 447; *Franklin v. Southern California Motor Road Co.* 85 Cal. 63, 24 Pac. 723; *Hurdle v. Missouri P. R. Co.* 73 Kan. 769, 85 Pac. 287; *Laverenz v. Chicago, R. I. & P. R. Co.* 56 Iowa, 689, 10 N. W. 268; *Pitcher v. Lake Shore & M. S. R. Co.* 40 N. Y. S. R. 896, 16 N. Y. Supp. 62; *Walger v. Jersey City, H. & P. Street R. Co.* 71 N. J. L. 356, 59 Atl. 14; *Purnell v. Raleigh & G. R. Co.* 122 N. C. 832, 29 S. E. 953; *Smith v. Atlanta & C. Air Line R. Co.* 132 N. C. 819, 44 S. E. 663; *Lassiter v. Raleigh & G. R. Co.* 133 N. C. 244, 45 S. E. 570; *Sherill v. Southern R. Co.* 140 N. C. 252, 52 S. E. 940; *Ray v. Aberdeen & R. E. R. Co.* 141 N. C. 84, 53 S. E. 622; *Chicago, B. & Q. R. Co. v. Troyer*, 70 Neb. 287, 97 N. W. 308, 103 N. W. 680; *Chicago, St. P. M. & O. R. Co. v. Lagerkrans*, 65 Neb. 566, 91 N. W. 358, 95 N. W. 2; *Spotts v. Wabash Western R. Co.* 111 Mo. 380, 33 Am. St. Rep. 531, 20 S. W. 190; *Hardin v. Ft. Worth & D. C. R. Co.* 33 Tex. Civ. App. 448, 77 S. W. 431.

Failure to carry a lantern was not the proximate cause of the injury, nor did such failure contribute to the injury in any way.

Tennessee Coal, Iron & R. Co. v. Bridges, 144 Ala. 229, 113 Am. St. Rep. 35, 39 So. 902; *Atchison, T. & S. F. R. Co. v. Morgan*, 31 Kan. 77, 1 Pac. 298; *Chicago, R. I. & P. R. Co. v. Ferguson*, 74 Kan. 253, 86 Pac. 471.

The negligence of the defendant in keeping a lookout, and especially in backing its train through the yards where it was bound to know that stockmen were liable to be, without sounding a whistle or ringing a bell, was the sole proximate cause of the injury.

pens, see *Atchison, T. & S. F. R. Co. v. Allen*, 10 L.R.A.(N.S.) 576 and note.

As to right of drover or stockman who uses car after destination is reached, see *Chicago, R. I. & P. R. Co. v. Thurlow*, 30 L.R.A.(N.S.) 571 and note.

Omaha & R. Valley R. Co. v. Cholette, 41 Neb. 578, 59 N. W. 941; Hardin v. Ft. Worth & D. C. R. Co. — Tex. Civ. App. —, 100 S. W. 995; San Antonio & A. P. R. Co. v. Connell, 27 Tex. Civ. App. 533, 66 S. W. 246.

Plaintiff's husband could enter into no contract that would deprive her of the right to bring this action for the benefit of herself and children.

Chicago, R. I. & P. R. Co. v. Martin, 59 Kan. 448, 53 Pac. 461; Missouri P. R. Co. v. Ivy, 71 Tex. 409, 1 L.R.A. 500, 10 Am. St. Rep. 758, 9 S. W. 346; Illinois C. R. Co. v. O'Keefe, 61 Am. St. Rep. 89, note; Missouri P. R. Co. v. Tietken, 49 Neb. 130, 59 Am. St. Rep. 526, 68 N. W. 336; Solan v. Chicago, M. & St. P. R. Co. 95 Iowa, 260, 28 L.R.A. 718, 58 Am. St. Rep. 430, 63 N. W. 692; Davis v. Chicago, M. & St. P. R. Co. 93 Wis. 470, 33 L.R.A. 654, 57 Am. St. Rep. 935, 67 N. W. 16, 1132; Sewell v. Atchison, T. & S. F. R. Co. 78 Kan. 16, 96 Pac. 1007.

Messrs. W. R. Smith, O. J. Wood, and Alfred A. Scott, for appellees:

Regardless of the legal relation which existed between the company and plaintiff's decedent, the latter was guilty of negligence *per se*, which bars a recovery.

Atchison, T. & S. F. R. Co. v. McElroy, 76 Kan. 271, 13 L.R.A.(N.S.) 620, 123 Am. St. Rep. 134, 91 Pac. 785; Coon v. Atchison, T. & S. F. R. Co. 82 Kan. 311, 27 L.R.A.(N.S.) 1013, 108 Pac. 85; Sutton v. New York, C. & H. R. R. Co. 66 N. Y. 243; Ackley v. West Jersey & S. R. Co. 76 N. J. L. 741, 71 Atl. 273; Suits v. Chicago, B. & Q. R. Co. 83 Neb. 272, 119 N. W. 463; Mizell v. Southern R. Co. 132 Ala. 504, 31 So. 86; Birmingham Southern R. Co. v. Kendrick, 155 Ala. 352, 46 So. 588; Hyde v. Missouri P. R. Co. 110 Mo. 272, 19 S. W. 483; Missouri P. R. Co. v. Jaffi, 67 Kan. 81, 72 Pac. 539; Union P. R. Co. v. Young, 57 Kan. 171, 45 Pac. 580; Mohrbacher v. Atchison, T. & S. F. R. Co. 65 Kan. 860, 70 Pac. 1133; Zirkle v. Missouri P. R. Co. 67 Kan. 77, 72 Pac. 539; Byrnes v. New York, N. H. & H. R. Co. 195 Mass. 437, 81 N. E. 187; Garlich v. Northern P. R. Co. 67 C. C. A. 237, 131 Fed. 837; Kansas City, Ft. S. & M. R. Co. v. Cook, 28 L.R.A. 181, 13 C. C. A. 364, 31 U. S. App. 277, 66 Fed. 115; Atchison, T. & S. F. R. Co. v. Withers, 69 Kan. 620, 77 Pac. 542; Coy v. Missouri P. R. Co. 74 Kan. 853, 86 Pac. 468; Pennsylvania Co. v. Meyers, 136 Ind. 242, 36 N. E. 32; King v. Illinois C. R. Co. 52 C. C. A. 489, 114 Fed. 855.

Mason, J., delivered the opinion of the court:

Mary J. Losey sued the Atchison, To-

peka, & Santa Fé Railway Company, alleging the death of her husband to have been caused by its negligence. A demurrer to her evidence was sustained, and she appeals.

There was evidence tending to show these facts: The deceased, Robert M. Losey, was accompanying a shipment of live stock and household goods. The train arrived at Strong City about 10 o'clock at night, and was placed on a siding; his car being about a block and a half east of the depot. Losey, with two other shippers, G. F. McClean and James H. Russell, went to the depot to learn when their train would leave, and were informed that it would not go out before morning. After eating at a restaurant they returned to the train to look after the stock and lock the cars for the night. They then started back to the depot to spend the night; the weather being cold. They walked west between the track on which their train stood and a track lying between four and five feet north of it; one witness said it was about four feet from the south rail of the north track to the cars on the other track. They all walked between the tracks, nearly abreast, Losey on the right, McClean on the left, and Russell a little behind them. When they were about halfway to the depot, the rear car (a coal car—that is, a flat car with a coal bin on top of it) of a part of a freight train backing west over the north track, at the rate of about five miles an hour, struck Losey, throwing him under the wheels and causing his death. His companions were listening, but heard no bell or whistle. They looked up the track before starting, but saw no train. None of the three carried a light of any kind. There was no person on the rear end of the rear car, but a brakeman with a lantern was on the other end of it, or on the nearer end of the car next to it. A string of freight cars stood on a track north of that on which the accident occurred. These cars, with those of the train to the south, increased the darkness by cutting off a part of the light from the street lamps. There was still enough light, however, so that a man could have been seen at a distance of two car lengths. It was usual for shippers of live stock, while waiting at Strong City at night, to walk back and forth between their cars and the depot over the railroad yards, as Losey did. After McClean had described the manner in which he and the two others walked between the tracks, this question was asked on cross-examination: "Mr. Losey, then, must have been walking on the ends of the ties of the track upon which the train was approaching, was he

not?" He answered, "I rather think he was." Russell also testified that he believed Losey was walking on the ends of the ties. Russell himself was walking south of the ends of the ties, and was struck on the right shoulder by a coal car. It was not shown whether or not the ground between the tracks was surfaced up level with the ties.

It may fairly be inferred that it was sufficiently common for shippers of live stock to be walking at night near where the deceased was killed, so that the presence of some one there was reasonably to have been expected. Therefore there was room for a finding that the trainmen owed a duty to Losey to give warning of the approach of the train; for the evidence tends to show that he was not a trespasser, nor a mere licensee; that he was engaged in a legitimate errand incident to the proper care of his car, and was subject to the rule applicable to a shipper in charge of stock on a freight train. *Coon v. Atchison, T. & S. F. R. Co.* 82 Kan. 311, 27 L.R.A.(N.S.) 1013, 108 Pac. 85. The fact that McClean and Russell heard no bell or whistle, although they were listening, justifies an inference that none was sounded, unless the train was so long that the sound would not carry the distance. In that case there was warrant for holding the railroad company to the requirement of maintaining an efficient watch at the rear. Although the brakeman on the train may have been in a position to see the three men, the fact that he gave them no warning would support a finding that he was not keeping a sharp lookout, since there was evidence that a man could be seen at a distance of two car lengths. The alternative would be that he did see them, but remained silent—a less favorable supposition for the defendant. Upon these grounds we conclude that upon the issue of whether the company was negligent there was sufficient evidence to go to the jury.

A more difficult question is whether the deceased was himself, as a matter of law, guilty of such negligence as prevents a recovery. He was not in the situation of an ordinary passenger; that is, he was not absolved from all duty to watch for approaching trains. He was required to exercise care in that regard for his own protection, adapted to the circumstances. *Ibid.* If when struck he had been walking upon the track between the rails, while he might with equal convenience have walked in safety between the tracks, no recovery could be had, because it would then be clear that he had voluntarily and unnecessarily chosen an unsafe place in lieu

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of a safe one. *Atchison, T. & S. F. R. Co. v. Schwindt*, 67 Kan. 3, 72 Pac. 573; 33 Cyc. Law & Proc. p. 826. If he had been walking upon the ends of the ties as a matter of deliberate choice, the situation would have been substantially the same, since he must have known that the danger there was as great as between the rails. Or if he occupied that position unconsciously, but by reason of a failure to use ordinary care to avoid it, his negligence would bar a recovery. But if he attempted to walk in the safe space between the two tracks, and while using reasonable diligence to that end inadvertently came within the overhang of the cars, and so met his death, he was not guilty of contributory negligence. We think the evidence is not necessarily inconsistent with the last hypothesis, and therefore that he cannot be said to have been negligent as a matter of law. He was, of course, in fact quite close to the track on which the train was approaching; but he may have supposed that he was near the middle of the space between the two tracks. In the yards, within so short a distance from the depot, it is not unreasonable to suppose the ballast between the tracks was surfaced even with the ties; the contrary not being shown, and the burden of proving contributory negligence being on the defendant. The presence of the freight train on the track to Losey's left may have made it easier for him to misjudge his position, or caused him involuntarily to incline to the other side, bringing him within reach of the cars on the right-hand track without his realizing it. Such an error under the circumstances cannot be said conclusively to show a want of ordinary care. It cannot be said with certainty that the exercise of reasonable diligence would enable one so situated to keep within the narrow zone of safety. Of a somewhat similar situation, it was said in *Chicago, B. & Q. R. Co. v. Troyer*, 70 Neb. 293, 303, 304, 103 N. W. 680, 683, 684: "It is . . . argued . . . that in stepping to one side of the center of the path between the tracks where he was walking, so as to come in the path of the projecting portions of the engine, his act was equivalent to stepping between the rails of the track with knowledge, which he is shown to have possessed, that this track was being used by passing engines and cars, used in and about the business of the company in its freight yard where the injury occurred. . . . A person in walking between the two tracks . . . would at times, in all probability and perhaps unconsciously, swerve his body from the true center line, so as to come within the path of the overhanging parts

of a car or engine moving on the adjacent track. Under such circumstances we cannot believe that negligence ought, as a matter of law, to be imputed to one who, while thus traveling, permitted himself to depart from the straight and narrow path in so slight a degree and, because of which, came in collision with a moving object on the track, the coming of which he was wholly unconscious of."

The language quoted is obviously in point, although the decision in support of which it is used might perhaps be distinguished from the present one upon various grounds. With this possible exception none of the many cases cited in the plaintiff's brief quite reaches the precise point here involved. A number of them relate to the duty of looking and listening before crossing a track, or while necessarily or excusably upon a track. There is abundant authority for the proposition that if one is rightfully upon a track the question of how often he must look for an approaching train, in order to show due diligence, is one for the determination of the jury. But the contention of the defendant is that Losey was negligent in unnecessarily placing himself in a position of peril. In the cases most nearly resembling the present one, the following differences may be noted. In two the public were accustomed to use the railroad track as a pathway, and it does not appear that there was a safe place by the side of the track. *Stanley v. Durham & N. R. Co.* 120 N. C. 514, 27 S. E. 27; *Bourassa v. Grand Trunk R. Co.* 75 N. H. 359, 74 Atl. 590. In two a person walking between two tracks got upon one of them in avoiding an engine which approached him on the other, occasioning some fright and confusion on his part. *Laverenz v. Chicago, R. I. & P. R. Co.* 56 Iowa, 689, 10 N. W. 268; *Ray v. Aberdeen & R. E. R. Co.* 141 N. C. 84, 53 S. E. 622. In another the space between the tracks, although as a matter of fact reasonably safe, was "not wholly free from obstructions more or less formidable to those walking after night." *Chicago, St. P. M. & O. R. Co. v. Lagerkrans*, 65 Neb. 566, 91 N. W. 358, 95 N. W. 2.

A shipping contract had been issued to and signed by Losey, which included an agreement as to his conduct thus expressed: "We, the undersigned, owners or in charge of the live stock . . . mentioned in the within contract . . . agree that . . . (we) will not walk or stand on any track or station or other places at night or in the dark without a lantern, and will not be upon or attempt to cross any track while switching is being or is about to be done thereon, or cars

moved thereon, but will first use every effort to ascertain whether it is safe to go upon or across said track or tracks." Except for a reference to a lantern, this language does not materially alter the situation, since with this exception the obligation assumed is substantially what the law would impose in any event, being implied in the requirement that the shipper should use reasonable diligence for his own protection. Moreover, as already stated, the evidence does not conclusively establish that Losey's getting upon the track, or too near the track, was either intentional or negligent.

The failure to comply with the requirement regarding a lantern is not a bar to a recovery, unless the evidence conclusively establishes that if the deceased had carried a lantern he would have escaped injury. The mere possibility or probability that such would have been the case is not enough. Such an omission, in order to constitute contributory negligence, must have been the proximate cause of the injury (29 Cyc. Law & Proc. pp. 526-528); that is, one without which the injury would not have occurred. 32 Cyc. Law & Proc. p. 745, note 77; 7 Am. & Eng. Enc. Law, p. 371. A lantern might have helped him to judge of his own true position with regard to the track, but would not necessarily have prevented a mistake; nor can the court say with certainty that it would have been of material aid in this respect, in view of the manner in which a light sometimes interferes with the vision of one who carries it. If it were established that the brakeman on the train had been keeping a lookout along the track, it might be said that he certainly must have seen the lantern, although he might not have been able to see the men without it. But there is no conclusive evidence that the brakeman was in fact watching the track, or, indeed, any evidence whatever to that effect. Therefore it is not proved that the absence of the lantern caused the injury.

The court sustained objections to several answers given by witnesses, and a review of these rulings is sought. McClean, having testified that he had looked up the track before starting for the depot, was asked whether Russell and Losey had done the same. He answered, "I think they did," and the answer was stricken out. If a witness employs such an expression as "I think" or "I believe," meaning that his uncertainty results, either from lack of close observation of the fact originally or from want of clear recollection regarding it, his testimony is admissible, and the qualification goes to its weight; but if he means that he did not observe the fact at

all, and so has no personal information regarding it, and has acquired his opinion from other sources, his testimony is incompetent. 1 Wigmore, Ev. §§ 658, 726, 727, 728, and cases cited, and also additional cases in volume 5, § 728. Ordinarily there may be something in the manner of the witness that helps to show what he really intends, but here this aid was not available, for the evidence was by deposition. Usually further questions develop the source of his belief; but here the subject was not pursued, either in direct or cross-examination. That a witness uses the expression "I think" does not of itself indicate an entire want of personal knowledge on the subject, and in the present instance there is nothing in the circumstances to suggest that such meaning was intended. The witness had an opportunity to observe the conduct of his associates, and, when he says that he thinks they looked up the track, he must be deemed to be speaking from his observation and recollection, rather than from his judgment of what they would have been likely to do.

In answer to the question whether Losey and McClean looked up and down the track at the same time he did, Russell answered, "I couldn't say as to that, but I rather think they did." This is not essentially different from the reply given by McClean. We think the natural presumption is that the witness meant that he could not speak with certainty, but thought he had observed such conduct on their part.

McClean was also asked whether there was a brakeman or other person on the rear end of the car that struck Losey. He answered, "I don't think there was; I think he was likely in the second car." This, as well as another similar answer, was stricken out. The witness testified in substance that at the time of the accident he did not know what had happened until he had assisted Russell, who had been hit; that he then looked up and saw the cars going by; that about opposite him he saw a man with a lantern on the rear of the first car or the front end of the second, who came down from the car and proved to be a brakeman; that a few minutes later several other persons came. This shows enough actual observation to give a basis for the testimony.

The judgment is reversed, and the cause remanded for further proceedings in accordance herewith.

Johnston, Ch. J., and Smith, Benson, and West, JJ., concurring.

Burch, J., dissenting:

In order that the appellee may discharge
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its public duties as a common carrier, it is entitled to the exclusive possession of its switch yards and tracks, and it owes no duty to be cautious toward one who enters upon such property without right. "A railway company has exclusive right to occupy, use, and enjoy its railway tracks, trestlework, and bridges, and such exclusive right is absolutely necessary to enable it to properly perform its duties; and any person walking upon a track or bridge, or any part of the same, of a railway track [company] without the consent of the company is held in law to be there wrongfully, and therefore to be a trespasser; and in case of an injury happening to such person while so trespassing upon it, from the movement or operation of the cars of the company over it, he is without remedy, unless it be proved by affirmative evidence that the injuries resulted from negligence so gross as to amount to wantonness." *Mason v. Missouri P. R. Co.* 27 Kan. 83, 84, 41 Am. Rep. 405 (syllabus).

The need of shippers to walk through the yards at Strong City and the danger attending such conduct had been considered by the appellee. If such persons were allowed to roam at will about the yards, along and across the tracks and among moving trains of cars, the appellee would be obliged to put into effect a special set of regulations for the handling of its business and the protection of stockmen at that point. So the appellee chose to withhold liberty to use its grounds, except upon certain definite and specific conditions. By mutual agreement with Losey it was provided that he would not walk upon any track or other place at night, or in the dark, without a lantern (evidently to guide his own footsteps and to disclose his whereabouts to train men), would not be on any track while switching was being done, and would use every effort to ascertain whether it was safe to go upon or across the tracks. The matter was a fair subject of contract, and the conditions imposed were reasonable and beneficial to both parties. Two of these provisions were positive conditions, and the third superseded the common measure of prudence with the requirement that Losey should use the utmost effort to avoid danger. This contract was the source and measure of Losey's right. It gave him the privilege which he did not otherwise possess, and unless he complied with its terms he could not justify his presence at the place where he was injured. The appellee's duty was measured by the same contract, and Losey could not at will substitute in his own favor another right and another duty by a deliberate disregard of his contract. He was obliged to regulate his con-

duct by his contract. *Leslie v. Atchison*, T. & S. F. R. Co. 82 Kan. 152, 27 L.R.A. (N.S.) 646, 107 Pac. 765.

Whatever the appellee's relation to other shippers may have been, its liability in this case can be founded only upon a breach of the duty which it owed to *Losey*. *United States Exp. Co. v. Everest*, 72 Kan. 517, 522, 83 Pac. 817; *Carey v. Chicago*, R. I. & P. R. Co. — Kan. —, — L.R.A. (N.S.) —, 114 Pac. 197. The fact that other shippers of live stock were accustomed to walk through the yards means nothing. Probably it occasioned the contract with *Losey*. There is nothing to show that the other shippers referred to were under contract not to do as they did, and in any event *Losey's* contract cannot be avoided by proof of a custom. *Ft. Scott, W. & W. R. Co. v. Sparks*, 55 Kan. 288, 297, 39 Pac. 1032.

No monitor was needed to tell *Losey* that walking at night, without a light, down a railroad track in crowded yards where switching was going on, was dangerous. If so, the track and the surroundings were sufficient, and his contract was sufficient.

The result is that the appellee owed no duty to *Losey*, except not to injure him wantonly when he went about the yards at night without a lantern, and when he went upon the track while switching was being done; and, having voluntarily placed himself in a position of danger in violation of the terms of his contract, an action for damages resulting from his injury cannot successfully be maintained. *Ft. Scott, W. & W. R. Co. v. Sparks*, 55 Kan. 288, and cases cited at page 295.

I am authorized to say that Mr. Justice Porter also dissents.

Petition for rehearing denied.

WEST VIRGINIA SUPREME COURT OF APPEALS.

STATE OF WEST VIRGINIA

v.

J. H. NICHOLS, Plff. in Err.

(67 W. Va. 659, 69 S. E. 304.)

Intoxicating liquor — unlawful sale by agent — liability.

1. An unlawful sale of intoxicating liquors made by the agent or bartender of a licensed saloon keeper, at his place of business, is a sale by both, and the saloon keeper, as well as his agent, is liable.

Same — effect of instructions.

2. In such case the saloon keeper cannot

escape liability on the ground that his agent made the unlawful sale without his knowledge and in violation of his express instructions. The unlawful sale constitutes the offense, and the seller's motive is immaterial.

Same — sale to minor.

3. If a licensed saloon keeper or his agent deliver intoxicating liquor to a minor, and receive from him the money therefor, under the belief, however induced, that the minor is buying as agent for another whose identity is unknown and is not disclosed, it constitutes a sale to the minor.

(October 18, 1910.)

Note. — Criminal responsibility for sale of intoxicating liquor by partner, servant, or agent.

The present note is supplementary to notes on the same subject appended to *Bryan v. Adler*, 41 L.R.A. 660; *State v. Gilmore*, 16 L.R.A. (N.S.) 786; and *Partidge v. State*, 20 L.R.A. (N.S.) 321.

Authority in fact.

While, as shown in the earlier notes, the question whether express or implied authority from the defendant to his partner, servant, or agent by whom the alleged illegal sale was made, is often decisive of his criminal responsibility, it is not always so, for the reason that even though express authority cannot be shown, implied authority from the defendant, or at least his knowledge of the violation of the law, may be inferred from the circumstances of the case.

For example, the decision in *Com. v. Perry*, 148 Mass. 160, 19 N. E. 212, is merely to the effect that evidence tending to show a sale by a clerk of the defendant in the regular course of defendant's business is sufficient to warrant a finding that the sale was authorized by him.

And even proof of formal instructions by defendant to his employee not to make sales in violation of law does not necessarily negative implied authority, since the evidence may justify the conclusion that those instructions were merely colorable, and not in good faith.

Thus, while the court in *Hugill v. Merrifield*, 12 U. C. C. P. 269, held that an instruction that defendant would be liable for a sale of liquor during prohibited hours by his bartender, though done in direct opposition to his commands, was too broad, it recognized that the defendant would be responsible if the circumstances led to the conclusion that the command was merely colorable and intended only to evade responsibility.

And it will be observed that the results in the cases next cited rest upon the ground that express or implied authority might be inferred from the circumstances; at least the cases do not necessarily involve the proposition that the defendant is responsible for the act of his partner, servant, or

ERROR to the Circuit Court for Cabell County to review a judgment convicting defendant of selling intoxicating liquors to a minor in violation of law. Affirmed.

The facts are stated in the opinion.

Mr. Lewis D. Isbell, for plaintiff in error:

The sale was to a guest of the hotel in his room.

State v. Davis, 62 W. Va. 500, 14 L.R.A. (N.S.) 1142, 60 S. E. 584.

Mr. William G. Conley, Attorney General, for the State:

A licensee cannot be excused from criminal liability if he sells to a minor, whatever imposition may be practised upon him; and he cannot escape liability for

an unlawful sale made to a minor by an employee without his knowledge, even though he has instructed such employee to make no sales to minors, for the act of the employee, while carrying on the licensed business, is his act, and the offense is completed when the sale is made either by himself or his employee.

State v. Gilmore, 80 Vt. 514, 16 L.R.A. (N.S.) 786, 68 Atl. 658, 13 A. & E. Ann. Cas. 321; Carroll v. State, 63 Md. 551; Paducah v. Jones, 126 Ky. 809, 104 S. W. 971; State v. Denoon, 31 W. Va. 126, 5 S. E. 315; Hill v. State, 62 Ala. 168.

It is no defense that the barkeeper supposed and intended that the liquor sold Peabody was to be used by an adult.

Com. v. O'Leary, 143 Mass. 95, 8 N. E.

agent, without reference to authority express or implied.

An employer engaged in the unlawful business of selling liquor is criminally liable for a sale made by his employee in the course of the employer's business, whether the employer be present and consenting to the particular sale or not. Cox v. State, 3 Okla. Crim. Rep. 129, 104 Pac. 1074, rehearing denied in 3 Okla. Crim. Rep. 129, 105 Pac. 369; Stack v. State, — Okla. Crim. Rep. —, 109 Pac. 126. Upon this hypothesis it is clear that the authority of the agent is implied.

The decision in State v. Winner, 153 N. C. 602, 69 S. E. 9, is merely to the effect if defendant knew of an arrangement on his premises by which liquor was furnished to a customer without the appearance of any person, he was guilty as a principal, and that it was inconceivable that such an arrangement could exist on his place of business without his knowledge.

In State v. Brown, 151 Mo. App. 349, 131 S. W. 760, where the defendant was present at the time the sale was made, even though he did not make it himself, the court said that it did not make a particle of difference in the criminal liability whether he handed out the liquor and took the money, or his agent did that service for him, declaring generally that when a person acts as a servant or agent of another in selling intoxicating liquors in violation of law, either may be indicted.

A principal who sells intoxicating liquor and delivers it by the hand of his agent, in a local option district, is jointly indictable with the latter for violation of the local option law. Com. v. Bottom, 140 Ky. 212, 130 S. W. 1091. This is a case where the principal knew, and at least impliedly authorized, the act of the agent.

One having control of a place knowingly allows it, permits it, to be used as a place of resort, within the meaning of a statute directed against the maintenance of liquor nuisances, if he has authority over it to prevent that use or to permit that use, and he permits it. State v. Fogg, — Me. —, 77 Atl. 714.
33 L.R.A. (N.S.)

If a sale to a minor in violation of law is made by defendant's clerk, and it was authorized by him by special authority in the particular case or by a general authority which included it, it would be no defense to show that he did not intend to make sales to minors, but was negligent in not taking any measures to prevent them. Com. v. Stevens, 155 Mass. 291, 29 N. E. 508. The court in this case, however, recognizes that the test of the master's liability for the act of his servant is whether or not it is done by his authority; but adds that if the act is the master's because done by the servant within his authority, and especially if it is an act which is made punishable, even when done in ignorance of its punishable quality, the statute applies to the master as well as to the servant.

As shown in the earlier notes, there is some conflict among the cases which hold or assume that the criminal responsibility of the defendant rests upon express or implied authority, as to whether the burden of proof as to authority rests upon the prosecution or on the defendant. In addition to the cases on that point cited in the other notes, it is held in State v. Heinze, 45 Mo. App. 403 and Liberty v. Moran, 121 Mo. App. 682, 97 S. W. 948, that proof that a sale in violation of law was made by an agent presumptively shows authority, consent, or knowledge of the principal.

View that authority, express or implied, is necessary.

The cases cited in this note reflect the conflict of authority disclosed by the other notes on the question of substantive law, whether express or implied authority from the defendant is essential to his criminal responsibility for a sale of liquor by his partner, agent, or servant in violation of law. In view of the tendency of the courts in any event to hold that the proof of the illegal sale is at least prima facie evidence of authority, the practical question is generally whether proof of such sale merely makes a prima facie case or a con-

887; *Sumner v. State*, 4 Ind. App. 403, 30 N. E. 1105; *People v. Garrett*, 68 Mich. 487, 36 N. W. 234, 8 Am. Crim. Rep. 399.

Williams, J., delivered the opinion of the court:

J. H. Nichols, the proprietor of a hotel and a licensed saloon keeper in the city of Huntington, was convicted in the criminal court of Cabell county for unlawfully selling spirituous liquors to Frank Peabody, a minor, and on the 3d of March, 1908, was fined \$50. The judge of the circuit court of said county refused a writ of error, and one was awarded by this court.

It is insisted that the verdict is against the evidence, and that the criminal court

clusive case against the defendant. This question depends to a considerable extent upon the terms of the particular statute under which the case is decided; and some cases make a distinction between a sale without a license and a sale in violation of a license.

Thus, in *State v. Fagan*, — Del. —, 74 Atl. 692, where defendant, having a license to sell only liquors to be drunk on the premises, was charged with selling liquor to be drunk off the premises, the court said that, as the defendant was the recipient of a license from the state giving him the authority and the privilege to sell liquor in a certain manner, and as he saw proper to conduct his business under that license by the agency of a bartender, he, as principal, must be held *prima facie* liable for the sales of liquor made by his agent in a manner different from that authorized by his license, and beyond and without the authority of a license. The court further held, however, that, as the defendant was not charged with a violation of his license in the sense of the rule laid down in the case of *State v. Peo*, 1 Penn. (Del.) 525, 42 Atl. 622, he might avoid this *prima facie* liability by producing evidence in rebuttal that the act of his bartender was without his authority or knowledge and against his instructions. The court said in this connection: "When a principal is charged with selling liquor by an agent or servant, not in violation of a license, but without a license, and a conviction is sought, it must appear expressly, or by implication such as that indicated in this case, that he gave authority to or had knowledge of his agent's acts, just as in any other case where criminal responsibility is sought to be attached to a principal for the wrongdoing of his agent."

A majority of the court of criminal appeals of Texas, in *Ollre v. State*, 57 Tex. Crim. Rep. 520, 123 S. W. 1116, were of the opinion that a sale of intoxicating liquor during prohibited hours, by an agent, clerk, or employee, established merely a *prima facie* case, and not a conclusive case against the owner of the premises under a

errred in overruling a motion to set it aside and grant defendant a new trial, and that it also erred in refusing to give the jury certain instructions, and in refusing to permit a certain question to be answered by defendant's witness.

The state proved that Frank Peabody, a boy seventeen years old, bought from William Reible, defendant's bartender, a half pint of whisky in June, 1907, and paid him the money for it. These facts are not controverted. The defense is that the sale was not made to the boy, who was at the time serving as bell boy in the hotel of defendant, but that it was made to some guest in the hotel, through the boy, who was simply acting as agent of the purchaser. But the boy did not say

statute prescribing that certain offenses against the liquor law, including sales during prohibited hours "by any agent, clerk, or other person acting for any retail liquor dealer, . . . shall be deemed and taken to be for all purposes of this act as the act of such retail liquor dealer or retail malt dealer or other person." In other words the principal is not precluded by the mere fact that his agent, clerk, or employee has sold in violation of the statute, but has the right to show want of authority on the latter's part. This decision was based largely on the fact that the statute in question was adopted from Missouri, and that such construction had been previously placed upon it by the Missouri court, citing in this connection *State v. McCance*, 110 Mo. 398, 19 S. W. 848. Two of the judges prepared elaborate dissenting opinions.

To the same effect are *Freedman v. State*, 37 Tex. Crim. Rep. 115, 38 S. W. 993; *Pecaria v. State*, 48 Tex. Crim. Rep. 139, 90 S. W. 42; *Holland v. State*, — Tex. Crim. Rep. —, 101 S. W. 1001, and other Texas cases cited in the earlier notes.

So, a conviction of selling intoxicating liquor without a license cannot rest upon evidence merely that the person who made the sale was the defendant's clerk, in the absence of any evidence that defendant authorized the sale or participated therein. *Daniel v. State*, 149 Ala. 44, 43 So. 22, citing *Seibert v. State*, 40 Ala. 60.

A conviction of a corporation of selling intoxicating liquor to a minor cannot be sustained where the state's evidence negated the idea that the agent of the corporation either knew of, consented to, or permitted the delivery of the liquor to the purchaser. *Southern Exp. Co. v. State*, 1 Ga. App. 700, 58 S. E. 87. Apparently it was not proved that the boy by whom the liquor was delivered was in the employment of the corporation.

A wife is not subject to the penalty prescribed by statute for selling or allowing liquors to be sold unlawfully upon one's premises, by reason of sales by her husband at her grocery store, of which he was

that he bought the whisky for any person other than himself, or that he told the bartender that he wanted it for a guest of the hotel. Nor does it appear that the bartender even inquired of him whether he was getting the whisky for himself, or for another person to whom the saloon keeper may have had a right to sell. So that, upon these uncontradicted facts, it becomes a question of law whether or not it was an unlawful sale. Section 21, chap. 32, Code 1906, makes it a penal offense for a person having a state license to sell or give spirituous liquors, wine, porter, ale, beer, etc., to a minor; and § 23 of the same chapter says that a sale by one person for another shall be deemed a sale by both, and makes both liable,

either jointly or severally. Hence it is not material to inquire whether or not Reible was instructed by the defendant not to sell to minors. There is no pretense that the sale by Reible was not for Nichols, and, being made by his agent for him, the statute says it is a sale by both Reible and Nichols. Consequently, the intent of Nichols to observe the law is immaterial. The question of his intention is not an ingredient of the offense. The act of making the sale is a positive act implying volition, understanding, will; from its very nature a sale could never be accidental. One cannot make sale of an article, and receive the money for it, without knowing it, and without willing to do the act. It is the sale alone that

manager, she being unaware that he was selling liquor at that place, and in fact having expressly forbidden him to do so. *Thurman v. Adams*, 82 Miss. 204, 33 So. 944. The court distinguishes between this case and cases where the principal was in the liquor business, and was charged with violations, such as sales to minors or intoxicated persons. See, in this connection, *Teasdale v. State*, — Miss. —, 3 So. 245, holding that the fact that a clerk violated instructions of a druggist and sold without his knowledge or consent is immaterial, under a statute which subjects to punishment not only the person violating the law by personally selling, but also "any person who may own or have any interest in any vinous or spirituous liquors sold contrary to this act."

So, a dramshop keeper is only prima facie liable for the act of his agent, and he may show that he in good faith gave positive orders not to make such sale. *State v. McCance*, 110 Mo. 402, 19 S. W. 648; *State v. Weber*, 111 Mo. 204, 20 S. W. 33.

In passing on the question whether the action of the license commissioners in revoking a license on complaint that the licensee had violated the law by selling liquor to an intoxicated person was binding upon the sureties on his bond, the court remarked, *arguendo*, that a violation by an agent or servant of the holder of the license would constitute a breach of the bond conditioned upon constant adherence to the terms of the license, but that the licensee could not be convicted of crime because of a violation of the act by his servant not authorized or ratified by him. *State v. Corron*, 73 N. H. 434, 62 Atl. 1044, 6 A. & E. Ann. Cas. 486.

To warrant a conviction for sales by a bartender to excepted persons, it must either appear that defendant gave no orders not to sell to such persons, or that if such orders were given they were not in good faith. *Com. v. Titlow*, 28 Pa. Co. Ct. 341.

One cannot be convicted of maintaining a liquor nuisance by proof of sales on Sunday by an agent employed by him on week days, without proof or knowledge on his

part of the unlawful act on Sunday, and without proof of authority, either express or to be inferred from the testimony in the case, that the agent might act for him on Sunday. *State v. Burke*, 15 R. I. 324, 4 Atl. 761.

A licensee who has given notice to his employees not to sell intoxicating liquor to children under fourteen years of age, except in sealed and corked bottles, is not responsible for a violation of those instructions by a bartender without his knowledge or connivance, under a statute providing for the conviction of one who knowingly sells or allows any person to sell intoxicating liquors to children in contravention of the statute. *Emary v. Nolloth* [1903] 2 K. B. 264, 72 L. J. K. B. N. S. 620, 67 J. P. 354, 89 L. T. N. S. 100, 19 Times L. R. 530, 52 Week. Rep. 107, 20 Cox, C. C. 507, 620. The decision is upon the ground that the word in the statute "allows" imports notice; and that while one may be held to have allowed the thing to be done when he has delegated his authority to another by whom it is done, yet he cannot be deemed to have allowed it to be done where he kept control, and did not delegate his authority, it appearing that he was present and in control of the business though he did not see the transaction in question.

In some instances the statute, by expressly declaring the defendant responsible for the acts of one class of persons, impliedly negatives his responsibility for those of another class.

Thus, one partner is not criminally responsible for an unlawful sale of liquor by a copartner, under a statute declaring that any person or principal shall be liable for the acts of its clerk, servant, agent, or employee for a violation of the law, there being no evidence that he had any connection with or knowledge of the unlawful sale. *State v. Burns*, — S. D. —, 126 N. W. 572. Compare with *State v. Grant*, 20 S. D. 164, 105 N. W. 97, 11 A. & E. Ann. Cas. 1017, holding that a statute imposes upon the keeper of a bar or saloon the affirmative duty to see that it is closed during certain hours and on holidays, and the neglect of this duty is an offense, and it is

constitutes the offense, and the law does not stop to inquire into the motives of the seller. Whatever the motive may be, it cannot change the nature of the offense. *State v. Denoon*, 31 W. Va. 125, 5 S. E. 315; *State v. Gilmore*, 80 Vt. 514, 16 L.R.A.(N.S.) 786, 68 Atl. 658, 13 A. & E. Ann. Cas. 321; *State v. Kittelle*, 110 N. C. 560, 15 L.R.A. 694, 28 Am. St. Rep. 698, 15 S. E. 103; *McCutcheon v. People*, 69 Ill. 606, 1 Am. Crim. Rep. 471; *Mogler v. State*, 47 Ark. 110, 14 S. W. 473; *Snider v. State*, 81 Ga. 753, 12 Am. St. Rep. 350, 7 S. E. 631; *Whitton v. State*, 37 Miss. 379; *Carroll v. State*, 63 Md. 551, 3 Atl. 29; *State v. Hartfel*, 24 Wis. 60; *People v. Roby*, 52 Mich. 577, 50 Am. Rep. 270, 18 N. W. 305; *Paducah v. Jones*,

126 Ky. 809, 104 S. W. 971; *Woolen & T. Intoxicating Liquors*, § 725; *Black, Intoxicating Liquors*, § 418. However, the decisions of the courts of the several states are not uniform on this question. A large number of them hold that an unlawful sale made by the agent without the knowledge and assent, express or implied, of the principal, or a sale made in violation of his express directions, is not a sale by the principal. A number of decisions taking this view of the law are cited in the case of *State v. Gilmore*, 80 Vt. 514, 16 L.R.A.(N.S.) 786, 68 Atl. 658, 13 A. & E. Ann. Cas. 321. But the better view seems to us to be the one followed by this court in *State v. Denoon*, *supra*.

no defense to show that the place was open by an agent, servant, or employee without authority or contrary to direction.

View that authority, express or implied, is unnecessary.

The view taken by some of the courts, as shown in the earlier notes, that proof of a sale in violation of law by a partner, servant, or agent conclusively established the criminal responsibility of the defendant, without reference to the question of express or implied authority, is sustained by some of the later cases.

Thus, under a statute declaring that one who shall sell for himself or another, or be interested in the sale of liquor without a license, shall be guilty of a misdemeanor, the owner or proprietor of a saloon is responsible for the illegal sales of liquor made by his servant and agent within the scope of their general employment. *Bell v. State*, 93 Ark. 600, 125 S. W. 1021, quoting from *Robinson v. State*, 38 Ark. 641: "The law says to persons wishing to engage in selling liquors, 'You must be careful in the selection of your partners or servants, and watchful of their conduct in your business; for, if they make forbidden sales, you are responsible. You must see that sales in which you are interested are not made without license.'"

In *Walters v. State*, — Ind. —, 92 N. E. 537, applying the doctrine that it is no defense that a sale is made by a clerk without the knowledge or consent of the defendant, the court said that criminal intent is not an essential ingredient of the offense; that "when appellant elected to engage in the sale of articles subject to legal restrictions, he did so at his own peril, and cannot escape responsibility for the nonobservance of such regulations, on the ground that he did not knowingly violate the law."

So, a saloon keeper is responsible for the act of his bartender in selling liquors on Sunday, as though he made the sale himself. He cannot be shielded by the fact that he has given his agent positive instructions not to make such sale. *Olson v. State*, 33 L.R.A.(N.S.)

143 Wis. 413, 127 N. W. 975. The court said that the statute imposed a penalty upon the acts prescribed, irrespective of the motive or intent of the person doing them; its purpose being to regulate the conduct of the liquor business, and to prohibit the specified acts whether done by the licensee himself as principal, or by his bartender as agent.

A licensee is answerable for the acts of an agent though he was absent from the place of business, and instructed the agent not to make the forbidden sales, under a statute providing in effect that if the licensee shall sell or give away intoxicating liquors to minors without the written authority of parent or guardian, his license shall be subject to revocation. *State ex rel. Conlin v. Wausau*, 137 Wis. 311, 118 N. W. 810. The court said that while the system grants the licensee the privilege of conducting the business through an agent, it also imposes upon him the affirmative duty to see to it that every regulation is obeyed by his agents as well as by himself.

Under a statute providing that the occupant of any place in which a violation of the act shall have taken place shall be personally liable to a penalty, notwithstanding that the sale, barter, or traffic be made by some other person who cannot be proved to have so acted under or by direction of the occupant, the occupant is responsible in all cases, and he cannot be heard to say that the act was done by some other person without his direction. *Reg. v. Green*, 30 U. C. Q. B. 84.

In *Austin v. Davis*, 7 Ont. App. Rep. 478, it is held that not even instructions to a bartender not to sell to a particular person would relieve the employer from liability for the penalty prescribed by statute against one who, being notified not to sell liquor to one in the habit of becoming intoxicated, delivers or "suffers to be delivered" any liquors to such person.

Rex v. McQuarrie, 37 N. B. 374, seems to hold that even where the sale was by an hostler in a livery stable, it was not necessary to introduce any proof that the sale

A licensed saloon keeper usually conducts the business of selling liquors through agents, clerks, or bartenders, not in person; and if he were permitted to defend an indictment for unlawful selling, on the ground that his bartender had violated his instructions, the result would be that a conviction in many such cases could not be had, and the statute, in a large measure, would be defeated. Such a defense is of a kind that is easy to manufacture to suit the emergency, yet difficult to overthrow, and many unscrupulous persons would not hesitate to fabricate such facts as would be needful to accomplish their defense.

We do not see how the jury could have found any other verdict upon the evidence than "guilty." The boy, at the time in question, was a bell boy in defendant's hotel. The defense which was sought to be made is that it was customary for the bell boy to get whisky for the guests of the hotel, on their orders, and carry it to their rooms, and that Reible thought the boy was getting the whisky on this occasion for a guest, and let him have it in good faith, believing it was for a guest. But there is no evidence that the boy told Reible that he was getting the whisky for another.

Reible's testimony on this point is as follows:

Q. About the latter part of June, 1907, Frank Peabody says that he purchased a half pint of whisky from you. State what

was with the authority or by the direction of the employer, the defendant, or that he was in any way connected therewith.

The apparent conflict among the Michigan cases on the question is due to differences in the phraseology of the statutory provisions under which the cases were decided. In *People v. Metzger*, 95 Mich. 121, 54 N. W. 639, it was held that one could not be convicted for the act of his bartender in making unlawful sales of liquor, where he knew nothing of such sales and had not directed them.

But as pointed out in *People v. Longwell*, 120 Mich. 320, 79 N. W. 488, the Metzger Case was decided under a statute which made a sale by a clerk or an agent "prima facie" evidence of intent on the part of the employer, thus negating any intention on the part of the legislature to make the employer responsible for the act of his employee, irrespective of his actual intent.

In the Longwell Case it was held under a statute declaring that "any person who himself, or by his clerk, agent, or employee," shall violate any of the provisions of a designated section, which prohibits, *inter alia*, the sale by a druggist to a person intoxicated, it is no defense that the sale was made by a clerk in the employment of the druggist, without his knowledge or consent.

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was said when he made that purchase, and what it was for.

A. He purchased it for upstairs for the rooms,—he had always taken the order up and fetched the money,—he was there as bell boy, and would get the orders and take them up.

It will be observed that he does not say that the boy told him he had an order from a guest for the whisky, or that the boy said anything which would justify the inference that he was getting it for anyone but himself. If Reible thought that a guest of the hotel had sent the boy for the whisky, it was his duty, at least, to have ascertained who the principal was, and what authority the boy had to act for him. The evidence shows that Reible was culpably negligent in this respect. Viewing the evidence in the light most favorable to defendant, it proves that his bartender delivered whisky to a bell boy in defendant's hotel, whom he knew to be a minor, and received the money therefor from him, under the impression and belief that the bell boy was getting it for some guest in the hotel, who was unknown to the bartender. But it does not follow that a lawful sale could be made to every guest. The guest might himself be an infant. It seems to be a rule of law well settled by decisions, and recognized by all text writers on the subject, that where a sale of intoxicating liquor is made to a minor for an undisclosed principal, it is a sale to the

The case of *People v. Parks*, 49 Mich. 333, 13 N. W. 618, was distinguished on the same ground as the Metzger Case; and *Faulks v. People*, 39 Mich. 200, 33 Am. Rep. 374, upon the ground that the statute involved in that case did not contain the words employed in the statute involved in the Longwell Case, "or by his clerk, agent, or employee."

While cases involving the violation of provisions of the statute against keeping saloons open on Sunday or holidays are not within the scope of this note, it may be remarked here that the Michigan cases (*People v. Roby*, 52 Mich. 577, 50 Am. Rep. 270, 18 N. W. 365; *People v. Kriesel*, 136 Mich. 80, 98 N. W. 850, 4 A. & E. Ann. Cas. 5; *People v. Lundell*, 136 Mich. 303, 99 N. W. 12; *People v. Possing*, 137 Mich. 303, 100 N. W. 396; *People v. Tolman*, 148 Mich. 305, 111 N. W. 772,) holding that the defendant is criminally responsible for his agent's violation of those provisions, irrespective of the question of knowledge or authority are distinguishable from the Parks Case and the Metzger Case upon the ground that the Sunday closing provision of the statute makes no reference to the intention of the defendant.

G. H. P.

minor. 17 Am. & Eng. Enc. Law, 2d ed. p. 337; 23 Cyc. Law & Proc. p. 196; and Black, Intoxicating Liquors, § 420. This rule of the criminal law is not inconsistent with the general law of agency, which treats a contract made by an agent with a third person, for an undisclosed principal, as the contract of either the agent or his principal, at the election of the other contracting party after he has discovered the principal and the relation of agency. This is generally true, whether the agent assumed to act in an individual capacity or as the agent for another who is not disclosed. Story, Agency, § 160; 1 Clark & S. Agency, § 457; 2 Clark & S. Agency, §§ 568, 569; 1 Am. & Eng. Enc. Law, p. 1124; 31 Cyc. Law & Proc. p. 1574.

"If liquor is sold to a minor who at the time declares that he is purchasing it for another whose name is not disclosed, the sale must be regarded as made to the minor, and not to the undisclosed principal, and the seller is liable to punishment under a statute making it criminal to sell liquor to a minor." Neely v. State, 60 Ark. 66, 27 L.R.A. 503, 46 Am. St. Rep. 148, 28 S. W. 800.

In *Ross v. People*, 17 Hun, 591, Ross was convicted of selling liquor to a minor, under a statute of New York almost identical with the statute of West Virginia, forbidding sales of liquor to minors. The boy purchased the liquor as agent for one Martin, an adult, who lived in the home with him, and with money furnished by his principal, but did not disclose his principal. It was held "that the conviction was proper, and that the fact that the boy was acting as agent for an undisclosed principal did not relieve the accused from penalties imposed by the statute."

In *Ritcher v. State*, 63 Miss. 304, the defendant was convicted of selling to a minor, and offered to prove that the minor purchased as agent for the minor's uncle and for the uncle's use, with money furnished by him. The trial court excluded this evidence, and it was held not error because there was no offer to prove that the agency was known at the time of the sale. "For if the minor was acting as agent it was an agency for an undisclosed principal, and, as in such case either might be treated as the buyer of the liquor, R. is guilty of the charge of selling to the minor."

Under a statute of Massachusetts forbidding the sale or delivery of intoxicating liquor to a minor, the supreme court held that it was a violation of law to deliver it to a minor even as agent for a disclosed principal. *Com. v. Joslin*, 158 Mass. 482, 21 L.R.A. 449, 33 N. E. 653.

In *Holmes v. State*, 88 Ind. 145, it was 33 L.R.A. (N.S.)

held to be no defense that the minor told the saloon keeper at the time of buying the whisky that it was for his sick mother, and that the saloon keeper was induced to believe the statement from the fact that his mother had on two or three previous occasions sent him for whisky, and that the saloon keeper acted in good faith. See also *Sumner v. State*, 4 Ind. App. 403, 30 N. E. 1105; *State v. McLain*, 49 Mo. App. 398; *Horsky v. State* (June, 1896) — Tex. Crim. Rep. —, 36 S. W. 443.

"Although a minor acts as the agent of his parent in purchasing liquor, if that fact be not disclosed to the seller at the time of the purchase, and the sale is made without the parent's written consent or order, it is unlawful, and a subsequent disclosure of the agency will not avoid a conviction." *Siceluff v. State*, 52 Ark. 56, 11 S. W. 964.

In *Com. v. Finnegan*, 124 Mass. 325, Finnegan was convicted of selling intoxicating liquor to Robert E. Devine, a minor. It appears that Devine had authority from his mother to get whisky for her use and on her account, and had done so frequently; but on the occasion in question he and two other boys made up the sum of 25 cents and went to defendant's place of business and bought a bottle of whisky. The supreme court upheld the following instruction given by the trial court, viz.: "That if Devine, when he bought the whisky, acted under authority from his mother, and bought it for her, the defendant could not be convicted; but if he did not act under authority from her, but bought the whisky for himself and the other boys, it would be a sale to him, although he had authority from his mother to buy for her, and stated to the defendant that he was buying for her, and the defendant believed that he was so buying."

The recent decision by this court, *State v. McNeal*, 66 W. Va. 411, 25 L.R.A. (N.S.) 178, 135 Am. St. Rep. 1038, 66 S. E. 512, harmonizes perfectly with the foregoing authorities. In that case the father, Ben Jaggie, had told McNeal, the saloon keeper, to let his son Joe, a minor, have spirituous liquors whenever he sent him with a written order for it. McNeal delivered whisky to Joe Jaggie on a written order from Joe's father, and he carried it to his father. That was a very different case from the one under review. That was clearly not a sale to Joe Jaggie, but only a delivery of the goods to him on a sale to the father, a known purchaser. In the present case there is no evidence that the minor, Frank Peabody, was acting as an agent for either a disclosed or an undisclosed principal; hence there can be no question that the sale was made to him.

There seems to be no conflict in the decisions on the question that a sale of intoxicating liquors to a minor who buys as agent for an undisclosed principal is a sale to the minor, in view of statutes forbidding sales of such liquors to minors.

The court refused to give defendant's instructions numbered 1, 2, and 3, and this is assigned as error. No. 1 would tell the jury that they must believe that the sale of whisky was to Frank Peabody, "and not for the guests of the hotel," before they could find defendant guilty. No. 2, that the defendant was not guilty unless his bartender knew at the time of the sale that the whisky "was not ordered for the guests of the hotel." And No. 3, that "they must believe beyond reasonable doubt, and to the exclusion of every other reasonable hypothesis, that the defendant knew or had reason to believe that the whisky was not for the guests of the hotel."

These instructions are bad and were properly refused because they do not state the law of the case. There is no evidence that the boy was buying the whisky for any person other than himself. The fact that the whisky had been delivered to the boy, and the money received from him at the time by the bartender, is not denied. In legal contemplation, this establishes a sale to the boy, whether he was buying for himself or for an undisclosed principal.

It is assigned as error that the court refused to allow witness Reible to answer the following question, viz.: "State whether or not, if you, as bartender at the West Virginia Hotel, did not let, or was in the habit of letting, this boy take up drinks ordered by the guests at that hotel, to the guests at their rooms." It is not shown what answer the witness was expected to make to this question, and we do not see that the defendant was prejudiced by the court's refusing the answer to be given. Furthermore, the question is objectionable in form, being leading and suggestive of the answer desired. Even if we could infer that the answer, if allowed to be given, would have been in the affirmative, still it could not have aided the defendant's cause. If it was, in fact, the custom for the boy to "take up drinks ordered by the guests at the hotel," it does not follow that previous acts constituting the custom were not also violations of law; neither does it follow that the facts in other instances were similar to the facts in this case.

We find no error in the record, and the judgment of the Criminal Court of Cabell County will be affirmed.

33 L.R.A.(N.S.)

WISCONSIN SUPREME COURT.

G. A. CLARK, Appt.,

v.

MRS. A. T. TENNESON, Resp't.

(— Wis. —, 130 N. W. 895.)

Husband and wife — necessities — artificial teeth.

1. Artificial teeth are necessities which a man must furnish to his wife.

Same — personal liability of wife.

2. A married woman is not personally liable for artificial teeth purchased by her for her own use, although she has always attended to the dental affairs of herself and her children, and paid the bills, and the dentist who made the teeth has never had any dealings with the husband, if there is nothing to show that she made the payment out of her separate estate.

(April 5, 1911.)

Note. — Liability of married woman for necessities purchased by her.

This note does not attempt to define necessities, and the fact that a case is included should not be taken to mean that the particular articles in that case were held necessities.

As to what constitute "family expenses" within a statute rendering a wife or her property liable for such expenses, see the note to Vose v. Myott, 21 L.R.A.(N.S.) 277.

In the absence of statute, there can be no legal claim against the estate of a married woman for necessities furnished at her request. Brown v. Sumner, 31 Vt. 671.

In Walford v. de Pienne, 2 Esp. 554, however, Lord Kenyon said if the wife was not to be personally charged for debts contracted by her when her husband was absent for some years, or had abjured the realm, she would be without credit, and might starve.

Other English cases are authorities for the doctrine that under such circumstances a married woman might contract and sue and be sued as if sole; but in most of them, if not in all, the contracts were for other things than necessities.

In equity.

But where a married woman purchases necessities for the support of herself and family, and for the benefit and advantage of her separate estate, which she directly and expressly agrees to pay for out of her separate estate, against which the amount should be a charge, her property is liable in equity therefor. Miller v. Newton, 23 Cal. 554; Priest v. Cone, 51 Vt. 495, 31 Am. Rep. 695; Porter v. Baldwin, 7 Humph. 177; Craft v. Rolland, 37 Conn. 491.

In Priest v. Cone, 51 Vt. 495, 31 Am. Rep. 695, the court announced the above rule as a safe and practicable deduction "from the conflicting decisions of the

APPEAL by plaintiff from a judgment of the Circuit Court for Eau Claire County affirming a judgment of the Municipal Court of the city of Eau Claire, dismissing an action brought to recover the purchase price of a set of artificial teeth purchased by defendant from plaintiff. Affirmed.

Statement by Siebecker, J.:

This is an action to recover the sum of \$40 for an upper plate of artificial teeth and a partial lower plate, which the plaintiff alleges were made for the defendant at her special instance and request, for her own and separate use and benefit, and which were reasonably worth the sum demanded. One of the defenses alleged is

that the defendant is a married woman, living with her husband, and that she has no separate estate. It is therefore averred that the defendant's husband is liable for the price of the teeth as articles of necessity. None of the other alleged defenses are material to the question raised on this appeal.

The plaintiff testified that he was a duly licensed dentist; that as such dentist he had made the plates for the separate use and benefit of the defendant; that the reasonable value of the plates was the sum claimed; that the plates were of no value to anyone but the defendant; that the defendant had an upper set of artificial teeth which she was using when he made the new sets for her; that he knew she was a mar-

American and English courts touching the power of married women and persons dealing with them to subject their separate estates to liability upon their contracts."

The attitude of equity toward the debts of a married woman contracted for necessities while the common-law disabilities still existed is thus tersely expressed in *Hall v. Faust*, 9 Rich. Eq. 301: "Deserted by her husband, as the defendant has been, for more than fifteen years, divorced from him by the laws of a sister state, she is still regarded as his wife by the law of South Carolina. Although the owner of a competent estate, with which her husband has no authority (nor, according to his answer, any inclination) to interfere, she has no legal power to bind that estate. Without the ordinary recommendation to credit which attaches to proprietorship, she might thus frequently be subjected to many of the inconveniences of destitution. Under such circumstances it is the peculiar province of this court to interfere, as well for the benefit of the married woman as for the protection of those who have supplied her necessities. But we are of opinion that, the plaintiffs asking the aid of this court, their recovery may properly be restricted to such articles as were necessary and proper for the defendant in the condition in society which she occupied."

The fact that a promise by a married woman to pay for necessities purchased by her is not in writing does not affect her liability therefor in a court of equity. *Miller v. Newton*, 23 Cal. 554.

Under general enabling statutes — power to bind herself.

Although the so-called enabling acts enlarging the rights of married women make no special provision therefor, nevertheless a married woman may charge her separate estate with her debt contracted for necessities as fully in all respects as she was authorized to do by the rules of equity previously existing in regard to such acts. *Conlin v. Cantrell*, 51 How. Pr. 312.

Under a statutory provision that a mar-

ried woman shall hold to her own use, free from the control of her husband, all property inherited by, bequeathed, given, or conveyed to her, and may sue and be sued in her own name as though sole in all matters pertaining to such property, a married woman is personally liable on a contract for necessities for her use, made by her personally, with the promise to pay out of her separate property, and the person from whom she bought so understanding it. *Hammond v. Corbett*, 51 N. H. 311.

A statute providing that "all the legal disabilities of married women to make contracts are hereby abolished except as herein otherwise provided" confers a general power which authorizes a married woman to make a valid contract for necessities, and is not limited by an additional statutory provision allowing a married woman to contract concerning her separate personal estate. *Arnold v. Engleman*, 103 Ind. 512, 3 N. E. 238.

The New York statute providing that a married woman shall be liable on her contracts as if unmarried has been applied to a purchase of necessities by a married woman while living with her husband, and a recovery against the wife upheld. *Mayer v. Lithauer*, 28 Misc. 171, 58 N. Y. Supp. 1064.

It was held in *Dobbins v. Thomas*, 26 App. D. C. 157, that the liability of a married woman for debts contracted by her for necessities is not relieved because of a statutory provision continuing the common-law liability of a husband for "debts contracted or engagements which the wife may incur or enter into upon the credit of her husband or as his agent, or for necessities for herself or for his or their children."

Statutes enlarging the capacity of married women to take and hold property do not enlarge their capacity to contract, but operate to disable the husband as to those rights which at common-law devolved on him in and to the property of his wife. The common-law duty of the husband to maintain the wife continues, therefor, and purchases by the wife of necessities are presumed to be on his credit, by his assent

ried woman; that the defendant had returned the upper set of teeth; that she never had had the lower plate; that the defendant had sent him payment for a bill for other work, but had stricken out from the bill these items for which he seeks to recover; that the defendant wore the upper plate from his office, and he had notified her that the lower set was ready for her; that she came back to his office, wearing her old set of teeth, and returned the teeth to him; and that she refused to wear the new teeth because the expression of her face was changed thereby. The defendant had always personally paid her dental bills and those of her children. The defendant offered no evidence in the case.

The municipal court of the city of Eau

Claire rendered judgment, dismissing the action. Upon appeal to the circuit court, the judgment of the municipal court was affirmed upon the record, and costs were awarded against the plaintiff. This is an appeal from the judgment of the circuit court.

Mr. Arthur H. Shoemaker, for appellant:

The capacity of a married woman to bind herself to pay any indebtedness incurred for property acquired by her is not dependent upon the purpose to which she intends to devote the property, or whether she has a separate property or business. She may pledge her credit for anything of value ac-

or authority, so that her property is not liable therefor unless the necessities are obtained on her own credit, and to the express exclusion of the credit of the husband. *Gayle v. Marshall*, 70 Ala. 522.

Upholding the validity of a married woman's contract for medical services rendered her after being abandoned by her husband, the court said, in *Carstens v. Hanselman*, 61 Mich. 426, 1 Am. St. Rep. 606, 28 N. W. 159; "Our statutes, before we had any law enlarging the business rights of married women, contained liberal provisions to enable women who were deserted to act for themselves. Since their rights have been put under their own control, they have had general power to contract concerning their own property, and have been authorized to sue singly for all causes of action, and to be sued separately for all their torts. Their power to make any kind of purchases on their own credit has been fully recognized. . . . And while they have not a general power to make agreements of all kinds, we think they must necessarily be able to make contracts concerning what it is essential for their safety and security for them to procure. . . . Where a husband utterly deserts his wife, it would be a cruel rule for her if she cannot, in his absence, at least, or in his presence, if he does not himself provide for her, make a binding agreement for any necessary, whether articles to be purchased or professional help, without becoming a public chafge."

It was held in *Wagg v. Gibbons*, 5 Ohio St. 580, that a married woman who had been abandoned by her husband in a foreign country, and had come to Ohio to live, might, under such circumstances, contract and sue and be sued as if sole, in respect to necessities.

But see *Valentine v. Bell*, 66 Vt. 280, 29 Atl. 251, which was an action against a married woman to recover upon a contract for the support of the defendant's minor child. At the time the contract was made, the defendant was not living with her husband. There is reference in the opinion to a statute enacted subsequently to the making

of this contract which apparently had to do with the rights of married women, but it is uncertain whether this was the first statute in Vermont to abrogate the common-law disability. The holding of the court is thus stated: "It was error to rule that, in the circumstances, the defendant was bound by that contract. Having been made when she was covert, and she having no separate estate nor property of any kind, as the case shows, that contract is entirely void, though for necessities for the child; and therefore unenforceable in this action."

In *Covert v. Hughes*, 8 Hun, 305, the property of a married woman was held liable for necessities purchased by her as the agent of her husband, under the New York statute of 1860, which exempted her property from her husband's debts, except such "as may have been contracted for the support of herself or her children, by her, as his agent."

Referring to the New York act of 1860 and its exception, the court of appeals of New York, in *Tiemeyer v. Turnquist*, 85 N. Y. 516, 39 Am. Rep. 674, held that the plain scope and purpose of the sections of the act in question was to free a married woman's property from the control of her husband and the burden of his debts, and make it her sole and separate estate; but that it has no reference to, and makes no provision for, the liability of the wife in a personal action. The exception, which has proved the source of some confusion, is interpreted to leave her property exposed to be taken for the debt of the husband as if the statute had not been passed. "The sole effect of the provision is not to make her personally liable for her husband's debt, for not a word of such grave import is contained in the statute; but merely that the shield and protection thrown over her property against the debts of her husband shall be withdrawn in a case where his debt has been contracted, his liability incurred, through her, acting as his agent, and for the purpose of providing for her own support and that of the children."

See the case of *Demott v. McMullen*, 8

quired by her in the transaction, as freely as an unmarried woman.

Kriz v. Peege, 119 Wis. 105, 95 N. W. 108; Cramer v. Hanaford, 53 Wis. 85, 10 N. W. 15; Merrell v. Purdy, 129 Wis. 331, 109 N. W. 82.

The possession of articles adapted plainly to the wife's separate and personal use, and not that of her husband or family generally, and so actually used by her, must be held to denote her ownership of the property.

Whiton v. Snyder, 88 N. Y. 299; Paterson v. Kicker, 72 Ala. 406; McCarty v. Quimby, 12 Kan. 494; Farwell v. Cramer, 38 Neb. 61, 56 N. W. 716; Wyatt v. Wyatt, 31 Or. 531, 49 Pac. 855.

A man is not bound to pay for neces-

saries furnished to his wife with whom he is living, upon any theory of implied agency on her part, where she was amply supplied with articles of the same character as those purchased, or was furnished with ready money with which to pay cash for them.

Wanamaker v. Weaver, 65 L.R.A. 529, and note, 176 N. Y. 75, 98 Am. St. Rep. 621, 68 N. E. 135.

Mr. A. C. Larson, for respondent:

The husband is liable for necessities furnished his wife.

Warner v. Heiden, 28 Wis. 517, 9 Am. Rep. 515; Nelson v. Spaulding, 11 Ind. App. 453, 39 N. E. 168; Gilman v. Andrus, 28 Vt. 241, 67 Am. Dec. 713; Freeman v. Holmes, 62 Ga. 556; Stack v. Padden, 111

Abb. Pr. N. S. 335, where this same section was under consideration. The debt in that case, however, was found by the referee to have been contracted by the husband, through the wife, as his agent.

It was held in Reed's Estate, 4 Phila. 375, that where a married woman contracts a debt as in that case, for necessities, the proviso of the act of 1848 applies, and her separate property is not exempt from the debt. The report of this case furnishes no information as to the provisions of the act referred to.

The statutory right of a married woman to acquire property by purchase, and charge the debt upon her separate estate, allows her to buy necessities upon her own credit, although she has no separate property other than the goods thus purchased. Tiemeyer v. Turnquist, *supra*.

And so in Crisfield v. Banks, 24 Hun, 159, it was held that when a married woman purchases necessities, and promises to pay for them herself, she is liable therefor although she has no separate property. "If that which was acquired by purchase was the only separate property she had, she would still be liable to pay for it. By the purchase she created a separate estate, so far as the purchased property made one, and no principle of justice will permit her to escape liability for the payment of the purchase price."

Opposed to the doctrine of the above New York cases that the purchase by a married woman of necessities made them a part of her separate estate, so as to bring the contract within the provision of the enabling statute, is Schneider v. Garland, 1 Mackey, 350, where the court says: "A married woman cannot undertake to purchase an article, and call it, when bought, her separate estate, so that her agreement to buy the thing thus purchased may be considered a contract in relation to the property she thus proposes for the first time to acquire. *A fortiori* would this be so when the thing acquired consisted of supplies, consumed in their use, and never, except by the wildest latitude of construction, admitting of the 33 L.R.A.(N.S.)

designation of 'her sole and separate estate.'"

And so in Brown v. Thomson, 27 S. C. 500, 4 S. E. 345, it appeared that the trial judge charged that if the defendant, a married woman, induced the plaintiff to sell her articles used for the support of herself, husband, and family on her credit, and the credit of her separate estate, she and her separate estate were responsible. The appellate court, however, reversed the judgment because it did not concur in the portion of the charge "which held the defendant responsible in this action for those articles used by herself and family." Examination of the dissenting opinion in this case indicates the probable ground of the decision to have been that a contract for the family supplies was not a contract as to her separate estate, within the statute.

And it has been held that statutes providing that married women may bind themselves at law by contract as if sole, so far as necessary or convenient to the beneficial enjoyment of their separate property or the carrying on of their separate business, but partially remove the common-law disability; and a married woman living with her husband is not liable for necessary medical services for herself and her son, contracted for by her, but without a promise by her to pay therefor, and without knowledge by the creditor that she had separate property. Stack v. Padden, 111 Wis. 42, 86 N. W. 568.

A statute providing that "any married woman may contract and sue and be sued in her own name in all matters having relation to her sole and separate property, in the same manner as if she was unmarried," does not so enlarge the common-law rights of a married woman as to make her liable at law for necessities furnished her, although upon her agreement to have them charged to her separate estate, and her promise to pay out of her own estate. Schneider v. Garland, *supra*.

Legislation so far removing the common-law disability of married women as to permit them to hold real and personal property as their separate estate does not

Wis. 42, 86 N. W. 568; *Morgenroth v. Spencer*, 124 Wis. 564, 102 N. W. 1086; *Towery v. McGaw*, 22 Ky. L. Rep. 155, 56 S. W. 727, 982; *Moore v. Copley*, 165 Pa. 294, 44 Am. St. Rep. 604, 30 Atl. 829; *Raynes v. Bennett*, 114 Mass. 424; *Bergh v. Warner*, 47 Minn. 250, 28 Am. St. Rep. 362, 50 N. W. 77; *Conant v. Burnham*, 133 Mass. 503, 43 Am. Rep. 532; *Hall v. Weir*, 1 Allen, 261; *Cunningham v. Rardon*, 98 Mass. 538, 90 Am. Dec. 670; *Breed v. Breed*, 125 Wis. 100, 103 N. W. 271; *Chickering-Chase Bros. Co. v. White*, 127 Wis. 83, 108 N. W. 797; *Ryan v. Dockery*, 134 Wis. 431, 15 L.R.A.(N.S.) 491, 126 Am. St. Rep. 1025, 114 N. W. 820; *Rowell v. Barber*, 142 Wis. 304, 27 L.R.A.(N.S.) 1140, 125 N. W. 937.

Stebecker, J., delivered the opinion of the court:

1. The only question in dispute is whether the defendant's husband is liable for these sets of artificial teeth, as articles of such necessity that he, as husband, is obligated to pay for them. This court in *Warner v. Heiden*, 28 Wis. 517, 9 Am. Rep. 515, declared what in general constitute "necessaries" which a husband is bound to furnish to his wife, and declared that they embraced the usual provisions for the maintenance of the wife's health and comfort appropriate to her mode of life, in view of their social station and standing and his financial abilities. It is a matter of common knowledge that artificial teeth are most useful and necessary articles for the

allow a married woman to contract for necessities, and her express promise to pay therefor is invalid and unenforceable. *Thomas v. Passage*, 54 Ind. 106.

And even where the statute removing the common-law disabilities of married women, and allowing them to hold as their separate estate all real and personal property, free from the debts and obligations of their husbands, also permits them to sue and be sued in relation to their sole property, they have not power to make valid contracts for necessities. *Howe v. North*, 69 Mich. 272, 37 N. E. 213.

—under special statute.

By virtue of particular statutes, numerous cases determine that the separate property of a married woman is liable for necessities, even though they were not contracted for by her nor charged against her. Such cases belong to the broader question of the general liability of a married woman's estate for necessities; and while not setting up arbitrary limitations, this note is intended to be confined to the scope of its title. In those states where the statutes give creditors broad rights against a married woman's property where the debt is for necessities, the question here presented would seem to allow of but one decision, if indeed it would arise; in other words, where a statute subjects a married woman's property to the payment of debts for necessities under all general circumstances, the contention that she was not liable when she herself contracted the debt would hardly be advanced.

In some states statutes have been enacted specifically subjecting the separate property of a married woman to debts contracted by her for family supplies or necessities. See *Pendleton v. Galbreath*, 45 Miss. 43; *Porter v. Casper*, 54 Miss. 359; *Palmer v. Coghlan*, — Tex. Civ. App. —, 55 S. W. 1122; *Bair v. Robinson*, 108 Pa. 247, 56 Am. Rep. 198.

In those states which have passed such statutes, the cases in most instances are decisions merely upon the question of what 33 L.R.A.(N.S.)

are necessities within the statute. Such cases, of course, are not within the scope of this note.

In some jurisdictions the statutes expressly subjecting the property of a married woman to her debts contracted or incurred on account of necessities for herself or any member of her family require that the debt shall be evidenced by writing signed by her. See *Marsh v. Alford*, 5 Bush, 392.

And such a statute has been held applicable even as to property acquired after the debt was contracted. *Singer Mfg. Co. v. Harned*, 79 Ky. 279.

A statute subjecting the real estate of a married woman to debts "contracted after marriage, on account of necessities for herself or any member of her family, her husband included, as shall be evidenced by writing signed by her and her husband," requires that the contract for such necessities be made by the wife, and the credit therefor given to her. *Gatewood v. Bryan*, 7 Bush, 509.

It was said in *Sawtelle's Appeal*, 84 Pa. 306: "The act enables the wife to bind her separate estate for necessities obtained for herself and family, but the very essence of the liability is that they are furnished at her request and on her credit. If not so furnished, her separate estate is not liable."

The execution by a married woman and her husband of a note in payment of a debt contracted by her for necessities subjects the general estate of the wife to the payment thereof, as specifically provided by statute; and the fact that the intent of the wife was to charge her separate estate, such separate estate not being subject to the debt according to the statute, did not relieve her general property, no express intentions on her part to charge her general estate being necessary. *Marshall v. Miller*, 3 Met. (Ky.) 333.

In *Jones v. Neall*, 19 W. N. C. 256, the statute allowed a recovery against a married woman for necessities furnished her only where her husband had been absent a year or more.

promotion of personal comfort and health, and that their use in this country has attained practical universality. We consider that such teeth come within the class of articles constituting "necessaries," which a husband may be bound to furnish his wife. It was so held in *Gilman v. Andrus*, 28 Vt. 241, 67 Am. Dec. 713.

2. It is contended that the plaintiff and the defendant understood from the course of the transaction of ordering, providing, and delivering these teeth that it was an individual and personal sale to the defendant, and that she personally assumed to pay for them. The facts and circumstances do not sustain this claim. True, the plaintiff had no personal dealings with the defendant's husband. But this is not neces-

sary, if the articles were purchased under circumstances indicating that they were supplied her in the usual manner, as necessities for which a husband is liable as such. The question is, Did the wife negotiate the purchase under circumstances indicating that she was authorized to do so?

It appears with sufficient certainty that the defendant attended to the dental affairs of herself and of other members of the family, including the payment of such bills. There is nothing in the record to show that she paid such bills out of her separate funds or estate. Presumably, then, she made the payments for the husband and father. This is sufficient to apprise the plaintiff of this fact, and he must be deemed to have dealt with her upon this basis,

—necessity of express contract.

In the absence of an express contract by a married woman to pay for necessities, her property is not liable for the debt. *Gunn v. Samuel*, 33 Ala. 201; *Freeman v. Holmes*, 62 Ga. 556; *Nelson v. Spaulding*, 11 Ind. App. 453, 39 N. E. 168; *Edmiston v. Smith*, 13 Idaho, 645, 14 L.R.A. (N.S.) 871, 121 Am. St. Rep. 294, 92 Pac. 842; *Quisenberry v. Thompson*, 19 Ky. L. Rep. 1554, 43 S. W. 723; *Weber v. Zook*, 21 Ky. L. Rep. 1027, 53 S. W. 1034; *Campbell v. White*, 22 Mich. 178; *Paul v. Roberts*, 50 Mich. 611, 16 N. W. 164; *Hirshfield v. Waldron*, 83 Mich. 116, 47 N. W. 239; *Fafeyta v. McGoldrick*, 79 Mich. 360, 44 N. W. 617; *Meads v. Martin*, 84 Mich. 306, 47 N. W. 583; *Chester v. Pierce*, 33 Minn. 370, 23 N. W. 539; *Maxon v. Scott*, 55 N. Y. 251; *Strong v. Moul*, 22 N. Y. S. R. 762, 4 N. Y. Supp. 299; *Bradt v. Shull*, 46 App. Div. 347, 61 N. Y. Supp. 484; *Feiner v. Boynton*, 73 N. J. L. 136, 62 Atl. 420; *Miller v. Brown*, 47 Mo. 504, 4 Am. Rep. 345; *Bear's Estate*, 60 Pa. 430; *Berger v. Clark*, 79 Pa. 340; *Robinson v. Bair*, 2 Sadler (Pa.) 223, 18 W. N. C. 120, 3 Atl. 669; *Reed's Estate*, 4 Phila. 375; *Darlington v. Ervin*, 13 Phila. 127; *Warren v. Freeman*, 85 Tenn. 513, 3 S. W. 513; *Dodge v. Knowles*, 114 U. S. 430, 29 L. ed. 144, 6 Sup. Ct. Rep. 1108, 1197.

Holding that the evidence failed to show a special promise to pay for certain dresses bought for herself and children, so as to make her liable for the debt, the court said, in *Kegney v. Owens*, 18 N. Y. S. R. 482, 2 N. Y. Supp. 319: "The common-law rule that a married woman living with her husband is presumed to have authority from him to order such goods as are ordinarily required for family use is not changed by the statute regulating the rights and liabilities of married women. If the party dealing with the wife knows she is a married woman, living with her husband, and the order is of a character to indicate that it is for the benefit of her husband's family, he is bound to presume that she is acting for her husband, and cannot hold

her personally liable, unless she expressly agrees to become so."

Just what conditions operate to establish the liability of a married woman for necessities are stated in the alternative in *Powers v. Russell*, 26 Mich. 179, thus: "Now if he [the tradesman] knew that she was a married woman, living with her husband, and the goods were not of a character to indicate that they were bought for other than family use in the husband's family, and she did not claim affirmatively to be purchasing them on her individual account, the natural inference would be that she was purchasing them on her husband's account and for the use of his family; and she could not be made individually liable without an express agreement to become so, or that the goods should be charged or the credit given to herself."

The necessity for charging a married woman's property with her debt for necessities, that it must be contracted by her, has been made a statutory requirement in some instances. Thus, in *Murray v. Keyes*, 35 Pa. 384, a statute providing for judgment against a married woman when the debt was contracted "by the wife, or incurred for articles necessary for the support of the family," was construed as if the "or" read "and," and recovery against the wife denied because the evidence did not bring the case within the provision of the statute. See also, in connection with this interpretation of the statute, *Rigoney v. Neiman*, 73 Pa. 330.

But it is intimated in *Mayer v. Lithauer*, 28 Misc. 171, 58 N. Y. Supp. 1064, that an express promise by a married woman to pay for necessities bought by her is not necessary to charge her separate property, the court saying: "It appears that the defendant is a married woman living with her husband, and the principal point urged by the defendant upon this appeal is that the dress ordered by the defendant, being in the nature of a necessity, the husband was presumptively liable for the materials furnished and the services rendered in making, and that the defendant could not be charged therewith, except by an express

which showed her relation to the transaction. For cases defining the authority of the wife to obtain "necessaries," charged to the husband, and under what circumstances he will be exempt from the obligation to pay for articles, see *Wanamaker v. Weaver*, 176 N. Y. 75, 65 L.R.A. 529, 98 Am. St. Rep. 621, 68 N. E. 135, and the cases and comments in the note. Under

the circumstances, we consider that it was established that the defendant was acting under the authority of her husband, and the court properly held that it was not shown that the defendant was individually liable upon the claim presented against her.

Judgment affirmed.

promise on her part to pay therefor. This contention is not well founded. While an action may be maintained against a husband, under certain circumstances, for goods sold or services rendered to the wife, an action of that character may be brought directly against a married woman. *Laws 1896, chap. 272, § 21.* The section referred to provides that a married woman has all the rights in respect to property, real or personal, to make contracts in respect thereto, and to exercise all powers and enjoy all rights in respect to her contracts, and to be liable on such contracts, as if unmarried.

—what sufficient to show contract to bind herself.

The facts necessary to the establishment of liability on the part of a married woman for necessities bought by her must be alleged in the complaint or declaration in order to sustain the action. *Cummings v. Miller*, 3 Grant, Cas. 146.

A married woman living with her husband is not liable for necessities purchased by her, although she promises to pay for them, unless her promise expresses the intent that her separate estate shall be charged with the debt. *Salmon v. McEnany*, 23 Hun, 87; *Weir v. Groat*, 4 Hun, 193.

And so it has been held that a married woman may charge an estate held in trust for her with debts which she contracts for necessities when it is her evident intention to charge her own estate. *Jackson v. West*, 22 Md. 71.

If there is no agreement by a married woman that necessities purchased by her are to be paid for out of her separate property, the mere fact that they are charged to her without her knowledge or assent does not make her liable therefor. *Smith v. Allen*, 1 Lans. 101.

Treating services of a seamstress as in the nature of necessities, it was held in *Flynn v. Messenger*, 28 Minn. 208, 41 Am. Rep. 279, 9 N. W. 759, that a married woman could not be held liable therefor in the absence of circumstances to take the hiring of the plaintiff out of the ordinary presumption that the employment was in behalf of the husband, although the wife made the arrangements and agreed upon the amount of the wages. Nothing was said as to who would pay the seamstress, but while she was at work the wife told her she had property of her own, and when she sold some land she would pay her. 33 L.R.A. (N.S.)

This was held to be a mere voluntary promise, and was not sufficient to shift the obligations of payment from the husband to his wife.

An undertaking by a married woman to pay for necessities is never presumed, and the act of delivering the goods to her, or the fact that the creditor charges them to her, is not sufficient to establish her promise. *Moore v. Copley*, 165 Pa. 294, 44 Am. St. Rep. 664, 30 Atl. 829.

The fact that a note given for necessities is in the language, "We or either of us promise to pay . . . for necessities furnished for myself and family," is not sufficient to charge the separate property of the wife, in the absence of evidence that the necessities were contracted for by her and the credit given to her. *Gatewood v. Bryan*, 7 Bush, 509.

A married woman was held not liable for necessities, in *Weir v. Groat*, 4 Hun, 193, because there was no express contract to charge her estate, although the evidence showed that the merchant of whom the goods were bought refused to trust the woman's husband, and so told her in a conversation in which she said she would be responsible for everything. In the statement of the case as reported, in addition to her assertion that she would be responsible, it is said that she promised to pay the debt after it was made. The court said in the course of the opinion: "In order to charge her estate, therefore, she must express such intention in her contract. This she has not done. The respondent labors under the false idea that such intention may be inferred from her simple promise to pay. That would destroy the only distinction now remaining between the contracts of a married and unmarried female. No case goes to that extent."

Baken v. Harder, 4 Hun, 272, presenting the same state of facts and the same legal question, follows the above holding.

In some cases courts have taken the view that surrounding circumstances may be relied on to show an implied contract sufficient to bind the separate property of a married woman. *Re Totten*, 137 App. Div. 273, 121 N. Y. Supp. 942; *Conlin v. Cantrell*, 64 N. Y. 217; *Wilson v. Herbert*, 41 N. J. L. 461, 32 Am. Rep. 243.

As to the question of extending credit to a married woman upon her implied contract, the court said in *Cook v. Ligon*, 54 Miss. 368: "With reference to family supplies, clothing, tuition, and the like, we think that where the husband has property

or an income of his own, the legal presumption would be that the credit was given to him; and in order to hold the wife liable, she must have either expressly assented or failed to object to the purchases, after being advised that her separate property was looked to. Where, on the other hand, as in the case at bar, the wife knows that the husband has no property which the law can reach, and he is engaged in no business save attending to her estate, and devoting his time to the productions of profits, all of which must inure to her benefit, the presumption would be that she was aware that the credit was being extended to herself rather than to him; and if, under such circumstances, she bought goods herself, or suffered him to buy goods which she consumed, her consent that her estate should be bound therefor would be implied. We do not mean to say that this would be a necessary and inflexible conclusion of law, but rather that, upon the question of fact as to whether or not she had consented that her estate should be bound, these circumstances would fully warrant an affirmative response."

W. A. S.

COLORADO SUPREME COURT.

UNION DEPOT & RAILWAY COMPANY,
Appt.,
v.
WOLFE LONDONER.

(— Colo. —, 114 Pac. 316.)

Union depot — duty to passengers.

1. A union depot company which undertakes to provide common terminal facilities for the passenger-carrying railroads entering a city owes to passengers and their attendants the duty of keeping the station and its facilities in a proper condition for their safety.

Same — servants — train employees — liability for negligence.

2. A union depot company which relied upon train employees to direct passengers

Note. — Liability of union depot company for negligence of its own or carrier's employees.

For notes on the liability of carrier on account of misdirection of passenger by employee, see *St. Louis Southwestern R. Co. v. White*, 2 L.R.A. (N.S.) 110, and *Mace v. Southern R. Co.* 24 L.R.A. (N.S.) 1178.

For a note on liability of railway company for injury to its servants by negligence of union depot employees, see *Floody v. Great Northern R. Co.* 13 L.R.A. (N.S.) 1196.

Apparently few cases have considered the question of the liability of union depot companies for the negligence of their own or the carrier's employees.

In *Indianapolis Union R. Co. v. Cooper*, 6 Ind. App. 202, 33 N. E. 219, where the 33 L.R.A. (N.S.)

to their trains is liable for injury caused to a passenger's attendant by following the direction of such employee, which takes him into an unsafe place, where the danger is not obvious, although the one giving it was not in its immediate employ.

Trial — failure to answer interrogatory — receiving verdict.

3. Failure of the jury to answer a special interrogatory as to an immaterial fact will not prevent receiving their verdict.

Damages — personal injury — loss of time.

4. In determining the compensation to be awarded for a negligent injury to one conducting a business of his own, the jury may consider the value of his time or services in such business during the time he was compelled to be away from it by the injury, and their diminished value while he could work only part time.

(March 6, 1911.)

APPEAL by defendant from a judgment of the District Court for the City and County of Denver in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been suffered as a result of a fall while on defendant's premises. Affirmed.

The facts are stated in the opinion.

Messrs. Dorsey & Hodges, for appellant:

The appellee, if he had any right upon any portion of the depot grounds, was a licensee of the Rio Grande Company, and not of the Depot Company.

Louisville, N. A. & C. R. Co. v. Treadway, 142 Ind. 475, 143 Ind. 689, 40 N. E. 807, 41 N. E. 794; *Scott v. Cleveland, C. C. & St. L. R. Co.* 144 Ind. 125, 32 L.R.A. 154, 43 N. E. 133; *Jacobs v. Tutt*, 33 Fed. 412; *Linn v. Terre Haute & I. R. Co.* 10 Mo. App. 125; *Murch v. Concord R. Corp.* 29 N. H. 9, 61 Am. Dec. 631; *Montgomery & E. R. Co. v. Thompson*, 77 Ala. 448, 54 Am. Rep. 72; *Delaney v. Rochereau*, 34 La.

plaintiff alleged in his complaint that he was waiting with a proper ticket at defendant's union station, and that when the caller announced the train, he started for the train, but was assaulted at the gate through which he had to pass by the gate-man, one of the employees and servants of the defendant, it was held that a good cause of action was set forth. The court said: "It is clear that this union railway company has assumed to carry out a portion of the obligations owed by the railroad companies whose lines ran into Indianapolis to the traveling public, and, this being true, this company assumed also toward the passengers the same liability within the sphere of its operations as rested upon the railroad companies from whose shoulders it took the burden. One of the prime duties resting upon a railroad company is to pro-

Ann. 1123, 44 Am. Rep. 456; Carey v. Rochereau, 16 Fed. 87; Van Antwerp v. Linton, 89 Hun, 417, 35 N. Y. Supp. 318, affirmed in 157 N. Y. 716, 53 N. E. 1133; Feltus v. Swan, 62 Miss. 415; Albro v. Jaquith, 4 Gray, 99, 64 Am. Dec. 56; Bryce v. Southern R. Co. 125 Fed. 958; Kelly v. Chicago & A. R. Co. 122 Fed. 286; Bowen v. Illinois C. R. Co. 70 L.R.A. 915, 69 C. C. A. 444, 136 Fed. 306; Drake v. Hagan, 108 Tenn. 265, 67 S. W. 470; Herrman v. Great Northern R. Co. 27 Wash. 472, 57 L.R.A. 390, 68 Pac. 82; Curtin v. Somerset, 140 Pa. 70, 12 L.R.A. 322, 23 Am. St. Rep. 220, 21 Atl. 244; Gibson v. Leonard, 143 Ill. 189, 17 L.R.A. 588, 36 Am. St. Rep. 376, 32 N. E. 182; Denny v. Manhattan Co. 2 Denio, 115, 5 Denio, 639; Colvin v. Holbrook, 2 N. Y. 126; Montgomery County Bank v. Albany City Bank, 7 N. Y. 459; Burns v. Pethcal, 75 Hun, 437, 27 N. Y. Supp. 499; Murray v. Usher, 117 N. Y. 542, 23 N. E. 564; Henshaw v. Noble, 7 Ohio St. 226; Bell v. Josselyn, 3 Gray, 309, 63 Am. Dec. 741; Greenberg v. Whitcomb Lumber Co. 90 Wis. 225, 28 L.R.A. 439, 48 Am. St. Rep. 911, 63 N. W. 93; Reid v. Humber, 49 Ga. 207; Bissell v. Roden, 34 Mo. 63, 84 Am. Dec. 71; Mitchell v. Durham, 13 N. C. (2 Dev. L.) 538; Labadie v. Hawley, 61 Tex. 177, 48 Am. Rep. 278; Hill v. Caverly, 7 N. H. 215, 26 Am. Dec. 735; Erwin v. Davenport, 9 Heisk. 44; Dean v. Brock, 11 Ind. App. 507, 38

N. E. 829; Lane v. Cotton, 12 Mod. 472, 4 Taunt. 628; Winterbottom v. Wright, 10 Mees. & W. 109, 11 L. J. Exch. N. S. 415.

The railroad company has the right to select the places where passengers are to mount and dismount, and if it has provided an adequate and proper way of access to and egress from its trains, and a passenger chooses some other or different way, and suffers injury thereby, the railroad company is not liable.

3 Elliott, Railroads, 2d ed. § 1256; 4 Elliott, Railroads, 2d ed. § 1641; Hill v. Louisville & N. R. Co. 124 Ga. 243, 3 L.R.A. (N.S.) 432, 52 N. E. 651; Dowd v. Chicago, M. & St. P. R. Co. 84 Wis. 105, 20 L.R.A. 527, 36 Am. St. Rep. 917, 54 N. E. 24; Burbank v. Illinois C. R. Co. 42 La. Ann. 1156, 11 L.R.A. 720, 8 So. 580; McCormick v. Detroit, G. H. & M. R. Co. 141 Mich. 17, 104 N. W. 390; Crowe v. Michigan C. R. Co. 142 Mich. 692, 106 N. W. 395; Maxfield v. Maine C. R. Co. 100 Me. 79, 60 Atl. 710; Atlantic & B. R. Co. v. Owens, 123 Ga. 393, 51 S. E. 404.

The rulings of the court in respect to the testimony and on the instruction as to the measure of damages were erroneous.

Denver & R. G. R. Co. v. Young, 30 Colo. 349, 70 Pac. 688; Denver & R. G. R. Co. v. Costes, 1 Colo. App. 336, 28 Pac. 1129; Central Coal & Coke Co. v. Hartman, 49 C. C. A. 244, 111 Fed. 96; Denver v. Sherret, 31 C. C. A. 499, 60 U. S. App. 104, 88

teet its passengers from assaults and injuries by its servants; nor does the question of its liability for a breach of this duty depend upon whether or not the servant, in the performance of the act, is within the scope of his employment."

And where, from the complaint and a stipulation by consent considered with it, it appeared that the defendant corporation was organized for the express purpose of furnishing depot and station-house accommodations at the city of St. Paul for the use of such railway corporations as entered into contract with it; that it leased a room in its depot building to a tenant, who therein carried on the business of storing for hire the parcels and light baggage of travelers; that plaintiff arrived at said depot by rail, and as a passenger, and proceeded to said room for the purpose of temporarily storing his valise, and was there wilfully and maliciously assaulted and beaten by an employee of defendant's tenant, and it was further charged that this employee was a man of savage and vicious propensities, who had frequently, during the six years of his employment there, attacked and beaten persons lawfully upon the premises, and that all of this was well known to the defendant corporation on the day of the attack upon the plaintiff.—it was held that the complaint, in connection with the stipulation, stated a good cause of ac-

tion. Dean v. St. Paul Union Depot Co. 41 Minn. 360, 5 L.R.A. 443, 16 Am. St. Rep. 703, 43 N. W. 54. The court said: "This complaint, considered in connection with the stipulation, charges that the defendant knowingly and advisedly permitted its tenant to keep in his employ for more than six years, in its depot building, into which it encouraged people to come, and was under contract to admit the plaintiff as an arriving passenger, a man of savage and vicious propensities, and who had, during said period of six years, frequently assaulted and beaten persons lawfully upon said premises, and who, upon the day named, attacked and beat the plaintiff without provocation. Whatever obligation otherwise, by virtue of its contract with the carrier, rested upon the defendant as to the plaintiff, it is manifest that it was bound to use ordinary care and diligence to keep its premises in a safe condition for those who legitimately came there. It had no more right, therefore, to knowingly and advisedly employ, or allow to be employed, in its depot building, a dangerous and vicious man, than it would have to keep and harbor a dangerous and savage dog, or other animal, or to permit a pitfall or trap into which a passenger might step as he was passing to or from his train."

J. T. W.

Fed. 226; *Boston & A. R. Co. v. O'Reilly*, 158 U. S. 334, 39 L. ed. 1006, 15 Sup. Ct. Rep. 830; *Vicksburg & M. R. Co. v. Putnam*, 118 U. S. 545, 30 L. ed. 257, 7 Sup. Ct. Rep. 1; *Whipple v. Rich*, 180 Mass. 480, 63 N. E. 5; *Braithwaite v. Hall*, 168 Mass. 38, 46 N. E. 398; *Stoetzle v. Swering*, 96 Mo. App. 592, 70 S. W. 911; *Galveston, H. & S. A. R. Co. v. Thornberry*, — Tex. —, 17 S. W. 521; *Texas & P. R. Co. v. Bigham*, — Tex. Civ. App. —, 30 S. W. 254; *Goodhart v. Pennsylvania R. Co.* 177 Pa. 1, 55 Am. St. Rep. 705, 35 Atl. 191; *Hastings v. The Uncle Sam*, 10 Cal. 341; *Lincoln v. Saratoga & S. R. Co.* 23 Wend. 425; *Leeds v. Metropolitan Gaslight Co.* 90 N. Y. 26; *Staal v. Grand Street & N. R. Co.* 107 N. Y. 625, 13 N. E. 624; *Baker v. Manhattan R. Co.* 118 N. Y. 533, 23 N. E. 885; *Johnson v. Manhattan R. Co.* 52 Hun, 111, 4 N. Y. Supp. 848.

The court erred in receiving the general verdict when the jury failed to agree upon, and refused an answer to, the special interrogatory.

Tourtelotte v. Brown, 1 Colo. App. 408, 29 Pac. 130; *Pickett v. Handy*, 5 Colo. App. 295, 38 Pac. 606; *Union P. R. Co. v. Fray*, 35 Kan. 700, 12 Pac. 98; *Wichita & W. R. Co. v. Feclheimer*, 36 Kan. 45, 12 Pac. 362; *Cleveland, C. C. & St. L. R. Co. v. Stephenson*, 139 Ind. 641, 37 N. E. 720; *Harbaugh v. People*, 33 Mich. 241; *Kansas P. R. Co. v. Reynolds*, 8 Kan. 624; *Marshall v. Marshall*, 18 W. Va. 395.

Messrs. Fred W. Parks and O. J. Blakeney, for appellee:

It was defendant's duty to use reasonable diligence to keep its premises in a reasonably safe condition for the use of all persons lawfully upon the premises.

Union Depot & R. Co. v. Meeking, 42 Colo. 89, 126 Am. St. Rep. 145, 94 Pac. 16; *Bishop, Non-Contract Law*, § 1086; 2 *Wood, Railway Law*, § 310; *Pierce, American Railroad Law*, 275; 2 *Rorer, Railroads*, p. 1130; *McDonald v. Chicago & N. W. R. Co.* 26 Iowa, 124, 96 Am. Dec. 114; *Patten v. Chicago & N. W. R. Co.* 32 Wis. 524; *Bennett v. Louisville & N. R. Co.* 102 U. S. 577, 26 L. ed. 235; *Sweeny v. Old Colony & N. R. Co.* 10 Allen, 368, 87 Am. Dec. 644; *Buenemann v. St. Paul, M. & M. R. Co.* 32 Minn. 390, 20 N. W. 379; *Carleton v. Franconia Iron & Steel Co.* 99 Mass. 216; *Toledo, W. & W. R. Co. v. Grush*, 67 Ill. 262, 16 Am. Rep. 618; *Colorado & S. R. Co. v. Sonne*, 34 Colo. 206, 83 Pac. 383; *Colorado Springs v. Smith*, 19 Colo. 554, 36 Pac. 540; *White v. Cincinnati, N. O. & T. P. R. Co.* 89 Ky. 478, 7 L.R.A. 44, 12 S. W. 936; *Kelly v. Manhattan R. Co.* 112 N. Y. 443, 3 L.R.A. 74, 20 N. E. 383; *Burbank v. Illinois C. R. Co.* 42 La. Ann. 1156, 33 L.R.A. (N.S.)

11 L.R.A. 720, 8 So. 580; *Dowd v. Chicago, M. & St. P. R. Co.* 84 Wis. 105, 20 L.R.A. 527, 36 Am. St. Rep. 917, 54 N. W. 24; *Seymour v. Chicago, B. & Q. R. Co.* 3 Biss. 43, Fed. Cas. No. 12,685; *Burgeas v. Great Western R. Co.* 6 C. B. N. S. 923; *Hamilton v. Texas & P. R. Co.* 64 Tex. 251, 53 Am. Rep. 756; *McKone v. Michigan C. R. Co.* 51 Mich. 601, 47 Am. Rep. 596, 17 N. W. 74; *Tobin v. Portland, S. & P. R. Co.* 59 Me. 183, 8 Am. Rep. 416; *Denver & R. G. R. Co. v. Spencer*, 27 Colo. 313, 51 L.R.A. 121, 61 Pac. 606; *Montgomery & E. R. Co. v. Thompson*, 77 Ala. 448, 54 Am. Rep. 72; *New York, C. & St. L. R. Co. v. Mushrush*, 11 Ind. App. 192, 37 N. E. 954, 38 N. E. 871; *Klugherz v. Chicago, M. & St. P. R. Co.* 90 Minn. 17, 101 Am. St. Rep. 384, 95 N. W. 586; *Gillis v. Pennsylvania R. Co.* 59 Pa. 129, 98 Am. Dec. 317; *Louisville & N. R. Co. v. Berry*, 88 Ky. 222, 21 Am. Rep. 329, 10 S. W. 472; *Langan v. St. Louis, I. M. & S. R. Co.* 72 Mo. 392; *Atchison, T. & S. F. R. Co. v. Johns*, 36 Kan. 769, 59 Am. Rep. 609, 14 Pac. 237; *Doss v. Missouri, K. & T. R. Co.* 59 Mo. 27, 21 Am. Rep. 371; *Sullivan v. Vicksburg, S. & P. R. Co.* 39 La. Ann. 800, 4 Am. St. Rep. 239, 2 So. 586.

Plaintiff had the right to follow the directions given by the train men.

Texas P. R. Co. v. Davidson, 68 Tex. 370, 4 S. W. 636; *Filer v. New York C. R. Co.* 59 N. Y. 351; *Bucher v. New York C. & H. R. R. Co.* 98 N. Y. 128; *St. Louis, I. M. & S. R. Co. v. Cantrell*, 37 Ark. 519, 40 Am. Rep. 105; *Lambeth v. North Carolina R. Co.* 66 N. C. 499, 8 Am. Rep. 508; *Curtis v. Detroit & M. R. Co.* 27 Wis. 158; *Lucas v. Milwaukee & St. P. R. Co.* 33 Wis. 41, 14 Am. Rep. 735; *Sweeny v. Old Colony & N. R. Co.* 10 Allen, 368, 87 Am. Dec. 644; *Denver & R. G. R. Co. v. Gustafson*, 21 Colo. 393, 41 Pac. 505.

A fair and just compensation for plaintiff's injuries was to be arrived at by taking into consideration the length of time plaintiff was confined to his home, the effect his injury had upon him to earn money, etc.

Masterton v. Mt. Vernon, 58 N. Y. 391; *Silaby v. Michigan Car Co.* 95 Mich. 204, 54 N. W. 761; *Bloomington v. Chamberlain*, 104 Ill. 268; *Grand Rapids & I. R. Co. v. Martin*, 41 Mich. 667, 3 N. W. 173; *Bierbach v. Goodyear Rubber Co.* 54 Wis. 208, 41 Am. Rep. 19, 11 N. W. 514; *Marks v. Long Island R. Co.* 14 Daly, 61; *Wade v. Leroy*, 20 How. 34, 15 L. ed. 813; *Union P. R. Co. v. Shovell*, 39 Colo. 443, 89 Pac. 764; *Pueblo v. Griffin*, 10 Colo. 368, 15 Pac. 616.

Musser, J., delivered the opinion of the court:

On a certain morning in September, 1905, Wolfe Londoner accompanied his daughter from his residence to the Union Depot in Denver, to aid her in getting aboard a train of the Denver & Rio Grande Railroad Company as a passenger for Colorado Springs. Upon arriving at the depot, they walked through an open, arched passageway, which ran through the depot building, thence through an open gateway, directly in line with the said passageway, into the yard, and they came upon a platform about 50 feet in width, made of brick and plank and built to the level of the rails, so as to afford a convenient walk for those coming from and going to trains. On either side of this walk, the various trains, about to depart, were standing and receiving passengers. After passing through the gateway, the first track reached was called track No. 1. Then came a brick platform about 16 feet wide, running for a considerable distance from the broad walk, parallel to the tracks, and designed for the use of those boarding trains standing on tracks No. 1 and No. 2. Then came track No. 2; then a passageway parallel to the tracks and about 9½ feet wide, between the right rail of track No. 2 and the left rail of track No. 3, looking to the southwest toward Sixteenth street; then track No. 3; then another brick walk about 16 feet wide, running parallel with the tracks, and designed for the use of those boarding trains standing on tracks No. 3 and No. 4. The train that the daughter desired to board was standing on track No. 3. It was the occasion of a Grand Army Encampment in Denver, and a great crowd of people were congregated on the wide walk, going to their various trains. Londoner and his daughter proceeded in the crowd to the train on track No. 3. The testimony on behalf of Londoner shows that on the broad walk at the rear of the train were two or three men dressed like railroad men, who cried out that that was the Rio Grande train for Colorado Springs and Cripple Creek. The crowd seemed to turn back from the 16-foot walk between tracks No. 3 and No. 4, and these men indicated by their gestures that the people should pass down the narrow passageway between tracks No. 2 and No. 3. A large number, among whom were Londoner and his daughter, turned down this passageway. The way was not bricked, but was formed of charred coal or cinders to the level of the tracks. In it and about 43 feet from the broad platform was a gas valve, elliptical in shape, several inches long and several inches wide, projecting above the walk 33 L.R.A. (N.S.)

about 4 inches. Londoner stumbled over this, fell, and severely hurt his knee. He arose, went forward with his daughter, until he came to an open door of a car. He then assisted his daughter into the car. After this he went home. The fall had affected his knee in such a way that it caused what one of the physicians who testified called water on the knee, and gave as the technical name "acute synovitis." He suffered pain, was bedfast for about two months, and was kept away from his business for about four months, after which, by the aid of crutches for a time, he gave some attention to business, and more as the knee improved. There was evidence that the knee was not yet well at the time of the trial in May, 1907, and that the weakness would continue. He expended about \$800 for physicians, surgeons, nurses, and other things necessary for treatment. He was engaged in the grocery business, and had been so engaged in Denver for about forty years, giving the business his constant supervision and care. The jury returned a verdict of \$2,000 in his favor, and from a judgment entered on this verdict the Depot Company appealed.

A special interrogatory was submitted to the jury, asking them whether there was a train standing upon track No. 2 at the time of the accident. The jury answered that they were unable to agree on that point. If there was a train there, then the space between the car on track No. 2 and the car on track No. 3 was about 4 feet. The appellant claims that it was but an agent for the several roads that made use of its depot, tracks, and yard, and that therefore, if anyone is liable for the injury, it is the Denver & Rio Grande Railroad Company, in whose train the daughter intended to and did become a passenger. It is upon this claim of agency that most of the errors assigned by appellant are based.

The appellant was organized in 1899, under the laws of Colorado, for the purpose, among others, of becoming the successor to the Union Depot & Railroad Company, which constructed, owned, maintained, and operated the Union Depot yards and tracks. The appellant asserts that it took over and succeeded to all the property, rights, and contracts of its predecessor; that among the things to which it succeeded was a contract between its predecessor and the railroad companies relative to the depot, yards, and tracks, wherein such a relation was established between it and the several companies as to make the appellant the agent of the railroad companies, and to relieve it of any duty to the public and of any liability in this case. The appellant was organized for the further purpose of

owning, maintaining, and operating a Union Depot in Denver, and in the accomplishment of this purpose it owned, used, maintained, and operated for profit, in its own name, the depot building, yards, and tracks for the accommodation of the traveling public, the same as any depot, yards, and tracks are maintained and operated for such use. It has been already determined in this state that the purpose for which the appellant was organized, and which had been accomplished by it, was for the accommodation of the traveling public. *Union Depot & R. Co. v. Meeking*, 42 Colo. 89, 126 Am. St. Rep. 145, 94 Pac. 16. It is the duty of railroad companies, as carriers of passengers, to provide proper stational accommodations and safeguards for persons who may come to stations in order to become passengers, or who may be discharged from incoming trains. *Hutchinson, Carr.* 3d ed. § 928. This duty, relative to stational facilities, is a duty which the carrier owes to the traveling public as much as any other of its duties, and it is a part of the duties which it thus owes. If this stational duty is performed by someone other than the carrier itself, it must of necessity remain a duty to the traveling public due from the one that undertakes to perform it. It is not intended to intimate that the carrier would be relieved of its duty because another undertakes to perform the same duty. The duty and liability of the carrier is not considered in this case. It was for the performance of this stational duty that the appellant was created, and it accomplished the purpose of its creation when it undertook and performed that duty in its own name, under its own direction, with its own buildings, tracks, and other structures, in its own yards, and on its own property. By its conduct it professed and made ostentatious the fact that it was performing this duty. There is no doubt that by private contract between the appellant and the railroad companies, the latter made use of the facilities which the former afforded, and it may be that the contract established certain private relations between them, which would be considered in any controversy among themselves or their privies, but that private contract does not profess to, nor could it, if it did, change the relation of the appellant to the public,—a relation which arose out of the very object of its creation, and was assumed, professed, and held out by it in the ostensible accomplishment of that object. The appellant was the owner and occupant of this station, yard, and tracks, and it is clear from the very nature of its business that it invited all those who might desire to take passage on

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any of the roads running from its station to come upon its premises. This invitation extended also to those who desired to accompany an intending passenger, to see him off or to aid him in getting aboard a train, and such persons came lawfully upon the premises by virtue of such invitation. *Denver & R. G. R. Co. v. Spencer*, 27 Colo. 313, 51 L.R.A. 121, 61 Pac. 606; *Dowd v. Chicago, M. & St. P. R. Co.* 84 Wis. 105, 20 L.R.A. 527, 36 Am. St. Rep. 917, 54 N. W. 24; *Elliott, Railroads*, 2d ed. § 1256. There is a well-known rule of law that declares that any owner or occupant of land who induces or leads others to come upon his premises is liable in damages to such persons, they using due care, for injuries occasioned by the unsafe condition of the land or its approaches, if the condition was known to the owner, and not to them, and was negligently suffered to exist without timely notice to the public or those who are liable to act upon the invitation to come there. *Lunt v. Post Printing & Pub. Co.* 48 Colo. 316, 30 L.R.A.(N.S.) 60, 110 Pac. 203; *Bennett v. Louisville & N. R. Co.* 102 U. S. 577, 26 L. ed. 235; *Carleton v. Franconia Iron & Steel Co.* 99 Mass. 216. In *Sweeny v. Old Colony & N. R. Co.* 10 Allen, 368, 87 Am. Dec. 644, speaking with reference to an owner or occupant of land, it is said: "If he directly or by implication induces persons to enter on and pass over his premises, he thereby assumes an obligation that they are in a safe condition suitable for such use, and for a breach of this obligation he is liable in damages to a person injured thereby." This rule is applied to the owner and occupant of railway stations, and the law imposes upon such an owner and occupant the duty to keep the station and facilities in a proper condition for the safety of those who go upon the premises in response to the invitation extended. *Toledo, W. & W. R. Co. v. Grush*, 67 Ill. 282, 16 Am. Rep. 618; *McDonald v. Chicago & N. W. R. Co.* 26 Iowa, 124, 96 Am. Dec. 114; *Patten v. Chicago & N. W. R. Co.* 32 Wis. 524; *Atlantic & B. R. Co. v. Owens*, 123 Ga. 393, 51 S. E. 404; *Hutchinson, Carr.* § 928; *Dowd v. Chicago, M. & St. P. R. Co.* 84 Wis. 105, 20 L.R.A. 527, 36 Am. St. Rep. 917, 54 N. W. 24; *Maxfield v. Maine C. R. Co.* 100 Me. 79, 60 Atl. 710; *Elliott, Railroads*, 2d ed. §§ 1256, 1641.

Among other things which the appellant undertook to do in the operation of its station was to direct passengers to their proper trains, as is shown by a rule which it had, requiring depot officers and their assistants and train men, when on duty, to perform this service for it. The rule

also shows the means or agency through which the appellant chose to perform that service. While the evidence is not clear that the employees who directed Londoner and the others to go down the passageway wherein the accident happened were train men, and not depot officers or assistants, for the purpose of this case, it may be assumed that these men were train men of the Denver & Rio Grande Railroad Company, on duty. The appellant argues that it did not employ these men, could not direct them nor discharge them; that they were not its agents; and that therefore it was not responsible for their direction of Londoner. These men were the agency through which the appellant chose to perform its service of directing passengers to their trains, and they were the only agency which it employed in this case to perform that service. It availed itself and had the benefit of the service of these men, made them the agents or means for the performance of that particular part of its work which it had undertaken in the operation of its station, and it cannot now be permitted to say that Londoner had no right, so far as it was concerned, to follow the directions of the agency which it adopted and used as the means through which it gave directions. This principle has already been settled in this state in *Denver & R. G. R. Co. v. Gustafson*, 21 Colo. 393, 41 Pac. 505. It follows, therefore, that the court did not err in its instructions in coupling the train men with the depot officers of the appellant and their assistants. While in the *Gustafson* Case it was shown that there may be instances when it is a question whether a person is justified in acting solely on directions, as at a crossing where danger is obvious, yet the reasoning plainly shows that in cases like the present, where no danger is obvious, a person may rely on the directions. Here, even if it be assumed that a train stood on track No. 2, the situation, as revealed by the testimony of both sides, was not one of obvious or apparent danger. There is no evidence that there was any sign or warning that the passageway was at all dangerous, or that it was not to be used in the face of directions to use it. The plat and evidence on the part of appellant show the absence of those things, and do not reveal anything that would cause, in an ordinary man, standing amidst the crowd on the wide walk, the slightest apprehension of danger in going into the passageway when directed. The passengers knew that trains would not pull out until schedule time, and that was about fifteen minutes away. They might think that the passageway was narrow or inconvenient, but there was nothing

about the premises or in the circumstances to indicate that there was any danger in going into the passageway when directed to do so, or that in any way suggested that they should do other than obey the directions given. There was nothing for the jury to conclude but that a person of ordinary caution would unhesitatingly and of right follow the directions and go down the passageway between the cars to board the train. Hence it follows that it was immaterial whether a train stood upon track No. 2 or not, for Londoner had the right to, and could not be expected to, do anything else than follow the others into the passageway to board the train. That fact being immaterial under the circumstances, the court did not err in receiving the verdict, notwithstanding the jury failed to answer the special interrogatory which covered the immaterial matter. *Denver v. Teeter*, 31 Colo. 486, 74 Pac. 459.

In an instruction relating to damages and the elements thereof, the jury were told that they could take into consideration, among other things, the pecuniary loss, if any there was, by reason of the suspension of Londoner's personal oversight and attention to his business during the time he was confined to his home on account of his injuries, his loss, if any there was, by reason of any decreased ability to give his personal attention and oversight to his business from the time he was able to return to his work until the trial, and his loss, if any there was, by reason of any decreased ability to earn money in the future, or to continue to give the same personal oversight and attention to his business as before the accident. These matters are objected to. The appellant does not say that they are not proper matters for consideration by a jury when supported by evidence, but asserts that they were not proper matters for consideration in this case, because there was no evidence justifying their submission to the jury. It was alleged in the complaint that Londoner was confined to his bed and home for four months; that thereafter he was unable to properly attend to his business or perform his ordinary duties; and that in the future he will not be able to attend to or perform more than a part of his work. There was evidence sustaining these allegations, and there was therefore evidence that his time was lost by reason of the suspension of his personal oversight and attention to his business, and by his decreased ability to give his personal oversight and attention. Was there evidence of the value of this lost time? There was evidence showing the character of the business; that Londoner had built it up and had always given it

his personal attention and oversight; that he had been engaged therein for many years, and the particular duties and work performed by him were shown generally. There was also evidence showing that the services rendered by Londoner in his business were worth \$500 or \$600 a month. These were all matters for the jury to consider in fixing the value of his time. In *Masterton v. Mt. Vernon*, 58 N. Y. 391, at page 396, it is said: "The plaintiff had the right to prove the business in which he was engaged, its extent and the particular part transacted by him, and, if he could, the compensation usually paid to persons doing such business for others. These are circumstances the jury have a right to consider in fixing the value of his time." There was no allegation of a loss of profits, nor any attempt to prove a loss of profits. That was not necessary. As is said in *Silsby v. Michigan Car Co.* 95 Mich. 204, at page 209, 54 N. W. 761: "The loss of profits in conducting a business involving the labor of others is not a necessary consequence of personal injury to the plaintiff. The extent of his recovery upon this ground would be what his services were worth in the conduct of such a business as he was engaged in." In *Grand Rapids & I. R. Co. v. Martin*, 41 Mich. 667, 3 N. W. 173, evidence of the nature and extent of plaintiff's business to show how far he was affected in it was held competent to show his pecuniary loss by reason of the suspension of his personal oversight and labor, and hence must have been considered as some evidence of his damage in that regard. The court said: "We think it was competent to give such a full account of plaintiff's business as to show how far he was affected in it, and this could not be done without showing its nature and extent. There was no evidence received as a ground of damage beyond his pecuniary loss by reason of the suspension of his personal oversight and labor. There was no error in this regard." Londoner had a definite status in a regular and established business to which he devoted his whole time. He was not engaged in odd jobs or various schemes. The value of his time or services was thus capable of measurement, and had a value, as shown by the uncontradicted evidence of a competent witness. Such evidence may be taken into consideration by the jury. *Harmon v. Old Colony R. Co.* 168 Mass. 377, 47 N. E. 100; *Whipple v. Rich*, 180 Mass. 477, 63 N. E. 5. It is thus seen that there was evidence to support these elements of damages embraced in the court's instruction. If more evidence could have been given, the company cannot complain of its omission. 33 L.R.A. (N.S.)

sion, for it probably would have increased the verdict above the sum of \$2,000. There were other elements that were considered in arriving at that verdict, such as expenses for doctors and nurses, and damages for physical pain and suffering. In a general way, all of the 76 assignments of error have been answered upon the phases of the case embraced in the assignments, the question of the negligence of the company and contributory negligence of Londoner were submitted to the jury, and, as no error has been discovered, the judgment is affirmed.

Campbell, Ch. J., and Bailey, J., concur.

UNITED STATES CIRCUIT COURT OF APPEALS, FIRST CIRCUIT.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Appt.,
v.

JEREMIAH SMITH, JR., Trustee, etc., of Edwin J. Dunning.

(106 C. C. A. 593, 184 Fed. 1.)

Insurance — future annuities — validity.

1. A contract by which an insurance company undertakes for a present cash premium to pay to the insurer annuities beginning at a designated future time, and continuing during his life, is not invalid as against public policy.

Bankruptcy — future annuity contracts — setting aside.

2. A trustee in bankruptcy has no right to set aside contracts made by the bankrupt with money fraudulently obtained, by which an insurance company, in consideration of a present cash premium, undertook to pay him annuities beginning at a designated future time, where the company acted in good faith without notice of the source of the funds, since it acquired rights and advantages under the transaction of which it could not be deprived.

(January 13, 1911.)

A PPEAL by defendant from a decree of the Circuit Court of the United States for the District of Massachusetts in com-

Note. — The case of *MUTUAL L. INS. CO. v. SMITH* seems to be one of first impression upon the right of a trustee in bankruptcy to set aside an annuity contract procured by the bankrupt by the fraudulent use of funds.

The general question of life insurance as assets of bankrupt has been discussed in the notes appended to *Morris v. Dodd*, 50 L.R.A. 33; *Re White*, 26 L.R.A. (N.S.) 451; and *Re Orear*, 30 L.R.A. (N.S.) 990.

plainant's favor in a suit to recover, as payments made in fraud of the bankrupt's creditors, premiums paid by him for deferred annuity contracts. Reversed.

The facts are stated in the opinion.

Argued before Colt and Putnam, Circuit Judges, and Aldrich, District Judge.

Messrs. Reginald Foster and Stephen S. FitzGerald, with Mr. William D. Turner, for appellant.

Messrs. Fish, Richardson, Herrick, & Neave and Stanley R. Miller, for appellee:

Dunning's payments were transfers in fraud of his creditors.

Winchester v. Charter, 12 Allen, 606; Winchester v. Charter, 102 Mass. 272; Jaquith v. Massachusetts Baptist Convention, 172 Mass. 446, 52 N. E. 544.

The appellant is not a purchaser for value.

2 Pom. Eq. Jur. 2d ed. § 757; 3d ed. § 751; Wormley v. Wormley, 8 Wheat. 422, 5 L. ed. 651; Villa v. Rodriguez (Alexander v. Rodriguez) 12 Wall. 323, 20 L. ed. 406; Dresser v. Missouri & I. R. Constr. Co. 93 U. S. 92, 23 L. ed. 815; Lytle v. Lansing, 147 U. S. 59, 37 L. ed. 78, 13 Sup. Ct. Rep. 254; Smith v. Allen, 5 Allen, 454, 81 Am. Dec. 758; Wells v. Morrow, 38 Ala. 125; Duncan v. Johnson, 13 Ark. 190; Hayden v. Charter Oak Driving Park, 63 Conn. 142, 27 Atl. 232; Brown v. Welch, 18 Ill. 343, 68 Am. Dec. 549; Baldwin v. Sager, 70 Ill. 503; Slattery v. Rafferty, 93 Ill. 277; Parkinson v. Hanna, 7 Blackf. 400; Kitteridge v. Chapman, 36 Iowa, 348; Bush v. Collins, 35 Kan. 535, 11 Pac. 425; Hardin v. Harrington, 11 Bush, 367; Dixon v. Hill, 5 Mich. 404; Warner v. Whittaker, 6 Mich. 133, 72 Am. Dec. 65; Blanchard v. Tyler, 12 Mich. 339, 86 Am. Dec. 57; Palmer v. Williams, 24 Mich. 328, 14 Mor. Min. Rep. 579; Crockett v. Phinney, 33 Minn. 157, 22 N. W. 292; Marsh v. Armstrong, 20 Minn. 81, Gil. 66, 18 Am. Rep. 355; Kilcrease v. Lum, 36 Miss. 569; Arnholt v. Hartwig, 73 Mo. 485; Dougherty v. Cooper, 77 Mo. 528; Young v. Kellar, 94 Mo. 581, 4 Am. St. Rep. 406, 7 S. W. 293; Cheek v. Waldron, 39 Mo. App. 21; Patten v. Moore, 32 N. H. 382; Haughwout v. Murphy, 21 N. J. Eq. 118; Keyser v. Angle, 40 N. J. Eq. 481, 4 Atl. 641; Jewett v. Palmer, 7 Johns. Ch. 65, 11 Am. Dec. 401; Pickett v. Barron, 29 Barb. 505; Spicer v. Waters, 65 Barb. 227; Sargent v. Eureka Spund Apparatus Co. 46 Hun, 19; Pierce v. O'Brien, 189 Mass. 58, 75 N. E. 61; Nicol v. Crittenden, 55 Ga. 497; Howlett v. Thompson, 36 N. C. (1 Ired. Eq.) 369; Wood v. Rayburn, 18 Or. 3, 22 Pac. 521; Youst v. Martin, 3 Serg. & R. 423; Bush v. Bush, 3 Strobb. Eq. 131, 51 33 L.R.A.(N.S.)

Am. Dec. 675; Fraim v. Frederick, 32 Tex. 294; Abell v. Howe, 43 Vt. 403; Rorer Iron Co. v. Trout, 83 Va. 397, 5 Am. St. Rep. 285, 2 S. E. 713; Everts v. Agnes, 4 Wis. 343, 65 Am. Dec. 314.

Appellee is entitled to recover the money without tracing it into the appellant's possession.

Newburyport v. Fidelity Mut. L. Ins. Co. 197 Mass. 596, 84 N. E. 111; Bailey v. Wood, 202 Mass. 562, 89 N. E. 149; Stigler v. Stigler, 77 Va. 163; Cole v. Marple, 98 Ill. 58, 38 Am. Rep. 83.

Property transferred in fraud of creditors is held by any transferee not a bona fide purchaser for value, as constructive trustee for the creditors.

Wood v. Robinson, 22 N. Y. 564; McCartney v. Bostwick, 32 N. Y. 53.

If the trust property is mingled with property of the wrongdoer, the *cestui* may separate an amount equivalent to his trust *res*, or have a charge on the whole mass.

Re Hallet, L. R. 13 Ch. Div. 696; Central Nat. Bank v. Connecticut Mut. L. Ins. Co. 104 U. S. 54, 26 L. ed. 693; Frelinghuysen v. Nugent, 36 Fed. 229; Smith v. Au Gres Twp. 9 L.R.A.(N.S.) 876, 80 C. C. A. 145, 150 Fed. 257; Re Oatway [1903] 2 Ch. 356, 72 L. J. Ch. N. S. 575, 88 L. T. N. S. 622; Lamb v. Rooney, 72 Neb. 322, 117 Am. St. Rep. 795, 100 N. W. 410.

Aldrich, District Judge, delivered the opinion of the court:

This is a bill in equity by a trustee in bankruptcy who offers to surrender certain insurance contracts entered into between the bankrupt and an insurance company, and asks that the company be ordered to pay to the trustee upon their surrender all sums which the company received from the bankrupt.

The case is a novel one in the sense that it involves a kind of insurance or indemnity which has not been in general use, if in use at all.

One Edwin J. Dunning, who was insolvent at the time, secured from the Mutual Life Insurance Company of New York three policies which are designated by the appellee, and perhaps correctly, as "deferred annuity contracts," whereby the company obligated itself to pay to Dunning \$1,000 yearly under each contract or policy, commencing in 1916, 1921, and 1926, respectively, provided Dunning was then alive, and the payments were to continue as long as Dunning should live.

The total amount paid by Dunning for these policies or contracts was \$4,920. There were three payments,—one in January, another in February, and another in July, 1901.

There is no substantial argument against the general proposition that Dunning was insolvent, and that he was acting in general bad faith with respect to his creditors, and that he was scheming to get money by fraudulent means from the Brooks family, and perhaps others, which he never intended to pay; and we think the record discloses a condition of things from which it should be assumed that, at a time at least as early as the date of the policies, Dunning was engaged in transactions of a hazardous and fraudulent character, whereby he was to secure financial advantages and securities for which he never intended to pay; but we are not aware that the proofs establish any precise fact connecting any particular fraudulent transaction under which he was to receive money with the particular transaction of securing the deferred annuities or insurance. It is, however, probably quite true that the policies were paid for with money which he fraudulently obtained.

It is neither alleged nor argued that the insurance company had any knowledge of Dunning's fraudulent career, and it is admitted that the company acted in good faith, and without having any ground to suspect the existence of any fraudulent intent on Dunning's part.

The position of the trustee in bankruptcy is that Dunning's payments were transfers in fraud of creditors, and that the insurance company, though acting bona fide, is not a purchaser for value, because it has not paid the purchase money, or secured it in such a manner that it cannot be relieved against payment.

In support of this position counsel rely upon that class of cases which are concerned with transactions between seller and purchaser, and transactions between grantors and grantees, with respect to which it has sometimes, and perhaps generally, been held that the execution and delivery of non-negotiable notes and bonds, and other things done by the purchaser or grantee less than actual payment before notice, do not constitute one a bona fide purchaser or grantee, and therefore that the creditors may have property restored to them where the purchaser or grantee may be placed *in statu quo*.

There is, of course, some diversity of authority in respect to the particular circumstances under which rescission and restoration is justifiable; but in our view we are not called upon to consider the large number of cases relating to such situations, because they have no direct application to the question involved in this case, and have very little bearing, if any, by way of analogy.

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If we are right in this position, it is because the relations here are not those of seller and buyer, and because the insurance company was in no sense a purchaser. The fundamental idea of the remedy for restoration is that it directs itself against the purchaser, and if either of the parties to the insurance contract in question could be considered a purchaser it would be Dunning, while the remedy is sought against the insurance company.

The courts are, of course, reluctant to give any aid whatever to parties tainted with fraud; but this is not a case between the trustee in bankruptcy and Dunning, but between the trustee and the insurance company, against whom there is no suggestion of fraud, and is therefore a case where the rights between these particular parties do not depend so much upon the bad faith and the wrongful intent of Dunning, who is one of the parties to the contract, as upon the good faith and innocent intent of the insurance company, who is the other party to the contract.

As stated at the outset, the contract between the insurance company and Dunning, or the policy of insurance from the company to Dunning, if it may properly be called that, is novel in kind; but that is no reason why it should be rescinded by the parties or repudiated by the law, provided it does not offend the law or general considerations of public policy.

All insurance was once new, and insurance in its early stages covered few contingencies; but the business under the law has grown until the idea of insurance now spreads itself broadly over many subjects and many contingencies.

Generally speaking, the contingency, so far as contingency is concerned, in life insurance, is death, with, of course, endowment plans, under which there is payment of a certain sum at a particular age.

The policies in question provide for payments of annuities beginning in 1916, if the insured is alive at that time, and for the continuance of annuities during his life.

Aside from what is urged in respect to the fraudulent purpose of Dunning to secure this insurance, and pay for it by funds which were realized out of fraudulent transactions, and which, if used for such a purpose, would divert funds which equitably belonged to creditors, we see very little to be urged against insurance of the nature in question, and, indeed, that does not go to the merit of the insurance itself. It is not unnatural that one should act upon the idea that, in the days when he is handling money, it is the part of wisdom to safeguard the period of old age, in which business and earning capacity will have become a thing of the past. Under modern

conditions in the various industries, as well as in business and in official life, men are influenced to enter upon a particular work by various old age safeguards, which become operative at the end of a specified period of service.

We see nothing, therefore, in the contract itself, disassociated from the general fraudulent purpose of Dunning, which offends public policy or any particular principle of law. The question whether the contract of insurance is one which should be repudiated upon principles of law, or as something offending public policy, is a very pertinent one, because, if the contract is a lawful and proper one in kind, the insurance company, acting in good faith, as it did, acquired certain rights and advantages upon which it is entitled to stand.

It is urged by the company that the nature of the contract, and the business acts in pursuance of it, by the insurance company, put it in a situation where it is not possible to place it *in statu quo*.

It is suggested that brokers' commissions were paid, that the costs of doing business are an element, that the fund had been classified and entered upon its books, and had assumed a certain status with respect to other contingencies, and that there is no offer in the bill to place the insurance company *in statu quo* in these respects. But, however that may be, we think the other ground, that it has acquired rights and advantages upon which it is entitled to stand, involves weightier considerations.

The business of a mutual insurance company is in a degree for profit as well as for security, and the enterprise involves large expenditures; and whether the margin is one way or the other depends upon whether the contingencies are well or ill advised; and if there is nothing in the contract itself which offends the law, there is no reason apparent why the company, if it has acquired advantages or rights under a particular transaction, should be deprived of its advantages obtained in good faith.

If there were no question of creditors, and if Dunning had died a week after the contract, and before bankruptcy, the contingency upon which the insurance was to become effective would have ceased to exist, or if he should die any time before 1916, such would be the case. That was the insurer's side of the contract, and the right being created in good faith and without any purpose to defraud, it is difficult to find any principle upon which the advantage can be wrested from the insurance company by Dunning's creditors. Whatever advantage Dunning is to receive under the contract would doubtless go to the creditors.

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The plaintiff, as trustee in bankruptcy, in his bill, offers to surrender the contract to the insurance company; but the insurance company says it is entitled to stand upon the contract entered into on its part in good faith, and under which it has acquired certain rights, and that it is willing that the trustee shall succeed to all the rights of the insured, and take all the benefits which may result under the contingencies and terms of the contract.

The trustee's position in this respect is that a right which is only partially operative in 1916, and not wholly operative until 1926, is not an available and efficient beneficial right in the bankruptcy sense, because the law contemplates that matters concerning bankruptcy estates must be speedily adjusted and closed.

We do not perceive that to be a justifiable legal or equitable ground for dispossessing the insurance company of its legitimate contractual rights and advantages.

The contingent right of the insured, like the statutory right to seize and hold and sell remainder and contingent interests in real estate, is doubtless something that the trustee may seize and hold for the benefit of the creditors, or doubtless he may waive it altogether under circumstances which justify it.

The decree of the Circuit Court is reversed, and that court is directed to dismiss the bill without prejudice to any right the trustee may have to claim whatever beneficial interest the bankrupt has, or may hereafter have, under the insurance contracts described in the bill; and the respondent, now the appellant, recovers its costs of this court, and of the Circuit Court, so far as the same can be paid from the estate in bankruptcy.

KENTUCKY COURT OF APPEALS.

JOE HIGDON, Doing Business under the Name of Crescent Coal Company, Appt.,

v.

LOUISVILLE & NASHVILLE RAILROAD COMPANY.

(143 Ky. 73, 135 S. W. 768.)

Carrier — railroad — duty to transfer within switching limits.

1. A railroad company which is a common carrier of passengers and freight, and maintains within a city a freight line and spur tracks to industrial plants, cannot refuse to transport freight from one part of the system to another, on the theory that they are within its switching limits, and that, as to such limits, it does not assume the duty of a common carrier.

Same — discrimination — material for reshipment and for consumption — refusal to haul.

2. The fact that a railroad company will receive a transportation charge on a finished product, the raw material for which it hauls from a warehouse to a mill within the limits of a city, while it will not secure such charge in case of coal hauled from a mine within the city to the mill, does not justify its refusing to haul the coal, and performing the service with respect to the raw material.

Same — refusal of service — establishment of right to continue refusal.

3. A railroad company cannot, by refusing to haul coal from a mine to industrial plants connected by belt lines, to spur tracks within the city, when it hauls other commodities to such points, establish the right to refuse to perform its duty as a common carrier, when such service is demanded.

Same — public rates — mistake in fixing — right to depart from.

4. That a railroad company, when pub-

lishing its rates for hauling cars from one point to another within the limits of a city, was under the mistaken impression that it was not bound to do a regular freight business between such points, does not entitle it to charge more than its published rates for handling such freight, and it cannot avoid this result by insisting that the rate was only for switching service, where it had done both switching and transportation service at such rate.

Damages — refusal of railroad to haul coal — inability to fill contracts.

5. One who contracts with a mine for a certain quantity of coal to fill orders already taken, and takes others in reliance thereon, and is prevented from filling his contract because of the refusal of a railroad company to haul the coal at its published rates, may hold it liable for the difference in cost of filling the orders under the conditions created by the refusal of the railroad to haul the coal, and what it would have cost him to fill them had the railroad company performed its duty, to the amount which the mine

Note. — Duty of carrier to accept freight originating and terminating within city limits.

The decision in *HIGDON v. LOUISVILLE & N. R. Co.*, that a common carrier who maintains a freight line and spur tracks to industrial plants cannot refuse to transport freight from one part of the system to another, on the theory that they are within its switching limits, and that as to such limits it does not assume the duty of a common carrier, seems upon the facts of that case to be sound.

In *Harp v. Choctaw, O. & G. R. Co.* 118 Fed. 169, affirmed in 61 C. C. A. 405, 125 Fed. 445, where the duty of a carrier to furnish cars to a coal mine, to be loaded by wagons on its commercial tracks in its yards at a time when traffic was unusually heavy, was in question, the court said: "Under the principles announced, and under the common law, and even under the Cardwel act in England, which, as will appear, is much broader and goes much further than the statute law of this state, it is clear that it was within the power of the defendant company to determine for itself the means and methods of transportation which it would employ or hold out to the public, as well as the character and kind of goods it would carry, or profess or hold itself out to carry, and under what conditions it would accept and receive the same for transportation, and from and to what points it would transport articles received for transportation."

It would not seem in all cases and under all circumstances to be the duty of railroads to accept freight to be transported from one part of a city to another. Although there may be two industrial plants in a city, connected by spur tracks with the main line of the railroad, if there has been no assumption or holding out on the part of the rail-

road of transporting intraurban shipments, it would not seem that this duty should be forced upon it.

It has been held that a law requiring a carrier to receive at its connecting point with another road, and switch, transport, and deliver, all live stock consigned from the stock yards of such other road, located just outside the city limits, to anyone at the stock yards of the first carrier, located on the other side of the city, is unconstitutional, since it amounts to a taking of property without due process of law. *Louisville & N. R. Co. v. Central Stock Yards Co.* 212 U. S. 132, 53 L. ed. 441, 29 Sup. Ct. Rep. 246. The court said: "If the principle is sound, every road into Louisville, by making a physical connection with the Louisville & Nashville, can get the use of its costly terminals and make it do the switching necessary to that end, upon simply paying for the service of carriage. The duty of a carrier to accept goods tendered at its station does not extend to the acceptance of cars offered to it at an arbitrary point near its terminus by a competing road, for the purpose of reaching and using its terminal station. To require such acceptance from a railroad is to take its property in a very effective sense, and cannot be justified, unless the railroad holds that property subject to greater liabilities than those incident to its calling alone."

In *Dixon v. Central R. Co.* 110 Ga. 173, 35 S. E. 369, it was held that the fact that the entire service in question was rendered on spur tracks of a railroad company, the transportation being from a wharf in a city to the city waterworks just outside the city limits, did not prevent it from being a transportation, as distinguished from transferring or switching, and it was therefore held that the rates for the latter service did not apply.

J. T. W.

would have been able to furnish in compliance with his contract.

Same — optional contract — failure to show loss.

6. One who has secured the sole right to sell the product of a mine in a certain city cannot hold a railroad company liable in damages for refusing to haul coal for him, where the mine was required to fill his orders only after other contracts were cared for, and it does not appear that the railroad company's refusal caused him any loss because of inability to fill orders taken under his contract with the mine, which it was ready to fill.

(March 18, 1911.)

APPEAL by plaintiff from a decree of the Circuit Court for Henderson County dismissing his petition for damages for loss sustained because of defendant's refusal to furnish cars, thereby preventing plaintiff from filling orders for coal in compliance with his contract. Reversed.

The facts are stated in the opinion.

Messrs. Clay & Clay for appellant.

Messrs. Yeaman & Yeaman and Benjamin D. Warfield, with Mr. Charles H. Moorman, for appellee:

The petition stated no cause of action against the defendant, nor did the evidence show that the plaintiff was entitled to recover.

Louisville & N. R. Co. v. Central Stock Yards Co. 133 Ky. 148, 97 S. W. 778, 212 U. S. 138, 53 L. ed. 443, 29 Sup. Ct. Rep. 246; Central Stock Yards Co. v. Louisville & N. R. Co. 192 U. S. 568, 48 L. ed. 565, 24 Sup. Ct. Rep. 339; Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 A. & E. Ann. Cas. 1075; Copp v. Louisville & N. R. Co. 43 La. Ann. 511, 12 L.R.A. 725, 26 Am. St. Rep. 198, 9 So. 441; Gulf, C. & S. F. R. Co. v. Moore, 98 Tex. 302, 83 S. W. 362, 4 A. & E. Ann. Cas. 770; Van Patten v. Chicago, M. & St. P. R. Co. 74 Fed. 981; Clafin v. Houseman, 93 U. S. 130, 23 L. ed. 833; Swift & Co. v. Philadelphia & R. R. Co. 4 Inters. Com. Rep. 633, 58 Fed. 858; Louisville & N. R. Co. v. Com. 114 Ky. 787, 71 S. W. 910, 915; Com. v. Louisville & N. R. Co. 112 Ky. 75, 65 S. W. 158; Houston Coal & Coke Co. v. Norfolk & W. R. Co. 171 Fed. 723, 101 C. C. A. 626, 178 Fed. 266; Baltimore & O. R. Co. v. United States, 215 U. S. 481, 54 L. ed. 292, 30 Sup. Ct. Rep. 164; Interstate Commerce Commission v. Illinois C. R. Co. 215 U. S. 452, 54 L. ed. 280, 30 Sup. Ct. Rep. 155.

There was no legal obligation on the defendant to engage in the service, and therefore it violated no duty and incurred no liability by refusing to engage in it.

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5 Am. & Eng. Enc. Law, p. 158; Moore, Carr. 98; 2 Elliott, Railroads, § 466; Hutchinson, Carr. §§ 59, 60, 144; Pfister v. Central P. R. Co. 70 Cal. 169, 59 Am. Rep. 404, 11 Pac. 686; Elkins v. Boston & M. R. Co. 23 N. H. 275; Varble v. Bigley, 14 Bush, 698; Bassett & Stone v. Aberdeen Coal & Min. Co. 120 Ky. 728, 88 S. W. 318; Harp v. Choctaw, O. & G. R. Co. 118 Fed. 169; Kansas P. R. Co. v. Nichols, 9 Kan. 243, 12 Am. Rep. 494; Johnson v. Midland R. Co. 4 Exch. 367, 18 L. J. Exch. N. S. 366, 6 Eng. R. & C. Cas. 61; Pitlock v. Wells, F. & Co. 109 Mass. 452; Lee v. Burgess, 9 Bush, 652; Chesapeake & O. R. Co. v. Hall, 136 Ky. 379, 124 S. W. 372; Louisville & N. R. Co. v. Central Stock Yards Co. 212 U. S. 132, 53 L. ed. 441, 29 Sup. Ct. Rep. 246; Louisville & N. R. Co. v. Com. 108 Ky. 628, 57 S. W. 508.

There was no discrimination against the plaintiff, for the defendant was under no duty to engage in the business of an intraurban carrier.

Louisville & N. R. Co. v. Com. 108 Ky. 628, 57 S. W. 508; Louisville & N. R. Co. v. Com. 105 Ky. 179, 43 L.R.A. 550, 48 S. W. 410; Dixon v. Central R. Co. 110 Ga. 173, 35 S. E. 369; Kentucky & I. Bridge Co. v. Louisville & N. R. Co. 2 L.R.A. 289, 2 Inters. Com. Rep. 351, 37 Fed. 507.

Carroll, J., delivered the opinion of the court:

The appellant, Crescent Coal Company, is the business name assumed by Joe Higdon, who, in 1908, was engaged in buying and selling coal in the city of Henderson. The appellee, Louisville & Nashville Railroad Company, was at the time, and is, a corporation organized under the laws of Kentucky and engaged in the business of a common carrier of passengers and freight. Its main line of road runs into and through the city, and in addition to its main line it operates and controls what is called a "belt line," running from its main line in two directions through the city. Leading from its main and belt line, there were a number of spur tracks that ran into various industrial plants in the city of Henderson, situated near its main and belt lines of road. These spur tracks were used for the purpose of transporting freight to and from these industrial plants, and were operated by the company as a part of its line of road. The Keystone Mining & Manufacturing Company was engaged in the operation of a coal mine in the city of Henderson, and was connected with the main or belt line by a spur controlled and operated by the appellee company.

In April 1908, Higdon, in the name of the Crescent Coal Company, conceived the

plan of supplying the industrial plants in the city of Henderson that had spur connections with the main or belt line of the appellee company, with coal mined from the Keystone mine. His purpose was to have cars furnished by the appellee company loaded with coal at the mine, and then transferred by the appellee company to the industrial plants in Henderson that had spur connections. With this object in view, he entered into a contract with the Keystone Company, by the terms of which he was to be furnished by it during the year beginning July 1, 1908, 20,000 tons of coal, which it was stipulated in the contract should be delivered to him on the spur track at its mine. Another contract made in May, 1908, gave him the right with certain conditions to sell the output of the mine in excess of 20,000 tons. After making these contracts with the Keystone Company, he contracted with various industrial plants having spur connections with the line of the appellee company, to deliver to them at their plants in carload lots, at a stipulated price, a large quantity of coal. On July 1, 1908, he applied to the appellee company to furnish him cars at the Keystone Company's mine to be loaded with coal and hauled by it to the industrial plants, and proposed to pay for the services \$4 per car, which would be about 10 cents per ton. The appellee company refused to furnish any cars for this service until July 13, 1908, when it notified Higdon that it would furnish cars, but would charge for the service 50 cents per ton. This offer, which was kept open until August 13, 1908, Higdon refused to accept, and on August 13th the appellee company informed him that it would not furnish cars for this service at any price. Thereupon Higdon brought this suit against the appellee company, setting up his contracts, and the action of the appellee in preventing him from fulfilling them, and sought to recover damages to compensate him for the loss he had sustained. This action was brought on the ordinary, or common-law, side of the docket, but, on motion of the appellee company, was transferred over the objection of the appellant to equity, and, upon hearing, the petition was dismissed.

A number of legal questions are presented by the record, and we will endeavor to dispose of such of them as seem essential to a solution of the matters in controversy. The first, and perhaps the most important, question is: Was the appellee company under a duty as a common carrier of passengers and freight to render this service?

The evidence for appellee conduces to show that the coal mine and the industrial plants located in Henderson to which Hig-

don desired to deliver coal were all located within what are called the "switching limits" of the appellee company. It is therefore said that it should not be treated as a common carrier, or charged with the duty of transporting freight as a common carrier from one point within these limits to another point within them. A common carrier, such as the appellee company was, may undoubtedly have what may be called yard facilities, including switches, spurs, and side tracks, for its convenience in the handling, storing, and distribution of its cars and freight, and it would not be obliged as a common carrier to transport from one point to another in these yards, or on these spurs or switches, freight for the convenience of shippers who might desire to have freight hauled from one point on a switch or spur in the yard to another point in the yard. In the use of tracks laid in its yards for its own convenience in handling, storing, and distributing cars and freight, a common carrier cannot fairly be said to be engaged in the business of a common carrier, in the sense that it must receive and deliver as at other points on its line of road freight or passengers. A rule like this would impose an unreasonable duty upon a common carrier, and unnecessarily hinder and interfere with the conduct of its business. It is essential in the operation of railroads that they should have at terminals, and other places where the business requires it, yards and facilities that they may use in the conduct of their business in such a way as not to be inconvenienced by the necessity of receiving and unloading goods for shippers. But we are not inclined to treat what the appellee company terms its "switching limits" in the city of Henderson, as coming within the meaning of yards and terminals such as we have described. The spur tracks to the coal mine and the industrial plants were not constructed, nor were they operated, for the convenience of the appellee company in handling, storing, and distributing its cars, engines, and other property. As we will presently show, they were constructed and were being used as a part of its railroad system, in carrying freight for compensation to and from the plants connected with its main line of road by these spur tracks. It is true these spur tracks were within what it called its "switching limits," and extended to factories and mills situated close to its line of road; but we regard as wholly immaterial, in the consideration of the question before us, the length of the spur track, or the kind of business establishments it connects the line of road with. Nor do we consider it a matter of any consequence how close together spur tracks such as these are lo-

cated, or whether they are upon one part of its line or another. Whether they run to factories or mines in cities or towns, or to industrial plants in country districts, whether they are long or short, or close together or widely separated, they are to be considered a part and parcel of the system constructed and operated in its business as a common carrier, and the public have an interest in their conduct and operation that the carrier must respect. A railroad company owes to establishments connected with its line of road by these spur tracks the same duty that it does to establishments situated immediately upon its main line of road. It is under the same obligation to furnish facilities for transportation to one as it is to the other. It must serve all alike. Nor can a railroad company arbitrarily, and without any relation to the use to which it is put, designate a part of its track or system as "yards or switching limits," and then say that it owes no duty as a common carrier in this district except such as it may choose to assume, or say that it will or not, as suits its pleasure or convenience, perform service as a common carrier in this territory. A railroad company engaged in the general business of a common carrier cannot, without regard to the convenience of the public, classify or divide its trackage into divisions or parts, and say that on one part it is a carrier and on another it is not. In the discharge of its duties to the public as a common carrier, a railroad company may establish reasonable depots or places at which it will receive and deliver freight, and cannot be required to receive or handle it at other places; but it must use for the public convenience all the tracks set apart by it for the transportation of freight, and treat without favor or discrimination all persons offering to it freight for carriage. The spur tracks to these various plants in Henderson were no more a part of its "yards or switching limits" than would be a spur track that connected its main line in a country district with a mill or factory.

It is shown by the evidence that the appellee company in 1908, and for a number of years prior thereto, had been in the habit of transporting carloads of freight from industrial plants in Henderson with spur connections, to other industrial plants in Henderson with spur connections, but that it had never performed this service for the Keystone Company. For example, it would haul a carload of corn from an elevator connected with its belt or main line by a spur track, to a mill connected with its main or belt line by a spur track; but it would not haul a carload of coal from the mine to either the elevator or the mill. In explanation of this practice, 33 L.R.A. (N.S.)

and for the purpose of showing that it involved a different character of service from that sought by Higdon, it attempted to show, and did so do by its traffic agents, that the service it performed in hauling products from one industrial plant to another, such as from the corn elevator to the mill, was merely auxiliary or incidental to a transportation service that preceded or followed this local movement. Or, in other words, when it hauled for a nominal charge a carload of corn from the elevator to the mill to be converted into food stuff of some kind, this food stuff would necessarily be sold to parties outside of Henderson, and therefore it would get what it calls a transportation charge for hauling the food product from the mill at Henderson to the place it was shipped. And so it would be compensated in the transportation haul for the service it rendered in switching the cars from the elevator to the mill at a nominal price. It is said, however, that if coal was hauled from the Keystone mine to a factory to be there consumed, the carrier could not get another haul out of this coal or the substance to which it was reduced, and therefore it had the right to decline to render in the transportation of coal the character of service that it rendered in the transportation of corn. Looking at this question from the standpoint of the traffic manager of the appellee company, it doubtless presented to his mind sufficient reasons why the discrimination should be made. But when considered in relation to the duties a common carrier owes to the public, it was wholly unjustifiable. A common carrier may under certain conditions hold itself out to the public as being a common carrier of certain articles of freight, and, if it was only engaged in the carriage of specified articles, it would not be under any obligation to carry other things. If it carried for every person who offered it, the articles and things that it held itself out to the public as a carrier of, it could not well be said to be guilty of discrimination. 1 Hutchinson, Carr. §§ 59, 90, 144. But, as the appellee company was engaged in the business of carrying coal, as well as all other articles of merchandise and freight offered to it, it had no right to make any discrimination between shippers, and was obliged to carry for all persons all classes and character of freight offered to it. Bassett & Stone v. Aberdeen Coal & Min. Co. 120 Ky. 728, 88 S. W. 318. The argument is further made that it had persistently and uniformly declined to haul coal from this mine to places in Henderson, and this was well known to Higdon when he made the contracts referred to; but this custom did not confer upon it the right to con-

tinue the discrimination. That it had never engaged in the business of carrying coal in the manner desired by Higdon did not under the circumstances of this case authorize it to refuse to render the service when demanded. No length of time, or manner of treatment, or habit of dealing, will discharge a common carrier from the obligation to furnish to the public the service it is engaged in performing. The appellee company could not transfer between mills and factories corn, wheat, and other articles, and refuse to transfer under the same conditions coal.

It follows from these conclusions that the appellee company was not justified in refusing to render the service requested by Higdon.

The next question is: What rate did it have authority to charge for his service? In April, 1908, the appellee company published and issued a book containing its tariff rates. In this book we find the following: "The Louisville & Nashville Railroad Company does not engage in the business of local switching between switches, tracks, warehouses, or industries in the Henderson, Kentucky, terminals, but where any such service is performed as an accommodation, a charge of \$2 per car, plus \$2 for car rental, shall be assessed." This tariff rate was in force from May 4, 1908, until after July, 1909. It was this rate that Higdon demanded that the appellee company should charge for the service he requested. The railroad company, however, insists that this tariff rate was not intended to and did not embrace the character of service Higdon desired. Its general traffic manager testifies that this provision in its tariff sheet was made for the sole purpose of fixing a rate at which it would transfer cars between warehouses or industries, that it had hauled from other points to Henderson, or that were loaded at Henderson for shipment to other places. For example, if a carload of freight was shipped from Memphis, Tennessee, to the Henderson mills at Henderson, it would charge the regular transportation price from Memphis to its depot in Henderson, and in addition \$4 for delivering the car from the depot to the Henderson mills, on the spur track that ran into its establishment. Or, if a carload of food product was delivered to it by the Henderson mills on the spur in a car furnished for that purpose, it would charge \$4 for carrying this car from the mills to its station in Henderson, and in addition charge the regular traffic rate for hauling it from there to the point of destination. In other words, the rate did not cover or contemplate a service in which a long haul did not follow or precede the movement of transferring 33 L.R.A. (N.S.)

the car to or from an industry in Henderson to its depot. Based on this theory, it is argued that the appellee company had not established or put in force any rate for the service demanded by Higdon at the time he requested it, and so it had the right to afterwards fix the rate at 50 cents per ton, which it did on July 13th. It is further said that this rate was reasonable, and, as Higdon declined to accept the service at this price, the company was thereby relieved from liability to him, unless he first brought the matter to the attention of the railroad commission, and obtained from that body a ruling that the rate was not reasonable. If it were true that the appellee company had no fixed or established rate that covered this service at the time it was requested, we have no doubt of its right to fix a reasonable rate. We are further of the opinion that if the rate so fixed was reasonable, and Higdon declined to accept it, he would not have any cause of action against the company growing out of the state of facts set up in his petition. Whether it is a condition precedent to the bringing of an action for damages on the ground that a rate fixed for a particular service is unreasonable, that the shipper must first obtain a ruling from the railroad commission, it does not seem necessary to decide, in the view we have of the case. It will be observed that the tariff rate previously quoted recites that the railroad company does not engage in the business of local switching between switches, tracks, warehouses, and industries in Henderson. But we have already determined that this declaration of what service it would perform did not authorize it to refuse to carry coal from the mine to the warehouses and industries in Henderson having spur connections. Therefore, so much of the provision as asserts that it will not perform this service need not be further noticed.

If the rate fixed was only for service rendered incidental to and in connection with a transportation service from which the company derived a benefit, and it was only a reasonable rate when considered in connection with the additional rate charged for transportation service, there would be much force in the argument that it was not a reasonable rate for the carriage of coal from the Keystone mine to industries in Henderson, as the company would get no other compensation from this service. But, conceding this, we are unable to relieve the company from the condition in which it voluntarily placed itself under the mistaken assumption that it was not required to render at all such service as Higdon requested. Undoubtedly the appellee company had the right to classify freight

and make a reasonable difference in its charges for different kinds of freight transferred to or from one industry to another in Henderson. Its authority to make this classification and to fix different rates was as extensive as its authority to classify and charge different rates for different kinds of freight transported from one point to another outside of Henderson. But, in publishing its tariff rates for the information and use of the public, it did not stipulate for different rates or make any classification. It said in substance that, when it transferred cars from one industry to another in Henderson, it would charge for the service \$4. Having thus established and promulgated the rate it would charge, without any attempt to designate the character of freight it would transport for this charge, we do not feel authorized to interpret this rate as meaning that it would be charged for corn or flour or meal, and not coal, or to limit its application to any particular article. The appellee company is bound not only by its published rate, but by its course of conduct under this published rate. It is shown by the evidence that for many years and whenever requested it transferred from one mill or industry to another mill or industry in Henderson, connected by spur tracks with its main or belt line, carloads of freight of different kinds, and charged for this service the established rate. So if there was doubt about the meaning of this published rate, or the character of service it applied to, we find that the appellee company in its course of business construed it to mean that it was under a duty to, or at least would for the charge named, transfer loaded cars of freight from one factory or mill to another.

Under these facts it was plainly a discrimination against Higdon to refuse to perform the service for him at the price charged to others for a like service. *Union P. R. Co. v. Goodridge*, 149 U. S. 680, 37 L. ed. 896, 13 Sup. Ct. Rep. 970; *Alabama & V. R. Co. v. Mississippi R. Commission*, 203 U. S. 496, 51 L. ed. 289, 27 Sup. Ct. Rep. 163. If the appellee company had confined the transfer service to such service as was incidental to transferring cars of freight to and from its depot to mills and industries, there would be much force in the contention of counsel; but, as it did not pursue this course of conduct, we must treat the case as we find it, and as it was made by the appellee company. The rate as published covered all service, and did not specify what character of freight it applied to, or make any distinction between corn and coal. If, under this rate, it was obliged to or did in its course of dealing transfer wheat, corn, or other produce for

certain persons from one point in Henderson to another, then it was obliged to perform this service upon the same terms and conditions for all persons demanding it, without reference to the class of freight hauled. Const. §§ 214, 215. In the absence of a tariff or rate classification by the appellee company, we cannot say that a higher rate should be charged for hauling coal than should be charged for hauling corn or wheat. Further insisting on its right to make a distinction between these articles, and to support the contention that the published rate was not intended to and did not apply to coal, it is said that, when it hauled a car of freight from a mill or industry or from one industry to another in Henderson, it did so with the expectation that the freight so transferred would be converted into some article by the mill or industry receiving it, and then shipped to points out of Henderson over its line, thus giving it what it calls a transportation haul, or a haul out of which it would be compensated for the transfer service from factory to mill. This contention is entirely lacking in merit. It might be argued with as much force and relevancy to the issue that, as the mills could not be operated without coal, therefore it should haul coal from the mine to the mill so that produce might be manufactured that the appellee company could haul to points outside of Henderson.

We have examined the case of *Dixon v. Central R. Co.* 110 Ga. 173, 35 S. E. 369, but do not find it applicable to the state of facts presented by the record before us. In that case the question before the court was whether or not the service was "transportation service" or "switching service," and under the facts of that case it was held to be "transportation service," and therefore the charge established for "switching service" was not applicable. In the case we have, our conclusion that the rate of \$4 per car was applicable to the service demanded, although it is described in the tariff sheet as "switching service," is largely rested upon the ground that the company charged this rate to other shippers for a like service. In the *Dixon* Case it does not appear that the question that influenced our decision upon this point was before the court. If the question of the applicability of the tariff rate we have quoted was submitted to us freed from the construction given to it by the appellee company in its dealings with reference to the transfer of freight between other industries, we would say that it did not apply to the service sought by Higdon. It seems to us that the service Higdon desired was not "switching," but "transportation," service. It was the same kind of service that

the appellee company would have performed if a car was loaded with coal at a mine at any point on its road, and then hauled to the customer to whom it was consigned. But the appellee company in its course of conduct treated what might properly be called "transportation service" as "switching service," and applied to it the rate it now claims is only applicable to "switching service." This being so, we again repeat that it cannot be allowed to make any discrimination between Higdon and others similarly situated.

Coming now to the amount of damages Higdon is entitled to recover: He had two contracts with the Keystone Company. In one contract, dated April 5, 1908, it agreed to furnish to him during the year not more than 20,000 tons, and it was in reliance upon this contract and the \$4 rate he anticipated the appellee company would charge, that he contracted to furnish to various industries about 14,000 tons. He also had other contracts to furnish coal to industries having spur connections, made before the contract with the coal mine, that it appears he could have filled with its coal. By the terms of the other contract, made in May, 1908, the Keystone Company appointed Higdon its sole agent in the city of Henderson to sell for it in the city coal in carload lots. But this contract stipulated that "the first party (Keystone Company) does not obligate itself to furnish for or on account of the second party (Higdon), under this contract, any given quantity of coal, nor shall it be required to furnish any coal which shall interfere with the supply of coal on the local market in less than carload lots or by wagon loads. It being the mutual understanding that the first party shall supply its local trade by wagon delivery, shall fill the contract made with the Crescent Coal Company, signed by said Joe Higdon, and if then it has any coal on hand the said Joe Higdon shall have the refusal, and the first party shall not have any right to ship it elsewhere, if the second party should desire to use it under this contract in carload lots."

It will be observed that it was virtually optional with the Keystone Company whether it furnished Higdon any coal under the May, 1908, contract, and upon the record before us we do not think he is entitled to any damages under this contract, as it does not appear that on the faith of it he made any contracts that caused him to suffer any loss. On the contract made in April, he is entitled to recover the difference between what it cost him to fill the contracts he had made, whether before or after July 1, 1908, with industries having spur connections, and

that he could have filled with coal from the Keystone mine between July 1, 1908, and July 1, 1909, and what it would have cost him to fill these contracts if he had obtained coal from this mine. As it appears that this mine ceased operations before July 1, 1909, the damage should be confined to the quantity of coal that the Keystone mine could have supplied under the contract before it ceased operations, and that he could have furnished in fulfillment of the contracts made with customers before that time. Upon these issues the appellant was entitled to a jury trial.

Wherefore the judgment is reversed, for a new trial in conformity with this opinion.

Petition for rehearing denied.

MINNESOTA SUPREME COURT.

JULIUS HOPPE, Admr., etc., of Ernest Lampe, Deceased, Resp't.,
v.

CITY OF WINONA et al., Appts.

(113 Minn. 252, 129 N. W. 577.)

Electricity — wires strung on city bridge — liability.

The city of Winona, under authority of Congress and of the legislatures of Wisconsin and Minnesota, constructed a bridge across the Mississippi river, from the Minnesota to the Wisconsin side thereof, and thereafter operated it as a toll bridge. By an ordinance duly enacted, the city authorized defendant power company to string its electric wires over and attach the same to the framework of the bridge, for the transmission of electricity from its plant in Wisconsin to, and the distribution thereof in, the city of Winona. The city reserved the right to control the manner in which the wires were so strung, and directions in that respect were given by the ordinance. The wires so placed upon the bridge carry for 25,000 to 45,000 voltage of electricity, and at times throw off a "brush" or "disruptive discharge" sufficient to cause the death of a person in close proximity therewith, without actual contact with the wire. The city thereafter let a contract for painting the bridge, and decedent was in the employ of the contractor in doing the work. He was killed while so at work by a

Headnote by BROWN, J.

Note. — Liability of municipality for injuries sustained on toll bridge maintained by it.

In *Augusta v. Hudson*, 88 Ga. 599, 15 S. E. 638, s. c. 94 Ga. 135, 21 S. E. 289, it was held that a city operating a toll bridge over a river, the abutment of which, on one end thereof, was in another state, was, as to the

"brush" or "disruptive discharge" of electricity from the wires. It is held:

(1) That if the wires were negligently strung upon the bridge, by reason of the fact that they were uninsulated, and not sufficiently elevated upon supports above the structure to avoid persons coming in contact therewith while at work upon the bridge, both the city and the power company are liable.

(2) Whether there was negligence in this respect was, on the evidence, a question of fact, and the verdict of the jury is sustained.

(3) That the relation of the city to the bridge was that of private owner of a quasi public highway, and its grant of authority to the power company to string its wires thereon was an exercise of its municipal, and not of its governmental, functions.

(4) The dangers from a "brush discharge" of electricity from the wire were unknown to the contractor or decedent, and both were entitled to warning thereof from the city.

(5) The doctrine of independent contract or has no application to the case.

(6) The question of decedent's contributory negligence was a question of fact for the jury.

(January 20, 1911.)

APPEAL by defendants from an order of the District Court for Winona County denying their independent motions for judgment notwithstanding a verdict for plaintiff, or for a new trial, in an action brought to recover damages for the death of plaintiff's intestate, which was alleged to have been caused by defendants' negligence. Affirmed.

The facts are stated in the opinion.

Messrs. R. A. Randall and Brown, Abbott, & Somsen, for appellant city:

The act of the city touching the placing and keeping of the wires upon any part of the bridge is wholly without the scope of its corporate power, *viz, ultra vires*.

Becker v. La Crosse, 99 Wis. 414, 40 L.R.A. 829, 67 Am. St. Rep. 874, 75 N. W. 84; Dill. Mun. Corp. § 89; St. Paul v. Traeger, 25 Minn. 248, 33 Am. Rep. 462; Red Wing v. Chicago, M. & St. P. R. Co. 72 Minn. 240, 71 Am. St. Rep. 482, 75 N. W. 223; Boyle v. Albert Lea, 74 Minn. 230, 76 N. W. 1131.

part of the bridge in that state, engaged in private business for gain, and was not protected by its character as a municipal corporation from liability for injuries sustained by reason of its failure to guard such abutment beyond the end of the bridge by a proper railing, though, by the law of the other state, a similar corporation of that state would not be liable for like negligence touching a similar bridge owned by it. The court declared that, inasmuch as the municipality entered another state, to engage in a private business and enjoy the profits 33 L.R.A. (N.S.)

The powers of the city in question were wholly public and governmental, and cannot be made the basis of liability.

Bryant v. St. Paul, 33 Minn. 289, 53 Am. Rep. 31, 23 N. W. 220; Grube v. St. Paul, 34 Minn. 402, 26 N. W. 228; Snider v. St. Paul, 51 Minn. 466, 18 L.R.A. 151, 53 N. W. 763; Ihk v. Duluth, 58 Minn. 182, 59 N. W. 980; Gullikson v. McDonald, 62 Minn. 278, 64 N. W. 812; Miller v. Minneapolis, 75 Minn. 131, 77 N. W. 788; Reed v. Anoka, 85 Minn. 294, 88 N. W. 981; Claussen v. Luverne, 103 Minn. 491, 15 L.R.A. (N.S.) 698, 115 N. W. 643, 14 A. & E. Ann. Cas. 673; Dolge v. Northern P. R. Co. 107 Minn. 242, 26 L.R.A. (N.S.) 600, 119 N. W. 1066.

Hoppe was an independent contractor, for whose act the city is not liable.

Klages v. Gillette-Herzog Mfg. Co. 86 Minn. 458, 90 N. W. 1110; Engel v. Eureka Club, 137 N. Y. 104, 33 Am. St. Rep. 692, 32 N. E. 1052; 2 Dill. Mun. Corp. §§ 1028, 1029; Schip v. Pabst Brewing Co. 64 Minn. 22, 60 N. W. 3; Vosbeck v. Kellogg, 78 Minn. 176, 80 N. W. 957; Bibb v. Norfolk & W. R. Co. 87 Va. 711, 14 S. E. 163; McCafferty v. Spuyten-Duyvil & P. M. R. Co. 61 N. Y. 178, 19 Am. Rep. 267; Eaton v. European & N. A. R. Co. 59 Me. 520, 8 Am. Rep. 430; Bailey v. Troy & B. R. Co. 57 Vt. 252, 52 Am. Rep. 129; Connors v. Hennessey, 112 Mass. 96.

Messrs. Webber & Lees for appellant Water Power Company.

Messrs. Buck & Fitzpatrick, for respondent:

This bridge is the private property of the city, and was maintained by the city in its corporate capacity, not its governmental capacity.

Snider v. St. Paul, 51 Minn. 472, 18 L.R.A. 151, 53 N. W. 763; Pittsburgh v. Grier, 22 Pa. 54, 60 Am. Dec. 65; Guthrie v. Philadelphia, 73 Fed. 688.

Brown, J., delivered the opinion of the court:

By an act of Congress approved September 25, 1890 (act September 25, 1890, chap. 918, 26 Stat. at L. 470), an act of the legislature of the state of Wisconsin (Sp.

thereof, it must perform the duties and assume the burdens incident to carrying on the business. "Whatever immunity, if any, from liability to actions of this sort, it may have possessed at home, as a part of the government, the same was lost when it divested itself of the attributes of sovereignty by undertaking such a business in another state."

As to the general question of the rights and duties of toll bridge proprietors, see the notes in 58 L.R.A. 155, and 30 L.R.A. (N.S.) 360.

J. A. C.

Laws Wis. 1880, chap. 274), and chap. 113, Sp. Laws Minn. 1891, the city of Winona was authorized to construct and maintain a wagon bridge across the Mississippi river from the city to the Wisconsin side of the stream. Pursuant to this authority the bridge was constructed and since maintained by the city. Defendant La Crosse Water Power Company owns and operates a power plant on the Wisconsin side of the river, developing therefrom electricity, and conveying the same by means of electric wires to the city of Winona. In 1907, the city council, by ordinance duly enacted, granted authority to and permitted the power company to string its said wires over and attach the same to the bridge. The ordinance required that the wires should be attached to high voltage insulators, and be strung from the frames of angle iron to be attached to the topmost girders of the bridge. The wires were so strung about 50 feet above the traveled portion of the bridge, and in no way interfered with the use of the same. They were of copper, three eighths of an inch in diameter, and not insulated. At one point upon the Wisconsin side of the channel of the river the wires were so strung that, by reason of the long distance between the supports, they sagged and came within 3 feet of a cross bar of the bridge, and extending parallel with the same a distance of 15 inches of the top girder, so that it was 3 feet above and 15 inches from the side of the girder.

It became necessary in 1909 to make certain repairs upon the bridge, and a contract was let by the city to one Hoppe to paint the ironwork of the entire structure. Hoppe employed plaintiff's intestate, who, while upon the iron girder at the top of the bridge, and at the point where the electric wires sagged to within 3 feet of the same, received a "brush" or "disruptive discharge" of electricity therefrom, without coming in actual contact therewith, and was killed. Plaintiff thereafter brought this action, charging the power company with negligently placing the wire upon the bridge, uninsulated, and not at a sufficient height from the top thereof to avoid injury to workmen upon the bridge, the city with permitting the same, and defendant city with a failure to warn and instruct decedent of the dangers incident to a "brush discharge" of electricity. Defendants put in issue the negligence charged, and alleged that decedent came to his death by reason of his own contributory negligence. Plaintiff had a verdict, and defendants separately appealed from an order denying their independent motions for judgment notwithstanding the verdict 33 L.R.A.(N.S.)

or a new trial. The assignments of error present questions peculiar to each defendant. We dispose of the question presented by the power company first.

1. It appears that the wires were strung upon the bridge pursuant to authority granted by the city in the form of an ordinance enacted for that purpose, which ordinance specified the manner and condition in which they should be strung. In fact, the ordinance required that the work be done under supervision of the city engineer. The trial court instructed the jury that if there was negligence in the manner in which the wires were attached to the bridge, directing the particular attention to the place where decedent met his death, both defendants were liable. It is the contention of the power company that the evidence wholly fails to make a case of negligence in this respect, and therefore, that a verdict should have been directed for both defendants. In this we do not concur. The question was, on the evidence, one of fact for the jury.

There is and can be no controversy concerning the principles of law applicable to the case. The power company was unquestionably under legal obligations, in placing the wires upon the bridge, to exercise care commensurate with the dangerous character of the instrumentality, and to adopt such methods as were reasonably practicable to avoid endangering those who might be employed upon or otherwise making legitimate use of the structure as a thoroughfare. *Gilbert v. Duluth General Electric Co.* 93 Minn. 99, 106 Am. St. Rep. 430, 100 N. W. 653; *Musolf v. Duluth Edison Electric Co.* 108 Minn. 369, 24 L.R.A.(N.S.) 451, 122 N. W. 499. The wires in question carried from 25,000 to 45,000 voltage of electricity, and were not insulated or otherwise protected from contact by persons working upon the bridge. It appears that uninsulated wires so heavily charged throw off at times a "brush" or "disruptive discharge" of electricity sufficient to cause the death of a person in close proximity thereto, without actual contact with the wire. This fact is well known to electricians and those familiar with this generally unknown, powerful, and destructive agency. The power company was bound to take knowledge of the fact that it would become necessary from time to time to make repairs upon the bridge, particularly in painting the same, to prevent deterioration and decay from exposure to the elements, and in placing the wires thereon precaution should have been taken for the safety of those thus engaged. *Byerly v. Consolidated Light, Power, & Ice Co.* 130 Mo. App. 593, 109 S. W. 1065. If the placing of the wires upon the bridge in the manner stated was

an act of negligence, and likely to result in injury in some form, it is immaterial that defendant could not reasonably have anticipated injury in the manner disclosed in the case at bar. *Christianson v. Chicago, St. P. M. & O. R. Co.* 67 Minn. 94, 69 N. W. 640. But, as stated, the law of the case is not disputed. Defendants' contention is that its full duty in the premises has been discharged.

It is claimed that the evidence is conclusive that it was impracticable to insulate the wires; that, if insulated, the elements would destroy the same and render the wires of greater danger; and, further, that they could not have been elevated higher at the point in question without imposing an additional strain upon the bridge and imperiling its strength; hence, that the court should have directed a verdict in defendants' favor. This argument is not of substantial force. It must be conceded, since the jury so found, that in the condition in which the wires were strung they were dangerous to the life and safety of those at work upon the bridge. There was no imperative necessity that they should be strung at this place, and the reason for doing so would seem to have been one of economy in the distribution of electricity developed by defendant at its plant. Defendant had no vested right in the use of the bridge for that purpose, and, though granted by the city council, the right should have been exercised with due regard to the safety of those engaged in the vicinity of the wires, and, if their safety could not be provided for, and probable injury guarded against by reasonable precautions, the right should not have been exercised at all, and other methods of transmitting the electricity to Winona adopted and resorted to.

Defendants offered considerable evidence tending to show that the manner of stringing the wires over the bridge involved a consideration of many technical facts and conditions, cognizable only by experts, and of which laymen could not intelligently judge, from which it is urged that the opinion of the experts that the wires were properly placed is conclusive. This contention is not sound. The experts, in giving their testimony to the effect that the wires were strung in the only practicable manner, had in mind, not the protection of third persons from possible injury, but the safety of the bridge, and the fact that additional supports would increase the strain upon that structure, and therefore were impracticable. For reasons already suggested, this furnishes no sufficient excuse. If the bridge was of insufficient strength to support the wires with proper supports, it

should not have been adopted as a means of reaching Winona with the wires.

2. The assignments of error challenging rulings of the court in the admission and exclusion of evidence, and in its charge to the jury, require no extended discussion. We have examined them all, and discover no reversible error. The complaint alleged that wires in the condition of those in question would throw off a "brush discharge" of electricity. This was supported by evidence at the trial in connection with other evidence of a "disruptive discharge," and complaint is made because the court permitted the jury to determine whether decedent's death was caused by either. In this there was no prejudicial error. It would seem of no particular importance by what name the escaping electricity was known. Defendant was informed by the complaint of the fact that a discharge of electricity from the wire caused decedent's death, and this was sufficient to admit of the evidence characterizing it either as a brush or disruptive discharge. The complaint also alleged that the wires were not insulated, and, as remarked by the trial court, the allegations thereof, fairly construed, charged negligence in stringing them over the bridge in that condition.

There were no errors in the instructions of the court to the jury. The charge was full and complete, and gave to the jury the correct rules of law applicable to the case. The points made support in the main the contention that issues not presented by a strict construction of the complaint were submitted to the jury. The complaint was entitled to a liberal construction, and there was no such departure therefrom as to justify a reversal. The question whether decedent was entitled to instructions concerning the dangers incident to a brush or other discharge of electricity was properly submitted to the jury, as well as the question of his contributory negligence. No evidence was presented that decedent was familiar with the action of electricity under conditions like those here disclosed, and in view of the fact that his work took him near the wires, he was entitled to proper warning of the dangers incurred. The evidence made the question whether decedent was at the particular point upon the bridge contrary to instructions, and whether he was in the exercise of due care for his safety while there, questions of fact for the jury, and we discover no reason for disturbing their conclusion.

The appeal by the city presents questions respecting its liability which do not involve the power company. These questions will be disposed of in the order presented in the brief of counsel for the city.

The bridge was constructed across the river under authority granted to the city by the Federal Congress and the legislatures of the states of Wisconsin and Minnesota. Both legislative acts provided that the bridge, when so constructed, might, at the election of the city council, be operated and maintained without cost to the traveling public, or as a toll bridge. The Wisconsin act prescribed a maximum charge, if the city council determined to operate it for hire. No question is made respecting the authority of the city to construct and maintain the bridge, and no controversy arises as to its ownership of the structure, and its power and duty to keep and maintain it in suitable repair for the uses intended by its construction. Nor is it questioned that authority was granted the power company by the city council to string its electric wires over and attach the same to the framework of the bridge. The city council determined to operate the structure as a toll bridge, and it has exacted a charge from persons making use thereof. It is also undisputed that the city entered into a contract with one Hoppe for painting the bridge, and that decedent was in the employ of the contractor, and engaged in the performance of this contract, at the time of his death. The contentions of the city are that:

(1) In passing the ordinance in question, and thereby permitting the wires to be strung and maintained upon the bridge, the city was (if not acting wholly *ultra vires*, so as to be in any way liable) in the exercise of a public or political, and not a private or corporate, function, and as a legislative body, in a semijudicial capacity, and in a matter involving governmental policy and discretion; (2) that Hoppe, the employer of deceased, was the city's independent contractor, and the rule of *respondent superior* had no application as between the city and the contractor's servants; and (3) that, if the city owed the contractor's servants any duty respecting notice and warning of dangers from coming in proximity with the wires, that duty was fully discharged.

1. The determination of the first question depends largely upon the relation of the city to the bridge and its maintenance. If the construction and control thereof was an exercise of its governmental powers, as distinguished from its municipal or proprietary affairs, then it is quite probable that its management, including the act granting permission to string the wires thereon, would also be governmental or legislative, for an exercise of which no action lies. But, if its relation to the bridge involves its business or proprietary capacity, the

ordinance granting the privilege to the power company would partake of the same character.

It is clear that the bridge was the private property of the city, and held, owned, and maintained in its proprietary capacity. It was not constructed with reference to a street or highway laid out or established by public authority, and was not open to the free and unrestricted use of the public. Travel thereon was limited to those who paid the prescribed toll, receipts from which went into the city treasury. The city was under legal obligation to keep and maintain the bridge in suitable repair for the use of those paying for the privilege, precisely as municipalities owning and maintaining public wharves, landings, and docks for hire are required to maintain them in safe condition for use. 28 Cyc. 1309, and cases cited. And there can be no serious question but that it would be liable, for damages sustained for a failure to exercise reasonable care in this respect, to the same extent as though the bridge was owned and operated by an individual. *Augusta v. Hudson*, 94 Ga. 135, 21 S. E. 289; 1 Thomp. Neg. 317.

The case of *Becker v. La Crosse*, 99 Wis. 414, 40 L.R.A. 829, 67 Am. St. Rep. 874, 75 N. W. 84, involving liability for neglect in the maintenance of a similar bridge at La Crosse, is not in point to the contrary. The defect involved in that case was an improper construction of the approaches to the bridge, extending a distance of 2 miles over and across the river bottoms on the Minnesota side of the stream. The Wisconsin court held that, while the bridge was constructed under proper authority, the city of La Crosse had no power to extend its jurisdiction into Minnesota, and make itself responsible for the highway over the bottom land adjacent to the river in that state. The act of the legislature of Minnesota, granting authority to the city of La Crosse to construct and maintain that bridge, provided that the city should be responsible for accidents and injuries resulting from its failure to maintain the structure in proper condition for use. Had the accident there complained of been caused by a defect in the bridge itself, though happening upon the Minnesota side of the river, the Wisconsin court would undoubtedly have held the city liable. In other words, the court would have held that, in accepting the grant from this state, it also, as a matter of law, accepted and assumed the conditions attached to it.

And again, though the bridge be treated as the private property of the city, it is in all essential respects a public thoroughfare, and the liability respecting its con-

trol and management must be measured and determined according to the principles of law applicable to the care and maintenance of public streets and other public grounds. The bridge answered every purpose of a public way. It was constructed to enable the public to pass to and from the state of Wisconsin, and in no essential respect differs from a public bridge along and upon a highway wholly within the boundaries of the city. It is well settled that, when a municipality authorizes a third person to place upon its public streets agencies of a character likely to endanger the traveling public, even though the privilege granted be beyond its authority, liability arises upon injury to a person lawfully upon the street, who is free from fault. *Winona v. Botzet*, 23 L.R.A. (N.S.) 204, 94 C. C. A. 563, 169 Fed. 321; *Stanley v. Davenport*, 54 Iowa, 463, 37 Am. Rep. 216, 2 N. W. 1004, 6 N. W. 706; *Richmond v. Smith*, 101 Va. 161, 43 S. E. 345; *Landau v. New York*, 105 Am. St. Rep. 709, and cases cited in note (180 N. Y. 48, 72 N. E. 631); 28 Cyc. Law & Proc. p. 1354. The liability in this respect is limited by some of the courts to those cases where the municipality retains control over the time, place, and manner in which the agency is placed in the streets. It is founded on entirely different principles from cases involving negligent maintenance of property to which the public have no right to resort for business or other purposes, where no duty or obligation to exercise care for their protection is imposed by law.

We shall not attempt to mark the line between governmental and municipal functions. The former concern the administration of the law by an agency of the state government; the latter, the internal affairs of the municipality. And whether the bridge and its maintenance be construed as a private enterprise, entered upon by special legislative authority, or as a quasi public highway, it is clear that the governmental functions of the city are in no way involved therein, and that the control of the bridge springs from its municipal or proprietary powers. From which it logically follows that the right granted the power company to string its wires thereon was not an exercise of governmental functions. *Snider v. St. Paul*, 51 Minn. 472, 18 L.R.A. 151, 53 N. W. 763.

2. The contention that Hoppe, to whom the city let the contract to paint the bridge, was an independent contractor, does not seem to be involved in the action. The thing causing the death of decedent was not the result of any act or omission on the part of the contractor, but the joint act of the power company in stringing the

wires upon the bridge and that of the city in permitting it. Had the contractor's negligence been the cause of the death of decedent, then the liability of the city could well be questioned. But such was not the case. The evidence is clear that the contractor failed in no duty to warn decedent of the likelihood of danger of a brush discharge of electricity from the wires, for he was in total ignorance of that fact. The danger from this source, though present, was concealed and beyond the knowledge of the contractor or his servants, and the duty of making it known was upon the city. *Smith v. Twin City Rapid Transit Co.* 102 Minn. 4, 112 N. W. 1001; *Hagen v. Schleuter*, 236 Ill. 467, 22 L.R.A. (N.S.) 856, 86 N. E. 112. The question whether defendant city was negligent in this respect was properly submitted to the jury. It is probable that, as to all dangers incident to the presence of the wires, known and understood by the contractor, the city could not be held responsible. In such case the contractor would perhaps alone be liable for injury to his servants. *Engel v. Eureka Club*, 137 N. Y. 104, 33 Am. St. Rep. 692, 32 N. E. 1052.

This covers all questions requiring special mention. The issues of fact involved in the action were properly sent to the jury, and the record presents no reversible errors.

Order affirmed as to both defendants.

UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT.

RE HUDSON RIVER POWER TRANSMISSION COMPANY.

(106 C. C. A. 139, 183 Fed. 701.)

Bankruptcy — public-service corporation.

Involuntary bankruptcy proceedings cannot be instituted against public-service corporations, under the act of 1898.

(December 12, 1910.)

Note. — Bankruptcy: involuntary proceedings against public-service corporations.

The question indicated by the foregoing title was discussed at some length in *Adams v. Boston, H. & E. R. Co.* 1 Holmes, 30, Fed. Cas. No. 47, 4 Nat. Bankr. Reg. 314, which construed § 37 of the bankruptcy act of 1867, declaring that "the provisions of this act shall apply to all moneyed business or commercial corporations and joint stock companies." The court, after referring to § 48 of that act, providing that the word "person" should also include corporations, declared that

APPPEALS by petitioners from a decree of the District Court of the United States for the Northern District of New York, dismissing petitions in involuntary bankruptcy filed against the Hudson River Power Transmission Company and others. Affirmed.

Statement by Lacombe, Circuit Judge:

These causes come here on appeals from decrees of the district court dismissing petitions in involuntary bankruptcy filed against the Hudson River Power Transmission Company, the Hudson River Electric Power Company, the Saratoga Gas, Electric Light, & Power Company, and the Hudson River Electric Company.

Argued before Lacombe, Coxe, and Ward, Circuit Judges.

public corporations created for municipal or political purposes, and such private corporations as are ecclesiastical or eleemosynary, or established for the advancement of learning, were clearly not made subject to the provisions of the act. It was held that railway corporations were not such public corporations as should be excluded from the operation of the act, and that they clearly came within the meaning of the act, the court apparently being of the opinion that such a corporation was embraced by the word "business" in § 37. In reaching this conclusion, the court said that private corporations are divided into ecclesiastical and lay; and that lay corporations are divided into civil and eleemosynary; and while not denying that a railroad corporation was a quasi public corporation, declared that, in the popular meaning of the term, nearly every corporation is public, inasmuch as they are created for the public benefit, but that if the whole interest does not belong to the government, or if the corporation is not created for the administration of political or municipal power, the corporation is private. It was contended in the case, that the Massachusetts legislature, in creating this corporation, had subjected it to certain duties and liabilities; that these liabilities were not transmissible; that the duties could not be delegated; and that the corporation could not divest itself of the power of performing those duties; and it was further contended that the inconvenience attending the alienation of the franchises and property of railroad corporations should move the courts to exclude such corporations from the operation of the bankruptcy act upon the ground of public policy. But the court, after pointing out that the Massachusetts legislature had authorized railroad corporations to alienate and to assign their franchises, and had authorized creditors to sell these franchises on execution, and permitted corporations to alienate them for the payment of debts or the security of creditors, declared that since the argument that the inconvenience

Mr. C. C. Lester for appellants.

Messrs. A. J. Rose and George B. Curtiss for receivers.

Mr. J. A. Van Voast for Schenectady Trust Company.

Mr. C. E. Hotchkiss for trustees of the mortgages.

Lacombe, Circuit Judge, delivered the opinion of the court:

Various points have been discussed upon the argument, but, under the view we take of the questions presented, this discussion may be confined to one subject only. It will be necessary first to state precisely what is the business of each company.

The Saratoga Gas, Electric Light, & Power Company was incorporated under the transportation corporations law of the

attending the alienation of the franchises and property was sufficient reason for refusing to adjudicate a railroad corporation a bankrupt had not prevented the state from allowing these franchises to be sold and the proceeds of the sale applied in payment of debts of first attaching creditors, it certainly did not apply with greater force to a statute for the more equitable division of the proceeds among all the creditors,—meaning, of course, the bankruptcy statute. And the court further said that since the grantees of the franchises of a corporation to operate a railroad can acquire no greater right than the corporation had by the terms of its charter, and since the purchaser must take his title subject to all the conditions of the original grant, and subject to all the duties and liabilities to the state, the public, and individuals, none of whose rights can be impaired by the transfer, there were no such inherent difficulties in the way of sale and transfer of the property and franchises as would exclude the corporation from the operation of the bankruptcy statute.

And in other cases it was held that the act of 1867 embraced railroad corporations, and that they were not corporations of such a public nature as required their exclusion from the operation of the act. *Sweatt v. Boston, H. & E. R. Co.* 3 Cliff. 339, Fed. Cas. No. 13,684; 5 Nat. Bankr. Reg. 234; *Alabama & C. R. Co. v. Jones*, Fed. Cas. No. 126, 5 Nat. Bankr. Reg. 97; *Winter v. Iowa, M. & N. P. R. Co.* 2 Dill. 487, Fed. Cas. No. 17,800, 7 Nat. Bankr. Reg. 289; *Rankin v. Florida, A. & G. C. R. Co.* Fed. Cas. No. 11,567, 1 Nat. Bankr. Reg. 647; *Re Southern Minnesota R. Co.* Fed. Cas. No. 13,188, 10 Nat. Bankr. Reg. 86; *Re California P. R. Co.* 3 Sawy. 240, Fed. Cas. No. 2,315, 11 Nat. Bankr. Reg. 193; *Re Greenville & C. R. Co.* Fed. Cas. No. 5,787.

In *New Orleans, S. F. & L. R. Co. v. Delamore*, 114 U. S. 501, 29 L. ed. 244, 5 Sup. Ct. Rep. 1009, the court declared that since the jurisdiction of the bankruptcy courts to adjudicate railroad companies

state of New York, having authority under its charter and franchises to lay down, erect, or maintain wires, pipes, conduits, or other fixtures in, over, or under the streets, highways, and public places of the village of Saratoga Springs, for the purpose of furnishing or distributing gas, or furnishing or transmitting electricity for light, heat, or power, or maintaining underground conduits or ducts for electrical conductors. At the time petition was filed, it was engaged in making gas at a plant which it maintained in Saratoga Springs. It also purchased electricity from a corporation known as the Hudson River Water Power Company. This gas and electricity it distributed through mains and wires for lighting the streets, avenues, public parks, and public and private buildings in the village. It also had a supply store for the furnishing of gas and electric light fixtures and

appliances. This, however, was a mere incidental activity, amounting to a very small part of its business. The pursuit in which it was principally engaged was the public and private lighting aforesaid, by means of the gas and electrical current which it made or bought.

The Hudson River Electric Company was incorporated under the transportation corporations law of the state of New York, having authority under its charter and franchises to lay down, erect, or maintain poles, wires, pipes, conduits, ducts, or other fixtures in, over, or under the streets, highways, and public places of the cities, villages, and towns in the counties of Warren, Saratoga, and the adjoining counties, for the purpose of furnishing or transmitting electricity for light, heat, or power, and of maintaining underground conduits or ducts for electrical con-

bankrupts, and to administer their property under the bankrupt act, had been sustained by several circuit courts in the Adams, Sweatt, Jones, and Winter Cases, and since these courts were of last resort upon this question, and valuable rights might depend upon their judgment upon this point, the question should be considered as settled by such cases.

On the other hand, in an early decision under the act of 1867, in *Re Opelousa & G. W. R. Co.* Fed. Cas. No. 10,547, 3 Nat. Bankr. Reg. 31, the district court of Louisiana to all appearance took the contrary view.

Under § 4b of the act of 1898, before the amendment of 1910, it was provided that any corporation engaged principally in manufacturing, trading, printing, publishing, mining, or mercantile pursuits should be subject to adjudication in involuntary bankruptcy. It should be observed that the amendment of 1910 employs the words used in the act of 1867, although it also makes a few specific exceptions, the statute now reading: "Any incorporated company, and any moneyed business or commercial corporation, except a municipal, railroad, insurance, or banking corporation." Of course, so far as railroad corporations are concerned, the question involved in this note is answered by the express provision of the statute; but so far as other public-service corporations are concerned, it might well be argued that the application of the maxim, *Expressio unius est exclusio alterius*, would entail the result that all public-service corporations except railroads are now subject to be adjudicated involuntary bankrupts, and this notwithstanding the attitude of the subjoined cases, decided under the statute before the amendment.

It has been held that a corporation given power by its charter "to buy and sell water for power, manufacturing, and hydraulic purposes," which power, however, did not appear ever to have been used, the company having confined itself entirely to ob-

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taining and furnishing water for municipalities, its customers, was not engaged principally either in trading or mercantile pursuits so as to render it subject to adjudication in involuntary bankruptcy. *Re New York & W. Water Co.* 98 Fed. 711, 3 Am. Bankr. Rep. 508, affirmed without opinion in 43 C. C. A. 91, 102 Fed. 1004. The court, although placing its decision unqualifiedly upon the ground that the language of § 4b was not sufficiently comprehensive to embrace companies of this kind, intimated, at least, that if they were comprehended within the plain language of the act, they should not be excluded from its operation merely because they might be said to be of a quasi public character, the court saying that while such companies do subserve a public use so as to justify the exercise of the right of eminent domain, and although the uses which they subserve are none the less public because procured through private enterprise, it did not attach much importance to any quasi public character, more or less, that water companies might have in consequence of the public use which they subserve, for, since the franchises of this particular company by its contract with local authorities were assignable, there was nothing to prevent the exercise of its functions by any transferee to whom its powers might pass through bankruptcy proceedings. In the foregoing case attention was called to, and some stress laid upon, the fact that the language of the act of 1898 is much narrower than that of 1867, and out of this was spelled an intention on the part of Congress to exclude from the act of 1898 some corporations which were subject to adjudication under the act of 1867. The same point is made in *Re Philadelphia & L. Transp. Co.* 114 Fed. 403, 7 Am. Bankr. Rep. 707, holding that a corporation engaged in the business of carriage by water of passengers and goods for hire could not be adjudicated an involuntary bankrupt under the act of 1898, the court saying that the specification

ductors. It did not own a generating plant, buying electric current from the Hudson River Electric Power Company. It owned transmission lines, with various substations and switch houses, and was engaged in the distribution of electrical energy in the cities of Glen Falls, Watervliet, and Cohoes, not only to private consumers, but also to the municipalities, for the lighting of public streets, parks, and buildings.

The Hudson River Electric Power Company was also incorporated under the transportation corporations law of New York, its object being to conduct in the state of New York the business of generating and dealing in electricity; the use of electricity for light, heat, and power; the carrying on of the business of "lighting by electricity, and using it for heat and power in cities, towns, and villages within the state, and the streets, avenues, and public

places thereof, and public and private buildings therein." It had an electric power plant at Utica, also transmission line from Utica to Clark's Mills, and tower transmission line from Ballston Spa to Amsterdam. It supplied electricity to other companies belonging to the group now under consideration, and to one or more electric railroads. Except for a small proportion which it got from Kane's Mills Company, it generated all the electricity it supplied. It held franchises in Johnstown, Little Falls, Ft. Plain, and Nelliston. It was engaged in furnishing public street lighting. It held the whole or a controlling interest in the stock of the other companies of the group, and conducted the whole as one business enterprise.

The Hudson River Power Transmission Company was also organized under the transportation corporations law for the development, use, sale, and transfer of elec-

of the narrower classes of manufacturing, printing, and publishing corporations, and the addition of the words, "trading or mercantile corporations," indicated that the latter words were to have a restricted meaning, and that they were not to be so broadened as to cover the whole field of commerce or commercial pursuits. The only allusion to the public nature of the corporation was the remark of the court that a proposed construction was self-condemnatory which would embrace within the act all railroad and steamship lines in the country, the telephone and telegraph lines, the express transfer companies, and perhaps other corporations having anything to do with the movement of persons or commodities; and that it felt sure that if Congress had intended to subject such well-known and important classes of corporations to the operation of the bankrupt act, a clearer legislative declaration to that effect would have been made.

In *Re Bay City Irrig. Co.* 135 Fed. 850, 14 Am. Bankr. Rep. 370, the court took up both phases of the question; that is, first, whether the language of the act was sufficiently broad to include a public-service corporation; and second, whether any consideration of public policy required the exclusion of a public-service corporation from its operation. Taking up the first phase, the court held that a corporation which buys nothing which it sells to others, but only charges a reasonable compensation for its labor, skill, and time in furnishing water to others for irrigation purposes, which compensation is paid in rice, the same afterwards being sold by the company and converted into money, is engaged in neither manufacturing nor in mercantile pursuits so as to be subject to adjudication under § 4b. On the second phase of the question, the court declared that it was against public policy to hold subject to adjudication as an involuntary bankrupt a quasi public corporation clothed with the

powers of eminent domain, and subject to the same restrictions and penalties in their exercise as railway companies, and whose business, pursuant to its charter rights, was to furnish water for irrigating for remuneration.

In *Re H. J. Quimby Freight Forwarding Co.* 121 Fed. 139, 10 Am. Bankr. Rep. 424, affirmed in 61 C. C. A. 111, 126 Fed. 167, 11 Am. Bankr. Rep. 205, appeal dismissed in 196 U. S. 643, 49 L. ed. 632, 25 Sup. Ct. Rep. 785, the court, in holding that a corporation which was chartered as a common carrier of property or persons, but which also let teams for hire and took horses to board, was not engaged in trading or mercantile pursuits so as to be subject to adjudication in involuntary bankruptcy under § 4b, said that while it might think it advisable that corporations of this kind should be brought within the scope of the act, it must be guided by what Congress had said, and not by its own view of public policy.

Attention is also directed to *Re Georgia Mfg. & Public Service Co.* 166 Fed. 964, 21 Am. Bankr. Rep. 878, holding that the fact that a corporation engaged in manufacturing paper and paper products also operated a waterworks and electric lighting plant did not, where the latter enterprises constituted a comparatively small portion of corporate business, prevent it from being adjudicated an involuntary bankrupt, as principally engaged in manufacturing.

And in *Re Charles Town Light & P. Co.* 183 Fed. 160, 25 Am. Bankr. Rep. 687, affirmed without opinion in 184 Fed. 986, it was held merely that a corporation which makes it its principal business to buy, sell, measure, and deliver electricity for compensation was engaged principally in trading, and was therefore subject to adjudication as an involuntary bankrupt under § 4b.

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tric power, light, and heat. It had a generating plant at Mechanicsville and various transmission lines. It supplied power to the United Traction Company, which runs cars in Albany, Troy, Cohoes, and Watervliet, and through the Albany Electric Illuminating Company furnished light and power both to the public and to private individuals in the city of Albany.

The district judge held that these corporations were not such as could be made bankrupts under the act of 1898 (act July 1, 1898, chap. 541, 30 Stat. at L. 545, U. S. Comp. Stat. 1901, p. 3418) and its amendments.

Various arguments are advanced in support of this decision. It is contended that whether or not companies manufacture or trade in gas or electricity, the dominant and characteristic feature of their activity is the transportation of the light-producing substance which they obtain through their wires or ducts to the individual points of consumption; and it is pointed out that the state of New York by legislative action has expressly classified corporations for manufacturing and supplying gas, or for manufacturing and using electricity for producing light, heat, or power, and in lighting streets, avenues, public parks, and other places, and public and private building of cities, villages, and towns, within the state as "transportation corporations." Laws 1890, chap. 566. See also public-service commissions law, as amended by chapter 480, Laws 1910 (Consol. Laws, chap. 48.)

It is contended that the generating of electricity is not technically a manufacture, and that the buying and selling of illuminating gas and electricity is not properly a trading or mercantile pursuit, which terms, it is insisted, should be restricted to dealings in merchandise, goods, or chattels, the ordinary subjects of commerce.

Without considering these several arguments, we find sufficient reason to sustain the decrees in a peculiar character of these companies. If they do manufacture and do trade, they do much more. Under authority conferred by the state and by various local authorities they are "principally engaged" in supplying the means whereby streets, avenues, and public places in the state are lighted and the public safety and comfort thereby promoted. They are corporations of "public utility," and if they did not themselves light these localities, the public authorities would no doubt be constrained to do so themselves. By reason, moreover, of the circumstance that they are given this authority, with, to a certain extent, the right of exercising eminent domain, they are correlatively charged with a duty to the public, which is no part of the obligations of ordinary corporations en-

gaged in "manufacturing, trading, printing, publishing, mining, or mercantile pursuits." And as a result, when financial adversity overtakes them, there are interests which have to be considered other than those which require attention when the ordinary corporation of the enumerated classes becomes insolvent.

In the case of an ordinary manufacturing or trading corporation, the matters presented for disposition are, in their last analysis, merely the disposition of dollars and cents. The assets are to be realized and their proceeds distributed among creditors of different classes, and the residue, if any, to owners. But in the case of a "public utility" corporation, such as these, the public itself, the community in which the corporation is rendering service, has a right superior even to creditors of every class, and which right cannot be extinguished by the payment of a dividend in money. With the power to terminate franchises for failure to discharge the obligations inherent in their grant, the state or local authorities can destroy what is usually the most valuable asset of the defaulting company, against the wishes of all creditors, and before the latter might succeed in finding an assignee of the franchise satisfactory to local authorities who would assume the burden and perhaps pay something for the transfer. Moreover, the public safety and comfort imperatively demand that, whatever else may happen, the corporation, devoid of ready cash though it be, shall not make default on its public obligations, with the result of plunging the community in darkness, or stopping the transportation of passengers, and that in some way or other the public service shall be rendered while the financial affairs of the company are being wound up. There are no indications in the bankrupt act that Congress intended to arrange any administrative machinery competent to accomplish these results. On this branch of the case the opinion of Judge Ray is especially illuminative, when it is remembered that he was chairman of the House judiciary committee when the bankrupt act was passed. He says: "There was a serious and wide difference of opinion in the committee on the judiciary and in the Congress itself whether corporations, any corporation, should be brought under the operation of the law. There was a feeling of the part of some that railroad corporations should be included, if any were. But when it was considered that railroads are the arteries of commerce and transportation, state and interstate, created by state laws in the main, and extending with their connecting lines from state to state and lakes to gulf under merger and consolidation agreements, it was seen that, to prop-

erly administer the property of such corporations in the bankruptcy courts and under a bankruptcy law, it would be necessary to make many special and extraordinary provisions for those cases, if the public service was to be considered and the interests of the public conserved." [173 Fed. 955.]

We have been referred to some *dicta* and to the expressions of some text writers (Re Bay City Irrig. Co. [D. C.] 135 Fed. 850; Re New York & W. Water Co. [D. C.] 98 Fed. 711; Collier, Bankr. 6th ed. 71; Remington, Bankr. § 89), but the point raised here has never been decided. So far as we can ascertain, no corporation engaged in rendering public service has been made an involuntary bankrupt, which may be some indication of the general understanding as to the scope of § 4 of the bankruptcy act. We are of the opinion that Congress had no intention to include corporations such as these now before us in the enumeration of that section, either as it originally stood or as it was amended in 1903.

The decrees are affirmed.

MICHIGAN SUPREME COURT.

CONSTANCE R. BROWN

v.

HORACE J. FULLER et al., Appts

(— Mich. —, 130 N. W. 621.)

Grant — existing easements — termination.

A grant with full covenant of warranty of the rear of a lot, for the construction of a building, terminates the right of the grantor to drain a building standing on the front of the lot to the sewer in the alley at the rear, where the sewer connection had been underground, and the grantee had no actual knowledge thereof, and the roof drainage had been across a low building on the lot which the grantor knew was to be torn down, while it is not impossible to secure drainage in other directions, although it will be expensive to do so.

(Bird and Moore, JJ., dissent.)

(March 31, 1911.)

APPPEAL by defendants from a decree of the Circuit Court for Kalamazoo County in plaintiff's favor granting a mandatory injunction to compel defendants to restore severed sewer and storm connections. Reversed.

Note. — As to implication from necessity of easement other than right of way, see note to Miller v. Hoeschler, 8 L.R.A. (N.S.) 327.

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Statement by Brooke, J.:

Complainant and defendants were, respectively, owners of adjoining lots facing Burdick street, in the city of Kalamazoo. Upon complainant's lot, which was 22 feet wide and about 230 feet deep, extending to Farmer's alley, there had stood for many years a three-story brick block, running east from Burdick street about 90 feet. To the east and in the rear of said brick building, a one-story building extended eastward to the alley, about 130 feet. The sewage from the brick block was conducted under the one-story building to a lateral sewer in Farmer's alley. The roof drainage of the block was carried onto the roof of the one-story building, and thence to the alley. Defendant desired to erect a theater, and, his own lot not affording sufficient area for his purpose, negotiated with complainant for the purchase of the rear or easterly 130 feet of her lot. On November 8, 1908, a warranty deed of said parcel, with full covenants against encumbrances, was executed by complainant to defendants for a consideration of \$5,000. This deed contains the following agreement: "It is understood and agreed between the parties hereto, as a part of the consideration of this deed, that the second parties are to build a wall on the west side of the land hereby conveyed, about 16 inches thick and about 40 feet in height, and that the party of the first part is to own said wall jointly with said second parties, and it is to be used as a party wall. The center of the said wall to be on the west line of the land above conveyed." Defendants, after said purchase was completed, proceeded to tear down the one-story building which stood on the lot conveyed, and commenced excavation for the basement under the proposed theater. In excavating, the sewer from complainant's block was uncovered, and, as defendants desired to make a basement 9 feet deep, which was 3 or 4 feet deeper than the sewer, the sewer was cut, and the excavation proceeded. In the negotiations complainant did not advise defendants of the existence of the sewer, and the record does not show that they or either of them knew it was there. After the sewer was cut, complainant filed her bill of complaint, praying for a mandatory injunction compelling defendants to restore the sewer connection and roof drainpipe, and for a permanent injunction restraining defendants from breaking or interfering with the sewer and from interfering with the passage of the roof drainage over said lot. A preliminary mandatory injunction was granted *ex parte*, which the court refused on motion to vacate. This injunction was granted on January 15, 1909. The cause came on to

be heard on the merits October 17, 1900. In the meantime defendants had completed the theater building, and, in obedience to the mandate of the court, had taken care of the complainant's sewage and roof drainage, at considerable expense. Upon final hearing, the preliminary injunction was made permanent. The decree further provides that the expense of maintenance and repairs of the sewerage connection and the storm pipe shall be borne equally by the parties. From this decree defendants appeal.

Mr. A. J. Mills, for appellants:

To entitle the complainant to a decree, the burden was upon him to establish that the servitude was apparent, continuous, and strictly necessary to the enjoyment of his land.

Covell v. Bright, 157 Mich. 419, 122 N. W. 101; Moore v. White, 159 Mich. 460, 134 Am. St. Rep. 735, 124 N. W. 62; Miller v. Hoeschler, 8 L.R.A.(N.S.) 327, and note, 126 Wis. 263, 105 N. W. 790; 14 Cyc. Law & Proc. pp. 1171, 1172; Dee v. King, 73 Vt. 375, 50 Atl. 1109.

Mr. E. M. Irish, for appellee:

The grantee of that part of the estate which is sold takes it subject to the easement.

3 Farnham, Waters, 2447, 2453, §§ 832, 832a; Smith v. Dresselhouse, 152 Mich. 451, 116 N. W. 387; Seymour v. Lewis, 13 N. J. Eq. 439, 78 Am. Dec. 108; Rawle, Covenants, 5th ed. § 84; Dunklee v. Wilton R. Co. 24 N. H. 489.

The remedy by mandatory injunction applies.

1 High, Inj. 4th ed. § 2; Toledo, A. A. & N. M. R. Co. v. Pennsylvania Co. 19 L.R.A. 387, 5 Inters. Com. Rep. 522, 54 Fed. 730; Gates v. Detroit & M. R. Co. 151 Mich. 548, 115 N. W. 420; Pyer v. Carter, 28 L. J. Exch. N. S. 258, 5 Week. Rep. 371, 1 Hurlst. & N. 916; Watts v. Kelson, L. R. 6 Ch. 166, 40 L. J. Ch. N. S. 126, 24 L. T. N. S. 209, 19 Week. Rep. 338; 3 Farnham, Waters, pp. 2448, 2449; Seymour v. Lewis, 13 N. J. Eq. 439, 78 Am. Dec. 108; Toothe v. Bryce, 50 N. J. Eq. 589, 25 Atl. 182.

Brooke, J., delivered the opinion of the court:

The sole question for determination here is whether or not there is an implied reservation of an easement over the land sold by complainant to defendants. It is said that in reaching the conclusion he did, the learned circuit judge relied upon the case of Smith v. Dresselhouse, 152 Mich. 451, 116 N. W. 387. An examination of the facts in that case will at once demonstrate that it differs vitally and fundamentally 33 L.R.A.(N.S.)

from the case here considered. There the owner of two adjoining tenements, located upon either side of a river, upon each of which stood a mill, sold one of the tenements to the complainant in that case, and, as appurtenant to the tenement conveyed, sold the water rights. The owner and his grantees continued to operate the mill on the other side of the river, using the water for that purpose. Complainant filed his bill to enjoin the use of the water. This court held that, as to the water, complainant was a tenant in common with the owner of the adjoining tenement on the opposite bank of the stream. Mr. Justice Ostrander, in stating the general rule, there said: "It is a general rule of the law of easements that, where the owner of two tenements sells one of them, the purchaser takes the portion sold with all the benefits and burdens which appear at the time of the sale to belong to it, as between it and the property which the vendor retains." The matter under consideration was a grant, not a reservation, and in discussing the effect of the grant, he further said: "We should not expect that a grant of the land on one side of the river only, the grantor retaining the land and mill on the other side, and using the water there appurtenant, conveyed an exclusive right to the entire water power. The terms of the grant to complainant are express and seem to be unambiguous. The land is described by metes and bounds. One boundary is the center of the main channel of the river. The mill tract and the mill are within the boundaries. It is the mill privilege and water power 'there situate,' i. e., appurtenant to the land conveyed, which is deeded, with the right to flow lands and to 'use and make use of the water power there situated.'"

Assuming, therefore, that the rule was correctly stated, the case was determined, not by any application of the rule, but by a construction of the terms of the grant. Nor is it applicable to the case under consideration. Here, the sewer was under ground. It was not apparent, and defendants are not shown to have had any knowledge of its existence under the land purchased by them. But, if they had such knowledge, that fact would not be controlling, because complainant knew that the use to which this property was to be devoted would uncover the sewer, and, as it existed, destroy it.

Even if it could be said that a grantor under any circumstances could by implication reserve the right to continue an underground sewer in the premises granted, which we do not determine, it would not aid complainant. Here, it is sought by

implication to reserve the right to have the existing sewer destroyed, and rebuilt in the air through the basement of the tenement to be erected upon the demised lands. Simply to state such a proposition would seem to be a sufficient answer.

The rule applicable to implied reservations of easements is stated in *Cyc. Law & Proc.* vol. 14, p. 1171, as follows: "As regards implied reservations of easements, the matter stands on principle in a position very different from implied grants. If the grantor intends to reserve any right over the tenement granted, it is his duty to reserve it expressly in the grant. To say that a grantor reserves to himself in entirety that which may be beneficial to him, but which may be most injurious to his grantee, is quite contrary to the principle upon which an implied grant depends, which is that a grantor shall not derogate from or render less effectual his grant, or render that which he has granted less beneficial to his grantee. Accordingly, where there is a grant of land with full covenants of warranty, without express reservation of easements, the best considered cases hold that there can be no reservation by implication, unless the easement is strictly one of necessity."

Cases are cited from many jurisdictions in support of this statement of principle, and we think it is in accord with the weight of modern authority. The great weight of authority touching the question, with reference to subterranean drainage, is to the effect that, if the owner of the land under which there is such a drain conveys a part of it with full covenants of warranty, without reference to the drain, no easement is reserved.

The grantor and his privies, under such circumstances, are estopped to claim any interest in the premises so granted. To permit such a claim would be to allow the grantor to derogate from the terms of his grant, which, by every applicable principle, is forbidden. The authorities upon the subject are collected and discussed in *Am. & Eng. Enc. Law*, 2d ed. vol. 10, p. 420. See also 14 *Cyc. Law & Proc.* p. 1166, and cases there cited, and *Farnham on Waters*, vol. 3, pp. 2454, 2455.

In the recent case on *Covell v. Bright*, 157 Mich. 419, 122 N. W. 101, which upon principle much resembles the case at bar, we said: "To entitle the complainant to a decree, the burden was upon him to establish that the servitude was apparent, continuous, and strictly necessary to the enjoyment of his lands,"—citing cases.

In New Jersey, a different doctrine for a long time obtained, based upon the ruling in the celebrated case of *Pyer v. Carter*, 1 33 L.R.A. (N.S.)

Hurlst. & N. 916, 26 L. J. Exch. N. S. 258, 5 Week. Rep. 371, and those cases which followed the rule there laid down. *Pyer v. Carter* has frequently been severely criticized, and was finally distinctly overruled in England. The case of *Tooth v. Bryce*, 50 N. J. Eq. 589, 25 Atl. 182, contains a review of the English and American cases, questions the soundness of the doctrine announced by that court in its earlier decisions, and seems to recognize the distinction between an implied grant of an easement and an implied reservation.

While it is apparent from the record that it will be somewhat expensive to dispose of the sewage from complainant's building otherwise than over defendant's land, it by no means appears that it is impossible to do so. There is not made out, therefore, a case of strict necessity.

The case presents this alternative: Either complainant at some, perhaps considerable, expense to herself, must take care of her own sewage and storm waters, or the defendants, who purchased and paid for a tenement warranted to be free from all encumbrances, must take that tenement charged in perpetuity with an encumbrance of a very serious character, and one which is liable, through the breaking or stoppage of the drain, to cause serious annoyance and damage.

Why should defendants be compelled to accept this burden? Why should they be charged in perpetuity with the duty of defraying one half of the expense of maintaining complainant's sewer, as well as the cost of its original construction? So far as the record discloses, they have done no act which was not fully warranted by the terms of the grant to them. They have sought to make use of the granted tenement in a lawful manner, and in a manner and for a purpose known by complainant before the sale.

Touching the disposition of the storm waters, it is clear that, by the sale of the one-story building upon which it had theretofore been carried to the alley, with the knowledge that said building was to be immediately demolished, complainant must have known that such drainage would be interrupted. The very terms of her written contract show this, because she stipulated for the erection of a brick wall between the premises granted and those retained. This wall was to be 16 inches thick and about 40 feet in height. It is obvious that she could not have contemplated the carrying of her roof waters over that wall. At that moment it was apparent that some new arrangement must be made to care for this water. Defendants did not contract to build a new drain and carry it across their

own property to the alley, nor did they agree to construct a new sewer, and we know of no principle of equity which would compel them to do so.

The decree of the court below is reversed, and the bill of complainant is dismissed, and, inasmuch as the record discloses that defendants have expended certain sums of money in obedience to the mandate of the court in caring for complainant's sewage and water, the record will be remanded for the purpose of ascertaining the exact amount of such expenditure, which, when ascertained, shall be decreed to be a debt due from complainant to defendants, for the collection of which execution may issue.

Ostrander, Ch. J., and Hooker, McAlvay, Blair, and Stone concurred with Brooke, J.

Bird, J., dissenting:

I am of the opinion that the trial court reached a right conclusion upon the law and facts in this case, and that it ought to be affirmed by this court.

In the case of *Smith v. Dresselhouse*, 152 Mich. 451, 116 N. W. 387, Mr. Justice Ostrander, discussing the doctrine of implied reservations quoted, with approval, the following general rule of easements: "It is a general rule of the law of easements that, where the owner of two tenements sells one of them, the purchaser takes the portion sold with all the benefits and burdens which appear at the time of the sale to belong to it, as between it and the property which the vendor retains. *Seymour v. Lewis*, 13 N. J. Eq. 439, 78 Am. Dec. 108. Every grant of a thing naturally imports a grant of it as it actually exists. *United States v. Appleton*, 1 Sumn. 502, Fed. Cas. No. 14,463."

Mr. Justice Selden, in speaking of this rule, said: "This is not a rule for the benefit of purchasers only, but is entirely reciprocal. Hence, if, instead of a benefit conferred, a burden has been imposed upon the portion sold, the purchaser, provided the marks of this burden are open and visible, takes the property with the servitude upon it." *Lampman v. Milks*, 21 N. Y. 505.

If we are to take the foregoing rule as our guide in determining this case, I am very firm in the conviction that defendants took the deed of the premises burdened with the sewer. In arriving at this conclusion, the distinction made by Mr. Justice Brooke, in his opinion, between implied grants and implied reservations, has not been over-

looked. Although there is a difference of opinion in the cases as to the degree of necessity required to create them, the better rule seems to be, and the one supported by the weight of authority is, that a reasonable necessity is sufficient to raise an implied grant; whereas, a strict necessity is necessary to raise an implied reservation. This court has adopted the strict necessity rule in *Covell v. Bright*, 157 Mich. 419, 122 N. W. 101. The question therefore arises whether the circumstances of this case are such as to bring it within the rule of strict necessity. A study of the record has persuaded me that they do. To establish her case, it was necessary for complainant to show that the easement claimed was apparent, continuous, and strictly necessary.

Was the easement apparent? "Apparent easements" have been defined to be those the existence of which appears from the construction or condition of one of the tenements, so as to be capable of being seen or known on inspection. 10 Am. & Eng. Enc. Law, p. 405. To this class of easements belongs the bed of a running stream, an overhanging roof, a pipe for carrying water, a drain, or a sewer. *Fetters v. Humphreys*, 18 N. J. Eq. 262. And the mere fact that a drain or aqueduct, as the case may be, is concealed from casual vision, does not prevent it from being "apparent" in the sense in which that word is used in that connection. *Larsen v. Peterson*, 53 N. J. Eq. 88, 30 Atl. 1094.

Defendant testified that he did not know that the sewer extended through the premises conveyed to him. If he had no actual knowledge, he did have constructive knowledge of that fact. He had owned for upwards of twenty-five years premises side by side with the premises in question, with like improvements. He knew there was a sewer which served complainant's premises, because he had the front portion of them under lease nearly two years before he purchased the rear portion, and at the time there were five water-closets in the portion he had under lease. He knew that the sewer from his own premises was discharged into the Farmer's alley sewer, and must have known that there was no other sewer into which it could be discharged, and, if he did, it would not be unreasonable to assume that he knew the same thing was true of complainant's premises. On one occasion, prior to his purchase, a portion of the floor in the rear part was taken up, which disclosed the sewer, and defendant was present at that time. Defendant had, before purchasing the property, talked and planned

with complainant's husband about building a theater where he has since erected one, and, in doing so, undoubtedly considered the question of plumbing among other questions of construction and arrangements. A knowledge of these facts was sufficient in the law to put defendant upon inquiry, and to charge him with notice that the sewer traversed that portion of the premises purchased by him.

Is the easement continuous? The answer had been in existence for twenty years, was of a permanent nature, was in use at the time, and was susceptible of being used and enjoyed without making an entry on defendant's premises, except for the purpose of repair. These facts would clearly bring it within the definition of a "continuous easement." Ibid.

Is the easement strictly necessary to the enjoyment of complainant's premises? The sewer in Farmer's alley is the only one available for her use. The city engineer testified that one might be constructed to De Visser alley, but that it would be impracticable for the reason that, where it would discharge into that sewer, it would be only 18 inches underground. The topography of that part of the city is such that no other sewer can be constructed which will serve these premises without a prohibitive expense. A cesspool was suggested by complainant; but the city authorities would not permit it. She then made an effort to buy the right of her neighbor on the north to go through the partition wall and connect with his sewer, which also discharges into the Farmer's alley sewer; but to this her neighbor would not consent. We have then a situation where complainant must be permitted to use the sewer which has served her premises for twenty years, if her building is to have any sewer service. If this situation, which nature has so fashioned that the sewage can be directed only in the direction of Farmer's alley, does not bring it within the rule of strict necessity, it would, indeed, be difficult to suggest one. If greater exigency than here exists is required before the strict necessity rule can apply, there would be little use for the existence of the rule, as its use would be so infrequent as to render it useless.

In my opinion, the trial court found his way to a very equitable adjustment of the entire matter, and I think his decree should be affirmed.

Moore, J., concurs with Bird, J.
33 L.R.A. (N.S.)

WISCONSIN SUPREME COURT.

STATE OF WISCONSIN

v.

DEMPSTER SMITH, Plff. in Err.

(— Wis. —, 130 N. W. 894.)

Bastardy — right of prosecutrix to employ counsel.

Prosecutrix in a bastardy proceeding is not precluded from retaining private counsel, by a statute making it the duty of the district attorney to appear and prosecute in such actions, since the proceeding is not primarily to punish defendant, but to recover compensation for the person injured.

(April 5, 1911.)

Note. — Bastardy: right of prosecutrix to private counsel.

By the weight of authority bastardy proceedings are treated as civil proceedings. In jurisdictions where this rule prevails, there can be little question as to the right of the prosecutrix to be represented by special counsel.

In the only other case which has been disclosed, where the question under consideration has been decided, it was held that bastardy proceedings are quasi criminal, and that the complainant was entitled to be represented by private counsel, under a statute providing that prosecuting attorneys should in their respective counties appear for the state or county, and prosecute or defend in all the courts of the county all prosecutions, suits, applications, and motions, either civil or criminal, in which the state or county was a party or interested, and that they should not receive fees from private individuals, and further that they should be allowed an assistant only in cases of felony. *Harley v. Ionia Circuit Judge*, 140 Mich. 642, 104 N. W. 21. The court said: "The many decisions of this court clearly recognize that these are not strictly criminal proceedings. The rules of evidence applying to criminal cases as to the proof required to find against the defendant are not applied. This case was the complainant's case. She was the proper party to bring it. The interest of the public is not the only interest involved. The statute wisely provides against the contingency of such a child becoming a public charge, but it recognizes that the complainant is interested, and must also be protected. To properly protect the interests of a minor under such circumstances, by the employment of counsel, would appear not only to be a right, but the duty, of a parent or guardian. The prosecuting attorney representing the people and the attorney representing the complainant do not represent conflicting interests; nor is the complainant's attorney in any sense an assistant prosecutor." J. T. W.

ERROR to the Circuit Court for Brown County to review a judgment in plaintiff's favor in a bastardy proceeding. Affirmed.

The facts are stated in the opinion.

Mr. M. E. Davis for plaintiff in error.

Messrs. Levi H. Bancroft, Attorney General, and Sheridan, Evans, & Merrill, for the State:

The appearance of private counsel does not violate the judicial policy of the state.

Biemel v. State, 71 Wis. 444, 37 N. W. 244, 7 Am. Crim. Rep. 556; *State ex rel. Durner v. Huegin*, 110 Wis. 189, 62 L.R.A. 700, 85 N. W. 1046, 15 Am. Crim. Rep. 332; *Meyer v. Meyer*, 123 Wis. 538, 102 N. W. 52; *Barry v. Niessen*, 114 Wis. 256, 90 N. W. 166.

The duty imposed by the statute is for the benefit of the prosecutrix.

Meyer v. Meyer, 123 Wis. 538, 102 N. W. 52.

Vinje, J., delivered the opinion of the court:

The sole question presented by this appeal is: Can private counsel lawfully prosecute in a bastardy proceeding? It is conceded by counsel for plaintiff in error that, previous to the enactment of § 1533m (chapter 648, Laws 1907), they could do so, but it is claimed that since its enactment only the district attorney has such right. The section reads: "It shall be the duty of the district attorney to appear and prosecute in all bastardy proceedings in the trial court. . . ." And it is argued that this law, placing the duty upon the district attorney to prosecute, by implication excludes the right of a private attorney from performing the duty, and that neither the complaining witness or the defendant may insist upon the statute being complied with. It is further urged that, while a bastardy proceeding is not a criminal action, yet it subjects the defendant to great humiliation and disgrace, and sound public policy dictates that the prosecution should be placed in the hands of a disinterested prosecutor, and not in the hands of private counsel, who may be indirectly pecuniarily interested in the result; and that the statute was passed to accomplish such a purpose.

The answer to the question presented for determination will depend upon the nature and object of a bastardy proceeding, and who is primarily interested in the result of the action. If the proceeding be one in which the defendant is sought to be punished for a wrong done to society or the state, then there is great force in the argument that the state alone should prosecute. *Biemel v. State*, 71 Wis. 444, 37 N. 33 L.R.A. (N.S.)

W. 244, 7 Am. Crim. Rep. 556; *State ex rel. Durner v. Huegin*, 110 Wis. 221, 62 L.R.A. 700, 85 N. W. 1046, 15 Am. Crim. Rep. 332. A bastardy proceeding has been held to be neither a civil nor a criminal action, but one depending wholly upon the terms of the statute authorizing it for the relief that may be afforded thereby. *State v. Mushied*, 12 Wis. 562; *State v. Jager*, 19 Wis. 235; *Baker v. State*, 56 Wis. 568, 14 N. W. 718; *Meyer v. Meyer*, 123 Wis. 538, 102 N. W. 52. The latter case held it was designed primarily to enable the injured female to recover compensation from the person who has in the eye of the law inflicted injury upon her with consequent damages. It has also been held that, when instituted by the mother, it is a proceeding for her benefit and protection, to enforce the father's natural obligations to support his child. *Baker v. State*, 56 Wis. 568, 14 N. W. 718; *Barry v. Niessen*, 114 Wis. 256, 90 N. W. 166. So, we see that whether the defendant's liability is founded upon a tort or upon a natural obligation, irrespective of blame, it is a liability primarily to the mother, and the remedy is given for her benefit. True, the state is remotely interested; for, if the father does not furnish support, it may be called upon to do so. But its contingent claim upon defendant is purely a pecuniary one, and has naught to do with the violation of any criminal statute. A defendant may be adjudged guilty in a bastardy proceeding and also in a prosecution for fornication, or whatever statutory offense he may have been guilty of when the child was begotten; but they are two separate and distinct actions, founded upon distinct grounds of liability. In the one the mother is primarily interested, the state only remotely, and both interests are wholly pecuniary. In the other the state alone is interested, but not in a pecuniary sense. It is enforcing its criminal laws on the ground of public policy.

In view of the considerations as to the nature and object of a bastardy proceeding, we reach the conclusion that § 1533m was designed to provide counsel at the expense of the state, for every mother who desired to avail herself of its provisions; but she is not limited to the services of the district attorney. If she prefers to engage counsel at her own expense, she may do so, as the action is primarily for her benefit, and essentially civil in the liability enforced and remedy sought. *State ex rel. Durner v. Huegin*, 110 Wis. 221, 62 L.R.A. 700, 85 N. W. 1046, 15 Am. Crim. Rep. 332. The object of the statute was not to place the prosecution of such actions in the hands of a disinterested counsel for the benefit of

defendant, or on grounds of public policy. There is no more reason why the prosecution of such an action, seeking merely a money judgment, should be solely in the hands of a district attorney than that of many other civil actions, such as assault and battery, libel, slander, seduction, and criminal conversation. In such actions an adverse judgment would in most instances subject the defendant to great disgrace and humiliation, at least, it ought to do so, and the pecuniary interest of plaintiff's attorney in such actions may well be coextensive with his interest in a bastardy proceeding. It follows that the trial court did not err in permitting private counsel to prosecute the case.

Judgment affirmed.

WYOMING SUPREME COURT.

CHARLES MAKI, Plff. in Err.,
v.

STATE OF WYOMING.

(— Wyo. —, 112 Pac. 334.)

Criminal law — accused — testimony before coroner — admissibility.

Testimony of one under arrest on a charge of murder, given before the coroner at the inquest upon the death of his alleged victim, in response to the coroner's inquiry as to whether or not he wanted to testify, is not admissible against him at his trial, if he was not informed that he need not testify or that his testimony might be used against him.

(January 3, 1911.)

ERROR to the District Court for Uinta County to review a judgment convicting defendant of manslaughter. Reversed. The facts are stated in the opinion.

Note. — Admissibility, on trial for murder, of testimony of accused at coroner's inquest.

For a note on necessity of claiming constitutional protection against being compelled to give incriminating evidence, see *State v. Duncan*, 4 L.R.A.(N.S.) 1144.

For a note on what confession is voluntary, see *Ammons v. State*, 18 L.R.A.(N.S.) 768.

For a note on admissibility, in criminal case, of statements or confessions made by accused before the grand jury, see *State v. Campbell*, 9 L.R.A.(N.S.) 533.

The early cases upon the question of the admissibility, on trial for murder, of testimony of accused at coroner's inquest, are gathered in the note to *Tuttle v. People*, 70 L.R.A. 33, and this note includes only 33 L.R.A.(N.S.)

Messrs. H. E. Christmas and H. R. Christmas, for plaintiff in error:

Testimony given, either under oath or otherwise, by persons under arrest or suspected of crime, at the coroner's inquest, cannot be admitted upon their subsequent trial for the crime then under investigation.

Twiggs v. State, — Tex. Crim. Rep. —, 75 S. W. 531; *Tuttle v. People*, 33 Colo. 243, 70 L.R.A. 33, 79 Pac. 1035, 3 A. & E. Ann. Cas. 513; *State ex rel. Atty. Gen. v. Simmons Hardware Co.* 109 Mo. 118, 15 L.R.A. 676, 18 S. W. 1125; *State v. Spier*, 86 N. C. 600; *Rex v. Lewis*, 6 Car. & P. 161; *Reg. v. Owen*, 9 Car. & P. 238; *State v. O'Brien*, 18 Mont. 1, 43 Pac. 1091, 44 Pac. 399; *People v. McMahon*, 15 N. Y. 384, reversing 2 Park. Crim. Rep. 663; *Wood v. State*, 22 Tex. App. 431, 3 S. W. 336; *Hendrickson v. People*, 10 N. Y. 13, 9 How. Pr. 155, 61 Am. Dec. 721; *State v. Garvey*, 25 La. Ann. 191; *Clough v. State*, 7 Neb. 320; *Schoeffler v. State*, 3 Wis. 823; *State v. Andrews*, 35 Or. 388, 58 Pac. 765; *People v. Gibbons*, 43 Cal. 557; *State v. Welch*, 36 W. Va. 690, 15 S. E. 419; *United States v. Bascadore*, 2 Cranch, C. C. 30, Fed. Cas. No. 14,536.

Mr. W. E. Mullen, Attorney General, for the State.

Statements made before coroners or at preliminary hearings are admissible.

Horn v. State, 12 Wyo. 80, 73 Pac. 705; *People v. Thayer*, 1 Park. Crim. Rep. 595; *Williams v. Com.* 29 Pa. 102; *Mack v. State*, 48 Wis. 271, 4 N. W. 449; *State v. Miller*, 35 Kan. 328, 10 Pac. 865; *Griggs v. State*, 59 Ga. 738; *State v. Mullins*, 101 Mo. 514, 14 S. W. 625; *People v. Mondon*, 38 Hun, 188.

Scott, J., delivered the opinion of the court:

An information was filed in the district court of Uinta county on November 4, 1908, charging Charles Maki with the crime of

the decisions which have passed upon the point since the date of that note.

The statements of defendant upon a murder trial are admissible where it appears that he was summoned as a witness at the inquest, and, without being sworn, testified as to his whereabouts at the time the crime was committed, the bill of exceptions not showing any suspicion that he thought he was under arrest. *McMeans v. State*, 55 Tex. Crim. Rep. 69, 114 S. W. 837.

And voluntary confessions made at a coroner's inquest while the defendant was under arrest charged with murder are admissible upon his trial for murder, where he was told that he did not have to testify, and that, if he did, the evidence would be used against him. *Reagan v. People*, — Colo. —, 112 Pac. 785.

And statements of an accused who was

murder in the first degree. He was duly arraigned, pleaded not guilty, and was subsequently tried and found guilty of manslaughter. He filed a motion for a new trial, which was overruled, judgment was pronounced against him upon the verdict, and he brings error.

1. The plaintiff in error was sworn and testified as a witness at the coroner's inquest. The coroner testified as a witness at the trial on behalf of the state, and inquiry was made as to statements made by the plaintiff in error in his evidence given at the inquest. The defendant was permitted to interrogate the witness as to the conditions under which he so testified. Upon the answers to such interrogatories, the defendant objected to the witness testifying to what he said under oath at the coroner's inquest, for the reason that his statements were not voluntarily made, but were made at a time when he was under arrest for the crime charged in the information, and had not been apprised by the coroner that he was under no obligation to testify,

and that, if he did testify at such inquest, his statements might be used against him upon his trial. The objection was overruled, and an exception reserved.

The evidence of the coroner shows that the plaintiff in error was under arrest at the time he gave his evidence before the coroner for killing the deceased, whose dead body and the nature of the death was then the subject of the coroner's inquest. He was not informed that what he said might be used against him upon his trial, nor was he advised of his rights in the matter, nor does it appear that he had the benefit of counsel. Under such circumstances, it is contended by the defendant that evidence of what he then and there testified to under the surrounding conditions was inadmissible as evidence against him upon the trial. This evidence was material. It tended to show that he was present with the deceased at the time and place when the latter received his death blow. The evidence was largely circumstantial, and

under arrest at the time of an inquest are admissible although he was not then informed of his legal rights, where he declined to answer a number of questions put to him and was not compelled to do so. *Anderson v. State*, 133 Wis. 601, 114 N. W. 112.

So, a confession made before a coroner, who, on being informed by the sheriff that the prisoner wished to confess, excluded all persons from the room except the county attorney, the sheriff, and the jury, is admissible, where the county attorney told him that he need not incriminate himself, and where, before he signed the confession, he was told that he did not have to sign it, and that it would be used against him in criminal proceedings, although when he hesitated in his answers the sheriff told him to tell the truth. *State v. Westcott*, 130 Iowa, 1, 104 N. W. 341.

And where the record does not show that a confession before a coroner was not voluntarily made, an objection that the defendant was in the custody of the officers under arrest at the time it was made, and while thus situated was compelled to give testimony against herself, is without merit. *Green v. State*, 124 Ga. 343, 52 S. E. 431.

And the statement of a defendant before the coroner's jury may be proved by parol evidence, notwithstanding the law requires the evidence before the coroner to be in writing, and it is claimed that such writing is the best evidence of such proceedings. *Ibid.*

But confessions or inculpatory statements obtained at the coroner's inquest from two persons arrested for the murder of a man found by the roadside are not admissible on their trial for murder, where, while in custody, they were taken to the inquest, and, without being informed that

they were not compelled to testify, they were sworn and examined as witnesses, not on their own motion, but on that of the coroner or the jury. *Adams v. State*, 129 Ga. 248, 17 L.R.A. (N.S.) 468, 58 S. E. 822, 12 A. & E. Ann. Cas. 158.

And statements made by defendants upon oath at the coroner's inquest, taken in writing and signed by them, they being at the time in the custody of the sheriff, having been taken from the jail handcuffed to the scene of the murder, where the inquest was held, are not admissible, since they are involuntary. *State v. Brown*, — Del. —, 80 Atl. 146.

And statements made by defendants at the coroner's inquest while in the custody of the sheriff are not admissible where they were examined before the coroner three times, and it appears that they were not advised of their rights each time they were examined, and it does not appear that the statements were made at the time they were advised of their rights as to testifying. *Daniels v. State*, 57 Fla. 1, 48 So. 747.

And the defendant in a murder trial cannot introduce his testimony taken at the examination before the coroner, either for the purpose of explaining the condition he was in when he gave it, or for the purpose of rebutting testimony of witnesses as to statements made by the defendant. *People v. Heacock*, 10 Cal. App. 450, 102 Pac. 543.

The provisions of a statute providing that the defendant shall be informed of his legal rights when brought before a magistrate do not apply to a preliminary investigation before a coroner, where the defendant had not been indicted or accused of the murder at the time. *People v. Strollo*, 191 N. Y. 42, 83 N. E. 573.

J. T. W.

the defendant did not testify as a witness upon the trial.

The right of the state to use this evidence turns upon the question as to whether it was voluntarily given by the plaintiff in error at the coroner's inquest. If it is not stamped with that essential requirement, then it was inadmissible and prejudicial, for it was one of the constitutional rights of the defendant that he should not be compelled to testify against himself. Section 11, art. 1, of the Constitution. It is the general rule that self-incriminating statements are not *per se* admissible over objection, when the evidence discloses that the defendant was in custody for the crime charged at the time of making such statements, unless shown to have been voluntarily made. Under this rule, there is no presumption that such statements are voluntarily made, but, on the contrary, the presumption is the other way, and upon the trial of an accused the burden is upon the state seeking to prove such statements, to show their voluntary character. It is impossible to show this where the accused is under arrest for the crime under investigation by the coroner's jury, and upon such investigation the incriminating statements were made under oath, without also showing that he had the benefit of counsel or was fully informed of his rights. He was not here told that he need not make a statement or might make a statement or be sworn as a witness, and that if he made a statement, whether under oath or not, it might be used against him, if subsequently tried upon the charge for which he was then under arrest, and that he could do as he pleased about the matter. It is true that the coroner testified that the accused voluntarily gave his evidence, but he also said, in answer to an inquiry propounded by the court as to what he said to the accused before the latter testified, and as to what the accused said: "I just merely asked him if he wanted to testify, and my recollection is he stated he did. I believe that was all that was said." Upon the inquiry of the coroner, the accused, being then under arrest for the crime being investigated, was brought before the coroner's jury, and, without being informed of his rights or warned that his evidence might thereafter be used against him, was sworn as a witness, and gave the evidence which was introduced upon the trial, over the objection that it was not shown to be of that voluntary nature to entitle it to admission.

The word "voluntary," as applied to evidence given by one at a coroner's inquest, who is not under arrest, but who knew he was under suspicion of having perpetrated

the homicide under investigation, and who was subpoenaed as a witness and afterward charged and tried for such homicide, is learnedly discussed in *Tuttle v. People*, 33 Colo. 243, 70 L.R.A. 33, 79 Pac. 1035, 3 A. & E. Ann. Cas. 513. In that case the court adopts the definition of what constitutes a voluntary statement used in this sense as given in *State v. Clifford*, 86 Iowa, 550, 41 Am. St. Rep. 518, 53 N.W. 299, as follows: "A confession or statement, to have been voluntarily made, must proceed 'from the spontaneous suggestion of the party's own mind, free from the influence of any extraneous, disturbing cause.'" The court proceeds to discuss the way of determining whether such extraneous, disturbing cause exists in a given case, which would exclude such statement from the inhibition of the Constitution, and lays down the rule that the surrounding circumstances must govern in each particular case. It was there held that the refusal of the witness to testify, or had he claimed his constitutional right not to testify, would probably, owing to the surrounding conditions, have subjected the defendant to immediate arrest upon the charge of murdering the deceased, and that evidence given under such conditions must be held to have been, not voluntary, but under the influence of a disturbing cause. In 1 *Greenleaf on Evidence*, 225, it is said with reference to this subject: "The manner of the examination is therefore particularly regarded; and if it appears that the prisoner had not been left wholly free, and did not consider himself to be so in what he was called upon to say, or did not feel himself at liberty wholly to decline any explanation or declaration whatever, the examination is not held to have been voluntary." In the case before us, there was no expression of a desire or willingness on the part of the prisoner to testify, until it was drawn from him by a question from the coroner. The suggestion was not therefore spontaneous and springing out of the prisoner's mind, but came from and through the inquiry of the coroner, and under conditions that a refusal to testify would constitute a powerful incentive in the minds of the officers of the law to continue his incarceration.

The defendant in a criminal case, under our statute, is a competent witness in his own behalf. It is optional with him whether he will avail himself of the right. Under the common law he could not testify as a witness, though his confessions or incriminating statements, if voluntarily made, could be used as evidence against him. The rules surrounding such confessions or admissions, that developed under the common law, have been extended and applied in

cases where the common-law disability has been removed by statute, to confessions or criminating statements made under oath by the accused, who is then under arrest, though the courts differ as to whether a criminating statement so made at a coroner's inquest, irrespective of its voluntary character, is admissible at all. The great weight of authority and the trend of the later decisions is to the effect that if he has been advised of his rights and duly cautioned, and he then testifies voluntarily, his evidence is admissible against him. *People v. McMahon*, 15 N. Y. 384; *People v. Mondon*, 103 N. Y. 211, 57 Am. Rep. 709, 8 N. E. 496; *People v. Chapleau*, 121 N. Y. 266, 24 N. E. 469; *People v. Wright*, 136 N. Y. 625, 32 N. E. 629; *Lyons v. People*, 137 Ill. 602, 27 N. E. 677; *Wood v. State*, 22 Tex. App. 431, 3 S. W. 336; *State v. Garvey*, 25 La. Ann. 191; *Steele v. State*, 76 Miss. 387, 24 So. 910. The object and purpose of warning the accused under such circumstances is twofold: First, that it may be brought home to his mind that what he says under oath may be used against him, and, being so informed, that he may be free to act as he pleases; and, second, that a legal proceeding may not be converted into an inquisition. It is true that everyone is presumed to know the law, and to assume the consequences of his own acts, and upon this theory it was held by the supreme court of Missouri that the evidence of one not under arrest, who admitted the killing, and voluntarily appears and testifies before a coroner's jury, may be used against him in the absence of a showing that the coroner informed him of his rights. *State v. Mullins*, 101 Mo. 514, 14 S. W. 625. This and other Missouri cases (*State v. Young*, 119 Mo. 495, 24 S. W. 1038; *State v. David*, 131 Mo. 380, 33 S. W. 28) are distinguishable upon the facts from the case before us, for in each of those cases the defendant was not under arrest at the time he gave his testimony at the coroner's inquest.

In *State v. Young*, *supra*, notwithstanding that he was not under arrest, the defendant, being an ignorant German boy, who at the time of the inquest was under suspicion of having committed the homicide, and without the aid or advice of counsel, and not having been informed of his rights by the coroner, gave his evidence. It was held that such evidence could not be subsequently used against him on his trial for the homicide. In *Schoeffler v. State*, 3 Wis. 823, the statement under oath of the defendant, in the form of a deposition, was taken before the coroner at the inquest, and reduced to writing at a time when the defendant was not under arrest, but under suspicion in the neighborhood of

having committed the homicide for which he was subsequently tried and convicted. He was neither cautioned nor informed of his right to decline to answer any question. His evidence was held admissible, because the defendant was not at the time charged with the commission of the crime. In *Clough v. State*, 7 Neb. 320, 339, the record did not show that the defendant was under oath at the time he made the statements before the coroner's jury, and they were held to have been properly admitted. In *State v. Young*, 60 N. C. (1 Winst. L.) 126, the prisoner was arrested as a witness, brought before the coroner's jury, and subjected to a rigid examination. The evidence was held to be not voluntarily given, and for that reason inadmissible against the prisoner upon a trial for the homicide. The last three cases are distinguishable upon the facts from the case here presented, where the defendant was in the custody and charged with the crime at the time he gave his evidence before the coroner's jury. While the decisions are not in harmony as to the rights of one who is not under arrest for the crime under investigation at the time he gives his evidence before a coroner's jury as a witness, they are practically unanimous as to one who is under arrest, and charged with the commission of the homicide at the time he is sworn and gives evidence before such jury. The person so under arrest and charged with the commission of the homicide, and who is without counsel, is entitled to be informed of his right to decline to be a witness or to answer any question, and properly cautioned as essential elements in determining the voluntary character of his statements then and there made. He is physically restrained of his liberty. In that sense he is not free to do and act as he pleases, and there is a very natural presumption that this restraint extends to and affects his mind to the extent that he would not freely say or admit those things which might thereafter be used as evidence against him. This presumption is not, however, conclusive, but may be overcome, if it be made to appear from the evidence that, after being cautioned and informed as to his rights, the prisoner voluntarily submits himself to examination under oath. Until he is so informed and cautioned, the law does not recognize his mind to be sufficiently free from the impending peril of his situation so as to entitle his statements to admission as evidence against him. Not alone upon the question that they may be untrue, but that the mind must also be left free to act with knowledge of the possible consequences.

We are of the opinion that the court committed prejudicial error in admitting, over

the objection of the plaintiff in error, the evidence of his statements made under oath before the coroner's jury, at a time when he was under arrest and charged with the commission of the homicide, and in the absence of any caution or information as to his rights.

2. It is assigned as error that the evidence is insufficient to support the verdict. It is unnecessary to review the evidence upon this assignment, and it would be improper for us to do so, as the judgment will have to be reversed, and a new trial awarded for the error previously discussed.

Beard, Ch. J., and Potter, J., concur.

NEW JERSEY COURT OF ERRORS AND APPEALS.

JULIUS H. KRUSE, Plff. in Err.,
v.

RUDOLPH F. RABE.

(— N. J. —, 79 Atl. 316.)

Slander — advice to client — unnecessary publicity.

Advice by an attorney to a client as to the business integrity of a third person with whom such client has been dealing is privileged. But when such advice is given in a public or semipublic place, in a loud voice, and in hearing of divers persons, and is addressed not to the client, but to the third person, is slanderous, and without need of either publicity or loud utterance, express malice is a jury question.

(Minturn and Bogert, JJ., dissent.)

(November 14, 1910.)

ERROR to the Hudson County Circuit of the Supreme Court to review a judgment in defendant's favor in an action brought to recover damages for an alleged slander. Reversed.

The facts are stated in the opinion.

Mr. Samuel A. Besson, for plaintiff in error:

The words concerning plaintiff were slanderous *per se*, inasmuch as they imputed to him fraud or want of integrity in his business.

Empire Cream Separator Co. v. De Laval

Headnote by PARKER, J.

Note.—The question whether an otherwise privileged communication is actionable slander or libel where excessively published is discussed in a note to Coleman v. MacLennan, 20 L.R.A. (N.S.) 361. No subsequent cases on the point, other than KRUSE v. RABE, have been discovered. 33 L.R.A. (N.S.)

Dairy Supply Co. 75 N. J. L. 207, 67 Atl. 711; 25 Cyc. Law & Proc. p. 342; Davis v. Davis, 1 Nott & M'C. 290; Masham v. Bridges, Cro. Car. 223; Moore v. Foster, Cro. Jac. 65; Drake v. Hill, T. Raym. 184; Seaman v. Bigg, Cro. Car. 480; Reginald's Case, Cro. Car. 563; Arundel v. Mare, Cro. Car. 552.

The words uttered by defendant were not a privileged communication between attorney and client.

Byam v. Collins, 111 N. Y. 150, 2 L.R.A. 129, 7 Am. St. Rep. 726, 19 N. E. 75; Harrison v. Bush, 5 El. & Bl. 344, 25 L. J. Q. B. N. S. 25, 1 Jur. N. S. 846, 3 Week. Rep. 474.

Messrs. Carrick & Wortendyke, for defendant in error:

The words complained of were not slanderous; they were true; and if ordinarily slanderous, the occasion was privileged, and no malice has been shown.

McCuen v. Ludlum, 17 N. J. L. 14; Townshend, Slander & Libel, § 190; Jaeger v. Beberdick, 70 N. J. L. 372, 57 Atl. 157; Moore v. Miers, 78 N. J. L. 201, 73 Atl. 32; Golderman v. Stearns, 7 Gray, 181; Root v. King, 7 Cow. 613; King v. Root, 4 Wend. 113, 21 Am. Dec. 102; Press Co. v. Stewart, 119 Pa. 584, 14 Atl. 51; 4 Wait, Act. & Def. 311; Warner v. Clark, 21 L.R.A. 502 & note, 45 La. Ann. 863, 13 So. 203; King v. Patterson, 49 N. J. L. 417, 60 Am. Rep. 622, 9 Atl. 705; Butterworth v. Todd, 76 N. J. L. 317, 70 Atl. 139; Fahr v. Hayes, 50 N. J. L. 275, 13 Atl. 261; Rothholz v. Dunkle, 53 N. J. L. 438, 13 L.R.A. 655, 26 Am. St. Rep. 432, 22 Atl. 193.

Parker, J., delivered the opinion of the court:

This was a suit for slander. At the trial there was a verdict directed for the defendant, and this writ of error is based upon an exception to that direction. The evidence was sufficient to justify the jury in finding that the plaintiff was a real estate broker doing business in Hoboken, and was employed under a written contract by a Mrs. Vette to negotiate the sale of certain real estate belonging to her, in which contract she agreed to pay him for his services a commission of 3 per cent; that the plaintiff succeeded in making a sale, and, at the time the transaction was to be closed, the plaintiff and Mrs. Vette, accompanied by defendant as her attorney, attended at the office of the attorney for the purchaser, when the title was closed and Mrs. Vette was paid by a check, and she and the plaintiff and defendant went to a neighboring bank, of which defendant was the president, to cash the check and pay plaintiff his commission; that plaintiff had

procured from Mrs. Vette a sort of certificate that he had negotiated the sale and had earned his commission, and stating its amount; and that he handed this, when in the bank, to Mrs. Vette, who handed it to defendant, who "went inside" (probably inside the partition) for the cash to pay plaintiff, and either on coming out, or before going in, looked at the paper, noticed that the amount was 3 per cent, and, addressing plaintiff, said in a loud tone of voice and in the presence of the bank clerks close by and of several persons transacting business in the bank, "I never heard of any such outrageous commission. I know a hundred real estate people in this county, and none of them charge over 2½ per cent." That plaintiff said, "Mr. Rabe, will you allow me to explain?" And he said: "No, it is simply this: You have taken advantage of this woman." There was no allegation of special damage in the declaration. Besides a plea of general issue, there were pleas of justification and privilege.

The motion for a direction of a verdict for defendant was based upon the grounds: First, that the words were not slanderous *per se*; secondly, that this was a case of a lawyer attempting to protect his client, and that whatever he said was in the course of a conversation addressed to the client, in which the plaintiff took part; and, third, that, if the words were slanderous, they were justified. The court directed a verdict for defendant without stating what grounds such direction was based on.

We think this action of the trial court was erroneous.

The defendant maintains: First, that the language used was not slanderous *per se*, and that no special damage was proved. If it was slanderous *per se*, proof of special damage was, of course, unnecessary, and we have no hesitation in saying that we think it was slanderous *per se*; the plaintiff being a real estate broker, his success in business depended in large measure upon a reputation for dealing fairly with his customers, and for not availing himself of their ignorance as a means of charging excessive and exorbitant commissions for his services. The language implied, if it did not plainly express, that there was a standard rate of commission for such services, and that plaintiff, knowing that rate, but having ascertained that Mrs. Vette did not know it, had taken an unfair advantage of her by reason of her ignorance. This is without question such an imputation upon the plaintiff's integrity in his business relations as to be slanderous *per se*. *Freisinger v. Moore*, 65 N. J. L. 286, 47 Atl. 432; *Odgers, Libel & Slander*, § 65; 25 Cyc. Law & Proc. pp. 326 *et seq.*

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Defendant's next point is that the language in question is true and therefore justified; but the testimony on this point was not so conclusive as to justify the judge in finding as court questions: First, that 2½ per cent was the standard rate and never exceeded; and, secondly, that plaintiff had taken advantage of his client by inducing her to contract for a higher rate.

Thirdly, it is claimed for the defendant that the occasion was privileged.

There can be no doubt that if Mrs. Vette had asked Mr. Rabe as her attorney, in his office, what he thought of the amount of plaintiff's charge, and he had expressed himself to her, in response to that inquiry, to the same effect as he expressed himself to plaintiff, with an honest belief in the truth of what he was saying, his language would then have been privileged. *King v. Patterson*, 49 N. J. L. 438, 60 Am. Rep. 622, 9 Atl. 705; *Fahr v. Hayes*, 50 N. J. L. 275, 278, 13 Atl. 261. But this is not what happened. The evidence seems to be somewhat in conflict as to whether Mrs. Vette made any inquiry of Mr. Rabe about the rate or amount of the commission; but assuming that she did, and that Rabe believed what he was saying, the question still remains whether, in view of the circumstances under which, and the manner in which, plaintiff claims he said it, the jury would not have been entitled to find the presence of express malice. Defendant's counsel point to *Fahr v. Hayes*, supra, as authority to the contrary; and that decision, though in the supreme court, and not binding on us, is entitled to great weight. It goes very far in the protection of such communications as privileged and in the negation of express malice, but is not dispositive of this case. In *Fahr v. Hayes* the plaintiff was asking for credit, and gave Hayes as a reference; this, in the opinion of the supreme court, justifying a confrontation of plaintiff by defendant for the purpose of convincing the prospective auditor of the danger of trusting the plaintiff. In the case at bar the plaintiff did not refer Mrs. Vette to Rabe, and had no part in consulting him. It is true that she was entitled to consult him and he was entitled to advise her with entire freedom so long as he did so honestly. But it cannot be said that a lawyer may shout to his client in a public place advice that a party with whom the client has been dealing has taken advantage of him, and claim immunity under the plea of privilege. The rule is thus stated in *Odgers on Libel & Slander*, at page 245: "If the words be spoken in the presence of strangers wholly uninterested in the matter, the communication loses all privilege. The defendant in all these cases

must be careful that his words reach only those who are concerned to hear them. Words of admonition or of confidential advice should be given privately, not shouted across the street, or written on post cards, or published in the newspapers. [Citing cases.] It is true that the accidental presence of some third person will not alone take the case out of the privilege, if it was unavoidable, or happened in the usual course of business affairs. But if the defendant purposely contrives that a stranger should be present, . . . and who, in the natural course of things, would not be present, all privilege is lost. [Cases.] And whenever a defendant deliberately adopts a method of communication which gives unnecessary publicity to statements defamatory of the plaintiff, the jury will be apt to suspect malice."

It is this last particular in which the case at bar is distinguishable from *Fahr v. Hayes*. The publicity of the words in that case was fairly attributable to the plaintiff's own act, and was considered by the court to be justified in consequence, and that malice was not inferable therefrom. In the case at bar, as already noted, the defendant, if plaintiff's evidence is believed, took occasion to impugn his business integrity by addressing him, and not defendant's client, in a semipublic place, in a loud voice, and without any invitation on his part. We think this brings the case within the last clause of the text just quoted, and that the question of express malice should have been left to the jury.

The judgment is, accordingly, reversed, to the end that a venire de novo issue.

Minturn and Bogert, JJ., dissenting.

MISSOURI SUPREME COURT.
(Division No. 1.)

ARTHUR McFALL et al., Plffs. in Err.,

v.

CITY OF ST. LOUIS et al.

('232 Mo. 716, 135 S. W. 51.)

Municipal corporation — license — special privilege — hack stands.

A municipal ordinance is not invalid as unconstitutionally granting special privileges, which allows the municipality to grant special permission to licensed hack drivers who can procure the consent of the abutting property owners, to stand their vehicles in the street in front of such property, when the same privilege is not granted to those who do not obtain such consent.

(February 28, 1911.)

33 L.R.A.(N.S.)

ERROR to the Circuit Court for the City of St. Louis to review a judgment in defendants' favor dismissing a bill filed to enjoin them from enforcing an alleged void ordinance regarding the use of public streets for standing places of vehicles. Affirmed.

Statement by Woodson, P. J.:

This is a bill in equity seeking to enjoin the defendants, the city of St. Louis, the mayor and chief of police thereof, from enforcing § 1747 of the Municipal Code of the city of St. Louis, approved April 3, 1900, regarding the use of public streets in said city for standing places of hacks, carriages, and such other vehicles. The petition was held bad on demurrer, and, plaintiffs declining to plead further, final judgment was entered dismissing the bill. In due time the plaintiffs sued out of this court a writ of error.

The petition in the cause, as shown by plaintiffs' abstract of the record, which was adjudged insufficient by the circuit court, was as follows (formal parts omitted):

"Plaintiffs state: That each of them are separately and individually owners and licensed operators of carriages and hacks, and that their present existing occupation, by means of which they earn their livelihood, and which they are now, and have

Note. — Power of municipality to establish exclusive hack stands.

As to the power of a municipal corporation to grant exclusive right or create a monopoly for the removal of substances inimical to the health, see note to *Landberg v. Chicago*, 21 L.R.A.(N.S.) 830.

As to the power of a municipal corporation to grant or lease spaces on street or sidewalk for business purposes, see note to *Chapman v. Lincoln*, 25 L.R.A.(N.S.) 400.

But few cases other than *McFALL v. St. Louis* have considered the question as to the power of a municipal corporation to establish in a public street exclusive hack stands. These cases are in harmony with the doctrine of *McFALL v. St. Louis*, and sustain the power of a municipality to establish an exclusive hack stand in a public street where the abutting property owner consents thereto.

Thus, in *New York v. Reesing*, 77 App. Div. 417, 79 N. Y. Supp. 331, a charter provision giving to the municipal legislature of the city the power to regulate the use of the streets and sidewalks by foot passengers, animals, or vehicles, and to provide for licensing and otherwise regulating the business of hackmen and cabmen, was held to confer upon the city authority to provide for public hack stands and special hack stands, the public hack stands to be for the use of all persons duly licensed, the special stands to be for the exclusive use of a designated person specially licensed in

been at all times herein mentioned, pursuing, is that of duly licensed carriers, that is to say, public and common carriers, by means of their said carriages and hacks, of passengers and their baggage, for hire, through and over the public streets of the city of St. Louis, state of Missouri. That in pursuit of their said business they have in all respects complied with all the ordinances of said city, which govern the licensing of public and common carriers in said city. That there are many other parties and persons similarly engaged in the business aforesaid, who are similarly situated and affected with the plaintiffs by this proceeding, and who have complied with all the ordinances aforesaid. That the said parties and persons are too numerous to be joined as parties plaintiff, and hence plaintiffs bring this suit in their own name, and on their own behalf, as well as on behalf of all others similarly situated and affected as aforesaid. That at all times herein stated, and there is now, in full force and effect in said defendant city of St. Louis, a certain Municipal Code of said city, which said Code is known as ordinance No. 19,991, and which ordinance was duly enacted by the municipal assembly of said city on the 3d day of April, 1900. That, under the provisions of § 1708 of said Code, plaintiffs, while severally plying their present existing occupation as aforesaid, are severally required to pay, and at all times herein stated have paid, to defendant city annually, as a license fee, the sum of \$5 for each

two-horse carriage hack, and the sum of \$3 for each one-horse hack. That, for the purpose of enabling said plaintiffs as a class to successfully and lawfully solicit and secure custom and traffic in their said licensed public calling, plaintiffs require public stands for their said vehicles in said city, where they may stand for service at points convenient to transient and resident public in said city. That all public carriers of the same class with plaintiffs as aforesaid, who have been duly licensed as aforesaid, when they each and severally desire to stand for public service at public hack stands provided by said city, are each and severally, as members of said single class, entitled to reasonable access to all public stands lawfully created by defendant city. That under the provisions of § 1746 of said Code, plaintiffs, and all other carriers of the same class of public carriers as aforesaid, after having been duly licensed as aforesaid, are required, when standing for public service on the public streets of said city, to stand with their said vehicles at a certain public stand provided by § 1746 or said Code, located on the north, west, and south sides of the courthouse of and in defendant city. That each and all of the said licensed public carriers of the said class to which plaintiffs belong, as aforesaid, have equal and reasonable access to said public hack stand provided for in said § 1746 of said ordinance and Code. That § 1747 of said ordinance and Code provides for a special class of hack

that respect, who had secured the consent of the abutting owner to the establishment of the stand in the street abutting his property. The court said that the right and power of the city to pass such ordinances cannot be questioned.

And in *Kissinger v. Hay*, 52 Tex. Civ. App. 295, 113 S. W. 1005, the validity of an ordinance was sustained against an attack that it was discriminatory and partial in that it gave to a board of commissioners the discretion to say who shall and who shall not have a permit to use certain hack stands therein established upon the streets of the city. The court remarked that the principle invoked against the ordinance was contrary to well-recognized authority, and added that the right of granting a license to one, and denying it to another, is given in the interest of the public, and an ordinance was not void on that ground. It is to be noted that the question raised in this case was somewhat different from that raised in *McFALL v. St. Louis* and in *New York v. Reesing*, *supra*, since in those cases the ordinances involved were alleged to be discriminatory in that they permitted the establishment in a public street of exclusive hack stands, which in *Kissinger v. Hay* the ordinance was claimed to be discriminatory 33 L.R.A. (N.S.)

and partial not because it permitted the establishment of exclusive hack stands, but because it authorized the commissioners to exercise their discretion in granting licenses for the use of public hack stands.

Both the case of *McFALL v. St. Louis* and *Kissinger v. Hay* involved another question not herein discussed, being the right of a person to question the invalidity of the ordinance when not directly injured thereby.

In *McFALL v. St. Louis* the person seeking to raise the question had not obtained the consent of the abutting owner, which was a condition precedent, under the ordinance in question, to the right to a license to establish and use an exclusive hack stand in a public street; and in *Kissinger v. Hay* it did not appear that the persons complaining had been refused a license; in both cases it was held under these circumstances that the persons complaining were not in a position to question the validity of the ordinances on the ground that they were discriminatory as to them.

For a discussion of the general question as to who may question the validity of an ordinance or statute on the ground that it is discriminatory, see note to *Pugh v. Pugh*, 32 L.R.A. (N.S.) 954. A. G. S.

stands upon the public streets of said city, whereby only an uncertain and undetermined number of said licensed public carriers of the class to which plaintiffs belong, as aforesaid, are permitted to stand for public service, upon condition that such carriers have first secured the permission of a certain class of occupants of property of said city, when said permission is supplemented by the written approval of the mayor of said city; said § 1747 being in words and figures as follows: 'Sec. 1747. Stands in Front of Private Premises—How Regulated.—Occupants of premises in front of which it is desired to stand for employment cabs, cabriolets, carriages, coupés, or one-horse vehicles, may give permission in writing to the owner or driver so to do, which permission shall not be effective until it is approved by the mayor, and it may be revoked by the mayor at any time, whereupon all rights under it shall at once cease and be ended.'

"Plaintiffs state they have at no time, either jointly or severally, participated in any attempt to secure the establishment or maintenance of a public or private hack stand under the provisions of said § 1747 of said ordinance, and that plaintiffs have at no time attempted to stand for public service with their several vehicles upon the public streets of said city at or upon any vehicle stand provided for by said § 1747. Plaintiff's charge and aver that said § 1747 of said Code, entitled, 'Stands in Front of Private Premises—How Regulated,' in fact, authorizes the condemnation of the public streets to private uses; (2) that the said § 1747 confers upon occupants of premises adjoining public streets certain rights and privileges and control over public streets which are denied to others; (3) that said § 1747 discriminates between licensed carriers of the same class; (4) that said § 1747 permits that to be done by a special license, which if done by others of the same class not having a special license, constitutes a penal offense, under § 1747 of said Code; (5) that said § 1747 fosters a monopoly in the passenger traffic in said city; (6) that defendant city of St. Louis is without power, under the Constitution and laws of the state of Missouri, to authorize by ordinance the appropriation to private use of any street or any part of any public street or streets of said city, and is without power to discriminate in the distribution of licenses and favors between subjects of the same class to which plaintiffs belong as aforesaid. Wherefore plaintiffs charge that said § 1747 of said ordinance is void and of no effect.

"Plaintiffs further state that, under the provisions of said § 1747, defendant city 33 L.R.A. (N.S.)

of St. Louis, over the objections and remonstrances of plaintiffs, has at all times herein stated and now does maintain certain hack and carriage stands upon the public streets and highways of said city and state for the exclusive use and benefit of the special licensees hereinafter mentioned, and who are named as defendants herein, and that the mayor of the city of St. Louis, who is defendant Rolla Wells, has unlawfully issued over his official signature, to the certain licensed public carriers of the same class with plaintiffs as aforesaid, a written permission to stand with their said vehicles for public service, and to occupy at all times, both by day and by night, with their said vehicles, horses, and drivers, as hack stands, and at points from which said licenses are permitted under the terms of said § 1747 to solicit, receive, control, and monopolize public passenger traffic, many large areas of the public streets of the said city; and defendant Rolla Wells as aforesaid, and defendant Matthew Kiely as aforesaid, together assist defendant city in the unlawful maintenance of said carriage and hack stands. And plaintiffs further aver that said carriage and hack stands are and constitute public nuisances, as hereinafter set forth.

"Plaintiffs state that said hack stands, the dates of said permits, the names of said licensees, and the areas of said private and unlawful stands, are respectively as follows to wit: Permit 1. Dated January 13, 1903. Name of licensee, defendant Wand Livery & Undertaking Company. Location of stand, adjoining northeast corner of Broadway and Elm street. Area of said street so occupied, about 100 square feet." (Then follow some twelve or fifteen others, differing only in dates, names of licensees, and locations of stands.)

"Plaintiffs state and charge, upon information and belief, that said licensees, who are defendants herein, to wit, Wand Livery & Undertaking Company, Barney McGilligan, Phillip Deis, Missouri District Telegraph Company, and the Public Hack & Drivers' Association, are, except defendants Phillip Deis and Barney McGilligan, corporations under the laws of the state of Missouri; that the said defendants, Phillip Deis and Barney McGilligan, are individuals, and are acting as such. Plaintiffs state and charge that all of these aforesaid licensees are now, and by virtue of their said permits or licenses have at all times herein stated, unlawfully obstructed and are obstructing and occupying with their said passenger vehicles, horses, and drivers, both by day and by night, and using for their special use, and to the permanent hindrance and exclusion of plaintiffs as public carriers,

said several areas of said public streets. And plaintiffs state that by virtue of the premises plaintiffs are denied the right to participate upon fair terms in the competition of passenger traffic in the territory controlled as aforesaid by the licensees of said carriage and hack stands, in the business which naturally flows from and to, and is naturally tributary to, the said locations. And plaintiffs state that said territory from which they are severally so excluded provides the most profitable field for the licensed public carriers of plaintiffs' said class, amounting in value annually in a sum of many thousand dollars. And plaintiffs state that by reason of the unlawful acts committed by the defendant, city of St. Louis and its municipal assembly, Matthew Kiely and defendant Rolla Wells, the defendant city's chief of police and mayor, respectively, plaintiffs have suffered and now suffer a legal wrong to their present existing occupation, and plaintiffs, while this proceeding is pending, are at all times injured by said unlawful acts, in that they are annoyed, delayed, and prevented from traveling over said portions of said streets, and are denied the use thereof, and their earning power and capacity has been greatly impaired and is now being greatly impaired, and they have suffered and are now suffering great loss in their incomes, and the actual damages so sustained, and now being sustained, aggregates a large sum, but is not susceptible of computation and apportionment between or by plaintiffs aforesaid, and is therefore irreparable.

"To the end therefore that plaintiffs may have that relief which they can obtain in a court of equity, and that the city of St. Louis, Rolla Wells, Matthew Kiely, and all the licensees hereinbefore mentioned, who are made defendants herein, may be required to answer plaintiff's bill of petition, but not under oath, answer under oath being hereby expressly waived, the plaintiffs pray that said section of said Code, to wit, § 1747, be declared illegal, null, and void, and that a perpetual injunction may be decreed by this honorable court, directed to the city of St. Louis, Rolla Wells, mayor of said city, and to his successors in said office, and to Matthew Kiely, the chief of police of said city, and to his successors in said office, perpetually restraining them from establishing and maintaining any private carriage and hack or vehicles stands on any portion of the public streets of said city, and perpetually restraining them and each of them from permitting any owner or driver of carriages or other vehicles to occupy said areas of said streets as private vehicle stands as aforesaid, unless the same be

lawfully constituted public hack stands, free of access to all licensed carriage drivers and owners alike, and upon the same terms, and that plaintiffs may have such other orders, judgments, and reliefs as shall seem agreeable to equity and meet in the premises. And plaintiffs pray that summons be directed to the said city of St. Louis, Rolla Wells, mayor of said city, and Matthew Kiely, chief of police of said city, and defendants Wand Livery & Undertaking Company, Phillip Deis, Barney McGilligan, Missouri District Telegraph Company, and the Public Hack & Drivers' Association, commanding them and each of them, at a certain time and under a certain penalty, to be and appear before this honorable court, and then and there a full, true, and direct, and perfect answer make to all and singular the premises, and further to stand to, perform, and abide by such further orders, directions, and decree therein as to your Honor shall seem meet."

As previously stated, to this petition a demurrer was filed and sustained. Afterwards, at the December term, 1907, of said court, the plaintiffs dismissed the cause against all the defendants except the city of St. Louis, Rolla Wells, mayor, and Matthew Kiely, chief of police. The demurrer of the city was as follows: "Comes now the defendant, the city of St. Louis, and demurs to the amended petition of the plaintiffs herein, on the following grounds, to wit: (1) Because the said petition does not state facts sufficient to constitute any cause of action as against this defendant. (2) Because it does not contain or state any matter of equity wherein the court could base any decree or give to the plaintiffs any relief as against this defendant. Wherefore this defendant prays to be hence dismissed with its costs." The demurrers filed by the other defendants were similar in import to the one filed by the city.

Mr. Charles Summers for plaintiffs in error.

Messrs. Lambert E. Walther and Truman P. Young, for defendants in error:

Section 1747 of the Municipal Code is valid. The use of the streets by hacks and carriages waiting for employment is a legitimate public use, incident to travel thereon. *Veneman v. Jones*, 118 Ind. 41, 10 Am. St. Rep. 100, 20 N. E. 644; *Helena v. Gray*, 7 Mont. 486, 17 Pac. 564; *People ex rel. Thompson v. Brookfield*, 6 App. Div. 398, 39 N. Y. Supp. 673.

No portion of the public street can be used regularly for such purpose in such a way as to annoy the adjoining property owner, or obstruct his ingress and egress,

without first obtaining his consent to such use.

Branahan v. Cincinnati Hotel Co. 39 Ohio St. 333, 48 Am. Rep. 457; *Lippincott v. Lasher*, 44 N. J. Eq. 120, 14 Atl. 103; *McCaffrey v. Smith*, 41 Hun, 117; *Donovan v. Pennsylvania Co.* 61 L.R.A. 140, 57 C. C. A. 362, 120 Fed. 215; *Schopp v. St. Louis*, 117 Mo. 131, 20 L.R.A. 783, 22 S. W. 898.

Woodson, P. J., delivered the opinion of the court:

1. The plaintiffs' contention is that § 1747 of ordinance 19,991 is void for the reason that it confers upon the mayor of the city of St. Louis, when based upon the written consent of certain property owners, the right to grant a special license to a certain class of licensed carriers, and refuses such license to others of the same class, who do not possess such written consent; that the defendants, while pretending to act under the provisions of said ordinance, before set out, have, by means of said special licenses, established and now maintain a large number of private hack stands upon the public streets of the city, and thereby control the major portion of the passenger carrying business of said city, by reason of the fact that said stands are easy of access to the densely populated districts and business centers of said city, thereby furnishing said special licensees the exclusive occupancy and right to solicit traffic from said special stands; and that plaintiffs, and many others of the same class holding a general license, are denied the equal right and privilege of participating in and enjoying the rights conferred by said special licenses issued under and in pursuance to said § 1747.

In support of this contention, we are cited to the following cases: *Schopp v. St. Louis*, 117 Mo. 131, 20 L.R.A. 783, 22 S. W. 898; *Lockwood v. Wabash R. Co.* 122 Mo. 89, loc. cit. 100, 24 L.R.A. 516, 43 Am. St. Rep. 547, 26 S. W. 698; *Dill. Mun. Corp.* 4th ed. § 660. In the first case cited, the plaintiffs instituted proceedings for the purpose of enjoining the city of St. Louis from maintaining and leasing stands in Third and Broadway streets, in front of their property, in pursuance to an ordinance duly enacted, setting apart that portion of said streets lying between Christy avenue and Howard street as a market "for farmers' and other wagons bringing produce to the market for sale." The evidence in that case showed that the stalls or stands in question were permanent in character, obstructed the street in front of plaintiffs' property, and materially interfered with and obstructed ingress and egress to and from their property, to their great damage. 33 L.R.A. (N.S.)

In the case of *Lockwood v. Wabash R. Co.*, the plaintiff sought to enjoin the defendant from laying and maintaining tracks and operating a steam railroad in front of his property on Collins street, being only 24 feet in width from curb to curb, and which already contained one track. In that case the evidence showed, and this court held, that the laying, maintaining, and operating of the second track in front of plaintiff's property upon said street, amounted practically to a total obstruction to the ingress and egress to and from his property, and "to a practical condemnation of this portion of Collins street to the private and almost exclusive use of the defendant." In each of those cases this court held, and properly so, that the erection and maintenance of the stalls in the one case and the railroad track in the other constituted both a public and a private nuisance in the streets of said city, and that because of the injury caused thereby to the plaintiffs' property injunction would lie. Judge Dillon, in his excellent work on *Municipal Corporations*, 4th ed. § 660, announces the same rule. However, those authorities are not in point here. The stands here in question are not permanent in character, but are simply spaces or areas in the streets, embraced by imaginary lines, upon which hacks, carriages, and similar vehicles stand while not in actual service. The licensees of such stands cannot occupy and use them to the exclusion of the plaintiffs or the public at large. The plaintiffs and all others, at will, may drive over said areas, and stand their horses and vehicles thereon a sufficient length of time to enable them to load and unload their freight and passengers, regardless of the special licenses.

If any one of the plaintiffs should at any time have a passenger to deliver or to receive at any of the places described in the petition, he would have, through the passenger, a right of access to that place. *Donovan v. Pennsylvania Co.* 61 L.R.A. 140, 144, 57 C. C. A. 362, 120 Fed. 215. The only difference that I can see between the general and the special license mentioned is: The latter can never be issued except where written consent is first obtained from the abutting property owners, agreeing that the space in front of their property may be used for such stands. This consent, of course, is required to be obtained in order that ingress and egress to and from their property may not be obstructed or interfered with, and thereby damage their property, without their consent. Clearly, it was the design of the city council, in requiring the consent of the property owners to be obtained, to avoid the effect of the rulings announced by this court in the cases

of *Schopp v. St. Louis*, 117 Mo. 131, 20 L.R.A. 783, 22 S. W. 898, and *Lockwood v. Wabash R. Co.* 122 Mo. 89, loc. cit. 100, 24 L.R.A. 516, 43 Am. St. Rep. 547, 26 S. W. 698. Without that consent, according to the authorities cited, the city would have no power or authority to authorize hack and carriage drivers to stand their horses and vehicles upon the streets in front of abutting private properties, and thereby obstruct the ingress and egress. For this reason, the general license mentioned, if attempted to authorize or justify the maintenance of such hack stands in front of private property, would be held invalid for violating that provision of the Constitution which prohibits private property from being taken or damaged without just compensation; but no such objection could be interposed against the general ordinance mentioned, for the reason that by its terms it is restricted in its operation to stands located in streets in front of property owned by the city, and not by private parties.

Under this view of the law, even though this court should grant the relief prayed for, it would lead to nothing, for plaintiffs could not use any of the places designated in the special licenses any more than they can now. They would still be required to obtain the consent of the owners of the abutting property, which they state they have never attempted to do. *Schopp v. St. Louis*, *supra*.

By reading the petition it will be observed that the plaintiffs do not ask to have the so-called private hack stands, described therein, abolished because they interfere with public traffic on the streets of the city; but, upon the contrary, they ask that the defendants be enjoined from permitting hackmen to occupy the described areas as private stands, unless the same be lawfully constituted public hack stands, free of access to all licensed hack and carriage drivers alike, and upon the same terms. That cannot be lawfully done, for the reason that public stands can only be established and maintained by the city in front of property belonging to the city; and to grant the injunction under those circumstances would have only the effect of putting plaintiffs' rivals out of business, and that too without opening up the private stands to themselves, for the obvious reason that if the city should devote parts of the streets in front of private property to public hack stands, the property owners would immediately object thereto, and proceed to have them declared private nuisances, as was done in the cases previously cited. The private stands in question are not public nuisances, for the reason that

they are expressly authorized by said § 1747, and do not interfere with travel upon public streets; nor are they private nuisances, for the reason that the abutting property owners have agreed in writing to their maintenance.

In *Veneman v. Jones*, 118 Ind. 41, 10 Am. St. Rep. 100, 20 N. E. 644, where a kindred question was presented, the supreme court of Indiana held valid an ordinance authorizing the police officers to prescribe the places where hacks and other vehicles should stand at a railway station. That case could have been maintained, and doubtless was maintained, upon the theory that railway depots are quasi public grounds, and, consequently, the streets in front thereof were subject to reasonable police regulations.

And in *Pennsylvania Co. v. Chicago*, 181 Ill. 299, 53 L.R.A. 223, 54 N. E. 825, the plaintiff, the abutting property owner, and not the cabman, sought to enjoin the maintenance of a hack stand created by an ordinance in front of its depot. The supreme court of Illinois held the ordinance valid on the ground that the railroad was a quasi public corporation, and its depot buildings were therefore public in character, and that the company could not refuse to permit the use of the street as authorized by ordinance for the benefit of the public.

Branahan v. Cincinnati Hotel Co. 39 Ohio St. 333, 48 Am. Rep. 457: Where the use and enjoyment of private property is interfered with by a cab stand and access rendered impossible, an ordinance granting the privilege of a cab stand is without authority of law, and constitutes no justification for obstructing the right of access to the street.

Lippincott v. Lasher, 44 N. J. Eq. 120, 14 Atl. 103: Where such use of the street results in foul odors, it will be enjoined at the suit of the owner of the property affected.

McCaffrey v. Smith, 41 Hun, 117: No use can be made of a highway other than to pass and repass, without the consent of the owner of the fee.

See also the *Schopp Case*, 117 Mo. 131, 20 L.R.A. 783, 22 S. W. 898.

In *People ex rel. Thompson v. Brookfield*, 6 App. Div. 398, 39 N. Y. Supp. 673, a licensed cabman sought by mandamus to compel the commissioner of public works to remove, or cause to be removed, all hackmen and others using or claiming to use as a hack stand portions of certain streets adjoining the Hotel Waldorf and the Holland House in New York city, and to remove all vehicles occupying said streets, on the ground they constituted obstructions and

nuisances. The writ was refused, and the court said: "While the temporary occupation of a street is for certain purposes permitted, the law requires that the commissioner of public works shall not allow permanent obstructions amounting to a nuisance to be maintained in any public street, whether such occupancy is sought to be justified with or without a permit. But, relative to the question of temporary or permanent occupancy, we agree with the respondents that a certain use of the streets by carriages, either in front of private residences or in front of hotels, clubs, theaters, churches, and similar buildings, is a legitimate use of the streets as such, and, when they are occupied temporarily and reasonably by licensed cabmen or by private carriages, not only should the commissioner of public works not be compelled to interfere, but he has no legal right or power to do so, unless such occupancy becomes so clearly and unmistakably annoying and continuous as to constitute an occupation which the law would regard as a nuisance." 6 App. Div. loc. cit. 403. And on page 402 of 6 App. Div., the opinion uses this language: "We do not think it will be contended even by the relator that a liveryman who has the permission of the proprietors of the hotels to supply the calls of guests is not entitled to some reasonable use of the streets adjoining the hotels."

We are therefore of the opinion that said § 1747 of the ordinance is valid, and not subject to the criticisms lodged against it, and for that reason the demurrers to the petition were properly sustained.

There are several other minor questions presented and discussed by counsel for the plaintiffs in error; but the view we have taken of the case renders it unnecessary to pass upon any of them.

Finding no error in the record, we are of the opinion that the judgment of the Circuit Court should be affirmed; and it is so ordered.

All concur, except Vaillant, J., absent.

TEXAS CRIMINAL COURT OF APPEALS.

JIM GROSS, Appt.,

v.

STATE OF TEXAS.

(— Tex. Crim. Rep. —, 135 S. W. 373.)

Evidence — incest — subsequent conduct.

1. Upon trial of a prosecution for incest in which the state relies upon a single act, 33 L.R.A. (N.S.)

evidence is not admissible of conduct at subsequent times tending to show a criminal intent.

Same — contradictory statements — impeachment.

2. Where, upon a trial for incest, the prosecuting witness denies a statement which has been introduced in evidence, to the effect that she had had illicit relations with other relatives, accused may introduce evidence to contradict her, for the purpose of showing the unreliability of her testimony and that her claim was fabricated.

Same — contradiction — immaterial matter.

3. The state, having introduced the testimony of the prosecuting witness on a trial for incest, which was defended on the theory that the charge was made to get even with defendant for accusing her of wrongdoing with a suitor, that she was never allowed to be in the company of men unchaperoned, cannot object to the introduction of evidence that she had been seen alone with such person, on the ground that it was an immaterial matter.

Admissions — character — impeachment.

4. Upon trial of a prosecution for incest which is defended on the theory that it was an attempt by the prosecuting witness to get even with defendant for accusing her of illicit relations with a suitor, where she had denied admitting such relations, evidence is admissible of such admission, for the purpose of impeaching her, and showing her relations to such person, and her character generally.

Same — statement in party's absence.

5. Upon trial of a man for incest who left home after the charge was made, evidence is not admissible of a conversation between his wife and her brother, in his absence, in which, because of an assumed separation, she was advised to return to her father.

Same — letter from husband to wife — knowledge by stranger — privilege.

6. One who has read a letter from a man to his wife, which was casually picked up where the wife had laid it, cannot testify to its contents in a criminal prosecution against the husband, where the statute forbids either spouse to testify in a criminal prosecution to communications from the other.

(February 8, 1911.)

Note. — Is privileged character of written or oral communication lost when a third person has power of disclosure.

It is assumed for the purposes of this note that the subject-matter of the communications and the parties thereto were such as to render them privileged except for the possible effect of the fact that, if oral, they were overheard, or, if written, had fallen into the custody and control of a third person.

A PPEAL by defendant from a judgment of the District Court for Ellis County convicting him of incest. Reversed.

The facts are stated in the opinion.

Mr. Will P. Hancock for appellant.

Mr. John A. Mobley for the State.

Davidson, P. J., delivered the opinion of the court:

Appellant was charged with and convicted of incest with his daughter Maud.

The evidence shows that appellant had been a resident of Ellis county something like thirty years, residing on a farm near Maypearl in that county. His daughter Maud was a girl about fifteen years of age, weighed about 200 pounds. The family consisted of appellant, his wife, three

daughters, and two boys; Maud being the oldest child. Appellant and his wife were members of the church in that community, and the family up to this transaction seemed to have been highly respected. The relations between appellant and his wife until the disagreement arose over the alleged conduct of the prosecutrix and appellant were pleasant. During the year 1908 a young man by the name of Emory Burns, about twenty-eight years of age, began working for appellant as a farm hand, and lived in the house with the family. Shortly after his appearance upon the scene he and prosecutrix became sweethearts and wanted to marry, to which appellant interposed objection. The mother decided with the girl. It seems that Burns was a young man with-

The note does not include the cases where the party for whose protection the privilege exists voluntarily makes disclosure to a third person, nor those cases where a conversation between two persons takes place in the presence of a third, whose presence is known to the conversers. It also excludes cases where writings are claimed to be privileged simply as the private property of the owner, taken from him unlawfully under a search warrant.

Cases are also excluded in relation to the clerks of attorneys, of which examples are Taylor v. Foster, 2 Car. & P. 195, 31 Revised Rep. 659; Bowman v. Norton, 5 Car. & P. 177; Rex v. Upper Boddington, 8 Dowl. & R. 726; Sibley v. Waffle, 16 N. Y. 180. Also those in relation to interpreters between attorney and client (see Du Barre v. Livette, Peake, N. P. Cas. 78, 3 Revised Rep. 655).

The doctrine which some of the cases apply to the question under annotation, that the illegality of the methods used in obtaining evidence does not affect its admissibility, is illustrated in another phase by the notes to State v. Fuller, 8 L.R.A. (N.S.) 762, and People v. Campbell, — L. R.A. (N.S.) —, as to admissibility against defendant of articles taken from him, and the note to State v. Turner, 32 L.R.A. (N. S.) 772, as to evidence of acts performed by defendant in a criminal case under compulsion.

For cases on communications between attorney and client affecting their respective rights or interests, as privileged communications, see the note to Strickland v. Capital City Mills, 7 L.R.A. (N.S.) 426.

It will be seen that in the case of privileged writings, the authorities are divided in opinion as to whether they are admissible in evidence when produced by a third party. But that, in case of oral communications overheard accidentally or by design, the courts are agreed that they are admissible. The courts approach the matter of privileged communications as an exception to general rules. In Hatton v. Roberson, 14 Pick. 416, 25 Am. Dec. 415. Show Ch. J., said: "The privilege of exemption 33 L.R.A. (N.S.)

from testifying to facts actually known to the witness is in contravention to the general rules of law; it is therefore to be watched with some strictness, and is not to be extended beyond the limits of that principle of policy upon which it is allowed."

Such communications are often referred to as preventing the full disclosure of the truth.

In Foster v. Hall, 12 Pick. 89, 22 Am. Dec. 400, Shaw, Ch. J., referred to the rule of privileged communications to an attorney as having a tendency to prevent the full disclosure of the truth, and so ought to be construed strictly. And this statement is made in many of the cases.

"It is the business of the party claiming the benefit of exemption from the general rule that compels all to disclose the truth, to show that the particular instance is privileged." Beeson v. Beeson, 9 Pa. 279.

The courts do not refer to the fact that in nearly all cases where oral confidential communications are sought to be put in evidence, they are prima facie inadmissible as hearsay, and only permitted at all as an exception to the general rule of hearsay, on the ground that they are declarations against interest or confessions.

So far as the view is concerned that the doctrine of privileged oral communications tends "to prevent the full disclosure of the truth," it may be well to refer to Rex v. Simons, 6 Car. & P. 540, where a witness was allowed to state what he overheard the prisoner say to his wife, as the prisoner was leaving the magistrate's room after his committal. Another witness was called to confirm this evidence, but his statement of what was said was decidedly different. Alderson, B., said: "One of these expressions is widely different from the other. It shows how little reliance ought to be placed on such evidence."

It is reasonable enough that a man should not be permitted to claim that a remark made loudly in a public street is privileged, but the doctrine of eavesdroppers seems to stand on the same ground with that of the thieves of private papers. The doctrine

out means or ability to support a wife. The opposition of appellant to this marriage brought about trouble between appellant and his wife which finally resulted in this prosecution. Appellant told his wife of improper relations he had discovered between Burns and his daughter Maud, and he charged the girl with this course of conduct with Burns in the presence of and to his wife. Maud denounced this as "a lie," and said she "would get even with" appellant. Subsequently appellant was informed by his wife that Maud had told her that he, appellant, had had intercourse with her, the prosecutrix; thereupon appellant called her in and asked her "what in the name of God" she meant by charging him with such an offense. She made no reply,

and appellant further stated, "I see now what you meant when you said you would get even with me," and further stated, "You know it is not so, for you have charged me with the same thing that you charged against your three uncles, John, Richard, and Earl Coleman,—with having intercourse with you." A reconciliation of the trouble in the family was partially brought about. Prosecutrix and Burns were married at home and began living near appellant and his family. Neighbors who were related to appellant's wife began interfering in their affairs. Appellant left home and was away for a short time and returned. He again went away, and during his absence the bill of indictment was found. There was quite a mass of testimony ad-

that the law cares not where the evidence comes from does not seem to bear satisfactory results in actual practice.

Writings—theory of lost privilege.

The following cases have held that the privilege has been lost as to written communications, because they were in the custody and control of a third person who was not the representative or agent of either of the parties to the communication. In view of the distinction suggested in some of the cases between a case where the writing came into the custody of a third person through the consent or connivance of a party in whose hands it was privileged, and one where it was obtained surreptitiously, the circumstances bearing on that point are indicated in parenthesis following the citation.

Lloyd v. Pennie, 50 Fed. 4 (letters from husband to wife, in possession of latter's administrator, both spouses being dead); *Hammons v. State*, 73 Ark. 495, 68 L.R.A. 234, 108 Am. St. Rep. 66, 84 S. W. 718, 3 A. & E. Ann. Cas. 912 (letter from defendant, in jail, to his wife, intercepted by the latter's father without reaching her); *People v. Swaile*, 12 Cal. App. 192, 107 Pac. 134 (letter written by husband to his wife, and without being sealed or inclosed in envelop, given by him to an officer to deliver to the wife, who, after reading it, at the officer's request, returned it to him); *State v. Hoyt*, 47 Conn. 518, 36 Am. Rep. 89 (letters written by defendant to his wife; it does not appear how they were obtained, or whether they were ever in the wife's possession); *State v. Buffington*, 20 Kan. 599, 27 Am. Rep. 193 (letter from husband to wife, given by her to the prosecuting witness, who gave it to the prosecution); *O'Toole v. Ohio German F. Ins. Co.* 159 Mich. 187, 24 L.R.A.(N.S.) 802, 123 N. W. 795 (letters written by wife to husband, found by one not in confidential relations to either, under circumstances indicating that they had accidentally slipped from husband's clothing); *People v. Dunigan*, 163 Mich. 349, 31 L.R.A.(N.S.) 33 L.R.A.(N.S.)

940, 128 N. W. 180 (letter which officers by artifice procured husband to write wife, intercepted before reaching her); *Geiger v. State*, 6 Neb. 545 (contents of letter from husband to wife stated by witness who still had it; whether given to him by wife does not appear); *People v. Hayes*, 140 N. Y. 484, 23 L.R.A. 830, 37 Am. St. Rep. 572, 35 N. E. 951 (letters from wife to husband, given by him to his mistress, received as evidence against him); *Lowther v. State*, 2 Ohio C. D. 685, 4 Ohio C. C. 522 (letters addressed by husband to wife, there being no evidence that she received them or how the producer got them); *Whalen v. State*, 12 Ohio C. C. 584, 5 Ohio C. D. 488 (letters of an accused bigamist to his alleged first wife, delivered voluntarily by her to an officer); *Connella v. Territory*, 16 Okla. 365, 86 Pac. 72 (letter written by defendant to his wife, never in her possession, but passed into possession of sheriff); *State v. Sysinger*, — S. D. —, 125 N. W. 879 (letters written by defendant to his wife, and by her delivered to prosecuting officers); *State v. Mathers*, 64 Vt. 101, 15 L.R.A. 268, 33 Am. St. Rep. 921, 23 Atl. 590 (letter intended for defendant's wife, intrusted to a daughter for delivery, from whom it was surreptitiously taken by another daughter); *State v. Nelson*, 39 Wash. 221, 81 Pac. 721 (letters from wife to husband which the report suggests were given by him to the state, which offered them in impeachment of the writer's testimony).

It will be seen that in some of the foregoing cases the letters were voluntarily delivered to a third person by the spouse to whom they were written; in others, that their history does not appear; and in still others, that they were not produced by the voluntary act of the spouse to whom they were addressed. In the last class of cases, those from Michigan lay stress on the fact that the letter was not voluntarily given to a third party by the spouse to whom it was addressed. Thus, in *O'Toole v. Ohio German F. Ins. Co.* supra, the court said: "The privilege is in derogation of the general rule that all persons may be compelled to testify concerning facts inquired about

mitted, most of it over objection of appellant, showing the course of conduct of appellant towards his daughter as detailed by her both before and after the alleged act of intercourse, which was relied upon by the state as having occurred on the 15th of December, 1908. Some of these acts and matters occurred subsequently to that date. This is, we think, a sufficient statement of the case.

1. We deem it unnecessary to discuss all the bills of exceptions. Bill No. 7 recites the following question asked by the county attorney: "I will ask you to state whether or not your father ever made or had your mother to leave the room, and call you and made you come over and get in bed with him?" She answered in the affirmative,

in courts of justice. It should be made effective, but ought not to be extended by the courts to cases where there has been no injury to the relation of the parties by the betrayal of the confidence reposed. And so it has been held, and, we think, correctly, that where the communication, oral or written, has, without collusion or voluntary disclosure, escaped the custody and control of the parties communicating, or the custody or control of their agents or representatives, it is not privileged." (Quoted in part in *People v. Dunnigan*, supra.)

The other cases of this class do not seem to attach importance to the involuntary feature. Thus, in *Connella v. Territory*, supra, where the letter was not delivered, the court seems to rest its decision on the general rule of *State v. Buffington*; and in *State v. Mathers*, supra, also a case of an undelivered letter, the court asserts the rule that "when papers are offered in evidence, the court can take no notice of how they were obtained, whether legally or illegally, properly or improperly; nor will it form a collateral issue to try that question."

So, in *Lloyd v. Pennie*, supra, which was an action against the administrators of both husband and wife, to set aside a certain agreement, as made in fraud of his creditors, the decision rests on the principle that letters are admissible when in the hands of a third person (the court distinguishing *Bowman v. Patrick*, 32 Fed. 368, infra).

In *Hammons v. State*, supra, where the letter had never been delivered, the court held it admissible (in distinction from *Ward v. State*, infra, where a letter forcibly taken from the wife was excluded), and said: "The object of the rule is to prevent husband or wife from impairing the sacredness of confidential communications between themselves, and hence they are rendered incompetent as witnesses to such transactions and letters, and other communications between them are shielded by the privilege of the marital relation, so long as such letters are in the possession or con-

and that this happened in January, 1909, subsequent to the alleged act of intercourse on the 15th of the previous December. The substance of the qualification, as we understand, to the bill, is that this matter was permitted to be shown, but the county attorney was not permitted to show the act of intercourse. This testimony was inadmissible. The authorities, we think, in this state, are all clear that acts of this kind in cases of this character, occurring after the act of intercourse relied upon for conviction, are inadmissible. And it is not changed by the fact that the witness was not permitted to testify to the actual intercourse. That fact was excluded. There are other bills of exception practically to the same effect. The acts between the par-

trol of either, and their production cannot be compelled when held by husband or wife, or their agents or representatives. This is the extreme limit that public policy and the weight of authority extends the privilege. The letter in question was not taken from the custody of the wife, neither her person or privilege was violated by its production, and it was admissible evidence."

Of the cases where the history of the writing was not given, those in Connecticut and Nebraska seem also to pay little attention to the involuntary feature. Thus, in *State v. Hoyt*, 47 Conn. 518, 36 Am. Rep. 89, the court said: "The question was not whether the husband or wife could have been compelled to produce this evidence, but whether, when the letters fell into the hands of a third person, the sacred shield of privilege went with them. We think not. 1 Greenl. Ev. § 254a. The fact that the communications in this case were written places them on no higher ground than if they were merely oral." The court cites authorities as to overheard conversations, etc., but gives no other reason for its decision.

In *Geiger v. State*, supra, where a witness was permitted to state that after the arrest of the prisoner he "got from his house" a letter from the prisoner to his wife, which he still had, and although not producing it, he was allowed to state part of its contents, the court said: "The Criminal Code provides that neither husband nor wife shall be competent to testify concerning any communication made by one to the other during marriage. Where, however, papers or letters are offered in evidence on the trial of a cause, which are pertinent to the issue, they should be admitted, and the court will not take notice how they are obtained, nor will it form a collateral issue to determine that question. . . . But there is no admission of the plaintiff contained in the letter given in evidence, tending to show that he was guilty of the offense charged."

In *Lowther v. State*, a prosecution against a husband for adultery with his daughter, letters written by the accused

ties occurring after that relied upon cannot be admitted in evidence when objection is urged. *Smith v. State*, 44 Tex. Crim. Rep. 137, 100 Am. St. Rep. 849, 68 S. W. 995; *Ball v. State*, 44 Tex. Crim. Rep. 489, 72 S. W. 384; *Barnett v. State*, 44 Tex. Crim. Rep. 592, 100 Am. St. Rep. 873, 73 S. W. 399, overruling *Hamilton v. State*, 36 Tex. Crim. Rep. 372, 37 S. W. 431; *Manning v. State*, 43 Tex. Crim. Rep. 302, 96 Am. St. Rep. 873, 65 S. W. 920; and *Cooksey v. State*, — Tex. Crim. Rep. —, 58 S. W. 103; *Henard v. State*, 46 Tex. Crim. Rep. 90, 79 S. W. 810; *Hackney v. State*, — Tex. Crim. Rep. —, 74 S. W. 554; *Wiggins v. State*, 47 Tex. Crim. Rep. 538, 84 S. W. 821; *Stripling v. State*, 47 Tex. Crim. Rep. 117, 80 S. W. 376; *Roberts v. State*, 51

Tex. Crim. Rep. 27, 100 S. W. 150; *Smith v. State*, 52 Tex. Crim. Rep. 80, 105 S. W. 501; *Pridemore v. State*, — Tex. Crim. Rep. —, 29 L.R.A.(N.S.) 858, 129 S. W. 1112; *Skidmore v. State*, 57 Tex. Crim. Rep. 497, 26 L.R.A.(N.S.) 466, 123 S. W. 1129. We deem it unnecessary to pursue this thought further or review each separate exception reserved. Upon another trial this character of evidence will not be permitted to go to the jury.

2. There was a statement of the prosecutrix that her three uncles had been having intercourse with her introduced in evidence, and became interwoven with the trial of the case. While prosecutrix was upon the stand, she denied making these statements. Having denied this, witnesses were placed

while in jail, and addressed to his wife, found in the possession of a third person, who produced them in court, were admitted in evidence, there being nothing to show but that the producer properly received them, and no evidence that the wife ever had them. The court said: "The only portion of the letters that could at all prejudice the defendant was addressed to his daughter Imo. We think these letters were properly admitted."

Perhaps the most cited case where the privilege was held to be lost is *State v. Buffington*, 20 Kan. 599, 27 Am. Rep. 193, where the court said: "It is certainly true that a communication between husband and wife is a privileged communication. But it is privileged only while it remains within their custody and control, or while it remains within the custody and control of their agents or representatives, and just so far as it remains within the custody and control of themselves or their agents or representatives."

In *People v. Swaile*, 12 Cal. App. 192, 107 Pac. 134, the court said: "If it be conceded that the letter was illegally obtained, this would not operate to exclude it from evidence on the ground that it was a privileged communication, or that the evidence was self-criminating. Though papers and other subjects of evidence may have been illegally taken from the possession of the party against whom they are offered, or otherwise unlawfully obtained, this is no valid objection to their admissibility if they are pertinent to the issue. *Greenl. Ev.* 16th ed. § 254a."

In *Whalen v. State*, 12 Ohio C. C. 584, 5 Ohio C. D. 488, a prosecution for bigamy, letters written by the defendant to the woman who, it was claimed, was his first wife, and which had been delivered by her voluntarily to a marshal, were brought into court by the marshal and given in evidence as tending to show a marriage. The court said the statute only prevents husbands and wives from going on the witness stand and divulging communications made by one to the other; "but if either of these parties divulge these things by giving the written

communication to another, or if that communication is disclosed by a robbery of the mails or otherwise, and it gets into the hands of a third person, and the issue be raised, it is clear that that third person may, if he be a witness in the case, offer that communication."

In *State v. Nelson*, 39 Wash. 221, 81 Pac. 721, where the defendant was accused of adultery, and the alleged paramour testified in his behalf, denying the state's allegation, for the purpose of impeachment, the state offered in evidence a letter written by the witness to her husband. It was held that, as the letter was produced and offered in evidence by the officers of the state, it had therefore lost its character as a privileged communication. It would seem to be suggested that the husband gave the letter to the officers, but it is not so stated.

In *People v. Hayes*, 140 N. Y. 484, 23 L.R.A. 830, 37 Am. St. Rep. 572, 35 N. E. 951, a prosecution for perjury, it was held that the privilege had been waived as to letters from a wife to a husband, and offered against the husband, which were given by him to his mistress, the prosecutrix, who subsequently delivered them to the district attorney, by whom they were offered in evidence. The court said: "Comment upon baseness of this act of the defendant is unnecessary. It speaks for itself. The result, however, is to release the letters from the operation of the rule as to confidential communications between husband and wife, and to leave them open to use as evidence to the same extent as if no such rule had ever guarded them."

—theory that privilege remains.

In the following cases it was held that a privileged communication in the hands of a third person was not admissible in evidence:

Bowman v. Patrick, 32 Fed. 368 (husband and wife); *Liggett v. Glenn*, 2 C. C. A. 286, 4 U. S. App. 438, 51 Fed. 381 (attorney and client); *Ward v. State*, 70 Ark. 204, 66 S. W. 926 (husband and wife); *Mercer v. State*, 40 Fla. 216, 74 Am. St.

upon the stand to contradict her and show that she had made the statement. On objection of the county attorney this was excluded. Various reasons were offered why this testimony was admissible; among others, that it was impeachment; that her testimony was unreliable; that she was in the habit of charging her relatives with this course of conduct with her. Without discussing whether or not this testimony as an original proposition was inadmissible for the purpose of attacking her evidence, and showing her ill will and matters of that sort towards her father for interfering with her proposed marriage with Burns, yet, it having gotten into the case, the defendant had the right to probe it as far as he could for what it was worth in at-

tacking her testimony, and in aiding his view of the case that her whole story was fabricated, and it was done because of the fact that he had interfered, in the first instance, with her proposed marriage, and to explain as best he could her threat to get even with him, and to show that her testimony was unreliable. If this matter should get into another trial, this testimony should be admitted.

3. The prosecutrix testified, among other things, that she had never been out in public with any young man unless her sister or someone else accompanied her, and especially that she had not been with Burns, whom she subsequently married, under such circumstances. To contradict and impeach her on this line, appellant

Rep. 135, 24 So. 154 (husband and wife); Fire Asso. of Philadelphia v. Fleming, 78 Ga. 733, 3 S. E. 420 (attorney and client); Wilkerson v. State, 91 Ga. 729, 44 Am. St. Rep. 63, 17 S. E. 990 (husband and wife); Southern R. Co. v. White, 108 Ga. 201, 33 S. E. 952 (attorney and client); Scott v. Com. 94 Ky. 511, 42 Am. St. Rep. 371, 23 S. W. 219 (husband and wife); Brown v. Brown, 53 Mo. App. 453 (husband and wife); Gross v. State (husband and wife); Selden v. State, 74 Wis. 271, 17 Am. St. Rep. 144, 42 N. W. 218 (husband and wife); Reg. v. Levenson, 11 Cox, C. C. 152 (attorney and client); Reg. v. Pamenter, 12 Cox, C. C. 177 (husband and wife).

Of these cases, in Wilkerson v. State, Brown v. Brown, and Selden v. State, the communication came voluntarily from a spouse to whom it was addressed.

Thus, in Wilkerson v. State, the defendant, who was accused of murdering the husband of a woman with whom his relations were illicit, offered in evidence a letter from the deceased to his wife, and by her given to the accused, and it was held that it was properly rejected.

So, in Brown v. Brown, in an action by a husband for a divorce, it was held that it was error to permit letters of the wife to the husband, which had been sent to their daughter for delivery, to be given in evidence by the husband. The court said that it did not appear that the letters were unsealed when inclosed to the daughter, "and if it did so appear, we would not assume that they were intended for her to read."

In Selden v. State, it appeared that upon the trial of a man for perjury, alleged to have been committed in an action for divorce from his life, the attorney for the wife in the divorce action, as a witness for the state, produced in evidence letters from the husband to the wife which she had given him, and it was held that their admission was reversible error, the court placing its decision not only on the ground that the wife had demanded the letters back from her attorney, but also on the ground that, as she could not disclose the letters, her attorney could not. It appears in a 33 L.R.A. (N.S.)

note to the opinion that the wife did consent to the attorney retaining the letters. The court said the attorney "was not an 'eavesdropper,' or a person who merely overheard communications of conversations between husband and wife, and it made no difference in favor of their admissibility that he used the letters as his authority for making the original complaint against the plaintiff in error, or in instituting the prosecution against him."

In Mahner v. Linck, 70 Mo. App. 380, the court, in laying down the rule that a letter by a husband to his wife should not be admitted in evidence against the husband unless it is first shown that the plaintiff did not get possession of it through the agency or connivance of the wife, said: "It is universally held that oral communications between husband and wife, when heard by a third person, may be given in evidence, regardless of the circumstances under which the conversation was heard. . . . It has been held in some of the cases that the fact that the communication was written places it on no higher ground than if oral."

It seems to us that these cases lose sight of the policy of the law making communications between husband and wife privileged, to wit, to secure the peace of the twain, and to protect and keep inviolate that mutual confidence so essential to their happiness, and we are disposed to adopt the reasoning and ruling of Judge Miller of the United States Supreme Court in the case of Bowman v. Patrick, 32 Fed. 368.

We think the policy of the law will be best subserved by refusing to admit written communications of this character, whenever they have come to the possession of a third party by the agency of the husband or the wife, or where such third party has gained possession of them by reason of his representative character, his agency, or other fiduciary relation to the husband or wife."

In Bowman v. Patrick, supra, Justice Miller, of the United States Supreme Court, in holding inadmissible a letter by a husband to his wife which her administrator had, in pure hostility to the husband,

offered testimony from several witnesses that they had seen her going to and in the town of Waxahachie with Burns when her sister was not with them. In fact, that she had been seen going to the town and with him in the town without anyone in company with them. She had also testified that her father was very rigid with her, and would not let her be with Burns anywhere alone, even on the premises where they lived. As before stated, appellant offered evidence to show that she and Burns were together in Waxahachie and were seen going there. This was excluded on objection by the county attorney. In view of the condition of this phase of the case, this testimony was admissible. Illustrative of this, one of the bills of exception recites

turned over to the husband's opponent, said: 'I confess I was very much astonished to find that there are some authorities which hold that while the wife cannot be permitted to tell, and not only that, but will be forbidden to tell, what her husband says to her in any matter of marital or private relations . . . that there are some authorities holding that where this evidence can be got at, either by obtaining possession of a letter, or some method of overhearing communications by some third party between the husband and wife, that this evidence can be used. . . . Whatever exceptions there may be to the rule protecting communications between husband and wife which may exist, and in regard to which I do not propose to say anything further, I am quite clear that the wife has no right to publish these communications; that she would not be permitted to produce the letter if she were a witness on the stand; that she could be enjoined from producing the letter if she were supposed to be hostile to her husband; and that the executor, in a voluntary and hostile spirit to the husband, who has letters, has no more right to produce them and deliver them over, to the husband's prejudice, than the wife had.'

In *Mercer v. State*, 40 Fla. 216, 74 Am. St. Rep. 135, 24 So. 154, where a letter from a witness to his wife was sought to be used on his cross-examination, it not appearing how it was obtained, the court, in referring to authorities to the effect that confidential communications which reach the hands of third persons are admissible, however their custody may be obtained, said: "We cannot agree to the correctness of this rule thus broadly laid down by these and other authorities, but think the policy of the law that forms the foundation of the general rule is far more strongly upheld and subserved by those authorities that recognize and declare certain classes of communications to be privileged from the inherent character of the communication itself, and that in such cases the privilege attaches to the communication and protects it from exposure in evidence, where-soever or in whose-soever hands it may be." 33 L.R.A. (N.S.)

that R. W. Hopkins was tendered as a witness, and by him it was offered to be proved that he had seen Emory Burns and prosecutrix on two separate occasions at a late hour of the night at Waxahachie at the Chautauqua in the summer of 1908. The court excluded this testimony upon the ground that it was an attempted impeachment upon an immaterial matter. The state seemed to think that it was of some value to show she was not alone with Burns at any time, and having introduced it, appellant certainly had the right to offset whatever effect it might have upon the jury by any available testimony which contradicted her statement. Her father had charged her, in the presence of his wife, mother of prosecutrix, with having had

In *Scott v. Com.* 94 Ky. 511, 42 Am. St. Rep. 371, 23 S. W. 219, where the defendant, while in jail on a charge of murder, wrote a letter to his wife which was procured from her by a brother of deceased, and read in evidence, the court, in reversing a judgment for manslaughter, said: "It seems to us, whether given up by her voluntarily or obtained against her will, it was a disclosure of what had been written by her husband in the privacy and confidence of the marital relation, and the use of it against the husband in this case was just as much against the policy of the law, because as fully within the reason for it, as would have been a disclosure of what he had said to her in confidence and privacy of the marriage relation."

Ward v. State, 70 Ark. 204, 66 S. W. 926, is explained in *Hammons v. State*, 73 Ark. 495, 68 L.R.A. 234, 108 Am. St. Rep. 66, 84 S. W. 718, 3 A. & E. Ann. Cas. 912, to the effect that an unlawful and forcible taking could not destroy privilege. In the *Ward Case* it appears that a wife visiting her husband in jail was seen to receive something from him, which the jailer took from her, and which proved to be a letter from the husband, addressed to a third person, at the foot of which was a note addressed to his wife, with instructions in regard to the letter. It was held that the part addressed to the wife was privileged, but that the part addressed to the third person was admissible in evidence against the husband.

In *Liggett v. Glenn*, 2 C. C. A. 286, 4 U. S. App. 438, 51 Fed. 381, quoted in *GROSS v. STATE*, it was held that a contract between an attorney and several clients, which had been filed by the attorney in the probate court, in proving the attorney's claim for fees against the estate of one of such clients, who had died, was not admissible in evidence against another of such clients, in an action brought by a third person, as it was privileged.

In *Fire Asso. of Philadelphia v. Fleming*, 78 Ga. 733, 3 S. E. 420, it was held that a letter from the defendant's attorney to its

intercourse with Burns, that he caught them in the act, and this brought from her the statement that she would get even with him. We are of opinion that this testimony, in the attitude in which it is presented in the record, was of considerable import.

4. It was also proposed to be shown by Hopkins that he remembered having a conversation with Maud Gross at the home of her father in the summer of 1908, in which he was teasing her, and in which she told him that he, witness, could do nothing with her, that she "only done business with Emory Burns, and that it was all his, and no one could do anything to her." Witness was playing the violin, and she and witness had been playing the violin and organ to-

gether; they played a few pieces, and the neck of her dress was open, and that left her breast exposed; that after playing a few pieces he took his violin bow and ran down the neck of her dress and touched one of her breasts, and she turned around on the organ stool and said "Nothing doing for you; that was promised to Mr. Burns; belonged to Mr. Burns, and no other." This was offered by appellant to show the relation between prosecutrix and Burns, whom she subsequently married, and to show her character generally, and also for the purpose of contradicting and impeaching her testimony in which she denied intimacy with Burns and all other persons, except the defendant. She denied this incident related by Hopkins. We think, in

agent was privileged and erroneously admitted, although it had been admitted on a former trial. The court said: "If error was committed on the former trial, it should have been corrected rather than persisted in, on the present occasion."

In *Southern R. Co. v. White*, 108 Ga. 201, 33 S. E. 952, the court excluded the evidence of a witness who would have testified that, at the request of the plaintiff, she had written and signed, in the name of the plaintiff, a letter to the plaintiff's attorney which had been transmitted by such attorney to the defendant's counsel. The appellate court said: "There was no error in this ruling. The circumstances under which the defendant's counsel came into possession of the letter would not render it admissible. It was a confidential communication from client to attorney, and is protected by the terms of §§ 5198 and 5199 of the Civil Code."

In a criminal action for obtaining money by false pretenses, a letter written by the prosecutrix to her attorney which had come into the possession of the defendant's attorney at the police court, and bore the magistrate's signature, was not allowed to be read by the defendant's attorney. *Reg. v. Levenson*, 11 Cox, C. C. 152.

In *Reg. v. Pamenter*, 12 Cox, C. C. 177, a prisoner who had been informed that all letters written by him would be read before leaving the station, asked a constable to post a letter for him "unknown" to the superintendent, and gave him three letters,—one to a police officer, one to his attorney, and one to his wife; the constable made no promise, merely saying, "I will see;" the Crown offered in evidence the letters to the officer and to the prisoner's wife. The court, however, refused to allow the latter to be read in evidence.

Where a letter addressed to his wife was found upon a suicide's body, and was read by the coroner, and delivered to the wife, the court, while not deciding the question, said: "The letter was in the possession of the wife, to whom it was addressed, and it is at least doubtful whether it or the information it contained could have been used

against the plaintiff upon a new trial without violating the statutory inhibition against the disclosure of communication between husband and wife." *Bunker v. United Order*, 97 Minn. 363, 107 N. W. 392. See also, in this connection, *Lindahl v. Supreme Ct. I. O. F.* 100 Minn. 87, 8 L.R.A. (N.S.) 916, 117 Am. St. Rep. 666, 110 N. W. 358.

—theory that secondary evidence is admissible.

In England the rule prevails that while the production of the original document may not be compelled, as it continues to be privileged, secondary evidence of its contents may be offered.

In *Calcraft v. Guest* [1898] 1 Q. B. 759, 67 L. J. Q. B. N. S. 505, 78 L. T. N. S. 283, 46 Week. Rep. 420, it appeared that a defendant in an action for trespass on the plaintiff's fishery came into possession of certain papers which had been used on behalf of the plaintiff's predecessor in an action relating to the same fishery over one hundred years before, and which were found among the papers of the solicitor in the former action for the plaintiff's predecessor, and that, on the plaintiff's demand, the defendant had delivered the papers over to him. It was held that the documents, being privileged in the first place, always remained so unless there had been a waiver; that the plaintiff could not be required to produce the documents, but that the defendant might offer secondary evidence of their contents from copies made while the papers were in his possession. The court distinguished *Wheeler v. Le Marchant*, L. R. 17 Ch. Div. 675, 50 L. J. Ch. N. S. 793, 44 L. T. N. S. 632, 45 J. P. 728. The giving of secondary evidence in such a case was held allowable under the authority of *Lloyd v. Mostyn*, 10 Mees. & W. 478, 2 Dowl. P. C. N. S. 471, 12 L. J. Exch. N. S. 1.

In *Wheeler v. Le Marchant*, supra, it was held that letters between the defendant's solicitors and his surveyors were not privileged, unless written after the dispute with the plaintiff arose.

view of what has been stated in regard to the prosecutrix, and what had occurred between them, that this testimony was admissible.

5. Oli Bruce testified for the state in rebuttal, and while so testifying the following question was asked by counsel for the state: "Calling your attention to the conversation that you had, if any, with Mrs. Gross about her leaving her husband, I will ask you to just explain that conversation, what you stated to her; just tell the jury what you said to her; don't say what she said, but what you said." Witness answered: "After defendant left home, I told Mrs. Gross it looked to me like there was but one thing for her to do, and that was to go to her father. I said, 'You can-

not stay here alone, and I have got all that I can do; I cannot stay with you.' That is the substance of what I told defendant's wife." Objection was urged to the question and answer, because the testimony is not admissible, upon the ground that such conversation between the wife of the defendant and the witness, or any explanation that was made by him to the wife when the defendant was not present, was inadmissible, and the testimony of the witness shows that the defendant was not present when he says he had the conversation with Mrs. Gross. At the time the objection was made, the court made the following statement: "The defendant's counsel, in cross-examination of other witnesses, sought to show conspiracy between this witness

In *Lloyd v. Mostyn*, supra, an action on a bond, a copy of the bond was admitted, it appearing to have been furnished by the defendant's attorney, who borrowed it from the custodian, who was the agent of the personal representative of the attorney for the obligors.

In *Legatt v. Tollervey*, 14 East, 302, and in *Jordan v. Lewis*, 14 East, 306, note, it was held that in actions for malicious prosecution, if the defendant had procured a copy of the indictment on the prosecution complained of, he might put it in evidence, although the copy was obtained without the order of the court, there being a general court order prohibiting the giving out copies of indictments for felony without a special order; the reason for the prohibition being that otherwise prosecutors might fear to come forward.

It may perhaps be questioned whether the principle of these last two cases has not been misinterpreted. If it was a citizen's right to take and offer in evidence a copy of such a court record, it would seem that the judges could not take away such right unless, indeed, there was a statute specially authorizing them to do so.

Perhaps it was the English rule which the court intended to follow in *Com. v. Fisher*, 221 Pa. 538, 70 Atl. 865, where it was held to be error to admit in evidence two letters written by fellow prisoners at the dictation and by the request of the defendant, to his wife, and by her delivered to the district attorney. The court said: "It is argued that this in effect was the giving of testimony by the wife against the husband, which, in our state, is forbidden by statute. We have concluded that this assignment must be sustained. The letters were produced at the trial by the district attorney. They could not be produced by the wife, and offered in evidence as coming from her. . . . We see no reason why the declarations contained in the letters, if they were made to other parties, competent to testify, should not be proven by them."

33 L.R.A. (N.S.)

Oral communications.

It is held that oral communications overheard by a third person by accident or design may be given in evidence by such third party.

This was held in *Hoy v. Morris*, 13 Gray, 519, 74 Am. Dec. 650, as to a conversation between attorney and client, where the court said that the hearer "was a mere bystander, and casually overheard conversation not addressed to him nor intended for his ear, but which the client and attorney meant to have respected as private and confidential." The attorney "could not lawfully have revealed it. But, in consequence of a want of proper precaution, the communications between him and his client were overheard by a mere stranger."

In *Com. v. Griffin*, 110 Mass. 181, on a trial for manslaughter the state proved, over the defendant's objection, a conversation as to the alleged homicide between the defendant and his wife, while confined in jail, from the testimony of two officers who concealed themselves in the jail for the purpose of listening to the conversation, without the defendant and his wife knowing that the witnesses or any other persons were within hearing of them. The opinion of the appellate court in overruling the defendant's exceptions was as follows: "There is no rule of law requiring that third persons who hear a private conversation between husband and wife shall be restrained from introducing it in their testimony."

In *Knight v. State*, 114 Ga. 48, 88 Am. St. Rep. 17, 39 S. E. 928, where the testimony of witnesses was admitted as to a conversation between the accused and his wife, the court said: "It is true that the Civil Code, § 5198, declares: 'There are certain admissions and communications excluded from public policy;' and, among them, 'communications between husband and wife.' But the meaning of this provision simply is that neither of the married pair will be permitted to testify as a witness concerning such communications, or to fur-

and the wife of defendant and other members of the family,—to show that he advised separation after the charges made against the defendant; and this testimony was permitted to go to the jury as explanatory of this witness's connection with the matter." We are of opinion this testimony was not admissible. The state could meet, as a matter of course by legitimate testimony, any attempt on the part of the family of the wife of defendant and witness with other members of the family, if the defendant had introduced this character of testimony; but the state could not introduce matters occurring between Oll Bruce, the brother of Mrs. Gross, and defendant's wife. She was the wife of defendant, and this evidence would tend to show, after

nish to another, for the purpose of being introduced in evidence, writings of any kind received under the seal of confidence during coverture. This section of our Code was not intended to forbid one who overhears a conversation between husband and wife from testifying with respect to the same. If they are unsuccessful in keeping secret that which they intend each other shall so regard, the mere fact that they did so intend will not render incompetent the testimony of an outsider."

In *Com. v. Everson*, 123 Ky. 330, 124 Am. St. Rep. 365, 96 S. W. 460, it was held by the state of an eavesdropper as to a conversation which he heard between the defendant and his wife. The court distinguished *Scott v. Com.* 94 Ky. 511, 42 Am. St. Rep. 371, 23 S. W. 219, and said: "While neither the husband nor wife may testify as to any communication between them, the authorities, so far as we can find, are unanimous in holding that third persons may testify to communications overheard by them between husband and wife. . . . The rule as to private communications between husband and wife is, by all the authorities, put on the same plane as private communications between attorney and client; and it has been said that if persons wish the communications they have with their attorneys to be kept a secret, they should be careful not to talk within the hearing of others. 4 Wigmore, Ev. § 2339; 1 Greenl. Ev. § 254."

In *State v. Falsetta*, 43 Wash. 159, 86 Pac. 168, 10 A. & E. Ann. Cas. 177, where an officer of the court testified that he heard the defendant make a certain statement to his counsel in the court room, the appellate court said: "The rule that precludes the attorney from testifying has no application to a third person who, by accident or design, overhears the communication."

In *People v. Durfee*, 62 Mich. 487, 29 N. W. 109, a deputy sheriff was allowed to testify to a conversation he overheard between the prisoner in jail and his counsel, but 33 L.R.A. (N.S.)

a prolonged conversation between her brother and sister, his conclusion of these matters, and it authorized the giving of his opinion in the concrete that, on account of these matters, the separation had occurred. Appellant was not a party to it. It was in his absence, and could not affect the question legitimately which was before the jury, to wit, the intercourse between appellant and his daughter. This whole thing was the act of third parties among themselves, and was, we think, necessarily damaging. Upon another trial this testimony should not be permitted to go to the jury.

6. Another bill of exceptions recites that the state placed upon the stand Mrs. Maud Coleman, who stated that she lived at Miles, in Runnels county, was the mother

the nature of the conversation does not appear.

The doctrine that it is the incompetency of the witness, and not of the evidence, was held in *Wells v. New England Mut. L. Ins. Co.* 187 Pa. 166, 40 Atl. 802, where a physician's deposition as to the cause of his patient's death was taken prior to the act providing "that no person authorized to practise physics or surgery shall be allowed, in any civil case, to disclose any information which is required in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity, which shall tend to blacken the character of the patient, without his consent." This act was passed before the trial, and the physician being then dead, the deposition was read, and it was held that there was no error, although, if living, he could not have testified. The court said: "It will be seen at once that the act establishes a personal incapacity only. It is the physician attending a patient who is prohibited from testifying to information acquired while rendering professional service. He is prohibited by the words, 'no person authorized,' etc., shall be allowed to disclose any information, etc. No other person who, being present at the time when the information was communicated, and heard the same, would be prevented by this act from testifying to the very matter in question. It is only the physician himself who is prohibited, and that is manifestly on account of the professional relation between himself and his patient."

Where, while his client was in jail, an attorney was shadowed by officers and found digging, and they joined him and assisted him, and some money being dug up, the attorney stated that it was his client's money, it was held that this declaration was admissible, the court stating that any overheard conversation between attorney and client would be admissible, and (apparently on this theory) held that acts of the attorney were admissible, and said: "Where testimony is prima facie competent and relevant, the burden of showing by competent evidence that it should not

of Mrs. Jim, or Eva, Gross, the wife of defendant, and that Mrs. Jim Gross and her children had been living at her home since the defendant got into this trouble. She further testified that she was acquainted with the handwriting of defendant and knew it when she saw it; and, further, while defendant was at Putman, Texas, he wrote a letter to his wife, Mrs. Jim Gross, and that she, witness, read the letter; that she "was prowling in to see what was going on between them in the way of correspondence," and through curiosity she got hold of this letter and read it. She further testified that she just picked up this letter in the house; that it was her home; but did not know why Mrs. Jim Gross, wife of defendant, did not give this

letter to her, nor did she do anything to direct her attention to this particular letter, and this letter that defendant sent to his wife from Putman, Texas, was burned up, as she saw her daughter, Mrs. Jim Gross, put this letter in the stove; and that she knew the contents of this letter from defendant to his wife, it being the same letter that she saw Mrs. Jim Gross burn; that she was not hunting evidence against defendant, as he had not at that time been arrested, and she hoped the matter would never get out. The state then proposed to prove by the witness, Mrs. Maud Coleman, the contents of the letter, to which the defendant objected for the following reasons: The letter was a privileged communication between defendant and his wife; that the

be admitted is upon the defendant." *State v. Perry*, 4 Idaho, 224, 38 Pac. 655.

There is a class of cases where it is not clear from the report whether the presence of a third person within hearing was or was not unknown to the conversers; such as *State v. Sterrett*, 68 Iowa, 76, 25 N. W. 936; *Toole v. Toole*, 109 N. C. 615, 14 S. E. 57; *State v. Center*, 35 Vt. 378; *Rex v. Smithies*, 5 Car. & P. 332; *Rex v. Bartlett*, 7 Car. & P. 832.

Miscellaneous.

Some of the following cases, while not, perhaps, strictly within the scope of this note, are closely allied to its subject.

Where a fellow prisoner who had been used as an interpreter between the defendant and his solicitor, later, in a conspiracy with secreted officers, told the prisoner that his solicitor had telephoned that he should tell such interpreter everything, evidence of the subsequent conversation was excluded. *Phippen, J. A.*, in his concurring opinion, said that the case was argued "as that of an overheard conversation between solicitor and client. I do not think the same rule applies. As part of the trick, the listeners were placed where they could overhear what passed, whereupon the prisoner was led to believe he was discussing the matter in hand with one person alone, his solicitor's agent. As a matter of fact, he was talking with three persons,—the supposed agent and two others who were concealed. I think we must treat the whole as an interview with several persons who had fraudulently adopted the character of solicitor's representatives. If so, we should, on the admitted principle, apply the cloak of privilege to what was heard by the listeners without, as well as within, the cell." *Rex v. Choney*, 13 Can. Crim. Cas. 296.

Where the district attorney represented himself as the prisoner's counsel over the telephone (*State v. Russell*, 83 Wis. 330, 53 N. W. 441), the court said: "The rule is invariable that confidential communications made to one falsely pretending to be the counsel of the accused are privileged." 33 L.R.A. (N.S.)

In *Jacobs v. Hesler*, 113 Mass. 157, it was held that evidence, apparently given by the wife, of confidential conversations between her and her husband, carried on in the presence of their five children, the eldest being eleven years old, none of the children being shown to have taken any part in the conversation or paid any attention to it, was not competent.

Jacobs v. Hesler, supra, was followed in *Hopkins v. Grimshaw*, 165 U. S. 342, 41 L. ed. 739, 17 Sup. Ct. Rep. 401, where it was held that conversations between husband and wife were improperly testified to by the wife when a widow, although held in presence of their young daughter, who did not appear to have taken any part in them. But it seems that, in the *Hopkins* Case, the daughter did testify, and the Supreme Court seemed to think that she may have been a competent witness to such a conversation; but the case was reversed in other grounds.

In *Campbell v. Chace*, 12 R. I. 333, it was held that, under the Rhode Island statute, a communication between husband and wife in the presence of her mother could not be testified to by the wife, but whether the mother could so testify is not considered.

It is pointed out by the court in *Cahen v. Continental L. Ins. Co.* 9 Jones & S. 296, in approval of the trial court, that a sick man is not to be judged as having waived his privilege when he makes a statement to his physician in the presence of third persons who are present in aid of the sick man. The court, however, reversed the judgment of the trial court, which judgment was in turn sustained by the court of appeals in 60 N. Y. 300.

In *Bowers v. State*, 29 Ohio St. 542, 2 Am. Crim. Rep. 592, it was held that, in a consultation between a young girl and her attorney respecting a civil action to be brought against her seducer, the presence of the girl's mother at the consultation will not waive the privilege.

Where a prisoner wrote to a friend to ask G. or any other solicitor a certain question, it not appearing that G. had ever

testimony shows that the witness Mrs. Maud Coleman was looking for letters, and that she found this particular letter in her home; that she was searching for letters from defendant to his wife; and, further, the letter was not admissible, nor is it admissible for the witness to state the contents as to what was in said letter; that it is making and using the wife as a witness against the defendant, her husband, indirectly, by using a privileged communication between them as husband and wife. These objections were all overruled, and witness testified that in said letter, being the same letter that wife of appellant burned, he wrote his wife the following: "For God's sake, get Emory and Maud Burns out of the way, for they could put me to death; you ought to do that much for me."

The court says this testimony was admitted on the theory that if the communication had been verbally made by defendant to his wife, and had been overheard by Mrs. Coleman, she could have testified to it, and it being made in a letter which came into Mrs. Coleman's hands without any act on the wife's part in aid thereof, the contents thereof could likewise be shown by the witness. There is a broad distinction between the introduction of conversations overheard by third parties, occurring between husband and wife, and the introduction of letters written by one to the other, as shown by practically, if not all, the authorities. It is unnecessary to take up or discuss the question as to conversations going on between husband and wife which are overheard by other parties. That question is not in the case, and it is unnecessary to discuss it. We hold that the intro-

duction of the contents of the letter through the witness Mrs. Maud Coleman was inadmissible. It was a privileged communication under the statute, and therefore interdicted. Code Crim. Proc. art. 774. That statute says: "Neither husband nor wife shall in any case testify as to communications made by one to the other while married; nor shall they, after the marriage relation ceases, be made witnesses as to any such communication made while the marriage relation subsisted, except in a case where one or the other is prosecuted for an offense, and a declaration or communication made by the wife to the husband, or by the husband to the wife, goes to extenuate or justify an offense for which either is on trial."

In the case of *Hearne v. State*, 50 Tex. Crim. Rep. 431, 97 S. W. 1050, the court permitted the introduction in evidence of ten or twelve letters alleged to have been written subsequent to the marriage of appellant with C. Wilson, which letters were written by appellant to her. The letters were admitted without objection on the part of appellant. Subsequently appellant moved to exclude the same from the consideration of the jury on the ground that they were privileged communications by the husband to the wife. The state relied upon *Crow v. State*, — Tex. Crim. Rep. —, 72 S. W. 392, to sustain the insistence that the letters were admissible. The court said, in substance, that the objection urged in the *Crow Case* was not that they were privileged communications, but that the testimony is remote. In the *Hearne Case* the letters were held inadmissible, and the court further said: "Letters of the wife to the husband or husband to the wife

acted for him (nor did he do so in the case), it was held that the letter was admissible against the prisoner. *Rex v. Brewer*, 6 Car. & P. 363.

A written statement made by the defendant, found on him when arrested, which he says he had prepared to give his lawyers, is not privileged. *Renfro v. State*, 42 Tex. Crim. Rep. 393, 58 S. W. 1013.

Under the Ohio statute of 1870, making husband and wife incompetent as to communications made by one to the other, and acts done by either in the presence of the other, and not in the known presence of a third person, and leaving them as to other matters competent witnesses, and where the bill of exceptions did not show that any third person was present at the time the communications or acts of the parties were made or took place, the court said: "Evidence to show the presence of such third person was for the court, and not for the jury, and must be presumed till the contrary is shown." *Westerman v. Westerman*, 25 Ohio St. 500. 33 L.R.A. (N.S.)

While the ground of decision would exclude *Norris v. Lee*, 136 App. Div. 685, 121 N. Y. Supp. 512, it may be referred to here. In that case a wife's mother sued her daughter and son-in-law upon a promissory note, and the defenses were the statute of limitations and that the note was given for the plaintiff's accommodation; and it was held that the plaintiff was properly permitted to read, on the husband's cross-examination, a letter from him to his wife, mostly about ordinary petty family matters, although it stated, "I will settle with your mother just as soon as I can get my hands on the money from the mortgage, which I hope to do next week," the court saying: "I think that this was not a confidential communication within the inhibition of the Code of Civil Procedure (§ 831)." But the case was reversed for refusal to permit the defendant to explain the letter on redirect examination. It does not appear how the plaintiff got the letter.

B. B. B.

are not admissible evidence in a prosecution for bigamy. We will not mention these letters seriatim, but hold that upon another trial none of the letters should be introduced that come within this rule." The judgment in that case was reversed on account of the admission of the letters. The same rule has been laid down in *Cole v. State*, 48 Tex. Crim. Rep. 447, 88 S. W. 341; *Burke v. State*, 15 Tex. App. 156, *Davis v. State*, 45 Tex. Crim. Rep. 202, 77 S. W. 451; *Gant v. State*, 55 Tex. Crim. Rep. 284, 116 S. W. 801. In the latter case the court said: "The privilege extends beyond dissolution of marriage relation by death or divorce. 10 Enc. Ev. pp. 196, 197, note 43 for collation of authorities. It includes letters from one spouse to the other." *Mitchell v. Mitchell*, 80 Tex. 101, 15 S. W. 705; *Mercer v. State*, 40 Fla. 216, 24 So. 154; *Connell v. Hudson*, 53 Mo. App. 418; *Com. v. Sapp*, 90 Ky. 580, 29 Am. St. Rep. 414, 14 S. W. 834; *Stein v. Bowman*, 13 Pet. 209, 10 L. ed. 129; *Saunders v. Hendrix*, 5 Ala. 224; 1 Greenl. Ev. §§ 254, 337, and notes; *Cook v. Grange*, 18 Ohio, 526-531; *Brown v. Wood*, 121 Mass. 137; *Maynard v. Vinton*, 59 Mich. 139, 60 Am. Rep. 276, 28 N. W. 401; *Jacobs v. Hesler*, 113 Mass. 157; *Hitchcock v. Moore*, 70 Mich. 112, 14 Am. St. Rep. 474, 37 N. W. 914; *Smith v. Poter*, 27 Vt. 304, 65 Am. Dec. 198; *Brock v. Brock*, 116 Pa. 109, 9 Atl. 486. The above list of cases is cited in *Gant's Case*, supra.

In the *Mercer Case*, supra, which is also found reported in 74 Am. St. Rep. 135, it is shown that *Mercer* was charged jointly with *Wesley Bush* for wilfully driving an ox upon the railroad track, and they were jointly tried and convicted; each being sentenced to ten years in the penitentiary. The court in that case, passing upon the question of the admissibility of letters from husband and wife, uses this language: "Such confidential communications between husband and wife have always been regarded as privileged, and when attempted to be detailed or divulged by either of the parties to whom the communication has been intrusted, the law not only forbids, but will not permit, it to be done. . . . Society has a deeply rooted interest in the preservation of the peace of families and in the maintenance of the sacred institution of marriage, and its strongest safeguard is to preserve with jealous care any violation of those hallowed confidences inherent in, and inseparable from, the marital status. . . . As Mr. Greenleaf puts it: 'The great object of the world is to secure domestic happiness by placing the protecting seal of the law upon all con-

fidential communications between husband and wife, and whatever has come to the knowledge of either by means of the hallowed confidence which that relation inspires cannot be afterwards developed in testimony, even though the other party be no longer living.'" 1 Greenl. Ev. 15th ed. §§ 254, 334, 337; 2 Taylor, Ev. §§ 908 and 910. The court further says that "the letter from the husband to the wife . . . was not sought to be introduced directly through the wife as a witness to whom it had been written, but in some manner, not disclosed by the record, had found its way to the possession of the attorneys for the defendants, and its offer in evidence was from their immediate custody. There is a considerable array of authorities to the effect that when confidential communication between husband and wife . . . get out of the possession and control of the parties to the confidence, and . . . find their way into the possession and control of third persons, regardless of the manner in which the possession thereof may be obtained by such third persons, that then communications lose their protected privileges of the law and become competent and admissible evidence. . . . We cannot agree to the correctness of this rule thus broadly laid down by these and other authorities, but think the policy of the law that forms the foundation of the general rule is far more strongly upheld and subserved by those authorities that recognize and declare certain class of communications to be privileged from the inherent character of the communication itself, and that in such cases the privilege attaches to the communication itself, and protects it from exposure in evidence whosoever or in whosoever's hands it may be."

In *Scott v. Com.* 94 Ky. 511, 42 Am. St. Rep. 371, 23 S. W. 219, Judge Lewis, rendering the opinion for the court of appeals of Kentucky, uses this language: "For it is essential to the happiness of social life that the confidence existing between husband and wife should be sacredly protected and cherished in its most unlimited extent; and to break down or impair the great principles which protect the sanctities of that relation would be to destroy the best solaces of human existence." "The evidence in this case shows the letter in question was procured from appellant's wife by a brother of the deceased, and thus came into possession of the commonwealth's attorney; but it seems to us, whether given up by her voluntarily or obtained against her will, it was a disclosure of what had been written by her husband in the privacy and confidence of the marital relation, and the use of it against the husband in this

case was just as much against the policy of the law, because as fully within the reason for it, as would have been a disclosure of what he had said to her in the confidence and privacy of the marriage relation," citing *Selden v. State*, 74 Wis. 271, 17 Am. St. Rep. 144, 42 N. W. 218, which was a prosecution of a party for perjury, and in the proceedings against his wife for divorce, he made affidavit that he did not know her place of residence, and the question on the trial was whether letters written by him to her, pending proceedings for divorce, showing he did know her place of residence, and which she had placed in the possession of her attorneys, were competent evidence against him in a criminal trial. Applying the rule mentioned, it was here held that the letters being confidential communications, not even the address on the envelopes could be used as evidence against the husband.

These authorities, we think, are sufficient to show that the ruling of the trial court was error, and we deem it unnecessary to discuss this question further, or add any remarks to those already quoted. The reasons are sufficiently stated in fully appropriate language.

In the case of *Liggett v. Glenn*, 2 C. C. A. 286, 4 U. S. App. 438, 51 Fed. 381, the court was passing upon privileged communications between attorney and client, and uses very much the same reasoning as the cases cited do with reference to marital relation. Our statute, article 773 of the Code of Criminal Procedure, in regard to privileged communications between attorney and client, is as follows: "All other persons except those enumerated in articles 768 and 775, whatever may be the relationship between the defendant and witness, are competent to testify, except that an attorney at law shall not disclose a communication made to him by his client during the existence of that relationship, nor disclose any other fact which came to the knowledge of such attorney by reason of such relationship." This statute declares the law in our own state in regard to privileged communications between client and attorney. The two statutes are quite similar, and have been rigorously upheld.

In *Liggett v. Glenn*, supra, Judge Shiras, delivering the opinion of the court, said: "The admissibility of the communications, in our judgment, is not dependent upon the manner in which control thereof is obtained from the counsel, but upon the inherent character of the communication itself. If the admission or statement sought to be

put in evidence was made by reason of the confidential relation existing between client and counsel, it becomes a privileged communication, and as such it is not competent evidence against the client. Its competency is not dependent upon the mere manner in which knowledge thereof may be obtained from counsel. The principle forbidding its use is not adopted as a mere rule of professional conduct on the part of the attorney. It confers a right upon the client for his protection and advantage, and which he alone is authorized to waive. It will not do to hold that the communication loses its confidential and privileged character if knowledge thereof can be obtained by means which do not involve the counsel in a breach of professional duty. For illustration, a letter is written by a client to his attorney containing statements of a privileged nature. The counsel, having this letter on his person, meets with an accident, causing his death. Third parties in this way became possessed of the letter, and from them it passes to the possession of the adversary party. Has this letter lost its privileged character and become competent evidence against the writer, simply because it passed from the possession of his counsel, to whom it was written, without fault on part of the attorney? Suppose that, upon a trial of a cause, an attorney is sworn as a witness, and he is asked to produce a letter written him by his client. He refuses, on the ground that it is a confidential communication. The trial court overrules the objection, and compels the production of the letter, which is filed as part of the evidence in the cause. An appellate court reverses the ruling of the trial court on this question, holding that the letter was privileged, and sends the case back for a new trial. On the second hearing the attorney is not called as a witness, but the clerk, in whose custody the letter was placed on the first trial, is summoned by a subpoena duces tecum, and required to produce the letter in order that the same may be read in evidence. Is it possible that this letter, being a confidential communication between client and counsel, can be rightfully put in evidence upon the theory that the possession thereof was obtained without fault on the part of the attorney? The argument founded upon the assumption that the admissibility of confidential communications between client and counsel is dependent solely upon considerations of the duty of counsel not to make known that which was communicated to him professionally is, in our judgment,

faulty, in that it ignores the main purpose of the rule, which is that the client shall be at liberty to freely communicate to his attorney knowledge of all matters connected with the business in hand, upon the assurance that confidential communications thus made are privileged and cannot be used in evidence against him, unless he deprives them of their privileged character."

It is unnecessary to quote further from the opinion of Judge Shiras. It does settle the question, and is in harmony with all the authorities, so far as we are aware, to the effect that privileged communications between counsel and client cannot be used as evidence directly, nor will its use be permitted in any indirect or surreptitious manner. The communication in any event is privileged. If this is true as to the relation of attorney and client, how much stronger the reasoning when privileged communications arise between husband and wife. Not minimizing the same relation of client and attorney, but we do say that the relation between husband and wife is far more sacred, and to be the more strongly guarded, than that of the relation between attorney and client. Our statute interdicts the use of testimony in both instances. It makes no difference in this case that Mrs. Maud Coleman obtained the possession of the letter in the manner that she did; that possession and her knowledge of the contents of the letter did not rob it of its confidential and privileged character. If obtaining the letter by Mrs. Coleman as she states, and her statement of its contents could be used, the wife could turn over the letter to state's counsel, and thereby constitute it admissible evidence. To hold this would be to in effect abrogate the statute and break down the purpose of the law, which was to shield and protect the privileged matters occurring between husband and wife. Not only does this privilege exist during the lifetime, but it passes beyond the life of either or both, and becomes a permanent and fixed fact for all time, whether this relation ceases to exist by divorce or death.

7. There is complaint made of the manner in which an additional charge was given to the jury after they had retired to consider their verdict. This will not occur upon another trial, and it is unnecessary to discuss it.

For the errors indicated, the judgment is reversed, and the cause is remanded.

Petition for rehearing denied March 15, 1911.

33 L.R.A. (N.S.)

ARKANSAS SUPREME COURT.

H. C. THORNTON, Appt.,
v.

JAMES FINDLEY et al.

(— Ark. —, 134 S. W. 627.)

Conditional sale — renewing credit — waiver of title.

1. A conditional vendor of chattels who reserves title until payment of the purchase money waives it in favor of an intervening mortgage from the vendee, who had paid enough to give him an interest to mortgage, by taking a renewal note for the unpaid purchase money without reserving title at the time he does so.

Mortgage — priority — failure to record.

2. The fact that a conditional vendor of a chattel takes a mortgage on the property at the time title vests in the vendee does not give his mortgage priority over that of a prior recorded mortgage given by the vendee on the chattel after he had paid enough on the purchase money to give him an interest to mortgage, if he neglected for a considerable time to place his mortgage on record, since such delay permits the prior mortgage to attach to the whole property.

(January 30, 1911.)

APPEAL by plaintiff from a decree of the Chancery Court for Craighead County awarding defendant Findley a superior lien on the property in an action to foreclose a mortgage. Reversed.

The facts are stated in the opinion.

Mr. Basil Baker, for appellant:

The reserved title was waived.

French v. Lewis, 218 Pa. 141, 11 L.R.A.

Note.— *Effect of taking collateral security upon conditional sale.*

The effect of taking collateral security as a waiver of the right of the seller of property upon conditional sale to rely upon a provision retaining title to the article sold until payment is the subject of a note appended to *Monitor Drill Co. v. Mercer*, 20 L.R.A. (N.S.) 1065. No case considering the question subsequently to this note, other than *THORNTON v. FINDLEY*, has been found.

In this connection, however, it is worthy of note that in *THORNTON v. FINDLEY*, the conclusion of the court that the seller had waived his right to treat the sale as a conditional one, as against a subsequent mortgagee of the property, was based upon the fact that renewal notes were given in lieu of the original title-clause notes, and these renewal notes contained no reservation of title in the seller to secure the payment thereof, and were secured by a mortgage upon the property, which was held to be

(N.S.) 948, 120 Am. St. Rep. 864, 67 Atl. 45, 11 A. & E. Ann. Cas. 545; *Adler-Goldman Commission Co. v. People's Bank*, 65 Ark. 380, 46 S. W. 536; *Neal v. Cone*, 76 Ark. 273, 88 S. W. 952; *Cox v. Harris*, 64 Ark. 213, 62 Am. St. Rep. 187, 41 S. W. 426; *Butler v. Dodson*, 78 Ark. 569, 94 S. W. 703; *Hendrickson Lumber Co. v. Pretorious*, 82 Ark. 347, 101 S. W. 733; *McRea v. Merrifield*, 48 Ark. 160, 2 S. W. 780; *Bell v. Old*, 88 Ark. 99, 113 S. W. 1023.

Messrs. Lamb & Caraway, for appellees:

Even if there is a lapse of time, not too extended, between a sale and the execution of a mortgage by the vendee to the vendor, upon the property sold, and securing the purchase money, still no other lien can intervene in behalf of a third party, providing there exists between the vendor and the vendee the agreement at the date of the original transaction that the mortgage shall be given.

Blevins v. Rogers, 32 Ark. 258; *Cohn v. Hoffman*, 50 Ark. 108, 6 S. W. 511; 23 Am. & Eng. Enc. Law, p. 466; *Barker v. Kelderhouse*, 8 Minn. 207, Gil. 178; *Blatchford v. Boyden*, 122 Ill. 657, 13 N. E. 801.

Frauenthal, J., delivered the opinion of the court:

This was an action instituted in the chancery court by H. C. Thornton, the plaintiff below, to foreclose a mortgage executed by A. D. Henry to him on one survey and one mare, to secure the payment of a note. The mare was, at the time of the institution of the suit, in the possession of J. H. Findley, who was also made a defendant. The defendant Henry

subject to the mortgage mentioned. Several late cases have passed upon the question whether the mere taking of a note constitutes a waiver by the seller of property upon conditional sale, of his right to rely upon the provision retaining title in himself until payment of the purchase price, and it is held that subsequently taking a note for the purchase price is not a waiver. *National Cash Register Co. v. Riley*, — Del. —, 74 Atl. 362; *Lane v. J. E. Roach's Banda Mexicana Co.* — N. J. Eq. —, 79 Atl. 365; *Beale v. Hudson County Water Co.* 185 Fed. 179.

In *Beale v. Hudson County Water Co.* the theory adopted by the court in reaching this conclusion is thus stated: "The acceptance of a promissory note from a debtor for a pre-existing debt will not operate as a discharge or satisfaction of the debt, unless it is agreed that such shall be its effect; nor will it discharge a lien in favor of such debt unless it clearly appears that such discharge was intended. A promissory note, as its name implies, is but a

made default, but the defendant Findley filed an answer in which he claimed a superior lien upon said mare for indebtedness due by said Henry to him. It appears from the testimony that Findley sold and delivered the mare to Henry on April 12, 1908, for \$150, a part of which purchase money was paid in cash, and for the balance thereof he executed a note to Findley, with one J. S. St. Clair as surety thereon, due eight months after date. At the time of the sale there was a verbal agreement between the parties that the title to the mare should remain in Findley until the payment of the note. On April 18, 1908, Henry purchased a survey from the plaintiff, and, to secure the payment of a note given therefor and other indebtedness, he executed to him a mortgage on said survey and said mare. This mortgage was duly acknowledged and recorded on April 18, 1908. Thereafter, from time to time, Henry made payments to Findley upon the note executed by him to Findley for the mare, amounting in the aggregate to \$43, and on December 31, 1908, executed a new note for the balance thereof, \$107, due one year after date, with the said St. Clair as surety thereon, and at the same time executed a mortgage on said mare to secure the payment of this last note. This mortgage to Findley was not recorded until August 27, 1909. At the time of the execution of the second note to Findley, the first note executed by Henry to him for the mare was thus paid; but at that time there was no agreement, either written or verbal, that the title to the mare was thereafter reserved in the vendor. In October, 1909, Henry turned the possession of the mare over to Findley, upon the note

promise to pay, and, ordinarily, is no payment if it is not itself paid; but it may amount to payment if the creditor so intended. Such intention, however, is not to be resolved against the creditor except by clear and convincing evidence. The burden of proof is upon him who claims the benefit of such discharge."

Reasoning along this line in *National Cash Register Co. v. Riley*, the court said that since a promissory note given by a debtor to his creditor does not operate as payment or discharge of a pre-existing indebtedness in the absence of an agreement between the parties that it shall so operate, the only effect the giving of a new note had upon a contract of conditional sale was to extend the time of payment, and defer or suspend the right of the seller to retake the property until default was made in the payment of the new note; but such extension of time did not deprive the seller of his right under the original contract to retake the article sold after default in the payment of the new note. A. G. S.

and mortgage executed by him to Findley. The chancellor entered a decree foreclosing both mortgages, but declared that Findley was entitled to a superior lien upon the mare under the mortgage executed by Henry to him. From that portion of the decree giving to Findley a superior lien upon the mare, the plaintiff has appealed to this court.

The plaintiff had the right to institute suit in the chancery court for the foreclosure of his chattel mortgage. This was one of the remedies which he had a right to pursue, and a court of equity possesses the jurisdiction to foreclose a chattel mortgage. A mortgagee of chattels may pursue any of the remedies to which he is entitled; he may sue at law for the recovery of the chattel or for its conversion, or he may sue in equity for the foreclosure of the lien which he has thereon by virtue of the mortgage.

In Jones on Chattel Mortgages, 5th ed. § 758, it is said: "He has the same right that a mortgagee of real property has to pursue all his remedies at the same time. He may maintain a suit at law to recover the mortgage debt, and also a suit at law to recover possession of the mortgaged property, and at the same time proceedings under a statute or in equity to foreclose the mortgage. In the absence of any controlling statute, the foreclosure of a chattel mortgage is inherently a matter of equity jurisdiction.

The sole question, then, involved in this case, relates to the priority of the rights and liens of the plaintiff and the defendant Findley upon the mare. On April 12, 1908, Findley sold the mare to Henry, but at the time reserved the title thereto in the vendor. This was a conditional sale, whereby the full title did not pass to the vendee, but upon the maturity of the first note given therefor the vendor had the right to determine whether the sale should be conditional or absolute, and, until he did so elect to determine, the title still remained in him, in event the purchase money for the mare was not paid at or before the maturity thereof. But by the contract of sale, although conditional, Henry obtained an interest in the mare. He had paid a part of the purchase money at the time he bought the mare, and he had an interest therein which he could mortgage. *Sunny South Lumber Co. v. Neimeyer Lumber Co.* 63 Ark. 268, 38 S. W. 902; *Snyder v. Slatton*, 92 Ark. 530, 123 S. W. 649.

Henry had therefore a right to execute a mortgage upon the mare to the plaintiff on April 18, 1908, before which time he had purchased, though conditionally, the mare and had the possession thereof; and by vir-

tue of such mortgage the plaintiff became entitled to a lien on all the interest which Henry then owned in the mare, or which he might thereafter acquire. When the indebtedness due to Findley, the vendor, for the purchase money of the mare, matured, and was not paid, he had the right to elect whether he would treat the contract for the sale at an end and thus cancel the debt, or whether he would insist on the existence and payment of said indebtedness, and thus affirm the sale and make it absolute. At the time when Findley took the second note from Henry for the mare, the indebtedness for the original purchase money had matured, and part thereof had been paid. At that time two courses were open to him to pursue: Either to treat the sale at an end and to reclaim the property, or to consider the condition waived and to seek payment of the price, either in cash or by note, or other property. And, as a general rule, if the vendor takes a mortgage or other security for the price without then reserving title, such act will be regarded as a waiver of the condition of the original sale, and an election to consider the sale as absolute. In the case of *Edgewood Distilling Co. v. Shannon*, 60 Ark. 133, 29 S. W. 147, it was held that where a vendor of personal property, sold conditionally, sued to recover its possession, and there was evidence tending to prove that, after the sale, the purchase money was paid partly in cash and by the execution of a new note, the vendee's title became absolute, unless there was an agreement for a reservation of title in the vendor at the time of the execution of the second note therefor. *Dudley E. Jones Co. v. Daniel*, 67 Ark. 206, 53 S. W. 890; *Butler v. Dodson*, 78 Ark. 569, 94 S. W. 703; *Baker v. Brown Shoe Co.* 78 Ark. 501, 95 S. W. 808; 35 Cyc. Law & Proc. p. 675.

In the case at bar, when Findley took the second note on December 31, 1908, for the balance due upon the purchase money of the mare, there was no agreement that he reserved title thereto until the payment of that note. On the contrary, he took a mortgage upon the mare in order to secure the payment of the note, and we think that he then waived any condition reserving title, and elected to consider the sale absolute. The absolute title to the mare then vested in Henry, and Findley had then and thereafter only a lien thereon by virtue of the mortgage executed to him. That mortgage was not recorded until August, 1909. Under our mortgage act (*Kirby's Dig.* § 5396) the filing or recording of a chattel mortgage is as essential to its validity as against third persons as any other element entering into the execution and

making of a valid chattel mortgage. It is not a valid lien against other mortgagees, purchasers, or creditors acquiring liens thereon until it is filed in the recorder's office, as provided by statutory law. *Fry v. Martin*, 33 Ark. 203; *Dodd v. Parker*, 40 Ark. 536; *Turman v. Bell*, 54 Ark. 273, 26 Am. St. Rep. 35, 15 S. W. 886; *Ringo v. Wing*, 49 Ark. 457, 5 S. W. 787; *Smead v. Chandler*, 71 Ark. 505, 65 L.R.A. 353, 76 S. W. 1066. "As between conflicting mortgages, the one first filed for record will have priority." *Mitchell v. Badgett*, 33 Ark. 387.

But it is urged that the mortgage given to Findley was executed at the same time when the sale became absolute, and should therefore have precedence over a mortgage executed prior to that time. It is held that a mortgage given to a vendor of land for the purchase money thereof is superior to a lien acquired prior to the execution of the deed therefor, where the mortgage for the purchase money is given and recorded on the land at the same time that the deed is executed therefor. But this is held upon the principle that the execution of the deed and mortgage to the vendor and the record of such mortgage are simultaneous acts, and the title to the land does not, for a single moment, rest in the purchaser, but merely passes through his hands and vests in the mortgagee without stopping at all in the purchaser; and that, during such instantaneous passage, a lien acquired before such time by another cannot attach to the title. But in such case the passing of the title to the vendee, the mortgage back of the property by the vendee to the vendor, and the record of such mortgage, must all be done simultaneously. For if the title rests even for a short time in the vendee, with no valid lien thereon in favor of the vendor, then a prior lien secured by another on such property will have precedence over a mortgage subsequently secured by the vendor. It is upon this principle that the cases of *Blevins v. Rogers*, 32 Ark. 258, and *Cohn v. Hoffman*, 50 Ark. 108, 6 S. W. 511, were decided. But in the case at bar the unconditional title to the property vested in the vendee, Henry, on December 31, 1908, and the mortgage executed for the purchase money was not filed for record until the following August. During all that time the title rested in Henry, and the mortgage given by him to Findley was not, during that time, valid as against third persons who secured or had secured liens thereon. It follows that, as between the mortgagees, Thornton and Findley, the priority of their liens is determined by the priority in the time of the filing of their

mortgages; and the mortgage of Thornton being filed first in time, it is first and prior in law.

The decree is reversed, and this cause is remanded, with directions to enter a decree in favor of the plaintiff.

MINNESOTA SUPREME COURT.

STATE OF MINNESOTA, Resp.,
v.

CHICAGO, MILWAUKEE, & ST. PAUL
RAILWAY COMPANY, Appt.

(— Minn. —, 130 N. W. 545.)

Municipal ordinance — statutory authorization — validity.

1. The validity of a provision in a city ordinance expressly authorized by the legislature does not depend upon the expediency or public policy of its enactment, but upon its being within the legislative power of the state.

Same — prohibiting use of soft coal.

2: The emission of dense smoke by yard and switch engines being caused by the use of soft coal therein, a prohibition of such use within a populous city is substantially related to and directly tends to the prevention of a nuisance, the emission of dense smoke, and is an exercise of the police power of the state within constitutional limits.

Constitutional law — class legislation — validity.

3. Where there is a substantial difference in the condition or situation of individuals or objects with reference to the subject embraced in a law, an appropriate limitation based on such difference, in the application of the law, does not make such legislation partial.

Same — use of soft coal — stationary and locomotive engines.

4. The fact that a prohibition of the use of soft coal in locomotives does not apply to stationary engines does not make such prohibition partial legislation; there being obvious differences between the two classes of engines in respect to the tendency that burning soft coal has to cause a smoke nuisance, and other appropriate legislation having been enacted by the city to prevent the emission of dense smoke by stationary plants.

(March 10, 1911.)

Headnotes by SIMPSON, J.

Note. — As to municipal control over smoke as a public nuisance, see note to *Rochester v. Macauley-Fien Mill Co.* 32 L.R.A.(N.S.) 554.

As to liability of railroad for creating nuisance, see notes to *Missouri, K. & T. R. Co. v. Mott*, 70 L.R.A. 579; *Louisville & N. Terminal Co. v. Lellyett*, 1 L.R.A.(N.S.) 49; and *Terrell v. Chesapeake & O. R. Co.* 32 L.R.A.(N.S.) 371.

A PPEAL by defendant from a judgment of the Municipal Court of Minneapolis convicting it of violating a city ordinance prohibiting the use of soft coal. Affirmed.

The facts are stated in the opinion.

Mr. M. L. Countryman, with Mr. F. W. Root, for appellant.

Messrs. Daniel Fish and John A. Dahl, for respondent:

If a statute or ordinance contains provisions that are invalid, the other portions thereof are valid, if they are not dependent on the part which is void.

State v. Stone, 96 Minn. 482, 105 N. W. 187; Duluth v. Krupp, 46 Minn. 435, 49 N. W. 235; Hurst v. Martinsburg, 80 Minn. 43, 82 N. W. 1099; State ex rel. Scheffer v. Justus, 85 Minn. 279, 56 L.R.A. 757, 89 Am. St. Rep. 550, 88 N. W. 759; State ex rel. Mince v. Schoenig, 72 Minn. 528, 75 N. W. 711; Simard v. Sullivan, 71 Minn. 517, 74 N. W. 280; Wykoff v. Healey, 57 Minn. 14, 58 N. W. 685; Hunter v. Tracy, 104 Minn. 378, 116 N. W. 922.

Within the constitutional limits the legislature may change the common law as to nuisances, and may move the line either way so as to make things nuisances which were not so, or to make lawful things which were nuisances, although by so doing it affects the use or value of property.

Sawyer v. Davis, 136 Mass. 239, 49 Am. Rep. 27; Com. v. Parks, 155 Mass. 531, 30 N. E. 174; Lawton v. Steele, 119 N. Y. 226, 7 L.R.A. 134, 16 Am. St. Rep. 813, 23 N. E. 878; State v. Tower, 185 Mo. 79, 68 L.R.A. 402, 84 S. W. 10; Re Jacobs, 98 N. Y. 98, 50 Am. Rep. 636; Powell v. Pennsylvania, 17 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257; Mugler v. Kansas, 123 U. S. 661, 31 L. ed. 210, 8 Sup. Ct. Rep. 273; Moses v. United States, 16 App. D. C. 428, 50 L.R.A. 532; State v. Beardsley, 108 Iowa, 396, 79 N. W. 138; Baumgartner v. Hasty, 100 Ind. 575, 50 Am. Rep. 830; North Chicago City R. Co. v. Lake View, 105 Ill. 207, 44 Am. Rep. 788; St. Paul v. Haugbro, 93 Minn. 59, 66 L.R.A. 441, 106 Am. St. Rep. 427, 100 N. W. 470, 2 A. & E. Ann. Cas. 580; Chicago v. Bowman Dairy Co. 234 Ill. 294, 17 L.R.A.(N.S.) 684, 123 Am. St. Rep. 100, 84 N. E. 913, 14 A. & E. Ann. Cas. 700; Sprigg v. Garrett Park, 89 Md. 412, 43 Atl. 813; Watertown v. Mayo, 109 Mass. 315, 12 Am. Rep. 694; Lake View v. Rose Hill Cemetery Co. 70 Ill. 191, 22 Am. Rep. 71.

A municipal corporation has the power to treat as a nuisance a thing that, from its character, location, and surroundings, may and does become such.

St. Paul v. Gillfillan, 36 Minn. 298, 31 N. W. 49; Walker v. Jameson, 140 Ind. 33 L.R.A.(N.S.)

591, 28 L.R.A. 679, 49 Am. St. Rep. 222, 37 N. E. 402, 39 N. E. 869; Rund v. Fowler, 142 Ind. 214, 41 N. E. 456; North Chicago City R. Co. v. Lake View, 105 Ill. 207, 44 Am. Rep. 788; St. Paul v. Haugbro, 93 Minn. 61, 66 L.R.A. 441, 106 Am. St. Rep. 427, 100 N. W. 470, 2 A. & E. Ann. Cas. 580; State v. Luce, 9 Houst. (Del.) 396, 32 Atl. 1076.

If all that can be said against this ordinance is that it is unwise or unnecessarily oppressive to those using switch engines in their business, the appeal must be to the council or to the ballot box, not to the judiciary.

Powell v. Pennsylvania, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257; St. Paul v. Colter, 12 Minn. 41, Gil. 16. 90 Am. Dec. 278; Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; Moses v. United States, 16 App. D. C. 428, 50 L.R.A. 532; State v. Tower, 185 Mo. 79, 68 L.R.A. 402, 84 S. W. 10; Sprigg v. Garrett Park, 89 Md. 406, 43 Atl. 813.

The determination by a legislative tribunal of open and debatable questions concerning what is expedient is not subject to review on questions of fact, provided that the question is one within the competency of the legislature tribunal to determine.

Pittsburgh, C. C. & St. L. R. Co. v. Hartford City, 170 Ind. 693, 20 L.R.A.(N.S.) 461, 82 N. E. 787, 85 N. E. 362; Spencer v. Merchant, 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921; Paulsen v. Portland, 149 U. S. 30, 37 L. ed. 637, 13 Sup. Ct. Rep. 750; Fallbrook Irrig. Dist. v. Bradley, 164 U. S. 112, 41 L. ed. 369, 17 Sup. Ct. Rep. 56; French v. Barber Asphalt Paving Co. 181 U. S. 324, 45 L. ed. 879, 21 Sup. Ct. Rep. 625; Edwards v. Cooper, 168 Ind. 54, 79 N. E. 1047; Lusher v. Scites, 4 W. Va. 11; De Camp v. Eveland, 19 Barb. 81.

Ordinances and statutes declaring the emission of dense smoke into the atmosphere of populous cities a nuisance, and prohibiting the same, have been universally sustained by the courts of the different states as a proper exercise of police power.

St. Paul v. Haugbro, 93 Minn. 59, 66 L.R.A. 441, 106 Am. St. Rep. 427, 100 N. W. 470, 2 A. & E. Ann. Cas. 580; Moses v. United States, 16 App. D. C. 428, 50 L.R.A. 532; Field v. Chicago, 44 Ill. App. 410; Harmon v. Chicago, 110 Ill. 400, 51 Am. Rep. 698; State v. Tower, 185 Mo. 79, 68 L.R.A. 402, 84 S. W. 10; State v. Donaldson, 41 Minn. 74, 42 N. W. 781; State v. Corbett, 57 Minn. 345, 24 L.R.A. 498, 4 Inters. Com. Rep. 694, 59 N. W. 317; Rippe v. Becker, 56 Minn. 100, 22 L.R.A. 857, 57 N. W. 331; St. Paul v.

Gilfillan, 36 Minn. 298, 31 N. W. 49; Butler v. Chambers, 36 Minn. 73, 1 Am. St. Rep. 638, 30 N. W. 308; Baumgartner v. Hasty, 100 Ind. 575, 50 Am. Rep. 830; North Chicago City R. Co. v. Lake View, 105 Ill. 207, 44 Am. Rep. 788; Harmon v. Chicago, 110 Ill. 400, 51 Am. Rep. 698; New York v. H. W. Johns-Manville Co. 89 App. Div. 449, 85 N. Y. Supp. 757; Brooklyn v. Nassau Electric R. Co. 44 App. Div. 462, 61 N. Y. Supp. 33.

Simpson, J., delivered the opinion of the court:

In the municipal court of the city of Minneapolis, the defendant was adjudged guilty of violating an ordinance prohibiting the use of soft coal, except smokeless coal, in certain engines within said city, and a fine of \$25 was imposed. The defendant appeals from the said judgment.

It was shown and conceded upon the trial that the specified switch engine of the defendant company was, on the day charged, engaged in switching in defendant's yards in the city of Minneapolis, and that the officers and servants of defendant having charge and control of such engine were, at the time, using soft coal therein, which was not smokeless coal, and that the engine was then emitting dense black smoke.

By a demurrer interposed to the complaint, and overruled, the defendant questioned, and now questions, by various assignments of error on this appeal, the validity of the ordinance, and urges in support of its position four objections to said ordinance: First, that the city did not have authority to declare the use of soft coal in the specified engines a nuisance, nor to prohibit such use as constituting a nuisance; second, that, if the city had power to regulate the use of soft coal, it did not have power to prohibit its use; third, that the ordinance is partial in its application and is class legislation; fourth, that the ordinance is unreasonable, and would deprive the defendant of its property without due process of law, because (a) the ordinance went into effect twenty-seven days after its publication, and not sufficient time was given the defendant company to comply with its terms and continue carrying on its business of transportation; (b) the supply of hard coal is limited.

A consideration of the questions so raised involves not only the terms of the ordinance the defendant was charged with violating, but as well the legislative or charter power under which it was passed, and the general plan and scope of all the ordinances passed in the exercise of these powers. These different provisions, so far as here material, are before the court on this 33 L.R.A. (N.S.)

appeal; the charter of the city of Minneapolis being a public act, and the municipal court, from which this appeal is taken, having judicial notice of all ordinances of the city of Minneapolis.

The charter of the city of Minneapolis gives the city council general power and authority to pass ordinances for the government and good order of the city, and to enforce the same, and for these purposes it is given, among many other express powers, power: "Seventh. To regulate the movement and speed of railroad locomotives and cars; . . . to regulate and prohibit the unnecessary discharging of steam therefrom; . . . and may direct what kind of coal any yard or switch engine shall use while being run or operated for any yard or upon any railroad within the limits of said city. Thirty-second. To do any and all acts and make all regulations which may be necessary and expedient for the preservation of health. Forty-seventh. . . . It shall have authority to prohibit and prevent the erection or maintenance of any insecure or unsafe buildings, stacks, walls, or chimneys, and the emission of dense smoke in said city, and to declare them to be nuisances and to provide for their abatement."

In the exercise of its charter powers, the city council at different times passed ordinances now in force, declaring the emission of dense smoke in the city a nuisance, prohibiting it, and providing a penalty therefor; prescribing the method of construction of chimneys and flues in buildings; requiring the submission to and approval by the smoke inspector of plans of furnaces and boilers in stationary heating and power plants in buildings to be constructed; creating the position of smoke inspector, and providing for the appointment of such officer; and in November, 1909, the ordinance which the defendant was charged with violating. The material part of this ordinance is as follows:

"Section 1. The use of soft coal in traction engines, switching engines, and locomotive engines in the city of Minneapolis is hereby declared to be a nuisance, and such use of soft coal other than smokeless coal, in the city of Minneapolis, is hereby prohibited; and no person, company, or corporation shall hereafter use or permit or cause to be used any soft coal, other than smokeless coal, in any traction engine, switching engine, or locomotive engine in the city of Minneapolis, Minnesota."

It is apparent that this ordinance, and the others referred to, are the outcome of a general plan on the part of the city of Minneapolis to abate the smoke nuisance, as authorized by the legislature. The legis-

lature, having authorized the city council to declare the emission of dense smoke a nuisance, and to provide for its abatement, gave the council specific authority to direct, as one means to that end, the kind of coal that may be used in switch engines. Was this authorization, and an ordinance passed thereunder, if within the limits of the authority, a valid exercise of legislative power?

It is elementary that the legislature cannot prevent a lawful use of property by declaring a certain use to be a nuisance, which is not in fact a nuisance, and prohibiting such use. *Lake View v. Rose Hill Cemetery Co.* 70 Ill. 191, 22 Am. Rep. 71; *Hutton v. Camden*, 39 N. J. L. 122, 23 Am. Rep. 203; *People v. Rosenberg*, 138 N. Y. 410, 34 N. E. 285. On the other hand, it is equally clear that acts or conditions which are detrimental to the comfort and health of the community may be effectively declared nuisances by the legislature, and, in the exercise of that power, specified acts or conditions may be declared a nuisance, although not so determined at common law. And the fact that the use or value of property as existing under the common law is thereby injuriously affected does not necessarily bring such legislative action within any constitutional prohibition. *St. Paul v. Gilfillan*, 36 Minn. 298, 31 N. W. 49; *Com. v. Parks*, 155 Mass. 531, 30 N. E. 174; *Lawton v. Steele*, 119 N. Y. 226, 7 L.R.A. 134, 16 Am. St. Rep. 813, 23 N. E. 878; *State v. Tower*, 185 Mo. 79, 68 L.R.A. 402, 84 S. W. 10. Whether the designation of a particular subject as a nuisance is within the legislative power is a question for judicial determination. *State v. Gerhardt*, 145 Ind. 439, 33 L.R.A. 313, 44 N. E. 469; *Lake View v. Rose Hill Cemetery Co.* 70 Ill. 191, 22 Am. Rep. 71. But the scope of legislative action, when invoked to promote the general welfare, is very great. *Mugler v. Kansas*, 123 U. S. 656, 31 L. ed. 208, 8 Sup. Ct. Rep. 273; *Powell v. Pennsylvania*, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257.

The emission of dense smoke into the atmosphere in populous cities may be declared, by the legislative department, a public nuisance, and prohibited. It is an annoyance, an interference with comfort, is destructive of property, and under some conditions is injurious to health. The right of the legislature to prohibit it is not an open question in this state, or apparently elsewhere. In *St. Paul v. Gilfillan*, 36 Minn. 298, 31 N. W. 49, it is said: "It will not be assumed that the legislature may authorize that to be declared a nuisance which, from the nature of the case, is not

and cannot become such. But the matter prohibited by this ordinance [dense smoke] may become a nuisance, and may therefore be the proper subject for regulation or restraint by the city council, under legislative sanction." And in *St. Paul v. Haugbro*, 93 Minn. 59, 66 L.R.A. 441, 106 Am. St. Rep. 427, 100 N. W. 470, 2 A. & F. Ann. Cas. 580, it is said: "Nor can it be questioned that the legislature could confer upon a municipality the right to prohibit whatever is injurious or detrimental to public health or comfort, and that whatever deprives the residents of urban communities of pure, uncontaminated, inoffensive air is a nuisance." *Moses v. United States*, 16 App. D. C. 428, 50 L.R.A. 532; *Marshall Field & Co. v. Chicago*, 44 Ill. App. 410; *Harmon v. Chicago*, 110 Ill. 400, 51 Am. Rep. 698; *State v. Tower*, 185 Mo. 79, 68 L.R.A. 402, 84 S. W. 10; *Hyatt v. Myers*, 71 N. C. 271; *Ross v. Butler*, 19 N. J. Eq. 294, 97 Am. Dec. 654; *State v. Noyes*, 30 N. H. 279.

That the smoke nuisance is directly contributed to and almost wholly caused by burning soft or bituminous coal is a matter of general knowledge, and is made to appear as a fact in this case. Ordinarily soft coal contains from 32 to 40 per cent of volatile matter. Dense smoke is caused by the volatile matter in the coal being distilled without being burned, and the tendency of coal to produce dense smoke depends on the amount of volatile matter in the coal. "Smokeless coal" is a trade or commercial term applied to a grade of soft coal in which the volatile matter runs from 16 to 21 per cent. The volatile matter in hard coal is a much smaller percentage. The only direction as to the kind of coal that locomotives might burn that would be at all effective in abating the smoke nuisance would be a direction to use coals other than those having the highest percentage of volatile matter. A legislative requirement that locomotives shall burn coal other than the kind that produces the smoke nuisance is directly and substantially related to the prevention of annoyance and discomfort incident to dense smoke. The public policy or wisdom of such a prohibition is for the legislature to determine.

The courts cannot undertake to decide whether the means adopted by the legislature are the only means, or even the best means, possible to attain the end sought. Such course would vest the exercise of the police power of the state in the judicial department. "The power which the legislature has to promote the general welfare is very great, and the discretion which that department of the government has, in the

employment of means to that end, is very large." *Powell v. Pennsylvania*, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257. In *Nelson v. Minneapolis*, — Minn. —, 29 L.R.A.(N.S.) 260, 127 N. W. 445, it is said: "The methods, regulations, and restrictions to be imposed to attain, so far as may be, results consistent with the public welfare, are purely of legislative cognizance. The courts have no power to determine the merits of conflicting theories, nor to declare that a particular method of advancing and protecting the public is superior or likely to insure greater safety or better protection than others. The legislative determination of the methods, restrictions, and regulations is final, except when so arbitrary as to be violative of the constitutional rights of the citizens."

Counsel for defendant urges that careful firing in locomotives will prevent the nuisance. Existing conditions suggest strongly either that such is not the fact, or that careful firing cannot, in general practice, be obtained. Evidence was submitted by the defendant and by the state on this point, and the trial judge found adversely to defendant thereon. This, then, taking the view most favorable to the defendant, is a mooted question as to the best way of preventing a nuisance. Such question clearly is not for the courts to determine. Under such circumstances the legislature, upon consideration of existing conditions, may decide as to the means best adapted to prevent such nuisance, and carry such decision into appropriate legislation. The wisdom or public policy of the decision so made, or of the law passed to carry it out, will not be reviewed by the court. "We regard it as a general rule that the determination by a legislative tribunal of open or debatable questions concerning what is expedient is not subject to review on questions of fact, provided the question is one within the competency of the legislative tribunal to determine." *Pittsburgh, C. C. & St. L. R. Co. v. Hartford City*, 170 Ind. 674, 20 L.R.A.(N.S.) 461, 82 N. E. 787, 85 N. E. 362.

The requirement of the ordinance under consideration directly tends to prevent a nuisance, and is clearly within the legislative discretion, and is valid as an exercise of the police power. "The courts will never set up their judgment against that of the legislature, and hold a police law invalid, unless it is clearly so, as having no reasonable tendency to accomplish the desired end." *State v. Mrozinski*, 59 Minn. 465, 27 L.R.A. 76, 61 N. W. 560. "Where a business is a proper subject of police regulation, doubtless, the legislature may, in the exercise of that power, adopt any

measures they see fit, provided only they adopt such as have some relation to, and have some tendency to accomplish, the desired end; and if the measures adopted have such relation or tendency, the courts will never assume to determine whether they are wise, or the best that might have been adopted." *Rippe v. Becker*, 56 Minn. 100, 22 L.R.A. 857, 57 N. W. 331; *State v. Corbett*, 57 Minn. 345, 24 L.R.A. 498, 4 Inters. Com. Rep. 694, 59 N. W. 317.

The ordinance is not an interference with the property rights of the defendant, or an abridgment of its privileges protected by the Federal and state Constitutions. If the use of soft coal tends directly to cause a nuisance, a prohibition of such use by the legislature is not forbidden by the constitutional provisions referred to. Such being the case, the ordinance is a legitimate exercise of the police power of the state for the promotion of the comfort and welfare of the people, and the defendant cannot complain of the resulting restrictions in the use of its property. Property rights and privileges are subject to reasonable regulations to promote the general welfare, and the defendant holds its property under the implied obligation that its use of it shall not be injurious to the community. The regulation and abatement of nuisances is one of the ordinary functions of the police power of the state. *Northwestern Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 24 L. ed. 1036; *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77; *Mugler v. Kansas*, 123 U. S. 656, 31 L. ed. 208, 8 Sup. Ct. Rep. 273; *Powell v. Pennsylvania*, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257.

It appearing that the legislature had power or authority to pass the enactment contained in this ordinance, there remain for consideration the questions raised by the defendant as to the due exercise of that power in the present ordinance. The ordinance declares the use of soft coal in certain engines a nuisance. This provision of the ordinance does not affect its validity. If the ordinance is a valid exercise of the legislative authority to prohibit the use of soft coal as a means of preventing the nuisance of dense smoke, its validity or purpose is not affected by the declaration that the use of soft coal in such locomotives is a nuisance.

An ordinance passed under general authority to regulate or control a subject may be held unreasonable as not within the purview of the charter authority. This ordinance was passed under express authority from the legislature, and therefore depends, for its validity, on the power of the legislature. The charter empowers the council

to direct, by ordinance, the kind of coal which may be used, and to punish violations of such ordinance. A designation of one kind of coal which may not be used, leaving other kinds open to use, is a designation of the kinds which may be used. The question of whether the passage of this ordinance, with the requirement therein contained as to fuel to be used in certain engines, is a reasonable exercise of the power granted the council, is therefore not involved. Dill. Mun. Corp. §§ 135-328; *St. Paul v. Gilfillan*, 36 Minn. 298, 31 N. W. 49; *State v. Tower*, 185 Mo. 79, 68 L.R.A. 402, 84 S. W. 10; *Landberg v. Chicago*, 237 Ill. 112, 21 L.R.A. (N.S.) 830, 127 Am. St. Rep. 319, 86 N. E. 638; *Walker v. Jameson*, 140 Ind. 591, 28 L.R.A. 679, 683, 49 Am. St. Rep. 222, 37 N. E. 402, 39 N. E. 869. Much of the testimony submitted on the trial, and a number of the authorities cited in the briefs herein, while applicable to the determination of the question whether an ordinance like the one under consideration would be reasonable if enacted under general charter powers, have no application to the question of the authority of the council to enact this ordinance under express power from the legislature.

Dense smoke is not a nuisance *per se*. It only becomes a nuisance when it permeates the air surrounding people, and invades their residences and places of occupation. It is stipulated in this case that the yards of the defendant company and tracks therein extend through a densely populated portion of the city of Minneapolis. The emission of dense smoke by switch and yard engines in such yards in the city of Minneapolis is therefore a nuisance *per se*. The legislature and the council alike are presumed to have acted with full knowledge of existing conditions, and the validity of the ordinance must be tested upon the assumption that yard and switch engines emitting dense smoke do thereby permeate with such smoke the atmosphere in the densely populated portions of the city.

The ordinance, including in its terms locomotives not operating in yards, is to that extent broader than the express provision of the act permitting the council to direct what kind of fuel shall be used in switch and yard engines. If locomotives generally were in the same situation with reference to the smoke nuisance that switch and yard engines are, the prohibition of the ordinance would be effective and valid as to all locomotives, because reasonably and necessarily included in the exercise of the express power conferred by the charter; but such is not the fact. The road

locomotive comes from without the city with fire made, or, if fired up within the city, ordinarily soon goes beyond the city limits. It is at work in the city but a comparatively short time, and on a continuous run. Clearly many considerations of necessity, expediency, and policy are involved in the regulation of the fuel of such locomotives, not involved in such regulation as to switch and yard engines. The legislature evidently distinguished between the two classes of engines, and the recognition of a basis for that distinction by the court leads to the conclusion that the prohibition of the ordinance is invalid as to locomotives other than yard or switch engines, because not within the purview of the general authority granted the council. Locomotives other than switch and yard engines being excluded from the operation of the express power conferred, they should not be held to be within the scope of an implied power. The engine in which soft coal was used resulting in the charged violation of the ordinance was a switch engine, and as to such engine the ordinance is valid and effective. "If a statute or ordinance contains provisions that are invalid, the other portions thereof are valid if they are not dependent on the part which is void." *State v. Stone*, 96 Minn. 482, 105 N. W. 187.

The second objection of appellant, that the city could not prohibit the use of soft coal, even though it had the power to regulate it, is involved in the first objection considered. The means adopted to prevent a nuisance are primarily for the legislature. Nor is it difficult to account for or justify the choice of means in this case. In the effective exercise of the police power, the aim is, not to punish the maintenance of nuisances, but to prevent their creation. Legislation, in the exercise of the police power of the state, contains many prohibitions as to locations of plants, manufacture and sale of articles, and carrying on of industries, justified not because the resulting conditions without such prohibitions would always or necessarily in each instance affect injuriously public welfare. The difficulty of enforcing a direct prohibition against the emission of dense smoke by switch engines is apparent. Moving about, as they do, it would be often impossible to determine to what company an engine which was excessively smoking belonged, or what individual was in charge of it.

It is further urged that the ordinance is invalid because it is class legislation, and this because it is invalid as to, and hence does not include, road engines, and it does not apply to stationary engines. It has

already been suggested that if there were in fact no basis for a distinction in respect to smoke prevention between road engines and switch engines, then the ordinance would be valid as to road engines; but there is a distinction between such engines, both as to the condition sought to be corrected, and as to the necessity, expediency, and policy of the application of a particular means for correcting such condition.

There would seem to be, also, ample grounds for a distinction between locomotives and stationary plants as to the means best adapted to prevent the smoke nuisance. As stated, the ordinance of the city dealing with stationary plants regulates the construction of chimneys and flues, and through the approval of plans the location, arrangement, and construction of furnaces and boilers, and prohibits the emission of dense smoke. In the case of switch engines, supervision of the construction is not attempted; but the protection of the community from dense smoke is sought by direction as to the kind of fuel to be used. The necessary limitations in the construction of locomotives, the fire box with a water jacket, the frequent hand firing, the forced draft and quickly varying conditions of work, the fact that steam is mingled with the smoke, and that unconsumed gases are discharged near the ground, instead of at considerable elevation, the fact that the engines are moving, and cannot be subjected to effective supervision, are in marked contrast with the conditions related to the making of dense smoke present in stationary plants. In stationary plants the most favorable conditions for complete combustion can be obtained. The fire box may be completely lined with brick, room is available for automatic firing mechanism, the down draft may be used, in fact all the adverse conditions referred to, necessarily present in a locomotive because of the work it is called upon to do, may be and are wholly eliminated in the case of stationary plants; and because the operator of a stationary plant can always be located and identified, as to him the prohibition of the emission of dense smoke may be made a sufficient and effective regulation. The ordinances of Minneapolis do not permit the emission of dense smoke by either stationary or yard engines, but for obvious reasons they prescribe different means for preventing, in the different plants, the creation of the nuisance. It is perhaps unnecessary to suggest that proof that some stationary plants cause dense smoke does not establish a basis for a necessary common classification of stationary plants with locomotives causing smoke; neither does it disprove that stationary

plants can, and that many in actual operation do, continuously burn soft coal without causing any appreciable smoke.

The application of a smoke prevention statute to one of these classes of engines, and not to the other, even where the law wholly exempts one class from the prohibition as to causing dense smoke, has been frequently passed upon and sustained by other courts. In *Moses v. United States*, 16 App. D. C. 428, 50 L.R.A. 532, an act of Congress was considered which prohibited the emission of dense smoke from smokestacks and chimneys other than those connected with private houses and locomotives. The classification was held not to be arbitrary. In *State v. Tower*, 185 Mo. 79, 68 L.R.A. 402, 84 S. W. 10, an act of the legislature making the emission of dense smoke a nuisance, which omitted from its operation locomotive engines and steamboats, and applied only to cities having a population of over 100,000, was held not objectionable as class legislation. In *People v. Lewis*, 86 Mich. 273, 49 N. W. 140, a similar ordinance, exempting dwellings and steamboats from its operation, was held not to make an arbitrary classification, but one resting upon reasons of public policy, growing out of the conditions surrounding the business of the different classes. In *Brooklyn v. Nassau Electric R. Co.* 44 App. Div. 462, 61 N. Y. Supp. 33, an ordinance providing that "no factory, engine room, or electrical station shall use what is known as soft coal for fuel in the furnaces of such factory, engine room, or electrical stations, within a radius of 4 miles of the city hall in the city of Brooklyn, except for the purpose of heating or welding iron or steel," was held valid against the objection that it was partial legislation.

Where there is a substantial difference in the condition or situation of individuals or objects with reference to the subject embraced in the law, an appropriate limitation based on such difference in the application of the law is not partial legislation. Legislation designed to prevent a smoke nuisance, to be equal and uniform, need not apply alike to "all soft coal users," without regard to the widely different conditions, related to the resulting smoke, surrounding such use by different users. The proper basis of the classification adopted by the legislature is the relationship of burning soft coal in the different kinds of plants, to the smoke nuisance. In *State ex rel. McCue v. Ramsey County*, 48 Minn. 236, 31 Am. St. Rep. 650, 51 N. W. 112, an ordinance relating to the smoke nuisance was held invalid, because it based a classification on the different

uses made of the power generated, without regard to the situation or conditions of the furnaces, with reference to smoke, generating such power, and the rule is stated that a law, to be general and uniform, must operate equally upon all the subjects within the class for which the rule is adopted, and the limits of such class must not be determined arbitrarily, but the classification must be based on some reason suggested by such a difference in the situation and circumstances of the subjects placed in the different classes as to disclose the necessity or propriety of different legislation in respect to them. In *State ex rel. Richards v. Hammer*, 42 N. J. L. 435, it is stated: "The characteristics which thus serve as the basis of classification must be of such a nature as to mark the objects so designated as peculiarly requiring exclusive legislation. There must be substantial distinction, having a reference to the subject-matter of the proposed legislation, between the objects or places embraced in such legislation and the objects or places excluded. The marks of distinction on which the classification is founded must be such, in the nature of things, as will, in some reasonable degree at least, account for or justify the restriction of the legislation."

The classification in the present case falls clearly within the rule thus well stated. Where there is a distinction related to the subject-matter of the law justifying a classification, the court cannot substitute its judgment for that of the legislature as to the wisdom or policy of the application to certain objects or individuals of the particular law based on such distinction. In the case of *State ex rel. Douglas v. Westfall*, 85 Minn. 437, 57 L.R.A. 297, 89 Am. St. Rep. 571, 89 N. W. 175, Chief Justice Start gave expression to this principle as follows: "Courts ought never to be unmindful of the fact that the lawmaking power is vested in the legislature. Therefore, if there be any facts fairly calling for the exercise of legislative discretion in the classification of particular subdivisions of the state for the purposes of legislation, courts cannot review such discretion, and declare statutes making such classifications invalid, simply because they differ with the legislature as to the propriety of the classification. It is only when the classification is so manifestly arbitrary as to evince a legislative purpose of evading the provisions of the Constitution that the courts may and must declare the classification unconstitutional. In considering the constitutionality of a statute, courts will take judicial notice of all facts relevant to the question."

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The final objection urged against this ordinance, that it is unreasonable and would deprive the defendant of his property without due process of law, because sufficient time was not given before the ordinance went into effect to enable the defendant to comply with it, does not seem sustained by anything appearing in the record of the case. So far as the record discloses, the only change the defendant company would be required to make in order to comply with the ordinance would be to use in its engines the grade of coal known as "smokeless coal." It does appear that some reconstruction of the fire boxes of engines would be necessary before hard coal could be burned therein successfully. By the ordinance the fuel directed to be used in switch engines is not limited to hard coal. It may very well be that an ordinance which did, in fact, require changes to be made in the appliances necessarily used by a transportation company, without giving a reasonable time to make such changes before the ordinance went into effect, would be an unlawful interference with property rights, but such case is not presented by the facts here.

The further ground assigned for the unreasonableness of the ordinance, that the supply of hard coal is nearly exhausted, likewise finds no support in fact, either as disclosed by the record in this case or within common knowledge.

The ordinance, and the judgment against the defendant for violation of the same, appearing to be valid, the judgment is affirmed.

IOWA SUPREME COURT.

HENRY LOXTERKAMP

v.

LININGER IMPLEMENT COMPANY,
Appt.

(147 Iowa, 29, 125 N. W. 830.)

Sale — jobber — farm implements — implied warranty.

1. A provision in a contract of sale by a jobber of farm implements that all goods are subject to the warranties published in factory catalogues does not supersede the implied warranty on his part that the im-

Note. — Sale: does express warranty as to quality exclude implied warranty as to quality.

I. General rule, 502.

II. Application of rule.

a. In general, 503.

b. Warranty of slaves, 504.

c. Warranty of animals, 504.

d. Grain, provisions, etc., 505.

e. Fertilizer, 505.

plement will perform the work for which it is intended.

Same — delay in testing — waiver of defects.

2. A retail merchant who purchases from a jobber with an implied warranty a farm implement for resale does not, by failing to make a test of its efficiency until it is sold and tested by a customer, waive his right to recover on the warranty because of concealed or latent defects which prevent the machine from doing the work for which it is intended.

Damages — breach of warranty — farm implement — loss of sale.

3. That plaintiff in an action for damages for breach of warranty of a machine purchased for resale alleges loss of a sale does not confine his right to recover to the question of his diligence with respect to

such sale, if he also alleges that the machine was wholly unsalable, useless, and without value.

(April 9, 1910.)

APPPEAL by defendant from a judgment of the District Court for Carroll County in plaintiff's favor in an action brought to recover damages for breach of an alleged implied warranty of a manure spreader. Affirmed.

The facts are stated in the opinion.

Messrs. B. I. Salinger and L. H. Salinger, for appellant:

There can be no recovery for breach of a warranty that a specific chattel is merchantable, if the buyer had an opportunity to inspect.

II.—continued.

f. Machinery, etc.

1. Implied warranty of fitness or suitability, 506.

2. Power, size, speed, quality, etc., 507.

g. Miscellaneous, 507.

III. Exceptions to rule.

a. Where article to be manufactured, 508.

b. Where article sold for retail purposes, 510.

c. Where implied warranty relates to distinct, independent matter, 511.

d. Where express warranty superadded for benefit of buyer, 512.

e. Where contract contains special provisions affecting warranty.

1. Where application of express warranty is conditioned upon performance by buyer, 512.

2. Where contract provides against any other obligation than that expressly assumed, 512.

Scope.

This note is limited to cases considering the question as to whether an express warranty excludes an implied warranty of the same general nature or relating to the same subject; hence, cases which discuss or consider the question as to whether an express warranty as to quality will exclude an implied warranty of title, or other similar questions, are not included herein. So also is excluded the question whether there is an implied warranty of quality or suitability, fitness, etc., where the contract of sale contains specific warranties, or relates to a known, described, and defined article.

As to whether a sale by sample excludes an implied warranty other than that the goods shall conform to sample, see *Remy v. Healy*, 29 L.R.A.(N.S.) 139, and note there-to.

As to whether words in an executory contract from which the law implies a war-

anty as to quality can be relied on as an express warranty, see *Heath Dry Gas Co. v. Hurd*, 25 L.R.A.(N.S.) 160, and note.

As to implied warranty by manufacturer or vendor of machinery or apparatus not in itself defective, of fitness for use under existing conditions, see note in 6 L.R.A.(N.S.) 180.

As to implied warranty of fitness of particular article purchased from a manufacturer or producer for a particular use, see note in 15 L.R.A.(N.S.) 855.

As to implied warranty of fitness of a particular article purchased from a dealer for a particular use, see note in 15 L.R.A.(N.S.) 868.

As to implied warranty of fitness upon sale of food, see 15 L.R.A.(N.S.) 884.

I. General rule.

It has frequently been stated as a general rule, that an express warranty in a contract for the sale of an article excludes the idea of an implied warranty. *Thomas v. Thomas*, 146 Ala. 533, 41 So. 141; *White v. Gresham*, 52 Ill. App. 399; *Thieler v. Hopkins*, 85 Ill. App. 207; *Nave v. Gross*, 148 Ill. App. 104; *Conant v. National State Bank*, 121 Ind. 323, 22 N. E. 250; *Reeves & Co. v. Byers*, 155 Ind. 535, 58 N. E. 713; *Sullivan Machinery Co. v. Breeden*, 40 Ind. App. 631, 82 N. E. 107; *Guhy v. Nichols & S. Co.* 33 Ky. L. Rep. 237, 109 S. W. 1190; *Stucky v. Clyburn*, *Cheves*, L. 186, 34 Am. Dec. 590; *Lanier v. Auld*, 5 N. C. (1 Murph.) 138, 3 Am. Dec. 680; *J. I. Case Threshing Mach. Co. v. Paul*, 32 Tex. Civ. App. 214, 73 S. W. 835; *Dwight Bros. Paper Co. v. Western Paper Co.* 114 Wis. 414, 90 N. W. 444; *Northern Supply Co. v. Wangard*, 117 Wis. 624, 98 Am. St. Rep. 963, 94 N. W. 785; *Budd v. Fairman*, 8 Bing. 48, 1 Moore & S. 74, 5 Car. & P. 78, 1 L. J. C. P. N. S. 16.

Of the foregoing cases it may be said that, with the exception of *Lanier v. Auld*, which holds that an express warranty of soundness excludes an implied warranty of title, the doctrine was not applied as broadly as stated. While the doctrine was asserted in general terms, it was not

Alpha Checkrower Co. v. Bradley, 105 Iowa, 546, 75 N. W. 369.

An implied warranty is merged in and superseded by an express warranty.

Ibid; Bucy v. Pitts Agri. Works, 89 Iowa, 464, 56 N. W. 541; Ideal Heating Co. v. Kramer, 127 Iowa, 140, 102 N. W. 840.

Messrs. Lee & Robb, for appellee:

Warranty on chattels purchased for resale is not waived or defeated by failure to inspect after purchase and before resale.

Haltiwanger v. Tanner, 103 Ga. 314, 29 S. E. 965; 2 Mechem, Sales, 1901 ed., § 1814.

There can be no warranty except between the parties to a contract, and if the express warranty relied on was not bind-

ing on the seller, there was no express warranty whatever.

2 Mechem, Sales, 1901 ed., §§ 1222-1224, 1247; Hexter v. Bast, 125 Pa. 52, 11 Am. St. Rep. 874, 17 Atl. 252; Summers v. Vaughan, 35 Ind. 323, 9 Am. Rep. 741; Towell v. Gatewood, 3 Ill. 22, 33 Am. Dec. 437; Cady v. Walker, 62 Mich. 157, 4 Am. St. Rep. 834, 28 N. W. 805.

If there was no express warranty, the purchaser has an implied warranty upon which he may recover.

Alpha Checkrower Co. v. Bradley, 105 Iowa, 547, 75 N. W. 369; Blackmore v. Fairbanks, M. & Co. 79 Iowa, 282, 44 N. W. 548; Parsons Band Cutter & Self Feeder Co. v. Mallinger, 122 Iowa, 707, 98 N. W. 580.

specifically applied, or, if applied, it was where the implied warranty sought to be relied upon related to the same matter as the express warranty, and would ordinarily merge therein. While these cases do not admit any exception to the general rule therein stated, they do not, on the other hand, deny that there are exceptions thereto.

In Kullman, S. & Co. v. Sugar Apparatus Mfg. Co. 153 Cal. 725, 96 Pac. 369, the general doctrine is asserted that implied warranties merge in a contract when reduced to writing. The doctrine, however, was stated with reference to implied warranties relative to the working qualities of machinery, where the contract for the sale of the machinery was reduced to writing, and it contained warranties with reference to the working qualities of the machinery.

The doctrine is also asserted in Gaar, S. & Co. v. Hodges, 28 Ky. L. Rep. 889, 90 S. W. 580, that there can be no implied warranty if there is an express one. In this case, however, there was an express warranty in the sale of a separator and stacker, to the effect that each article of machinery furnished is warranted to be made of good material, well constructed, and with proper use and management will do as good work as any other of the same size and capacity, followed by the proviso that if any part of the machinery cannot be made to fill the warranty, that part which fails shall be immediately returned by the undersigned to the place where it was received, and written notice of such return given to the company at its home office, with the option of the company either to furnish another machine or parts in place of the machine or parts so returned, or return the money, etc.

In other jurisdictions it has apparently been recognized that an implied warranty may exist although the contract of sale contains an express warranty, if the express warranty refers to a different subject, or is of a different nature than the implied warranty, although the rule is also asserted that an express warranty excludes an

implied warranty relating to the same subject, or of the same general nature. DeWitt v. Berry, 134 U. S. 306, 33 L. ed. 806, 10 Sup. Ct. Rep. 536; Reynolds v. General Electric Co. 73 C. C. A. 23, 141 Fed. 551; Wilcox v. Owens, 64 Ga. 601; Johnson v. Latimer, 71 Ga. 470; Malsby v. Young, 104 Ga. 205, 30 S. E. 854; Holcomb v. Cable Co. 119 Ga. 466, 46 S. E. 671; Moultrie Repair Co. v. Hill, 120 Ga. 730, 48 S. E. 143; Springer v. Indianapolis Brewing Co. 126 Ga. 321, 55 S. E. 53; International Harvester Co. v. Dillon, 126 Ga. 672, 55 S. E. 1034; DeLoach Mill Mfg. Co. v. Tutweiler Coal, Coke & Iron Co. 2 Ga. App. 493, 58 S. E. 790; Stimpson Computing Scale Co. v. Taylor, 4 Ga. App. 567, 61 S. E. 1131; Yancey v. Warner Elevator Mfg. Co. 6 Ga. App. 125, 64 S. E. 63; Pidcock v. Crouch, 7 Ga. App. 299, 66 S. E. 971; Pidcock v. Merchants' Nat. Bank, 7 Ga. App. 303, 66 S. E. 973; Forest City Ins. Co. v. Morgan, 22 Ill. App. 198; Lombard Water-Wheel Governor Co. v. Great Northern Paper Co. 101 Me. 114, 6 L.R.A. (N.S.) 180, 63 Atl. 555; McGraw v. Fletcher, 35 Mich. 104, 15 Mor. Min. Rep. 98; Monroe v. Hickox, M. & H. Co. 144 Mich. 30, 107 N. W. 719; International Harvester Co. v. Smith, 105 Va. 683, 54 S. E. 859; J. I. Case Plow Works v. Niles & S. Co. 90 Wis. 590, 63 N. W. 1013; Dickson v. Zizinia, 10 C. B. 602, 20 L. J. C. P. N. S. 72; Chanter v. Hopkins, 4 Mees. & W. 399, 1 Horn & H. 377, 8 L. J. Exch. N. S. 14, 3 Jur. 58.

In Budd v. Fairman, 8 Bing. 48, 1 Moore & S. 74, 5 Car. & P. 78, 1 L. J. C. P. N. S. 16, the rule is stated that where there is an express warranty as to any single point, the law does not beyond that raise an implied warranty that the commodity sold shall be also merchantable.

II. Application of rule.

a. In general.

Even if it is conceded that there are exceptions to the general rule that an express warranty will exclude an implied warranty relating to the same general subject, it is frequently a matter of some

Where the facts are conceded, or the statement is in writing, the question whether or not it constitutes a warranty is for the court.

2 Mecham, Sales, 1901 ed. § 1244

Weaver, J., delivered the opinion of the court:

At the date of the transaction under inquiry, the plaintiff was a retail dealer in farm implements at Carroll, Iowa, and the defendant a wholesale dealer at Omaha, Nebraska, in like merchandise, including the Kemp manure spreader, manufactured by a concern known as the Richardson Manufacturing Company at Worcester, Massachusetts. Plaintiff gave defendant a written or printed order for a Kemp

spreader, in which the only reference to a warranty or representation of quality is in the following words: "We agree to receive the following mentioned below and settle for the same on arrival by notes due as per terms marked below. . . . All goods subject to the warranties published in factory's catalogue and circulars." There is evidence to the effect that the Richardson Manufacturing Company in its advertising literature described the virtues and the triumphs of the Kemp spreader in the following terms: "The Worcester Kemp manure spreader has had nearly thirty years of this field experience. Every part has been demonstrated in actual field work; it is strong, simple, and mechanically right. It does its work with a cer-

difficulty to determine whether, in a given case, the express warranty is of such a character as will raise the conclusive presumption that it was the only warranty intended to be assumed by the seller, and the only one relied upon by the buyer. The following cases, arranged according to the character of the article to which the warranty relates, may be found of some value as illustrative of the application of the general rule already considered.

In this connection, however, it may be said that the weight to be attached to decisions holding that an express warranty excludes implied warranties relating to the same matter depends to a great extent upon the nature of the warranty, its application to the article to which it relates, and the use to which it is intended to put such article, if known to the seller. Thus, a case holding that an express warranty of the quality of an article excludes all implied warranties on the same subject, when the facts present a case calling for the application of this general rule, is entitled to but little, if any, weight in determining the question when presented with reference to a case in which an implied warranty was relied upon which related to an entirely distinct matter of quality than did the express warranty. As, for instance, an express warranty that grain was of good quality might ordinarily exclude an implied warranty of quality, yet such a warranty, if made with reference to grain for seed, would not exclude an implied warranty that such grain was free from noxious seeds. (See *Bell v. Mills*, *infra*, II. d.) So, while an express warranty of the quality of fruit would ordinarily exclude implied warranties as to quality, yet an express warranty of the quality of fruit sold for shipment to a distant point would not exclude an implied warranty that the fruit was fit for such shipment (see *Alvin Fruit & Truck Asso. v. Hartman*, *infra*).

Likewise, if it be conceded that general express warranties of the quality of a machine or of machinery will exclude implied warranties of quality, it does not follow that this rule would be applicable where

the machine or machinery was sold for a particular purpose or manufactured for a particular purpose. So, the application of the general rule to a case involving specific express warranties as to the size, power, or ease of operation of a machine or machinery, to the effect that such special warranties excluded implied warranties of quality or fitness or suitability for the use intended, would not be inconsistent with a denial of the operation of the general rule where the warranties relating to the quality of a machine or machinery were general in character, and the implied warranties relied upon were special, as, for instance, the suitability or fitness of the article for a particular purpose, or the manner of operation. In such a case it is doubtful if any court would apply the general rule and hold that general express warranties of quality excluded such special implied warranties. See *infra*, II. f, III. a, b, c.

b. Warranty of slaves.

A warranty that a negro is sound in body and mind precludes the implication that anything else is intended to be warranted. *Stucky v. Clyburn, Cheves*, L. 186, 34 Am. Dec. 590.

In *M'Laughlin v. Horton*, 1 Hill, L. 383, in holding that a special warranty that a negro is sound and healthy excludes the general implied warranty of soundness said that the general rule is that, when arising from the price paid, the court contract is reduced to writing, parol evidence is inadmissible to show that anything else is intended than what is expressed; and *Wells v. Spears*, 1 M'Cord, L. 421, which held that a bill of sale warranting property in a negro did not exclude an implied warranty of soundness, was distinguished on the ground that there the soundness of the negro did not enter into the written contract at all, but here the soundness of the negro was the subject of express warranty.

c. Warranty of animals.

An express warranty as to the character

tainty that is not disturbed by any possible local conditions. The Worcester Kemp is well built in every detail. Every particle of material has its office to perform, and forms its part of the magnificent whole." The machine was shipped to plaintiff, who, after having it in store for a time, made a tentative sale thereof to one Schwaller for use on a farm. On being tested by Schwaller, it proved to be incapable of doing good work, and was returned to the plaintiff, who, after unsuccessful appeals, first to the defendant and later to the Richardson Company, to remedy the defects, brought this action for damages, declaring both upon a breach of a written warranty and a breach of an implied warranty of fitness. The defendant answered,

admitting the sale of the machine to plaintiff, but denying that it gave the plaintiff any warranty, express or implied, concerning said machine, and alleging that "whatever warranties, express or implied, were made, if any were made, were not those of the defendant, but of the makers of the machine in controversy;" and it further avers that, if any implied warranty did or could have arisen from the sale to plaintiff, yet, as it is conceded that such sale was made to him for the purpose of resale, and as he had the machine in his possession for a period reasonably sufficient to enable him to inspect it and ascertain its quality before selling to Schwaller, the office of such warranty had been accomplished, and no ac-

and qualities of oxen will preclude an implied warranty as to their fitness for the purpose for which they were purchased. *Deming v. Foster*, 42 N. H. 165.

An express warranty as to the pedigree and procreative qualities of a stallion excludes implied warranties on the same subject. *Pidcock v. Crouch*, 7 Ga. App. 299, 6 S. E. 971; *Pidcock v. Merchants' Nat. Bank*, 7 Ga. App. 303, 66 S. E. 973.

An express warranty in the sale of a jack, that, if the animal proves barren, the purchaser may return him, and the seller will furnish him with another good jack, is an express warranty which will exclude an implied warranty as to the same qualities of the jack. *Thisler v. Hopkins*, 85 Ill. App. 207.

To the same effect as to warranties in the sale of a stallion is *Nave v. Gross*, 146 Ill. App. 104.

d. Grain, provisions, etc.,

The court will not insert in a contract an implied warranty that corn is fit for a foreign voyage, where the contract contains an express warranty that the corn is in good, merchantable condition. *Dickson v. Zisnia*, 10 C. B. 602, 20 L. J. C. P. N. S. 72.

An express guaranty that stores and provisions for a foreign voyage shall in quality be such as to pass survey of the officers of the East India Company does not exclude the warranty implied by law in such a contract, that the provisions and stores shall reasonably be fit for the purpose of being used in the way in which the provisions are meant to be used. *Biggs v. Parkinson*, 8 Jur. N. S. 1014, 7 Hurlst. & N. 955, 31 L. J. Exch. N. S. 301, 7 L. T. N. S. 92, 10 Week. Rep. 349. The foregoing case is based upon the doctrine that an express warranty does not exclude an implied warranty where it is superadded for the benefit of the buyer. See this subject *infra*.

An express warranty as to the quality of beer excludes an implied warranty with reference thereto. *Springer v. Indianapolis Brewing Co.* 126 Ga. 321, 55 S. E. 53.
33 L.R.A. (N.S.)

An express warranty that certain merchandise called "flocks" contained no cotton excludes the supposition of an implied warranty that such merchandise was reasonably fit for the purpose for which it was intended to be used. *Prentice v. Dike*, 6 Duer, 220.

Although a contract for the sale of seed oats contains an express warranty that the oats are in good condition, choice stock, and well cleaned, nevertheless such warranty does not exclude an implied warranty that the oats are free from noxious seeds, such as mustard seed. *Bell v. Mills*, 78 App. Div. 42, 80 N. Y. Supp. 34.

e. Fertilizer.

An express guaranty that fertilizer contains certain ingredients excludes an implied warranty that it is fit for the purpose for which it was purchased. *G. Ober & Sons Co. v. Blalock*, 40 S. C. 31, 18 S. E. 264.

Jackson v. Langston, 61 Ga. 392, holds in the sale of fertilizer that the implied warranty of the Code does not operate where the parties by their contract have expressly agreed upon a different warranty, whether it be more or less extensive. It is said, however, that while an express warranty of quality will exclude implied warranties of quality, yet an express warranty of quality will not exclude the implied warranty of title.

This case is distinguished in *Wilcox v. Owens*, 64 Ga. 601, which holds that a guaranty in the sale of fertilizer that the article comes up to a certain analysis does not expressly include, and hence does not exclude, the statutory warranty that it is merchantable and reasonably suited to the use intended, to wit, manuring land and increasing the crop, and it is said that this case differs from *Jackson v. Langston*, *supra*, because, in the latter case, by the terms of the warranty the fertilizer was guaranteed only as to the analysis of the state inspector, as evidenced by his brand on each and every package. The court said that this warranty was utterly inconsistent

tion would thereafter lie against defendant for its breach.

At the close of the testimony, the trial court withdrew from the jury the issue upon the alleged express warranty, but submitted the case for a verdict upon the alleged breach of an implied warranty. On this question it instructed the jury in substance that if the machine was ordered for the purpose of resale, and at the time of such order plaintiff had no opportunity to inspect and ascertain the quality of such spreader, the law would imply a warranty that it was reasonably fit for the purpose for which it was designed, and was in a merchantable condition; and that if, on a reasonable trial, it proved to be materially defective in the respects named, plaintiff

was entitled to recover his damages so sustained. The jury found for the plaintiff.

Stated in brief terms, the position of appellant is that, under the circumstances of this case, there was no implied warranty in the sale of the machine; or, if such implication did arise, it was fully satisfied and discharged when plaintiff had held it in possession a sufficient time for inspection of its quality and character before making a resale. Was there an implied warranty? We do not understand counsel to deny the proposition that, generally speaking, in an executory contract for sale of personal property when the thing sold is not present for inspection and delivery, or where a dealer undertakes to furnish an article to fill the order of one who buys for resale

with any other warranty of its commercial value of fitness for the use intended.

f. Machinery, etc.

1. Implied warranty of fitness or suitability.

In *Cuhy v. Nichols & S. Co.* 33 Ky. L. Rep. 237, 109 S. W. 1190, the rule is stated generally that where there is an express warranty in the sale of machinery (engine and separator), there is no implied warranty. In this case, the contract contained a provision that the machinery was sold subject "to the following express warranty and agreement, and none other." The effect of this provision, however, was apparently not considered.

In *McGraw v. Fletcher*, 35 Mich. 104, 15 Mor. Min. Rep. 98, the rule is stated that if there is an express warranty as to the working qualities of machinery, there is no implication that the machinery is fit for the purpose for which it was purchased.

In *Reeves & Co. v. Byers*, 155 Ind. 535, 58 N. E. 713, the court said that while it is true that when a machine or other article is sold for a particular purpose there is an implied warranty that it is reasonably fit for the purpose for which it was made and sold, yet this rule does not apply where there is an express warranty in writing, since, in such case, implied warranties are excluded.

For language to similar effect, see also *Shirk v. Mitchell*, 137 Ind. 185, 36 N. E. 850; *Sullivan Machinery Co. v. Breeden*, 40 Ind. App. 631, 82 N. E. 107.

In *Conant v. National State Bank*, 121 Ind. 323, 22 N. E. 250, the doctrine is asserted that a manufacturer of machinery, selling it to a person who he knows buys it for a special purpose, with the intention of putting it to a particular use, as a general rule, and in the absence of an express warranty, impliedly warrants that the machinery is reasonably fit for that purpose, and reasonably suited to that use; but the doctrine is also asserted that where the writing contains an express warranty, implied ones are excluded. It is 33 L.R.A. (N.S.)

not clear, however, that the court, in asserting this latter doctrine, intended it as a limitation upon the doctrine subsequently asserted as to articles manufactured for a particular purpose.

In Georgia the doctrine is asserted that it is only in the absence of an express warranty as to the working qualities of a machine that resort can be had to an implied warranty that the machine is reasonably suited to the use intended. *Johnson v. Latimer*, 71 Ga. 470; *Malsby v. Young*, 104 Ga. 205, 30 S. E. 854; *Moultrie Repair Co. v. Hill*, 120 Ga. 730, 48 S. E. 143. Compare with *Hawley Down Draft Furnace Co. v. Van Winkle Gin & Mach. Works*, 4 Ga. App. 85, 60 S. E. 1008 (analyzed *infra*, III. c.).

Where a manufacturer furnishes a heating apparatus designed for heating a specific building, he impliedly warrants the sufficiency of the apparatus for the purpose intended. This implied warranty, however, cannot be availed of if the apparatus is sold upon an express warranty as to the temperature to which it will heat the rooms which it is designed to heat. *White v. Gresham*, 52 Ill. App. 399.

The existence of an implied warranty that an automatic governor should be suitable for the purposes of the buyer's plant is negated by the fact that the contract of purchase contained an express warranty of quality and also as to speed, and the governors were such as the seller in the ordinary course of his business manufactured for the general market, the general rule being that where an express warranty is made upon a sale, no other will be implied. *Lombard Water-wheel Governor Co. v. Great Northern Paper Co.* 101 Me. 114, 6 L.R.A. (N.S.) 180, 63 Atl. 555.

An express warranty that a concrete mixing machine could be operated by hand by two men, that it would discharge concrete in half-yard batches, and that it would work to the entire satisfaction of the purchaser, precludes an implied warranty that the machine was reasonably fit and suitable for the purpose for which it was

or for any other known or specified use, a warranty is implied that it is of merchantable quality; and this is ordinarily held to mean or include an assurance that such article (if a product or manufacture) is well made, of good material, and reasonably well fitted for the uses for which it is constructed or furnished. *Davis v. Sweeney*, 75 Iowa, 45, 39 N. W. 1174; *Russell v. Critchfield*, 75 Iowa, 69, 39 N. W. 186; *Blackmore v. Fairbanks, M. & Co.* 79 Iowa, 282, 44 N. W. 548; *Alpha Checkrower Co. v. Bradley*, 105 Iowa, 537, 75 N. W. 369; *Parsons Band Cutter & Self Feeder Co. v. Mallinger*, 122 Iowa, 703, 98 N. W. 580; *First Nat. Bank v. Dutcher*, 128 Iowa, 413, 1 L.R.A.(N.S.) 142, 104 N. W. 497. In some states the rule may be somewhat

narrower than is here stated, but it is too well settled in our own jurisdiction to admit of question. It is argued, however, that the terms of the written order are such as to exclude any implication of warranty. This position is grounded on the clause, "all goods subject to the warranties contained in the factory's catalogues and circulars." It is said, in substance, that here is an express written warranty which includes all the terms and liabilities which in any case could arise from an implied warranty, and therefore, under the rule of *Bucy v. Pitts Agri. Works*, 89 Iowa, 464, 56 N. W. 541, the implied warranty must be considered as merged in the writing, and the latter be taken as expressing the entire agreement. At the same time it is stren-

intended and was purchased. *John Turl's Sons v. Williams Engineering & Contracting Co.* 136 App. Div. 710, 121 N. Y. Supp. 478.

So, an express warranty of workmanship and material of cream separators excludes an implied warranty of fitness. *La Crosse Plow Co. v. Helgeson*, 127 Wis. 622, 106 N. W. 1094.

Compare the doctrine of the foregoing cases with *Aultman v. Hunter*, 82 Mo. App. 632, which holds that an agreement to make a harvester and binder bind and do good work generally does not exclude an implied warranty that the binder is reasonably fit for the purpose intended. As to the theory of this decision, see *infra*, III. c. "where implied warranty relates to distinct and independent matter."

See also, to same effect, under the same heading, *Bucy v. Pitts Agri. Works*, 89 Iowa, 464, 56 N. W. 541, and *Hawley Down Draft Furnace Co. v. Van Winkle Gin & Mach. Works*, 4 Ga. App. 85, 60 S. E. 1008.

In *International Pav. Co. v. Smith, B. & R. Mach. Co.* 17 Mo. App. 264, the court conceded that there might be an implied warranty wholly independent of anything contemplated in the express warranty, if sustained by virtue of its own distinctive force. This exception, however, was held not to apply to an implied warranty which in itself formed an integral element of the express warranty, into which it merged and by which its effect was circumscribed. The express warranty in this case was that a boiler should stand a certain hydrostatic pressure to the square inch; the implied warranty insisted upon was that the article should be reasonably fit for the purpose intended, it being claimed that the boilers were so thin that it was impossible to use them.

2. Power, size, speed, quality, etc.

There is no implied warranty that engines and boilers will generate sufficient power successfully to work a plant in all its departments, and also furnish the neces-

sary amount of steam to cook paper manufactured therein, where the contract of sale describes the kind, amount, and size of machinery to be furnished, and contains certain express warranties with respect to the capacity of the machinery. *Buckstaff v. Russell*, 25 C. C. A. 129, 49 U. S. App. 253, 79 Fed. 611, rehearing denied in 169 U. S. 737, 42 L. ed. 1216, 18 Sup. Ct. Rep. 940.

An express warranty of the size of a pump raises a conclusive presumption that other qualities requisite to its fitness for general use were not warranted, since an express warranty of one of the qualities of an article excludes any implied warranty of other qualities of a similar nature. *Reynolds v. General Electric Co.* 73 C. C. A. 23, 141 Fed. 551.

An express warranty of the working qualities of an elevator excludes an implied warranty as to the rate of speed. *Yancey v. Warner Elevator Mfg. Co.* 6 Ga. App. 125, 64 S. E. 663.

An express warranty that scales shall be accurate in weight and computation excludes an implied warranty with reference to the same matter. *Stimpson Computing Scale Co. v. Taylor*, 4 Ga. App. 567, 61 S. E. 1131.

A written warranty in the sale of grain drills, warranting them against breakage caused by manifest defects in material, etc., excludes all implied warranties of quality. *Dowagiac Mfg. Co. v. Mahon*, 13 N. D. 516, 101 N. W. 903.

g. Miscellaneous.

An express warranty as to the strength and quality of paper excludes an implied warranty that the paper is fit for a particular use. The idea that any additional warranty is expected or intended is repelled by the fact that the parties have chosen to make their own warranty on the subject in express terms. *Dwight Bros. Paper Co. v. Western Paper Co.* 114 Wis. 414, 90 N. W. 444.

Where in the sale of cans to a canning factory, to be used for canning purposes,

uously insisted that the written warranty, so called, is not the agreement, representation, or warranty of the defendant, but of the "factory" which made the machine which was in no manner a party to the contract of sale in controversy, and is not a party to this action. This defense appears to us to be untenable. To give the clause referred to any reasonable construction or effect as an express warranty by any person would require us to say that the appellant thereby adopted as its own warranty the representations, if any, found in the publications of the manufacturer. It could not reasonably be said that the appellee was buying upon a warranty to him by the Richardson Manufacturing Company, for that company was a stranger to the

transaction. If there be any warranty expressed in the writing, it must be that of the appellant, who alone was filling the order. But defendant denies that the language constituted an express warranty on its part, and, having succeeded in inducing the trial court to so hold, it cannot be permitted in this court to escape liability on the ground that its implied warranty has been merged in an express warranty which it never gave. Moreover, even if it should be held that this writing contains an express warranty, we are not prepared to say that it is such as excludes the idea of an implied warranty. Though such is not the universal holding, it is the rule in this state that a written contract of sale and written warranty do not necessarily deprive the

there is an express warranty of the quality of the cans, their nature, character, and the price to be paid upon failure thereof, and the conditions upon which such payments are to be made, such warranty excludes an implied warranty on the same subject-matter of quality. *Wasatch Orchard Co. v. Morgan Canning Co.* 32 Utah, 229, 12 L.R.A. (N.S.) 540, 89 Pac. 1009.

An express warranty of quality excludes an implied warranty that the articles sold were merchantable or fit for their intended use. It is the existence of the express warranty or its absence which determines the question. Thus, where there is an express warranty in terms that a quantity of varnish and drier should in quality be equal to similar goods furnished a designated person, and also according to a sample furnished at the time, which was delivered and accepted, no implied warranty of quality exists. *DeWitt v. Berry*, 134 U. S. 306, 33 L. ed. 896, 10 Sup. Ct. Rep. 536.

Compare with *Alvin Fruit & Truck Assn. v. Hartman*, 146 Mo. App. 155, 123 S. W. 957, which held that an express warranty that a carload of berries were fancy klondikes did not exclude the implied warranty that the berries were reasonably fit for shipment, where the seller knew they were being purchased for shipment. As to the doctrine of this decision, see *infra*, "where implied warranty relates to distinct and independent matter."

III. Exceptions to rule.

a. Where article to be manufactured.

As heretofore pointed out (II. a), to the general rule already considered, that an express warranty will exclude an implied warranty relating to the same general subject, there are many exceptions recognized and applied by the weight of authority. Considering the cases wherein the general rule is asserted in connection with the cases asserting exceptions thereto, the rule is apparently established by the great weight of authority that, while ordinarily an express warranty will exclude an implied warranty relating to the same general sub-

ject, yet, for this rule to apply, the character of the article warranted, as well as the express warranty relative thereto, must be such as to cover all implied warranties on the same subject, so that they are merged therein, or the warranty, considered with reference to the article warranted, must be of such a character as to preclude the supposition that the seller intended to assume any other obligation than that expressly assumed, or that the buyer was relying upon any other warranty than that expressly stated. Hence, by the weight of authority, the rule does not apply to sales by a manufacturer as to implied warranties that his product is free from latent defects arising from the process of manufacture, or that it is reasonably fit for the purpose for which it was manufactured, unless the express warranty specifically warranted the property as to its working qualities in such terms as to preclude the supposition that the manufacturer intended to warrant it to be reasonably fit for some particular purpose.

This question received able consideration in *Carleton v. Lombard, A. & Co.* 149 N. Y. 137, 43 N. E. 422, on rehearing, 149 N. Y. 601, 44 N. E. 1121. A distinction is here made between contracts for the sale of specific articles and executory contracts for the manufacture of some particular article. The court said that the rule that where parties to a contract of sale express in words the warranty by which they intend to be bound, no further warranty will be implied by law, but the express warranty will be deemed to include the whole obligation of the seller, applies to sales of specific existing chattels, and not ordinarily to sales of goods to be made or supplied upon the order of the buyer. It is not applicable to the obligation of a manufacturer who contracts for a sale of his own product, the condition of which he is presumed to know, and in such a case, whether the words of description are considered as warranties or as conditions precedent to any obligation on the part of the purchaser to take the property, there is an implied obligation that the commodity shall

buyer of the benefit of an implied warranty. *Bucy v. Pitts Agri. Works*, supra; *Alpha Checkrower Co. v. Bradley*, 105 Iowa, 537, 75 N. W. 369; *Ideal Heating Co. v. Kramer*, 127 Iowa, 142, 102 N. W. 840. Our attention is directed to nothing in the writing which is inconsistent with the existence of an implied warranty.

It is further argued that plaintiff received and held the machine a sufficient length of time in which to inspect and reject it if found wanting, and cannot now be heard to claim a breach of the warranty. The record does not make a case for the application of the rule which counsel here invoke. It may be true (though that question is not now before us) that, had the alleged defects been of a patent character,

or such as were readily observable from an ordinary inspection, a retention of the machine beyond a reasonable time for such casual inspection would be a waiver of the right to claim a breach of the warranty; but it certainly is not the rule that one who purchases with an implied warranty a piece of farm machinery like a threshing machine, a windmill, a harvester, a manure spreader, or other article the real character and quality of which can be determined only by a test of actual practical use, must lose the benefit of his warranty because he fails to discover concealed or latent defects until, in the ordinary course of business, he or his customers put the thing purchased to the use for which it is designed and sold. Indeed, we think the

be free from latent defects arising from the process of manufacture, or, as in this case, being the sale of oil, the process of refining, which could be guarded against by ordinary care so as to render it merchantable.

A warranty that machinery is to be made of good material, well constructed, and with proper use and management will do as good work as any other of the same size and rated capacity, etc., does not exclude the implied warranty under the sale of goods act, R. S. M. 1902, chap. 152, § 16, to the effect that, when there is a contract for a sale of goods by description, there is an implied condition that the goods shall correspond with the description, and that they shall be reasonably fit for the purpose for which they were purchased. *North-West Thresher Co. v. Darrell*, 15 Manitoba L. Rep. 553.

A postscript to a contract for installing furnaces in a steamboat, that the work shall pass government inspection, does not relieve the manufacturer from the implied warranty that the work will be properly performed and free from such defects as are only discoverable after use and trial. *The Venezuela*, 173 Fed. 834.

In a contract for the instalment of a heating apparatus, a warranty that all work is to be done in a good and workmanlike manner does not exclude the implied warranty arising where a seller undertakes to manufacture or construct the thing sold, that it will be fit for the contemplated use; neither is such implied warranty excluded by a provision in the contract that the same, when signed, shall fully express the agreement between the parties thereto. *Ideal Heating Co. v. Kramer*, 127 Iowa, 137, 102 N. W. 840.

An express warranty by a manufacturer, of the power of an engine and boiler to be manufactured for a given purpose, and that they should be in good order except from exposure to the weather, is not inconsistent with, and does not exclude, an implied warranty that the engine and boiler are fit for the purpose for which they were purchased. *Blackmore v. Fairbanks*, 33 L.R.A. (N.S.)

M. & Co. 79 Iowa, 282, 44 N. W. 548. And to the same effect see *Boulware v. Victor Automobile Mfg. Co.* infra.

But an express warranty that a gasoline engine should be of two and one half horse power, that it was made of good material and in a workmanlike manner, etc., excludes an implied warranty that the engine was fit and proper to run a newspaper plant, it being apparent that the express warranties were intended to embrace all the obligations assumed by the warrantor. *Fairbanks, M. & Co. v. Baskett*, 98 Mo. App. 53, 71 S. W. 1113. And see to the same effect, *Hart Parr Co. v. Eberle*, 3 Sask. L. R. 34, 13 West. Law Rep. (Can.) 263.

In *Boothby v. Scales*, 27 Wis. 626, it was held that a manufacturer of fanning mills, in selling the same for use, impliedly warranted that the mill was reasonably fit for the purpose for which it was manufactured and to which it was to be applied, and that, in an action on a note given for the purchase price, it was proper to submit the case to the jury on the defense by the purchaser of a breach of this implied warranty, as well as upon a breach of an alleged special warranty that the mill possessed the capacity set forth in a certain printed advertisement or post bill. In considering an alleged error on the part of the court in permitting the defendant to amend his pleadings so as to assert as a counterclaim the breach of this implied warranty, the plaintiff claiming that the amendment took him by surprise, and he was not prepared to meet the issue thereby raised, the court said that "it was obvious as to the implied warranty which it was the object of the amended answer to set up that the plaintiffs had all the testimony before the court and jury of which that issue was susceptible. They could rebut or disprove the implied warranty only by showing, either that they were not the manufacturers of the mill . . . or that there was a special agreement at the time of sale that the defendant should take the mill at his own risk, whether it would work well or answer the pur-

duty of inspection upon receipt of the article purchased is applicable only to cases where the buyer undertakes to rescind his order, or to exercise the right to return the property to the seller. He may, if he so elect, rest upon his right to damages for breach of the warranty, and recoup therefor in an action against him for the purchase price, or he can maintain an independent action for damages, and in such proceeding it is immaterial that he did not inspect the article and ascertain the defects promptly upon its receipt. *Bushman v. Taylor*, 2 Ind. App. 12, 50 Am. St. Rep. 228, 28 N. E. 97; *Brigg v. Hilton*, 99 N. Y. 517, 52 Am. Rep. 63, 3 N. E. 51; *Bonnell v. Jacobs*, 36 Wis. 59.

pose for which it was intended or not." In *Dwight Bros. Paper Co. v. Western Paper Co.* 114 Wis. 414, 90 N. W. 444, the court, in referring to *Boothby v. Scales*, said that there was involved in that case no express warranty by written contract, and that the doctrine therein asserted relative to the right of a purchaser, in purchasing from the manufacturer of an article, to rely upon an implied warranty that it was fit for the purpose for which it was manufactured, did not apply where there was an express warranty of quality. And this seems to be the doctrine of Wisconsin.

The same rule is asserted and applied in *J. I. Case Plow Works v. Niles & S. Co.* 90 Wis. 590, 63 N. W. 1013, which holds the fact that limited warranties going to the question of suitability of wheels to be manufactured were expressed in the contract of sale by the strongest implication excludes and negatives the idea that it was intended that other or more comprehensive warranties should exist, and repels any implication of law to that effect.

See also *Whitmore v. South Boston Iron Co.* 2 Allen, 52, which holds that when a contract for the purchase of an article to be manufactured is in writing, and contains warranties of quality, no additional warranty, not expressed or implied by its terms, that the article is fit for a particular purpose, can be added by implication. The court said that such a warranty is excluded by the ordinary doctrine of construing contracts by adopting the fair import of the language which the parties have used.

In *Forest City Ins. Co. v. Morgan*, 22 Ill. App. 198, the court said that a warranty in an agreement to furnish and set up a steam boiler, as to the quality of the boiler, left no room for implications by law of a further warranty relative to the quality of the boiler.

An express warranty that machines to be manufactured shall be like the sample, and that the manufacturer, when called upon, shall make good any defects in workmanship or material, excludes any implied warranty of fitness for the purpose intended. 33 L.R.A. (N.S.)

Again, it is urged that the damages which the plaintiff was permitted to recover were for his loss of a resale to Schwaller, and not the ordinary compensation allowable upon showing a breach of warranty, and this loss of a resale could have been avoided by him had he exercised reasonable diligence to ascertain the defects of the machine. It is true that plaintiff pleads the alleged loss of a resale of the machine and a consequent loss of profits; but he does more, and alleges that, by reason of its defective condition, the article was wholly unsalable, useless, and without value. The court, as was proper, instructed the jury that, if it found him entitled to a verdict, the measure of plaintiff's

ed, the manufacturer having expressly refused to make an express warranty of fitness. *Monroe v. Hickox, M. & H. Co.* 144 Mich. 30, 107 N. W. 719.

b. Where article sold for retail purposes.

An exception to the general rule that an express warranty will preclude an implied warranty relating to the same general subject has also been asserted as to sales by manufacturers of articles for retail purposes. In such cases the manufacturer of articles, in selling same for retail, impliedly warrants that the article is reasonably fit for sale at retail and for the purpose for which it was manufactured, and this implied warranty is not excluded by express warranties relating to the quality of the articles sold.

Thus, a warranty in the sale of jewelry for retail, that any article failing to wear satisfactorily would be duplicated free if returned within five years, that such articles might be changed for new goods within twelve months from date of invoice, that the purchaser waived all right to claim failure of consideration, or that the goods were not like sample, or not according to order, unless he first exhausted the terms of the warranty in exchange, will not exclude the implied warranty that the articles shall be merchantable and reasonably fit for the purpose for which they were intended, such warranty arising whenever a manufacturer offers his goods for sale where the opportunity of inspection is not present before the purchase. *Main v. Dearing*, 73 Ark. 470, 84 S. W. 640.

An agreement in the sale of jewelry for retail purposes, that, if any of the articles are unsatisfactory, the seller will replace same, provided they are returned within a specified time, is not such a warranty as will exclude an implied warranty that the goods sold are reasonably fit for the retail trade. *White v. Mercantile Jewelry Co.* 6 Ga. App. 860, 65 S. E. 1075.

The rule that, if property is sold under a contract of express warranty, the terms

recovery was the difference between the reasonable value of the machine had it been in a merchantable condition, as impliedly warranted, and its value in the actual condition in which it was delivered. The fact of an attempted resale was important only as showing plaintiff's conduct with reference to the machine, and the sufficiency of the efforts he had made to test its merchantability and fitness for the work it was designed to perform. His recovery was not simply the loss of a sale of the machine, but for its failure to fill the measure of the warranty on which it was sold to him.

Error is assigned upon the alleged refusal of the court to admit evidence of an expert

witness as to the meaning of the phrase "all goods subject to warranties published in factory's catalogues and circulars." While it appears that the court at first sustained plaintiff's objections to this line of evidence, the transcript shows that it finally yielded to counsel's persistence, and admitted the very matter which this assignment of error assumes was excluded. In view of this record, it is not easy to understand just why the ruling is pressed upon our attention as reversible error.

We find no reason for interfering with the judgment below, and it is affirmed.

Petition for rehearing denied.

of which explicitly define the warranty actually made. the law of implied warranty has no application, does not apply to an agreement in the sale of jewelry for retail purposes, that, if the same does not prove satisfactory, it will be replaced by the vendor free of charge if returned within five years, and such an agreement does not prevent the raising of an implied warranty from the sale, that the articles are reasonably suited for the purposes for which they were bought, where the jewelry was worthless, and not fit for sale at retail trade. *Elgin Jewelry Co. v. Estes*, 122 Ga. 807, 50 S. E. 939.

c. Where implied warranty relates to distinct, independent matter.

A very similar exception to the general rule to those already considered, but which is stated in a somewhat different form, is the rule that an implied warranty wholly independent of the matters contemplated by the express warranty is not thereby excluded, although both warranties relate to the same general subject.

In *Aultman v. Hunter*, 82 Mo. App. 632, on this question, the court quoted with approval from *International Pav. Co. v. Smith, B. & R. Mach. Co.* 17 Mo. App. 264, to the effect that "the general rule denies an implied warranty as to any matter or particular which may be brought within the purview or intentment of the special warranty. But there may be an implied warranty so wholly independent of anything contemplated in the express warranty as to stand by virtue of its own distinctive force;" and added: "In other words, the two warranties may be so distinct and separate that both may stand at the same time, and both be enforced."

On the same point, in *Boulware v. Victor Automobile Mfg. Co.* 152 Mo. App. 567, 134 S. W. 7, the court said that an express warranty and an implied warranty may exist together where not inconsistent; that an express warranty, to exclude an implied warranty, must be of such a character as to make it apparent that the express warranty contains all the obligations assumed by the warrantor. This language was used 33 L.R.A. (N.S.)

in sustaining an implied warranty in the sale of an automobile manufactured for the purchaser to the effect that the automobile would turn on the roads in the section where the buyer lived, although there was an express warranty relating to the general qualities of the machine and also that it was in perfect running order.

See also, *Alvin Fruit & Truck Asso. v. Hartman*, 146 Mo. App. 155, 123 S. W. 957, wherein the court remarked that an express warranty will not exclude an implied one upon other matters, but will as to matters which the former covers.

In Iowa, it is held that the rule that where there is an express warranty none will be implied does not extend to the exclusion of warranties implied by law where they are not excluded by the terms of the contract, and it is there asserted that the rule deducible from the authorities is that an implied and an express warranty may exist in the same contract if the express warranty does not relate to the obligation created by the implied; but when the express warranty does provide as to the same obligation, it excludes the implied. In other words, the law will not imply anything as to matters about which the parties have expressly agreed. *Bucy v. Pitts Agri. Works*, 89 Iowa, 464, 56 N. W. 541.

In *Crankshaw v. Schweizer Mfg. Co.* 1 Ga. App. 363, 58 S. E. 222, the court on this point said: "Not infrequently a mere shade of difference determines whether the issue calls for the application of the doctrine of implied warranty or excludes it. In many cases, in our experience, the line of demarcation was very dim, and we think there can be cases in which, as to different portions of even the same transaction, the law of express warranty will control so far as there has been express warranty without excluding the application of an implied warranty to other portions of the contract. We are aware that this statement seems contradictory, and is not in accord with the general view, for in *Johnson v. Latimer*, 71 Ga. 470, it was held that 'it is only in the absence of an express warranty that re-

sort can be had to implied warranty, and where there was an express warranty, the court could refuse to charge on the subject of implied warranty. . . . This is an express holding that there can be no implied warranty if there is an express warranty. We yield to it as binding authority."

And see *Hawley Down Draft Furnace Co. v. Van Winkle Gin & Mach. Works*, 4 Ga. App. 85, 60 S. E. 1008, wherein it is asserted that the rule that an express warranty as to any feature of the sale excludes implied warranties does not go to the extent of excluding an implied warranty as to the working qualities of a machine unless the express warranty relates to the same thing; and that express warranties containing descriptive words of make, size, grade, quantity, etc., will not usually exclude an implied warranty that the article is merchantable and free from such inherent defects as render it worthless or not reasonably suited for the purpose for which such articles are designed and intended.

d. Where express warranty superadded for benefit of buyer.

Another exception to the general rule is that, where the express warranty, when considered with reference to the article to which it is applied, is of such a character as to indicate that it was merely superadded to the warranty implied by law for the benefit of the buyer, rather than as being the extent of the obligation assumed by the seller, the express warranty does not exclude the implied warranty. *Mody v. Gregson*, L. R. 4 Exch. 49, 38 L. J. Exch. N. S. 12, 19 L. T. N. S. 458, 17 Week. Rep. 176; *Bigge v. Parkinson*, 8 Jur. N. S. 1014, 7 Hurlst. & N. 955, 31 L. J. Exch. N. S. 301, 7 L. T. N. S. 92, 10 Week. Rep. 349; *Drummond v. Van Ingen*, L. R. 12 App. Cas. 284, 56 L. J. Q. B. N. S. 563, 57 L. T. N. S. 1, 36 Week. Rep. 20.

Thus, the doctrine that an express warranty excludes any implication does not apply to cases in which the express provision appears, on the true construction of the contract to have been superadded for the benefit of the buyer. *Mody v. Gregson*, L. R. 4 Exch. 53, 38 L. J. Exch. N. S. 12, 19 L. T. N. S. 458, 17 Week. Rep. 176.

This doctrine is also applied in *Bigge v. Parkinson*, supra, as to a guaranty that stores and provisions ordered for a foreign voyage should pass a certain inspection, as such warranty was said to be superadded to the implication raised by law from the fact that the seller knew the purpose for which the stores were purchased, that the same would be reasonably fit for that purpose, and that, hence, the two were not incompatible.

Applying the same rule, a warranty arising from a sale by sample does not exclude an implied warranty that the article shall be fit for the purpose for which such

an article is ordinarily used. *Drummond v. Van Ingen*, supra.

e. Where contract contains special provisions affecting warranty.

1. Where application of express warranty is conditioned upon performance by buyer.

An express warranty does not exclude an implied warranty relating to the same general subject, where the contract of sale contains requirements the performance of which are conditions precedent to the application of the express warranty, and these requirements are not insisted upon by the seller, and are not performed by the buyer.

Thus, the implied warranty that a machine is adapted to the use intended, and that it will reasonably perform the service required, is not excluded by an express warranty as to the working qualities of the machine, which does not become of force or effect because, by the contract of sale, such warranty is conditional upon the payment of the purchase price of the machine, either by cash or note, before delivery, delivery being made without such requirement being insisted upon. *Parsons Band Cutter & Self Feeder Co. v. Mallinger*, 122 Iowa, 703, 98 N. W. 580.

Applying this doctrine in *Alpha Check-rower Co. v. Bradley*, 105 Iowa, 537, 75 N. W. 369, it was held that a warranty in the sale of corn cutters by manufacturer to retailer, that the same were well made and finished, did not exclude an implied warranty that the cutters were fit for the purpose for which they were intended.

So, where a contract for the sale of machinery provides that unless notes are given according to the terms thereof, the express warranty of quality contained therein shall be of no force and effect as against the seller, the law will then imply a warranty that the article is fit for the purpose intended, although ordinarily an express warranty will preclude an implied warranty on the same subject. *Hansmann v. Pollard*, — Minn. —, 129 N. W. 248.

2. Where contract provides against any other obligation than that expressly assumed.

The seller of an article may, by his contract of warranty, provide that no obligation other than that set forth in the contract and made part thereof shall be binding upon either party, and thus exclude any implied warranty that the article sold is fit for the purpose for which it was manufactured. *Bagley v. General Fire Extinguisher Co.* 80 C. C. A. 172, 150 Fed. 284.

But a provision in a contract for the sale of binding twine, that express warranties of quality will not be recognized unless approved by the seller in writing, does not exclude implied warranties of quality arising by virtue of a statutory provision ap-

plying to the sale of articles by the manufacturer thereof. *Hooven & A. Co. v. Wirtz*, 15 N. D. 477, 107 N. W. 1078. And see, to same effect, *Ideal Heating Co. v. Kramer*, 127 Iowa, 137, 102 N. W. 840.

So, a warranty of the quality and capacity of machinery (engine and separator) will exclude an implied warranty that the machinery is fit for the purpose for which it was purchased, and for which it was in fact worthless, where the allowance of the implied warranty would contravene the express terms of the contract relating to the remedy of the purchaser for breach of the warranty expressed in the contract. *Boyer v. Neel*, 50 Mo. App. 26. To the same effect is *Walter A. Wood Mowing & Reaping Mach. Co. v. Bobbst*, 56 Mo. App. 427. A. G. S.

MINNESOTA SUPREME COURT.

GEORGE A. HORMEL & COMPANY,
Resp.,
v.
AMERICAN BONDING COMPANY, Im-
pleaded, etc., Appt.

(112 Minn. 288, 128 N. W. 12.)

Guaranty insurance bond — construction.

1. The appellant executed a guaranty insurance bond to indemnify the respondent against loss from the failure of the principal in the bond to perform on his part the conditions of a building contract to which he and the respondent were parties. The contract reserved the right of the respondent

Headnotes by START, Ch. J.

Note. — Character of, and rules governing, contracts by corporations engaged for profit in business of guarantying the fidelity or contracts of other persons.

The overwhelming weight of authority supports the proposition that the rule of *strictissimi juris*, by which the rights of uncompensated sureties are determined, is not applicable to the contracts of surety companies, which make the matter of suretyship a business for profit; that their business is essentially that of insurance; and that therefore their rights and liabilities under their contracts will be governed by the laws of insurance. Hence, as declared in the above decision, if the contract of suretyship is ambiguous or fairly open to two constructions, it will be construed in favor of the assured. *Guarantee Co. of N. A. v. Mechanics' Sav. Bank & T. Co.* 26 C. C. A. 146, 47 U. S. App. 91, 80 Fed. 766, affirming 68 Fed. 459, reversed on other grounds in 173 U. S. 582, 43 L. ed. 818, 19 Sup. Ct. Rep. 551; *Mercantile Credit Guarantee Co. v. Wood*, 15 C. C. A. 563, 35 U. S. App. 381, 68 Fed. 529; *Minnesota Title Ins. & T. Co. v. Drexel*, 17 C. 33 L.R.A. (N.S.)

ent to make changes in the work and order extras in writing, and provided that 15 per cent of the contract price should be retained until the work was completed, which was to be done within a time limited. The bond provided that the appellant should be notified of any breach of the contract or of any act on the part of the principal which might involve loss to the appellant, immediately after the knowledge thereof should come to the respondent. This is an action on the bond to recover the amount paid by the respondent to discharge liens upon the building arising from the failure of the principal to pay for labor and materials. Held:

While the bond in form resembles a contract of suretyship, it is in effect a contract of insurance, to which the rules of construction peculiar to contracts of suretyship proper do not apply, but to which the rules governing ordinary contracts of insurance are applicable.

Same — strictness — intent.

2. If a guaranty insurance bond is fairly open to two constructions, one of which will uphold and the other defeat the claim of the insured, that should be adopted which is most favorable to the insured; but the plain intention of the parties cannot be nullified by construction.

Same — release — noncompliance as to provision of building contract for extras.

3. Where a building contract, the performance of which is secured by a guaranty insurance bond, reserves the right to make changes in the work and order extras in writing without limit, the mere fact that such changes are made and extras ordered verbally, which are audited and allowed by the architect, does not release the bond.

C. A. 56, 36 U. S. App. 50, 70 Fed. 194; *American Credit Indemnity Co. v. Wood*, 19 C. C. A. 264, 38 U. S. App. 583, 73 Fed. 81; *Lowenstein v. Fidelity & C. Co.* 88 Fed. 474; *American Bonding Co. v. Spokane Bldg. & L. Soc.* 65 C. C. A. 121, 130 Fed. 737; *Ætna Indemnity Co. v. J. R. Crowe Coal & Min. Co.* 83 C. C. A. 431, 154 Fed. 545; *Home Mixture Guano Co. v. Ocean Acci. & Guarantee Corp.* 176 Fed. 600; *United States use of J. R. Van Sciver Co. v. Fidelity & G. Co.* 178 Fed. 721; *United States Fidelity & G. Co. v. Bank of Batesville*, 87 Ark. 348, 112 S. W. 957; *Title Guaranty & Surety Co. v. Bank of Fulton*, 89 Ark. 471, 117 S. W. 537; *American Bonding & T. Co. v. Burke*, 36 Colo. 49, 85 Pac. 692; *People ex rel. Kasson v. Rose*, 174 Ill. 310, 44 L.R.A. 124, 51 N. E. 246; *City Trust, S. D. & Surety Co. v. Lee*, 204 Ill. 69, 68 N. E. 485, affirming 107 Ill. App. 263; *United States Fidelity & G. Co. v. First Nat. Bank*, 233 Ill. 475, 84 N. E. 670; *Leshner v. United States Fidelity & G. Co.* 239 Ill. 502, 88 N. E. 208; *Merchants' Underwriters v. Parkhurst-Davis Mercantile Co.* 140 Ill. App. 504, affirmed in 237 Ill. 492, 86 N. E. 1062; *T. M. Sinclair & Co. v. National Surety Co.* 132 Iowa, 540,

Same — notice of default.

4. The provision of the bond for notice to be given the insurer of any default on the part of the principal which may result in loss, immediately after the insured has notice thereof, requires that it be given only within a reasonable time in view of all the circumstances. This is ordinarily a question of fact; but if the facts are undisputed, and only one reasonable conclusion can be drawn therefrom, it is the duty of the trial judge to instruct the jury accordingly.

Same — release — failure to give notice of default within reasonable time.

5. It conclusively appears from the undisputed facts in this case, which are stated in the opinion, that notice of the default of the principal was not given to the appellant within a reasonable time, and that thereby the bond was released.

(Oct. 28, 1910.)

107 N. W. 184; Van Buren County v. American Surety Co. 137 Iowa, 490, 126 Am. St. Rep. 290, 115 N. W. 24; Champion Ice Mfg. & Cold Storage Co. v. American Bonding & T. Co. 115 Ky. 863, 103 Am. St. Rep. 356, 75 S. W. 197; Grand Rapids Light & P. Co. v. Fidelity & C. Co. 111 Mich. 148, 69 N. W. 249; Crystal Ice Co. v. United Surety Co. 159 Mich. 102, 123 N. W. 619; Allen v. Eneroth, 111 Minn. 395, 127 N. W. 426; Long Bros. Grocery Co. v. United States Fidelity & G. Co. 130 Mo. App. 421, 110 S. W. 29; Fairbanks Canning Co. v. London Guaranty & Acci. Co. — Mo. App. —, 133 S. W. 664; Trenton Potteries Co. v. Title Guarantee & T. Co. 50 App. Div. 490, 64 N. Y. Supp. 116; Mercantile Credit & G. Co. v. Littleford Bros. 18 Ohio C. C. 889, 9 Ohio C. D. 846; Fenton v. Fidelity & C. Co. 36 Or. 283, 48 L.R.A. 770, 56 Pac. 1096; Edgefield Mfg. Co. v. Maryland Casualty Co. 78 S. C. 73, 58 S. E. 969; Cowles v. United States Fidelity & G. Co. 32 Wash. 120, 98 Am. St. Rep. 838, 72 Pac. 1032; Pacific Bridge Co. v. United States Fidelity & G. Co. 33 Wash. 47, 73 Pac. 772; Pacific Nat. Bank v. Aetna Indemnity Co. 33 Wash. 428, 74 Pac. 590; Title Guaranty & T. Co. v. Murphy, 52 Wash. 190, 100 Pac. 315; Shakman v. United States Credit System Co. 92 Wis. 366, 32 L.R.A. 383, 53 Am. St. Rep. 920, 66 N. W. 528.

Thus, in *American Surety Co. v. Pauly*, 170 U. S. 133, 42 L. ed. 977, 18 Sup. Ct. Rep. 552, affirming 18 C. C. A. 644, 38 U. S. App. 254, 72 Fed. 470, it was declared that if, looking at all its provisions, a bond insuring a bank against any fraud or dishonesty of its cashier was fairly and reasonably susceptible of two constructions, one favorable to the bank and the other to the surety company, the former, if consistent with the objects for which the bond was given, must be adopted, because the instrument was drawn by the attorneys, officers, or agents of the company. The court said: "The object of the bond in 83 L.R.A. (N.S.)

APPEAL by defendant American Bonding Company from a judgment of the District Court for St. Louis County in plaintiff's favor in an action brought to recover the amount alleged to be due on a certain guaranty insurance policy. Reversed.

The facts are stated in the opinion.

Messrs. Fitzhugh Burns and Washburn, Bailey, & Mitchell, for appellant:

The bond was released by the alteration made in the contract in the matter of extra work.

Simonson v. Grant, 36 Minn. 439, 31 N. W. 861; *Erickson v. Brandt*, 53 Minn. 10, 55 N. W. 62; *Fillmore County v. Greenleaf*, 80 Minn. 242, 83 N. W. 157; *Norwegian Evangelical Lutheran Bethlehem Congregation v. United States Fidelity & G. Co.* 81 Minn. 32, 83 N. W. 487, 83 Minn. 269, 83 N. W. 330; *Winona v. Jackson*, 92

suit was to indemnify or insure the bank against loss arising from any act of fraud or dishonesty on the part of O'Brien in connection with his duties as cashier, or with the duties to which, in the employer's service, he might be subsequently appointed. That object should not be defeated by any narrow interpretation of its provisions, nor by adopting a construction favorable to the company, if there be another construction equally admissible under the terms of the instrument, executed for the protection of the bank."

And in *United States Fidelity & G. Co. v. Golden Pressed & Fire Brick Co.* (United States Fidelity & G. Co. v. United States), 191 U. S. 416, 48 L. ed. 242, 24 Sup. Ct. Rep. 142, in which it was held that the extension of time for payment of a bill for materials furnished to the principal obligor by a third party did not, in the absence of any evidence of loss, thereby discharge a surety on a bond conditioned not only for the faithful performance of the original contract, but for the prompt payment of all persons supplying labor and materials, the court said: "The rule of *strictissimi juris* is a stringent one, and is liable at times to work a practical injustice. It is one which ought not to be extended to contracts not within the reason of the rule, particularly when the bond is underwritten by a corporation which has undertaken for a profit to insure the obligee against a failure of performance on the part of the principal obligor. Such a contract should be interpreted liberally in favor of the subcontractor, with a view of furthering the beneficial object of the statute. Of course, this rule would not extend to cases of fraud or unfair dealing on the part of a subcontractor, . . . or to cases not otherwise within the scope of the undertaking."

And in *Supreme Council, C. K. A. v. Fidelity & C. Co.* 11 C. C. A. 96, 22 U. S. App. 439, 63 Fed. 48, it was declared, with reference to bonds of suretyship executed

Minn. 453, 100 N. W. 368; Pioneer Sav. & L. Co. v. Freeburg, 59 Minn. 230, 61 N. W. 25; Fidelity Mut. Life Assn. v. Dewey, 83 Minn. 393, 54 L.R.A. 945, 86 N. W. 423; Imperial F. Ins. Co. v. Coos County, 151 U. S. 452, 38 L. ed. 231, 14 Sup. Ct. Rep. 379; American Surety Co. v. Pauly, 170 U. S. 133, 42 L. ed. 977, 18 Sup. Ct. Rep. 552; Guarantee Co. of N. A. v. Mechanics' Sav. Bank & T. Co. 183 U. S. 402, 46 L. ed. 253, 22 Sup. Ct. Rep. 124; United States v. Freely, 186 U. S. 309, 46 L. ed. 1177, 22 Sup. Ct. Rep. 875; United States Fidelity & G. Co. v. Golden Pressed & Fire Brick Co. (United States Fidelity & G. Co. v. United States) 191 U. S. 416, 48 L. ed. 242, 24 Sup. Ct. Rep. 142; Northern Light, Lodge No. 1, I. O. O. F. v. Kennedy, 7 N. D. 146, 73 N. W. 524; Beers v. Wolf, 116 Mo. 179, 22 S. W. 620; Killoren

v. Meehan, 55 Mo. App. 427; Burnes's Estate v. Fidelity & D. Co. 96 Mo. App. 467, 70 S. W. 518; Evans v. Graden, 125 Mo. 72, 28 S. W. 439; Eldridge v. Fuhr, 59 Mo. App. 44; Chapman v. Eneberg, 95 Mo. App. 127, 68 S. W. 974; Erfurth v. Stevenson, 71 Ark. 199, 72 S. W. 49; Fullerton Lumber Co. v. Gates, 89 Mo. App. 201; Reissaus v. Whites, 128 Mo. App. 135, 106 S. W. 603; O'Neal v. Kelley, 65 Ark. 550, 47 S. W. 409; School Dist. v. Green, 134 Mo. App. 421, 114 S. W. 578; Miller-Jones Furniture Co. v. Ft. Smith Ice & Cold Storage, 66 Ark. 287, 50 S. W. 508; Lonergan v. San Antonio Loan & T. Co. 101 Tex. 63, 22 L.R.A. (N.S.) 364, 130 Am. St. Rep. 803, 104 S. W. 1061, 106 S. W. 876.

It was a question of law for the court as

upon a consideration by a corporation organized to make the same for profit, that the rule of construction applicable to ordinary sureties was out of place, and that, such instruments being in the terms prescribed by the surety, any doubtful language therein should be construed most strongly against the surety, and in favor of the indemnity that the assured had reasonable ground to expect.

In Tebbets v. Mercantile Credit Guarantee Co. 19 C. C. A. 281, 38 U. S. App. 431, 73 Fed. 95, it was declared that cases holding that a surety was "a favorite of the law," and that a claim against him was *strictissimi juris*, had no application to a contract of indemnity against mercantile losses. The court said: "Corporations entering into contracts like the one at bar may call themselves 'guaranty' or 'surety' companies, but their business is in all essential particulars that of insurers, who, upon careful calculation of the risks of such business, and with such restrictions of their liability as may seem to them sufficient to make it safe, undertake to assure persons against loss, in return for premiums sufficiently high to make such business commercially profitable. Their contracts are, in fact, policies of insurance, and should be treated as such."

And in Carstairs v. American Bonding & T. Co. 54 C. C. A. 85, 116 Fed. 449, writ of certiorari denied in 187 U. S. 644, 47 L. ed. 346, 23 Sup. Ct. Rep. 844, it was declared to be quite true that the written contracts of indemnity issued by surety companies had come to be looked upon by the courts and to be treated more as policies of insurance than as bonds. The court said: "As contracts of indemnity, they will be liberally construed so as to effectuate the purpose for which they were issued, and as, like policies of insurance, they are generally prepared by the bonding company, the rule of *contra proferentem* will often be applied in construing their stipulations."

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So, in American Bonding Co. v. Morrow, 80 Ark. 49, 117 Am. St. Rep. 72, 96 S. W. 613, it was declared to be now well settled that the bond of a surety company, "like any other insurance policy," was to be most strongly construed against the insurer, since its language was that selected and employed by the latter, and "when doubtful or ambiguous must be given the strongest interpretation against the insurer which it will reasonably bear."

In Lakeside Land Co. v. Empire State Surety Co. 105 Minn. 213, 117 N. W. 431, it was declared that it had become very well settled in the courts of the United States that the strict rule of construction was not applicable to bonds issued by surety companies, which, in the issuing thereof, furnished their own forms, and were presumed to be acting advisedly in the selection of the language used, and that therefore the intention of the parties would be ascertained by the rule applicable to insurance contracts. "When it fairly appears from the face of the contract what the parties intended, a strict construction of general statements or of particular clauses will not be indulged in to vary the evident purpose to be accomplished by the instrument."

And in Brandrup v. Empire State Surety Co. 111 Minn. 376, 127 N. W. 424, it was held that, a surety company being one who for hire executed fidelity bonds, which in their nature more nearly approached insurance policies than ordinary contracts guarantying the fulfillment by another of some obligation resting upon him, it "must be held to a stricter accountability for its own acts and conduct than would a surety who without consideration assumed a similar obligation."

And in Roark v. City Trust, S. D. & Surety Co. 130 Mo. App. 401, 110 S. W. 1, it was held that a contract of suretyship was "for all practical purposes a contract of insurance, and the contract must be governed and construed as an insurance policy."

. . . An insurance company's contract,

to whether the notice was given in time, as the facts here were not in dispute.

Wood, Ins. § 439; Bacon, Ben. Soc. p. 1023; Insurance Co. of N. A. v. Brim, 111 Ind. 281, 12 N. E. 315; Travelers' Ins. Co. v. Myers, 62 Ohio St. 529, 49 L.R.A. 760, 57 N. E. 458; American F. Ins. Co. v. Hazen, 110 Pa. 530, 1 Atl. 605; Kimball v. Howard F. Ins. Co. 8 Gray, 33; Bennett v. Lycoming County Mut. Ins. Co. 67 N. Y. 274; Baker v. German F. Ins. Co. 124 Ind. 490, 24 N. E. 1041.

The bond was released by failure to give immediate notice.

Ermentrout v. Girard F. & M. Ins. Co. 63 Minn. 305, 30 L.R.A. 346, 56 Am. St. Rep. 481, 65 N. W. 635; Smith & D. Mfg. Co. v. Travelers' Ins. Co. 171 Mass. 357,

50 N. E. 516; Inman v. Western F. Ins. Co. 12 Wend. 452; Mellen v. Hamilton F. Ins. Co. 17 N. Y. 609; Quinlan v. Providence Washington Ins. Co. 133 N. Y. 356, 28 Am. St. Rep. 645, 31 N. E. 31; Foster v. Fidelity & C. Co. 99 Wis. 447, 40 L.R.A. 833, 75 N. W. 69; Railway Pass. Assur. Co. v. Burwell, 44 Ind. 460; Trask v. State F. & M. Ins. Co. 29 Pa. 198, 72 Am. Dec. 622; Edwards v. Lycoming County Mut. Ins. Co. 75 Pa. 378; Whitehurst v. North Carolina Mut. Ins. Co. 52 N. C. (7 Jones. L.) 433, 78 Am. Dec. 246; Burnham v. Royal Ins. Co. 75 Mo. App. 394; La Force v. Williams City F. Ins. Co. 43 Mo. App. 528; National Surety Co. v. Long, 60 C. C. A. 623, 125 Fed. 887; Accident Ins. Co. v. Young, 20 Can. S. C. 280; Weed v. Ham-

drawn by such company, is to be construed most strongly against the company. . . . And no reason exists why the same rule should not apply to a bond surety company giving bond to secure employers against loss by dishonesty of employees."

And in *Kansas City v. Davidson*, — Mo. App. —, 133 S. W. 365, it was declared that sureties for hire were not favorites of the law, entitled to stand upon the strict terms of their obligations, but their status was rather that of insurers, and that their contracts should be reasonably construed to give effect to the protective purposes of their execution.

So, in *Bank of Tarboro v. Fidelity & D. Co.* 128 N. C. 366, 83 Am. St. Rep. 682, 38 S. E. 908, which was an action on a bond guarantying the fidelity of the plaintiff's cashier, the court declared that none of its members had ever seen or heard of a bond being tendered by a private surety in such a form as that sued on, and then went on to say: "In its very form and essence, the bond before us resembles an insurance contract, and differs materially from the ordinary forms coming down to us by immemorial usage. Therefore we must place such bonds in the general class of insurance policies, and construe them upon the same general principles; that is, most strongly against the company, and most favorably to their general intent and essential purpose. . . . The defendant has voluntarily become, by virtue of the statute, what may be called a 'common surety'; not exactly in the nature of a common carrier, like railroad and telegraph companies, but still one of those public agencies to which are given unusual powers, and which have assumed the most sacred responsibilities. Permitted by law to act as sole sureties for trustees, guardians, administrators, and other fiduciaries, they are held by the policy of the law to the full measure of the responsibility they have voluntarily assumed. They may make such reasonable regulations as are necessary for their own protection, or the proper transaction of their business; but such stipulations will be most strongly con-

strued against a forfeiture of the indemnity for which alone the bond is given, and in favor of a fair and equitable construction of the essential purposes of the contract."

And in *Bryant v. American Bonding Co.* 77 Ohio St. 90, 82 N. E. 960, the court, in considering the construction of the contract before it, asked what its nature was. "Is it one simply of suretyship, one of those known as voluntary contracts, or is it rather one of the class issued for a money consideration and because of a desire for pecuniary gain? If the former, then it is one wherein the surety is regarded as a favorite of the law, and all doubtful questions to be resolved in his favor; if the latter, then he is regarded as an insurer, whose contract, being drawn by the surety himself, and for a money consideration, is, if ambiguity exists in the language, to be resolved most strongly against the surety."

And in *Young v. American Bonding Co.* 228 Pa. 373, 77 Atl. 623, it was said: "In all essential particulars the appellee here is an insurance company, and its obligation in this particular instance was that of an insurer. It was paid for its undertaking; the amount of its compensation being based on the calculation of risk assumed. The trend of all our modern decisions, Federal and state, is to distinguish between individual and corporate suretyship where the latter is an undertaking for money consideration by a company chartered for the conduct of such business. In the one case the rule of *strictissimi juris* prevails, as it always has; with respect to the other, because it is essentially an insurance against risk, underwritten for a money consideration by a corporation adopting such business for its own profit, the courts generally hold that such a company can be relieved from its obligation for suretyship only where a departure from the contract is shown to be a material variance."

In *Walker v. Holtzclaw*, 57 S. C. 459, 35 S. E. 754, it was held that while, as a general rule, a surety was a favorite of the law, and his contracts should be strictly construed in his favor, such rule had no ap-

burg-Bremen F. Ins. Co. 133 N. Y. 394, 31 N. E. 231.

The bond was released by the plaintiff making payments in a manner not authorized by the contract.

Brennan v. Clark, 29 Neb. 385, 45 N. W. 472; Peters v. Mackay, 20 Wash. 172, 54 Pac. 1122; Backus v. Archer, 109 Mich. 660, 67 N. W. 913; Eager v. Seeds, 21 Okla. 524, 96 Pac. 646; Bragg v. Shain, 49 Cal. 131; Bell v. Paul, 35 Neb. 240, 52 N. W. 1110; Cowdery v. Hahn, 105 Wis. 455, 76 Am. St. Rep. 921, 81 N. W. 882; Evans v. Graden, 125 Mo. 72, 28 S. W. 439; Kunz v. Boll, 140 Wis. 69, 121 N. W. 601; Queal v. Stradley, 117 Iowa, 748, 90 N. W. 588; Electric Appliance Co. v. United States Fidelity & G. Co. 110 Wis. 434, 53 L.R.A.

609, 85 N. W. 648; First Nat. Bank v. Fidelity & D. Co. 145 Ala. 335, 5 L.R.A. (N.S.) 418, 117 Am. St. Rep. 45, 40 So. 415, 8 A. & E. Ann. Cas. 241; Lawhon v. Toors, 73 Ark. 473, 84 S. W. 636; Glenn County v. Jones, 146 Cal. 518, 80 Pac. 695, 2 A. & E. Ann. Cas. 764; Bell v. Trimby, — Tenn. —, 38 S. W. 100; Greenville v. Ormand, 51 S. C. 121, 28 S. E. 147; Morgan County v. Branham, 57 Fed. 179; O'Rourke v. Burke, 44 Neb. 821, 63 N. W. 17; Wehrung v. Denham, 42 Or. 386, 71 Pac. 133; Pauly Jail Bldg. & Mfg. Co. v. Collins, 138 Wis. 494, 120 N. W. 225.

Messrs. Catherwood & Nichol森 and H. B. Fryberger, for respondent:

Unpaid claims alone against a contractor

plication where the surety received compensation and the suretyship was in the line of his regular business.

And in Remington v. Fidelity & D. Co. 27 Wash. 429, 67 Pac. 989, it was held that fidelity bonds were in their nature insurance contracts, to indemnify the employer against the dishonesty of employees; that they were issued for profit, and therefore the same rules of construction should apply thereto as apply to other insurance contracts; and that if, looking at all its provisions, the contract was fairly susceptible of two constructions, one favorable and the other unfavorable to the insurance company, the latter, if consistent with the object of the contract, must be adopted, because the instrument was prepared by the attorneys, officers, or agents of the insurance company.

And in United American F. Ins. Co. v. American Bonding Co. — Wis. —, —L.R.A. (N.S.) —, 131 N. W. 994, which was an action upon a bond guarantying the fidelity of the plaintiff's employee, the court said: "The bond in question was an indemnity contract entered into by the defendant for a money consideration. It has all the essential features of an insurance contract, and should be subject to the rules of construction applicable to such contracts. . . . It being apparent that the bond sued on was prepared by the defendant, as to any ambiguity therein, the provisions, conditions, and exceptions of the bond which tend to work a forfeiture should be construed most strongly against the party preparing the contract."

But, as was said by Chief Justice Fuller in Guarantee Co. of N. A. v. Mechanics' Sav. Bank & T. Co. 183 U. S. 402, 46 L. ed. 253, 22 Sup. Ct. Rep. 124: "This rule cannot be availed of to refine away terms of a contract expressed with sufficient clearness to convey the plain meaning of the parties, and embodying requirements compliance with which is made the condition to liability thereon."

And in Granite Bldg. Co. v. Saville, 101 Va. 217, 43 S. E. 351, it was declared that, conceding that the contract of surety com-

panies should be construed as insurance contracts and taken most strongly against the company issuing them, still, where their terms were clear and unambiguous, the principle invoked could not be availed of to refine away the terms of a contract deliberately entered into, and expressed with sufficient clearness to convey the plain meaning of the parties, and embodying requirements compliance with which was made the condition to liability thereon.

So, in United States Fidelity & G. Co. v. Overstreet, 27 Ky. L. Rep. 248, 84 S. W. 764, it was declared that whether or not the rule that a surety was a favorite of the law, and that his contract should be construed strictly in his favor, applied to those who make it a business to become sureties for pay, or whether a contract in the latter case was to be construed as any other insurance contract, that is, most strongly against the insurer, still the obligation could not be extended beyond the plain meaning of its expressed terms.

In Union Cent. L. Ins. Co. v. United States Fidelity & G. Co. 99 Md. 423, 105 Am. St. Rep. 313, 58 Atl. 437, it was said that contracts of indemnity, like policies of fire insurance, to which they were closely analogous, though with which they were not strictly identical, must receive a reasonable construction so as to give effect to the intention of the parties, and so as to carry out, rather than defeat, the purpose for which they were executed. "They should neither, on the one hand, be so narrowly or technically interpreted as to frustrate their obvious design; nor, on the other hand, so loosely or inartificially as to relieve the obligor from a liability within the scope or spirit of their terms."

. . . The liability of an indemnitor is measured by the contract into which he enters, and it is never endangered by mere construction to include a term specifically excluded. Inasmuch as an indemnitor's liability is one dependent wholly upon the contract, it would be anomalous to hold that he is answerable under conditions directly contrary to the express stipulations of his undertaking. When he covenants to

do not constitute a breach, even though at a later date they may develop into liens.

Simonson v. Grant, 36 Minn. 439, 31 N. W. 861.

Reasonable diligence and good faith was all that could be required of the owner.

Lancashire Ins. Co. v. Callahan, 68 Minn. 277, 64 Am. St. Rep. 475, 71 N. W. 261; Manchester Fire Assur. Co. v. Redfield, 69 Minn. 10, 71 N. W. 709; Bank of Tarboro v. Fidelity & D. Co. 128 N. C. 366, 83 Am. St. Rep. 682, 38 S. E. 908.

An entire absence of notice of any kind would not have defeated the plaintiff's claim.

Lakeside Land Co. v. Empire State Surety Co. 105 Minn. 213, 117 N. W. 431; 1

Brandt, Suretyship & Guaranty, pp. 307, 308.

Proof of damage for failure to give notice totally failed. Therefore no defense can be claimed on that ground.

Farmers' & M. Bank v. Kercheval, 2 Mich. 515; Second Nat. Bank v. Gaylord, 34 Iowa, 246.

Start, Ch. J., delivered the opinion of the court:

On October 28, 1908, the plaintiff, hereinafter referred to as the owner, entered into a written contract with J. W. Hilliard, hereinafter referred to as the contractor, whereby he was to erect at Duluth a cold storage warehouse for the owner, in accordance with the plans and specifications

be bound provided certain antecedent conditions are complied with by the party indemnified, in the very nature of things, if those conditions are not fulfilled, his liability never becomes fixed. This is so elementary that we do not pause to cite authority in support of it. Giving to the bond of indemnity the most liberal construction contended for, treating it in point of fact as closely akin to a technical policy of insurance, we cannot understand how the indemnitor can be held accountable upon it, in the teeth of the explicit covenants that it should not be answerable unless designated provisions distinctly declared to be conditions precedent to the validity of the bond have been first complied with, when they have not been observed at all."

As intimated at the beginning of this note, the rule here discussed is not accepted by all the authorities. The supreme court of one jurisdiction has refused to follow it, and has declared that the rule of *strictissimi juris*, applicable to gratuitous sureties, should also govern contracts of suretyship entered into for hire by a surety company. In Lonergan v. San Antonio Loan & T. Co. 101 Tex. 63, 22 L.R.A.(N.S.) 304, 130 Am. St. Rep. 803, 104 S. W. 1061, the supreme court of Texas declared that it had been unable to discover a plausible ground for a distinction between the rights of a compensated and voluntary surety. The contract in suit was a bond guarantying the performance of a building contract, and the court said: "How it could be that receiving compensation by the surety would affect the relation between the surety on the bond and the owner of the building has not been suggested by counsel, and is not apparent to us. The well-established rule that material changes in the contract, made without the consent of the surety, will discharge him from liability, is based upon the clear and distinct ground that the surety's obligation is to answer for the contract as it is made, and a material change destroys that contract and substitutes a new one, for which the surety has not contracted to be responsible. Why

should a compensated, any more than a voluntary, surety, be held to guarantee a contract to which he has not consented? The proposition antagonizes the fundamental requirement that, to make a valid contract, the minds of the contracting parties must meet and agree upon its terms."

And in American Surety Co. v. Koen, 49 Tex. Civ. App. 98, 107 S. W. 938, which was an action on a statutory appeal bond executed by a surety company, the court declared the general rule to be that such contracts should be strictly construed, and uncertainties and ambiguities be resolved in favor of the surety.

But in a later case in the Texas court of civil appeals, Griffin v. Zuber, 52 Tex. Civ. App. 288, 113 S. W. 961, the court thought the rule "correct" that where the language used was susceptible of more than one construction, that interpretation should be adopted which was most favorable to the party indemnified, upon the ground that the party issuing the same was engaged in the business of making such contracts for a consideration, and prepared the same and selected the language used therein. It may be added that the court said that there was nothing about the contract before it calling for the application of the rule. Lonergan v. San Antonio Loan & T. Co. supra, was not referred to.

And in American Surety Co. v. San Antonio Loan & T. Co. — Tex. Civ. App. —, 98 S. W. 387, another court's statement of the prevailing rule was quoted apparently with approval, but the application of such rule was not necessary to the decision of the case. In any event, however, the two cases last cited can be deemed of little or no authority in Texas, at least, in view of the position taken by the supreme court upon this question.

There are some cases dealing with surety companies in which the language used, standing by itself, would seem to indicate an adherence to the old rule applicable to uncompensated sureties, but taking into consideration the fact that the circumstances of the cases did not call for a decision as to the applicability of either rule, and that the surety would have been dis-

therefor, which were a part of the contract. The contract price was \$19,500, in consideration of which the contractor undertook to furnish all materials, and perform all the labor for the erection of the warehouse, protect it from liens, and complete it by March 1, 1909. The other provisions of the contract, which are here material, are these: "No alterations shall be made in the work, except upon written order of the architects. . . . The owner reserves the right to make changes in the plans and specifications as may be necessary. If the alterations increase or decrease the cost, the contract price shall be increased or decreased in fair proportion. The architect is the arbiter of the amount, and it shall be fixed before the work proceeds. . . . Changes will not invalidate the contract, nor increase the time within which the work is to be completed, unless it can be shown that changes have caused delay. If extension of time is agreed to by the contractor and owner, the contractor is to

notify the surety company. If the owner desires any extra work, it shall be on written order of the owner or architect. . . . Itemized bills for extras will be presented at the close of the week during which they are performed, and, if approved, paid at the next monthly payment day. . . . Monthly payment certificates for 85 per cent of the cost of the work performed and material delivered, which is to become a part of the permanent structure, shall be issued about the first of each calendar month by the architect or superintendent, on presentation by the contractor of a statement showing the cost of the materials and labor and the unwrought materials delivered. . . . The contractor will furnish a bond for 33½ per cent of the amount of his contract, to guarantee the faithful performance thereof. The surety company's terms are in no way to invalidate the terms of the contract between the parties thereto."

The appellant, hereinafter referred to as

charged without regard thereto, the cases cannot be deemed much authority on either side of the question here offered for discussion.

In *United States v. American Bonding & T. Co.* 32 C. C. A. 420, 61 U. S. App. 584, 89 Fed. 925, it was held that when the rights of sureties were involved, they were bound only by the contract which they had signed, and had a right to look to a literal and strict construction of the same, and that their contract should not be extended by implication or as a consequence of what others might "do in matters in which they have no notice, and with which they are not connected."

And in *American Bonding Co. v. Pueblo Investment Co.* 9 L.R.A.(N.S.) 557, 80 C. C. A. 97, 150 Fed. 17, 10 A. & E. Ann. Cas. 357, it was held that a surety was never liable beyond the strict terms of his contract, that his obligation might not be extended by construction or implication, and that, on the other hand, it might not be reduced or destroyed thereby. "His agreement, like all other contracts, must have a rational construction, an interpretation which, while it carefully restricts his liability to that which he agreed to undertake, does not fail to hold him to that liability which, by the plain terms of his agreement, he promised to assume. Written language has the same significance, and its meaning must be ascertained by the same rules of law, when it is found in the contract of a surety as when it appears in other agreements."

And in *State use of Howard County v. Hill*, 88 Md. 111, 41 Atl. 61, an earlier case in the same jurisdiction, *Archer v. State*, 74 Md. 450, 28 Am. St. Rep. 261, 22 Atl. 8 (which was an action upon a bond, but whether such bond was signed by gratuitous sureties or by a surety company cannot be ascertained from the opinion), was quoted to the effect that the contract

of a surety upon an official bond was subject to the strictest interpretation, that his obligation was *strictissimi juris*, and that nothing was to be taken by construction against him, and that his liability must be found within the terms of his obligation.

And in *N. K. Fairbank Co. v. American Bonding & T. Co.* 97 Mo. App. 205, 70 S. W. 1096, it was declared that the obligation of a surety was *strictissimi juris*, and that the law had begun early to deal tenderly with sureties out of consideration for the gratuity of the promises. The court said: "It is the law that a surety has the right to stand on the strict terms of his agreement, but what his agreement is, is to be determined by the same canons of interpretation applied to other contracts, without technical nicety or strained distinctions. . . . If this doctrine is applied to gratuitous sureties, it may certainly be applied to a company whose business is to become surety for hire. Appellant was paid to make this bond, and a plain liability arose on it which ought to be discharged."

And in *Board of Education v. United States Fidelity & G. Co.* — Mo. App. —, 134 S. W. 18, the court used the following language: "Though a surety is regarded as a favorite of the law, and the obligation of suretyship in its application to concrete facts is therefore considered *strictissimi juris*, the suretyship contract itself is nevertheless interpreted and construed in accord with the identical rules which obtain with respect to other undertakings. In other words, the terms employed in the obligation are to be given a reasonable interpretation, according to the intent of the parties as disclosed by the instrument read in the light of surrounding circumstances and the purposes for which it was made." See, however the other Missouri cases cited herein.

J. A. C.

the surety company, gave the required bond, which contained the provisions, with others following: "The owner shall keep, do, and perform each and every, all and singular, the matters and things set forth and specified in said contract to be by the owner kept, done, and performed, exclusively at the times and in the manner as in said contract specified, provided said surety shall be notified in writing of any breach of said contract by said principal, or of any act on the part of said principal, or his agents or employees, which may involve a loss for which said surety may be liable hereunder, immediately after the occurrence of such act shall have come to the knowledge of said owner."

The contractor did not protect the warehouse from liens, and the owner was compelled to and did pay \$7,615.95 in discharge of valid liens thereon, and thereupon brought this action in the district court of the county of St. Louis against the surety company on its bond to recover the amount so paid. The surety company answered to the effect that the bond was released, for the reasons that changes in the work were made and extras ordered orally, and not on the written order of the owner or architect; and that payments were made to the contractor in a manner not authorized by the contract; and, further, that immediate notice was not given to the surety company by the owner of the alleged failure of the contractor to complete the contract within the time limited, and to pay his bills for materials and labor. At the close of the evidence the surety company requested a directed verdict in its favor, for the alleged reason, in effect, that upon the evidence the owner was not entitled to recover. The motion was denied, the ruling excepted to, and the issues tendered by the answer submitted to the jury, with instructions, one of which was excepted to at any time. Verdict for the owner in the sum of \$1,725.19. No motion for a new trial was made, but a motion was made for judgment in favor of the surety company notwithstanding the verdict, which was denied, and judgment entered upon the verdict, from which this appeal was taken.

The sole question for our decision is whether, upon the record as it stood at the close of the evidence, the surety company was, as a matter of law, entitled to a verdict in its favor. The answer to the question depends upon whether there was any evidence, taking the most favorable view of it for the owner, reasonably tending to show that it was entitled to a verdict in any amount. If there was not, then a verdict should have been directed as requested. If there was, then the requested instruction

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was rightly refused. The answer cannot be controlled in any respect by the instructions of the court to the jury in submitting to them the issues made by the pleadings; for the charge of the court as to either the law or facts, although not excepted to, is not the law of the case, as appellant claims. If the refusal to direct a verdict as requested was wrong, because there was no evidence to support any different verdict, the error could not be corrected by any charge which did not in effect grant the request. On the other hand, if there was such evidence, the ruling was correct, and no instructions in submitting the issues could make it erroneous. The charge, however, is entitled to consideration so far as it indicates the opinion of the learned trial judge as to the law and facts of the case.

In considering the question whether the surety company was entitled to a directed verdict for any of the reasons here urged, we must keep in view the character of contracts of suretyship of corporations organized for the purpose of engaging, for profit, in the business of guarantying the fidelity or contracts of a third party, and the rules of construction applicable to their contracts. While such contracts in form resemble those of suretyship, they are in effect contracts of insurance, to which the rules of construction peculiar to contracts of suretyship proper do not apply, but to which the rules governing ordinary insurance contracts are applicable. 32 Cyc. Law & Proc. p. 307; 27 Am. & Eng. Enc. Law, 2d ed. p. 452, §§ 174, 179, 208; *Lake-side Land Co. v. Empire State Surety Co.* 105 Minn. 213, 117 N. W. 431; *Brandrup v. Empire State Surety Co.* 111 Minn. 376, 127 N. W. 424. The rule of construction applicable to a contract of insurance, in cases where, as in this one, the legislature has not prescribed a standard policy, is settled, to the effect that if there is any ambiguity in the language of a condition, or it is fairly open to two constructions, one of which will uphold and the other defeat the claim of the insured, that should be adopted which is most favorable to the insured. The rule of strict construction against the insurer, and the liberal one in favor of the insured, must prevail under such circumstances. If, however, the terms of the contract be clear, and not fairly susceptible of two constructions, an ambiguity cannot be assumed and the plain intention of the parties nullified by construction. *Loy v. Home Ins. Co.* 24 Minn. 315, 31 Am. Rep. 346; *American Surety Co. v. Pauly*, 170 U. S. 133, 42 L. ed. 977, 18 Sup. Ct. Rep. 552.

1. This brings us to the first reason urged why it was error for the court not to direct

a verdict for the defendant, namely, that the bond was released by a change in the contract by an unauthorized ordering of extras. The only basis for this claim found in the record is that changes were made in the work and extras ordered amounting in value to \$1,804.39. Those ordered in writing amounted only to \$442.80; but there was evidence tending to show that the whole thereof was audited and allowed by the architect before payment. The contract expressly reserved the right of the owner to make such changes and order extras without limit. In this respect this case differs from that of Norwegian Evangelical Lutheran Bethlehem Congregation v. United States Fidelity & G. Co. 81 Minn. 33, 83 N. W. 487. The right to make changes and to order extras being expressly reserved by the contract, a failure to give a written order for them could in no event prejudice the insured or release the bond to any greater extent than the value of the extras ordered orally; for delay or increased risk, if any, due to the increase in the amount of work to be done, would be the same, whether or not the order was in writing. This seems to have been the view of the trial judge in denying the motion for a directed verdict, for the jury were instructed, in effect, that the owner could recover for payments for extras which were ordered orally. The evidence shows that, eliminating such payments, there would be at least a substantial balance which the owner was compelled to pay by the default of the contractor. It follows that the surety company was not entitled to a directed verdict for the first alleged reason urged, even if the construction of the trial court of the contract as to extras be accepted. It is not, however, necessary to rest this conclusion alone upon the consideration stated; for if a building contract, the performance of which by the contractor is secured by a bond of guaranty insurance, reserved the right of the owner to make changes in the work and order extras in writing without limitation, the mere fact that such changes are made and extras ordered verbally, but the architect audits and allows the amount thereof before payment does not release the insurer. *Brandrup v. Empire State Surety Co.* 111 Minn. 376, 127 N. W. 424; *Smith v. Molleson*, 148 N. Y. 241, 42 N. E. 669; *Cowles v. United States Fidelity & G. Co.* 32 Wash. 120, 98 Am. St. Rep. 838, 72 Pac. 1032.

2. It is also urged that the surety company was entitled to an instructed verdict for the alleged reason that the owner made payments to the contractor in a manner not authorized by the contract; that is, the owner failed to retain 15 per cent of the cost of the work performed and materials

delivered until the completion of the contract. The trial judge submitted to the jury the question whether the owner failed so to retain such percentage, and in case they found an overpayment, the amount thereof should be deducted from any amount the owner would otherwise be entitled to recover. It is evident that this instruction was given upon the basis that the question whether there was any overpayment during the progress of the work was made by the evidence a question of fact, and that if there was, it released the bond *pro tanto* only. It was held in the case of *Simonson v. Grant*, 36 Minn. 439, 31 N. W. 861, that such an overpayment would release the surety absolutely. That case, however, was not, as is this case, one of guaranty insurance, and the rule of strict construction was applied. It would seem to follow logically, from the rule of construction applicably to guaranty insurance, that any overpayment would release the surety company *pro tanto* only. However this may be, we are of the opinion that the question whether there was an overpayment was made one of fact by the evidence. The contract provided for the payment of 85 per cent of the cost of work performed and unwrought materials delivered. This provision, construed without reference to other provisions of the contract, would extend the 85 per cent to all work performed and materials furnished as extras. But the time and manner of payment for extras was specifically provided for by another clause of the contract, to the effect that they should be paid for at the next monthly payment day after they were furnished and approved. Therefore, in determining whether the evidence is conclusive that more than the 85 per cent was paid before the completion of the contract, the amount paid for extras must be excluded, and the fact kept in mind that payment of 85 per cent of the costs of work performed and unwrought materials delivered was authorized by the contract. *Graves v. Merrill*, 67 Minn. 463, 70 N. W. 562. The burden of establishing a breach of this condition of the contract was upon the surety company. Taking the most favorable permissive view of the evidence for the owner, it cannot be held as a matter of law that there were any overpayments made to the contractor during the progress of the work.

3. The last reason urged why the surety company was entitled to an instructed verdict is the alleged failure of the owner to give the surety company notice of the failure of the contractor to complete the contract within the time limited, and of his failure to pay bills for work and materials furnished. The bond provided that the owner should notify in writing the surety

company of any breach of the contract by the contractor, or of any act on his part "which may involve a loss for which said surety may be liable hereunder, immediately after the occurrence of such act shall come to the knowledge of said owner." The object of requiring notice to be given of the contractor's default which may involve loss to enable the surety company seasonably to take such practicable action as might prevent or minimize loss by reason of the default, and it is not to be strictly construed for or against either party, but reasonably as to both. So construing it, it is clear that the provision for immediate notice does not require notice to be given instantly upon learning of the default, but that it should be given within a reasonable time in view of all the circumstances. *Fidelity & D. Co. v. Courtney*, 180 U. S. 342, 46 L. ed. 1193, 22 Sup. Ct. Rep. 833. The general rule is that the question of reasonable time is one of fact, and must be submitted to the jury with proper instructions; but when the facts are undisputed, and only one reasonable conclusion can be drawn therefrom, it is the duty of the trial judge to instruct the jury accordingly. *Dunnell's Trial Book*, § 206; *Cochran v. Toher*, 14 Minn. 385, Gil. 293; *Roberts v. Mazeppa Mill Co.* 30 Minn. 413, 15 N. W. 680; *Warder v. Bowen*, 31 Minn. 335, 17 N. W. 943.

Was the question in this case one of law? The answer depends upon a consideration of the undisputed evidence and admitted facts relevant thereto, which are, briefly stated, these: The work was to be completed by March 1, 1909. The general contract on that day was not entirely completed, as there remained work to the amount of \$500 to be done, besides extra work done after that date amounting to over \$1,400. On March 6th the contractor asked for an estimate of \$3,500 to pay bills, which was allowed and paid to him on March 15th, but he used the amount to pay bills on other contracts on which the surety company had risks. On April 6th the contractor presented a bill for extras in the sum of \$1,804.39, which was paid April 16th. On April 7th suit was brought against the contractor by a materialman to recover some \$1,500, the value of materials which were furnished and used in the construction of the warehouse, and the owner was garnished. This was one of the claims for the payment of which an estimate was requested and allowed on March 6th. The owner, upon being garnished, at once communicated with the contractor with reference to the matter, who, on April 13th, replied to the effect that the claim made in the case in which the owner had been garnished was excessive in the sum of \$400, and, further, that he

would be cramped for money with which to meet his pay rolls and other obligations, and he would like to have the amount of the bill for extras paid. The owner also consulted a commercial agency, and received a favorable report as to the contractor's solvency. The bill for extras, \$1,804.39, was paid April 16th. The owner, however, gave the surety company no notice of the default of the contractor until April 27th, at or about which date liens were filed against the warehouse, and the contractor went into bankruptcy. The trial court submitted to the jury the question whether this notice was given within reasonable time under all the circumstances.

The fact that the contract was not fully completed within the time limited, and no notice given, did not release the bond, for no claim for damages for failure to complete the warehouse on time is made by the owner against anyone. *Lakeside Land Co. v. Empire State Surety Co.* 105 Minn. 213, 117 N. W. 431. Nor was the bond released by the mere fact that the owner made payments to the contractor after it knew that he was not applying the money paid him under the contract to the payment of bills for labor and materials furnished for the warehouse, for it was bound to make payments as provided by the contract. *American Surety Co. v. Waseca County*, 77 Minn. 92, 79 N. W. 649. Such facts, however, are relevant and weighty in the consideration of the question whether the notice was given within a reasonable time under all the circumstances. The fact that the owner, upon being garnished, made an investigation, instead of giving the notice, is of special significance; for the very purpose of the notice was to enable the surety company to investigate, exercise its judgment, and take steps to avert the threatened loss. The owner could not speculate upon the probabilities of loss, but was bound to give the notice as required by the contract.

Upon a consideration of the undisputed evidence and admitted facts, we are of the opinion, and so hold, that it conclusively appears therefrom that the owner did not within a reasonable time give the surety company notice of the default and acts of the contractor to which we have referred, and that for this reason the surety company was entitled to a directed verdict. Therefore the judgment herein must be reversed, and the case remanded, with direction to the District Court to grant appellant's motion for judgment notwithstanding the verdict.

So ordered.

Jaggard, J., concurs in the conclusion.

**NEW JERSEY COURT OF ERRORS
AND APPEALS.**

IDA VIRGINIA BISBING
v.
ASBURY PARK, Plff. in Err.

(— N. J. —, 78 Atl. 196.)

**Park — dangerous condition — injury
— liability.**

Where a dangerous condition exists in a public park or way, in a portion thereof not leased, the power to rent portions only of such public lands having been conferred by statute, such condition not arising from it or in consequence of the management or control of the municipality over the

Headnote by VOORHEES, J.

Note. — Liability of municipal corporations for injuries through unsafe conditions in parks or other public grounds other than streets.

The weight of authority supports the fundamental proposition of law upon which the decision in *BISBING v. ASBURY PARK* rests, that a municipality maintaining public parks is discharging a public duty, and is not performing a private, corporate function for its own advantage.

A leading case upon this subject is *Blair v. Granger*, 24 R. I. 17, 51 Atl. 1042, in which it was held that where the place of injury was a public park, a municipal corporation would not be liable, in the absence of a statute, for omissions or neglect in the performance of a corporate duty imposed upon it by law, or for that of its servants engaged therein, where such corporation derived no benefit therefrom in its corporate capacity. The court said: "The city of Providence, for aught that appears, seems to have been in the discharge of a governmental power, engaged in the performance of a public service, in which it had no particular interest, and from which it derived no special benefit or advantage in its corporate capacity, but which it is bound to see performed in pursuance of a duty imposed by law for the general welfare of the inhabitants, or of the community; that the members of the park department, like those of the fire department, although appointed by the city corporation, are not, when acting in the discharge of their duties, servants or agents in the employment of the city, for whose conduct the city can be held liable; but they act rather as public officers, or officers of the city, charged with a public service, for whose negligence or misconduct in the discharge of official duty no action will lie against the city, unless expressly given; and hence the maxim *respondet superior* has no application."

And in *Park Comrs. v. Prinz*, 127 Ky. 460, 105 S. W. 948, which was an action to recover for injuries alleged to be caused by the negligence of the board's employees, 33 L.R.A.(N.S.)

rented parts of the public lands, or connected therewith, the negligence of the public authorities in permitting such condition to exist will not render such municipality liable to respond to the suit of one of the general public injured in consequence thereof.

(November 14, 1910.)

ERROR to the Monmouth County Circuit of the Supreme Court to review a judgment in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by the negligence of defendant's servants. Reversed.

The facts are stated in the opinion.

it was declared that parks were essentially public places established for purely public purposes, and that an action would not lie against a municipality for the neglect of a public duty imposed for the benefit of the public, or for mere personal tort or negligence of any of its officers or agents in the performance of such public duties.

And in *Clark v. Waltham*, 128 Mass. 567, the court refused to hold a town liable for injuries occasioned a traveler by a defect in a public common, upon the ground that, though it was alleged that the town negligently suffered a dangerous place to exist in the park, and failed to give proper notice to persons using the same, it did not hold the park for its own profit or emolument, but for the direct and immediate use of the public.

And in *Steele v. Boston*, 128 Mass. 583, recovery was refused for injury to a person on Boston Common by colliding with a sled on one of the paths there upon which the city permitted coasting, where the city held the common for the public benefit, and not for its own emolument or as a source of revenue, and had constructed and kept in repair the paths as a part of the common for the comfort and recreation of the public, and not as a part of its system of highways or streets.

And in *Russell v. Tacoma*, 8 Wash. 156, 40 Am. St. Rep. 895, 35 Pac. 605, it was held that a city was not liable for injuries occasioned by the negligence of its officers or employees while engaged in the improvement of a park. The court declared that the city in improving the park was exercising a power or franchise conferred upon it for the public good, and not for private corporate advantage.

In *McGraw v. District of Columbia*, 3 App. D. C. 405, 25 L.R.A. 691, in which recovery was denied for the death of a boy from drowning while swimming at a public bathing beach, it was declared that a municipality required by statute to establish and maintain a free bathing beach could not be held responsible for its safety, and the safe use of it by those likely to have recourse to it, in the same manner

Messrs. Patterson & Rhome for plaintiff in error.

Messrs. Durand, Ivins, & Carton, for defendant in error:

The defendant owed plaintiff a duty with respect to this land, because it was used, devoted, and appropriated for purposes of pecuniary profit or special advantage to the defendant, as distinguished from the duty imposed upon defendant as a public instrumentality of the state without pecuniary or other special advantage to the defendant city.

Hill v. Boston, 122 Mass. 344, 23 Am. Rep. 332; Dill. Mun. Corp. 4th ed. 967; 15 Am. & Eng. Enc. Law, p. 1141; Galveston v. Posnainsky, 62 Tex. 118, 50 Am. Rep. 517.

A municipal corporation in its private character as the owner, lessee, or controller of lands, houses, public docks, piers, water and gas works, etc., is to be regarded in the same light as an individual, and dealt with accordingly.

Oliver v. Worcester, 102 Mass. 489, 3 Am. Rep. 485; Curran v. Boston, 151 Mass. 505, 8 L.R.A. 243, 21 Am. St. Rep. 465, 24 N. E. 781; Child v. Boston, 4 Allen, 52, 81 Am. Dec. 680; Thayer v. Boston, 19 Pick. 511, 3 Am. Dec. 157; Bigelow v. Randolph, 14 Gray, 541; Mower v. Leicester, 9 Mass.

247, 6 Am. Dec. 63; Galveston v. Posnainsky, 62 Tex. 118, 50 Am. Rep. 517; Conway v. Beaumont, 61 Tex. 10; Barnes v. District of Columbia, 91 U. S. 551, 28 L. ed. 443; Evanston v. Gun, 99 U. S. 660, 25 L. ed. 306; Chicago v. Robbins, 2 Black, 418, 17 L. ed. 298; New York v. Sheffield, 4 Wall. 189, 18 L. ed. 416; Weightman v. Washington, 1 Black, 39, 17 L. ed. 52; Providence v. Clapp, 17 How. 161, 15 L. ed. 72; Nebraska City v. Campbell, 2 Black, 590, 17 L. ed. 271; Rock Island County v. United States, 4 Wall. 435, 18 L. ed. 419; Lyme Regis v. Henley, 2 Clark & F. 331; Mersey Docks & Harbour Board v. Penhallow, L. R. 1 H. L. 93; 7 Hurlst. & N. 439; Parnaby v. Lancaster Canal Co. 11 Ad. & El. 223, 3 Prob. & D. 162, 9 L. J. Exch. N. S. 338; Scott v. Manchester, 37 Eng. L. & Eq. Rep. 495; Russell v. Devon, 2 T. R. 667, 1 Revised Rep. 585, 12 Eng. Rul. Cas. 694; Makinnon v. Penson, 25 Eng. L. & Eq. Rep. 457; Rhodes v. Cleveland, 10 Ohio, 159, 36 Am. Dec. 82; McCombs v. Akron, 15 Ohio, 476; Western College v. Cleveland, 12 Ohio St. 377; Dayton v. Pease, 4 Ohio St. 94; Davenport v. Ruckman, 37 N. Y. 568; Requa v. Rochester, 45 N. Y. 129, 66 Am. Rep. 52; Rochester White Lead Co. v. Rochester, 3 N. Y. 463, 53 Am. Dec. 316; Aldrich v. Tripp, 11 R. I. 141, 23

as streets and highways, where to be rendered safe, or even as parks and grounds kept for entertainment and amusement, without direct profit or advantage to the municipality, might have to be maintained in a condition of safety. But the court made no attempt to discuss municipal liability as to parks or grounds kept for entertainment and amusement.

On the other hand, in Denver v. Spencer, 34 Colo. 270, 2 L.R.A. (N.S.) 147, 114 Am. St. Rep. 158, 82 Pac. 590, 7 A. & E. Ann. Cas. 1042, it was held that a city would be liable for the negligent acts of its park commission in erecting a stand in a park for the convenience of the public so insecurely that it collapsed under the weight of the persons using it. The court declared that no authorities need be cited to the proposition that the parks were the private and exclusive property of the city, in which the state, as distinguished from the municipality, had no property interest whatever.

And in Bloom v. Newark, 3 Ohio N. P. N. S. 480, a city was held to be liable for an assault committed by a care taker in a public park while acting in the line of his duty, upon the ground that the city, in maintaining and caring for a park, was exercising a private corporate function.

In the following cases, in which judgment was had against municipalities upon the merits, no reference was made to the question offered for discussion in this note, it apparently being assumed that municipalities would be liable for their negligence 23 L.R.A. (N.S.)

in maintaining parks and other public grounds:

In Weber v. Harrisburg, 216 Pa. 117, 64 Atl. 905, a city was held liable for injuries caused by the plaintiff's falling over an iron cable stretched across a path along a river front which had long been used as a public park under the control of the city, and also as a public landing place, upon the ground that it was the city's duty to see that the path was kept in a safe condition for public use.

That a municipality is charged with the duty of keeping its public grounds in a safe condition seems also to have been the ground for the decision in Barthold v. Philadelphia, 154 Pa. 109, 26 Atl. 304, in which a city was held liable for the death of a boy eleven years old caused by drowning in an open well acquired by the city for the purpose of adding it to a park, the court treating the land as "public grounds," though not formally thrown open to the public.

So, in Silverman v. New York, 114 N. Y. Supp. 59, recovery was allowed against a city for injuries occasioned by one of its employees driving a wagon used for removing rubbish from the park over the plaintiff's foot while he was seated on a bench in the park.

And in Lowe v. Salt Lake City, 13 Utah, 91, 57 Am. St. Rep. 708, 44 Pac. 1050, recovery was allowed against a city for injuries received by the plaintiff's straying from a path and falling into an unguarded

Am. Rep. 434; *Maxmilian v. New York*, 62 N. Y. 160, 20 Am. Rep. 468; *Conrad v. Ithaca*, 16 N. Y. 158; *Barton v. Syracuse*, 36 N. Y. 54; *Bailey v. New York*, 3 Hill, 538, 38 Am. Dec. 669; *Weet v. Brockport*, 16 N. Y. 161, note; *New York v. Furze*, 3 Hill, 612; *Ring v. Cohoes*, 77 N. Y. 83, 33 Am. Rep. 574; *Lloyd v. New York*, 5 N. Y. 369, 55 Am. Dec. 347; *Storrs v. Utica*, 17 N. Y. 104, 72 Am. Dec. 437; *Noonan v. Albany*, 79 N. Y. 470, 35 Am. Rep. 540; *Morey v. Newfane*, 8 Barb. 645; *McCarthy v. Syracuse*, 46 N. Y. 194; *Lacon v. Page*, 48 Ill. 499; *Champaign v. Patterson*, 50 Ill. 62; *Bloomington v. Bay*, 42 Ill. 503; *Sterling v. Thomas*, 60 Ill. 265; *White v. Bond County*, 58 Ill. 298, 11 Am. Rep. 65; *Walsham v. Kemper*, 55 Ill. 346, 8 Am. Rep. 652; *Browning v. Springfield*, 17 Ill. 143, 63 Am. Dec. 345; *Clayburgh v. Chicago*, 25 Ill. 535, 79 Am. Dec. 346; *Springfield v. Le Claire*, 49 Ill. 476; *Hewison v. New Haven*, 37 Conn. 475, 9 Am. Rep. 342; *Jones v. New Haven*, 34 Conn. 1; *Chidsey v. Canton*, 17 Conn. 478; *Smoot v. Wetumpka*, 24 Ala. 112; *Albrittin v. Huntsville*, 60 Ala. 486, 31 Am. Rep. 46; *Meares v. Wilmington*, 31 N. C. (9 Ired. L.) 73, 49 Am. Dec. 412; *Wheeler v. Troy*, 20 N. H. 77; *Ball v. Winchester*, 32 N. H. 435; *Rowe v. Portsmouth*, 56 N. H. 291, 22 Am. Rep. 464; *Eastman v.*

Meredith, 36 N. H. 284, 72 Am. Dec. 302; *Gilman v. Laconia*, 55 N. H. 130, 20 Am. Rep. 175; *Anne Arundel County v. Duckett*, 20 Md. 469, 83 Am. Dec. 557; *Calvert County v. Gibson*, 36 Md. 229; *Baltimore County v. Baker*, 44 Md. 1; *Pittsburgh v. Grier*, 22 Pa. 54, 60 Am. Dec. 65; *Boyd v. Insurance Patrol*, 113 Pa. 269, 6 Atl. 536; *Erie City v. Schwingle*, 22 Pa. 384, 60 Am. Dec. 87; *Western Sav. Fund Soc. v. Philadelphia*, 31 Pa. 175, 72 Am. Dec. 730; *Memphis v. Lasser*, 9 Humph. 757; *Savannah v. Waldner*, 49 Ga. 316; *Helena v. Thompson*, 29 Ark. 569; *Cook v. Milwaukee*, 24 Wis. 270, 1 Am. Rep. 183; *Crossett v. Janesville*, 28 Wis. 420; *Wilwaukee v. Davis*, 6 Wis. 377; *Kenworthy v. Ironton*, 41 Wis. 647; *Ward v. Jefferson*, 24 Wis. 342; *Wallace v. Muscatine*, 4 G. Greene, 373, 61 Am. Dec. 131; *O'Neill v. New Orleans*, 30 La. Ann. 220, 31 Am. Rep. 221; *Petersburg v. Applegarth*, 28 Gratt. 321, 26 Am. Rep. 357; *Sawyer v. Corse*, 17 Gratt. 241; 99 Am. Dec. 445; *Richmond v. Long*, 17 Gratt. 375, 94 Am. Dec. 461; *Noble v. Richmond*, 31 Gratt. 271, 31 Am. Rep. 726; *Armstrong v. Brunswick*, 79 Mo. 319; *Blake v. St. Louis*, 40 Mo. 570; *Hannon v. St. Louis County*, 62 Mo. 313; *Kiley v. Kansas City*, 87 Mo. 103, 56 Am. Rep. 443; *Murtaugh v. St. Louis*, 44 Mo. 480; *Kobs v. Minneapolis*,

and unlighted hatchway, while undertaking to cross, at night, the back yard of the city hall, while legally on the premises as a legislator.

In *Roullier v. Magog*, Rap. Jud. Quebec 37 C. S. 248, recovery was allowed against a municipal corporation for the death of a child drowned in a reservoir maintained by the city near a street, it appearing that defendant permitted the public, and particularly children to play upon the land.

On the other hand, in the following cases recovery was denied against defendant municipalities upon the merits, also without considering the question here under discussion:

In *Sheehan v. Boston*, 171 Mass. 296, 50 N. E. 543, recovery was refused against a city for injury occasioned to a person who, in violation of an ordinance of the city, and aware that the public were warned to keep off, walked across the grass in a public park, and fell into an unguarded trench which had been dug by the city for the purpose of laying a water pipe.

In *Carey v. Kansas City*, 187 Mo. 715, 70 L.R.A. 65, 86 S. W. 438, a city was held not liable for the death of a child eleven years old, who was drowned in the city's water supply reservoir, situated in a public park, it appearing that the city had so constructed a 4-foot fence around the reservoir that children had to remove their shoes to climb it, and that deceased had climbed the fence notwithstanding the fact that he had been warned by public watchmen not to go

inside the inclosure, and had been driven out of it.

In *O'Rourke v. New York*, 17 App. Div. 349, 45 N. Y. Supp. 261, recovery was refused against a municipality for injuries to one who, walking briskly upon a path at night talking to a companion, did not observe, and fell down, properly constructed steps in the path, which were not lighted by artificial light, upon the ground that no legal duty was imposed upon the municipality to light up its walks in the park so that the attention of the people would necessarily be called to irregularities, like the steps in question, that might be found in different parts of the park.

In *Platt v. New York*, 8 Misc. 409, 28 N. Y. Supp. 672, in which it appeared that the city had constructed a fence separating a bridle path from a foot path, recovery was refused for injuries received by a horseman who went on the foot path at night, and was injured by his horse falling over such fence.

Cases like *Oliver v. Worcester*, 102 Mass. 489, 3 Am. Rep. 485, which is set forth in *BISBING v. ASHBURY PARK*, will be found collected in the note to *Columbia Finance & T. Co. v. Louisville*, 25 L.R.A. (N.S.) 88, on municipal liability for tort in connection with municipal buildings, since the decisions in such cases went off upon the nature of the buildings on the grounds, though the injury complained of occurred on public grounds.

J. A. C.

22 Minn. 160; *Simmer v. St. Paul*, 23 Minn. 408; *Logansport v. Wright*, 25 Ind. 513; *Brinkmeyer v. Evansville*, 29 Ind. 187; *Reed v. Belfast*, 20 Me. 248; *Sussex County v. Strader*, 18 N. J. L. 108, 35 Am. Dec. 530; *Young v. Road Comrs. 2 Nott. & M'C.* 537; *McConnell v. Dewey*, 5 Neb. 385; *De-troit v. Blackeby*, 21 Mich. 84, 4 Am. Rep. 450.

Voorhees, J., delivered the opinion of the court:

This writ of error removes a judgment entered for the plaintiff in Monmouth county circuit court, in an action brought to recover damages for personal injuries sustained by the plaintiff, alleged to be in consequence of the negligence of the servants and agents of the city of Asbury Park. The case was tried before the court without a jury. It appeared that on the evening of the 30th day of August, 1906, the plaintiff was at a carnival or celebration in progress in the streets of the city of Asbury Park, and, for the purpose of viewing the pageant, had gone upon the board walk extending along the ocean, between 7 and 8 o'clock, and walked up to about Seventh avenue, and then turned to retrace her steps. The crowd was then "immense," as she expresses it, making it very difficult to walk, so she decided to leave the board walk, and, when near the corner of Second avenue, turned into a narrower brick walk, some 22 feet in width, leading at right angles into Ocean avenue. North of this brick walk or way were located a group of bath houses, and on the south side of it was a grass plot, on the same level with the walk. In the grass plot, about 2½ feet southerly from the walk, there was maintained by the city an upright water pipe 3 or 4 inches in height, and a lateral pipe which, near the upright pipe, was exposed; there being a hole or depression in the ground about 6 inches deep, and some 2 feet in diameter.

The plaintiff thus describes the accident: "I hadn't gone very far before I felt my foot go in that hole. I caught it. It seemed to catch between something and threw me to the ground." She also testified that there was so great a crowd that she and her sisters, who were with her, could not walk together, but were making their way through it as best they could, and that there were just as many people on the grass as on the walk, and she did not realize that she was walking on the grass. The grounds were illuminated by electric lights. There was no railing or other barrier separating the cross walk from the grass plot, and no inclosure or protection about the pipes. The defend-

ant's negligence is thus set forth in the declaration: "That the defendant, a municipal corporation, was clothed with the powers and subject to the duty by and through its public grounds commission, among other things, of keeping sound, safe, and serviceable for public use all the parks and public places, except the streets and avenues in said city of Asbury Park, and particularly the public place known as the beach front, lying east of Ocean avenue. . . . Yet the defendant did not keep said public place known as the beach front . . . sound, safe, and serviceable for public use and travel," etc.

It is not controverted, and could not well be under the law as expounded in this state since the year 1840, that, in the absence of statute, an action will not lie against a municipal corporation at the instance of an individual who has sustained special damage in consequence of the neglect of such corporation in the performance of a public duty. *Sussex County v. Strader*, 18 N. J. L. 108, 35 Am. Dec. 530; *Livermore v. Camden County*, 29 N. J. L. 245, affirmed in 31 N. J. L. 507; *Pray v. Jersey City*, 32 N. J. L. 394; *Wild v. Paterson*, 47 N. J. L. 406, 1 Atl. 490; *Carter v. Rahway*, 55 N. J. L. 177, 26 Atl. 96, affirmed in 57 N. J. L. 196, 30 Atl. 863; *Paterson v. Erie R. Co.* 78 N. J. L. 592, 30 L.R.A.(N.S.) 209, 75 Atl. 922. The plaintiff, however, seeks to bring herself within an exception to this general rule, and argues that the negligent act was committed by the city, not in the discharge of a strictly public duty, but while holding and dealing with the property whereon the neglected dangerous condition existed, as its own and for its own benefit, by receiving income therefrom, just as a private owner would lease his property and receive the rents therefrom. It is contended by the plaintiff that when a municipal corporation so deals with its property,—that is, as its own, as distinguished from the property which it holds strictly for public benefit,—the law discriminates between negligent acts done in the discharge of a public duty, wherein no liability to the corporation will attach, and acts done not in the performance of a public function, but in what has been called, by way of distinction and for lack of a better designation, its private capacity, for which an action may be maintained against the municipality.

The principle here invoked has authority in several well-considered cases, among which are *Bailey v. New York*, 3 Hill, 531, 38 Am. Dec. 669; *Western Sav. Fund Soc. v. Philadelphia*, 31 Pa. 185; *Scott v. Manchester*, 3 Hurlst. & N. 204, 26 L. J. Exch. N. S. 406, 3 Jur. N. S. 590, 5 Week. Rep. 598; *Oliver v. Worcester*, 102 Mass. 489,

3 Am. Rep. 485; and *Hill v. Boston*, 122 Mass. 344, 23 Am. Rep. 332. In the last-cited case the opinion by Chief Justice Gray is most instructive, and in it he has collected and critically reviewed all the cases, both English and American, on the subject of public liability for negligent acts. The exception above urged finds some recognition in passing allusions to it in at least two cases in our supreme court. *Pray v. Jersey City*, *supra*, and *Jersey City v. Kiernan*, 50 N. J. L. 246, 13 Atl. 170.

In order to apply this distinction to the present case, the plaintiff has shown that the accident occurred upon lands acquired by the city of Asbury Park by purchase from James A. Bradley by deed of April 4, 1903. This deed conveyed a strip of land bordering on the ocean, together with the board walk, piers, pavilions, etc. The city was enabled to accept the conveyance and acquire the property by virtue of an act of the legislature of 1900, entitled "An Act to Authorize Cities Bordering on the Atlantic Ocean to Purchase the Lands in Any Such City Bordering on the Ocean, and Adjacent Lands Thereto in Such City, for Public Purposes, and to Improve the Same, and to Issue Bonds for Such Purposes." P. L. 1900, p. 285, and the several amendments to said act, passed in 1902 and 1904 (P. L. 1902, p. 805; P. L. 1904, p. 199). The city in the deed covenanted that the lands were to be used by the city for the purposes set forth in the act, and for such other purposes and uses as might be then or thereafter authorized by law.

An examination and construction of the enabling act are necessary, not only to characterize the lands thus acquired, but as well to determine whether the neglect of the municipal agents arose by the nonperformance of a public duty. The 1st section of the act authorizes the acquisition by purchase or condemnation of lands bordering on the ocean, for "public purposes and for places of resort for public health and for recreation, and to improve the same." A bond issue is sanctioned to provide the funds. By the 2d section the city is required, after acquiring such lands, to establish a "public grounds commission" consisting of three commissioners with three years' terms, to be appointed by the mayor and confirmed by the governing body, to serve without compensation. This commission, by § 3, is given the entire supervision and control of all parks and public places in the city, except the streets and avenues, including all lands then owned by the city or thereafter to be acquired for the purposes mentioned in the act; also full power to erect public buildings on the grounds, and to make and direct all im-

provements, alterations, repairs, and expenditures upon and on account of said parks, places, and lands. The 4th section of the act deals with the defraying of the expenses of maintenance, and the construction of buildings, roadways, and walks, the paying of the principal and interest of the bonds, and the expense of the general improvement of said public parks and places of public resort. The commissioners are then given power to set apart one or more places or pavilions for holding concerts and entertainments to which an admission fee may be charged. They are also authorized to operate the bathing grounds and bath houses in the event of their inability to rent the same, and until they may be able to do so, in order to prevent great public inconvenience and loss to the city. They may also lease any part of the property so acquired for any special term, not exceeding three years, for any purpose not inconsistent with the laws governing the city, which may seem proper for the improvement of the same. They may also rent spaces for the erection of a pier or piers, with the consent of the council. These rentals are then directed to be applied in the payment of the operating expenses and necessary repairs and improvements in said public parks, and the balance applied to the payment of the principal and interest of the bonds.

The principle underlying the exemption in favor of a municipality is rested upon the fact that the duty is owed to the public, the neglect of which forms the basis of the action, although such neglect may be injurious in varying degrees to every individual composing the public. Where, however, the duty is specifically owed to an individual, such individual has a right of action whenever the breach of that duty has occasioned injury to him. This is made clear by an examination of the opinion by the late Chief Justice Beasley in *Jersey City v. Kiernan*, *supra*. Therefore, in order to decide whether the present action is maintainable against the city, it must first be determined whether the neglect properly to guard the water pipe which caused the injury was a duty owed to the public. Aside from the fact that the dangerous condition existed not in a public way, but upon a grass plot evidently not intended to be walked over (which I think, under the circumstances, it is not necessary to discuss, for the case has not been tried on that theory), it cannot be doubted that the duty owed was a public duty.

I say "public duty" because the lands were originally acquired under the conveyance and by specific legislative sanction for public purposes, and for a place of resort

for public health and recreation. The commissioners were public appointive officers, serving without compensation, and under their control were placed, not only the particular lands acquired by the Bradley conveyance, but all the parks and public places in the city, except the streets and avenues. Nor is it argued or seriously contended that the brick way, in proximity to which the dangerous condition existed, was not a public way, and free for all citizens to pass and repass. The only difference between that and the ordinary streets and avenues is the fact that it existed within the confines of the public park. It cannot be doubted that the act was designed primarily to create a public park, and that, in establishing a public commission to serve without emolument, to care for it, as well as for all other public places in the city, it created public officers whose acts in so doing are public acts exercised for the benefit of the general public. I conclude therefore that thus far there is no difference to be noted between an action brought by an individual to recover damages sustained for the nonrepair of the ordinary public street, and the circumstances surrounding the present action.

But it also appears in the case, that upon the lands so acquired under the Bradley deed, there were "constructed piers, pavilions, bath houses, a restaurant, soda water stands, novelty stands, confectionery stands, cigar stands, and other buildings owned by the city, and from which the city, by way of rents, admissions, charges, and bathing privileges, derived a revenue." It as well also was in receipt of a revenue from ground rents for portions of said grounds, for rolling chair privileges, weighing machines, telescopes, and charges for the privilege of going to a place of landing of a sailing yacht. By reason of the income from these buildings and from the privileges granted by the commission, the city became liable, it is said, for the negligence of its servants in not using due care to keep safe all parts of the lands upon which they were erected, inasmuch as the board walk leads to all of said buildings, attractions, and privileges, and the brick cross walk was one of the principal walks whereby the board walk was reached from Ocean avenue. Hence, the insistence is that the defendant was managing and dealing with this whole property as a private owner would, and that it was held by the city for its own advantage and profit.

Has the plaintiff brought herself within the exception thus invoked? As before in-
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dedicated, the primary object of the purchase, and of the act permitting it, was to acquire lands for public or park purposes for public resort. The construction of a board walk along the ocean, of the walks leading to it through the several grass plots, most appropriate to make it attractive for public resort and preserve its park-like appearance, the installation of the very water pipe (an appliance designed and used, not for private gain, but for sprinkling the grass and public ways) in consequence of which the accident occurred, all indicate the public character of the place, and the effort to carry into effect this most obvious purpose of the act.

Now, the right to lease and accept rentals from the land was not an unlimited right in the public ground commission. They had powers to set apart one or more places for pavilions, not the whole of the lands. They had power over the bathing grounds, and might take charge of the bath houses until they could be rented, referring also to a part only of the lands purchased. They might lease any part of the property so acquired, not the whole of it. It must be here mentioned that to the jurisdiction of this commission were committed, not only the Bradley tract, but also all the parks and public places in the city (except the streets) then owned by the city or thereafter to be acquired. Therefore the privilege of leasing any part of the property, it would seem, was not confined, under the act, to the specific lands conveyed by the Bradley deed, but extended to all the lands over which the commission had control.

It would not be seriously contended that a dangerous condition existing in a park territorially disconnected with the Bradley lands would visit liability upon the city because of the rental derived from buildings located upon the Bradley tract, or *vice versa*. If not, then, if the plaintiff's insistence be correct, it must be because the dangerous condition existed within the confines of the Bradley tract, upon some parts of which, specially set apart and rented, were located the income-producing structures, thus making the mere territorial boundaries of the whole purchase a magic inclosure to visit liability upon the public. Nor would it be reasonable to assert that because a city street led to another upon which a rented building was located, this circumstance laid the foundation for recovery because of the dangerous condition of the former street.

It is perfectly apparent that the condi-

tion was in no wise consequent upon the renting, that it arose quite independently thereof, and upon lands which, under the powers granted by the act, have been reserved from the leased portions of the tract, or, more properly speaking, that the rented portions had been set apart from the public park. Nor did the condition result from any act performed or omitted in connection with the properties thus separated and rented.

In *Oliver v. Worcester*, 102 Mass. 489, 3 Am. Rep. 485, the plaintiff was walking in a footpath within the public common in the city of Worcester, and fell into an excavation which had been caused in the course of the reparation of a building standing in the common, which the city had leased and was receiving rent for. The court said: "If, in the course of repairing this building, the servants and agents of the city negligently suffered the adjoining land within its control to be in a dangerous condition, . . . the city was responsible." It will be perceived that the negligence there grew out of the control of the property actually in use by the city in its private capacity. It arose directly from the management of the rented premises, a condition of affairs clearly distinguishable from this case.

Neither the grass plot nor the way upon which it bordered produced revenue to the city. They still remained to serve the public uses humanely and beneficently made possible by the lawgivers, to promote the health and recreation of all citizens. In keeping up the public grounds, the agents of the city were fulfilling a corporate duty imposed by law, from which the city derived no benefit in its corporate capacity. This was a governmental act, and not the exercise of a power conferred for its own benefit. *Curran v. Boston*, 151 Mass. 505, 8 L.R.A. 243, 21 Am. St. Rep. 465, 24 N. E. 781; *Moffitt v. Asheville*, 103 N. C. 237, 14 Am. St. Rep. 810, 9 S. E. 695.

Where a dangerous condition exists in a public park or way, in a portion thereof not leased, the power to rent portions only of such public lands having been conferred by statute, such condition not arising from or in consequence of the management or control of the municipality over the rented parts of the public lands, or connected therewith, the negligence of the public authorities in permitting such condition to exist will not render such municipality liable to respond to the suit of one of the general public injured in consequence thereof.

The judgment will be reversed, to the end that a venire de novo may be awarded.

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NORTH CAROLINA SUPREME COURT.

STATE OF NORTH CAROLINA EX REL.
J. H. KERR et al.

v.

ISAAC HICKS et al., Appts.

(154 N. C. 265, 70 S. E. 468.)

Religious society — special meeting — attempted call — validity.

1. A voluntary religious association consisting of an annual meeting of delegates from constituted churches, whose constitution provides only for a yearly meeting, the place of which shall be designated at the prior meeting, has no authority to call special meetings or change the place of the annual meeting after it has been fixed and the regular annual meeting adjourned, and an attempt to do so by the majority members will be ineffectual as against the acts of the minority assembling at the regular time and place fixed.

Same — rival trustees — authority.

2. Trustees of a school maintained by a voluntary religious association, appointed by a minority at a meeting regularly called in accordance with the constitution of the association, are entitled to act as against those appointed by a special meeting of the majority, for which there is no provision in the constitution.

Parties — intervention — trustees — real parties in interest.

3. The trustees selected for a sectarian school by a regular meeting of the religious body controlling it may be permitted to become parties to a suit by the state against rival trustees, to determine who was entitled to administer the school.

Appeal — refusal to dismiss — separate review.

4. No appeal lies from an order refusing to dismiss an action brought by the state to determine which of two sets of trustees is entitled to administer a sectarian school, but the entry of appeal may be treated as an exception upon appeal from the final judgment.

Action — amendment — change of parties — necessity of dismissal.

5. It is no ground for dismissal of an action brought by the state against parties claiming to be trustees of a sectarian school, to determine who is entitled to administer the school, that the trustees having the right to the property are admitted as parties by amendment, and that the state solicitor still remains a party, since the rights of the parties may be adjudicated without the necessity of bringing a new action.

(March 1, 1911.)

Note. — The general subject of litigation growing out of schism or division in religious societies is treated in the note to *Mack v. Kime*, 24 L.R.A. (N.S.) 692.

A PPEAL by defendants from a decree of the Superior Court for Warren County in an action by the State to remove the trustees of an educational institution and place its property under control of a receiver until proper trustees could be appointed and qualified. Affirmed.

The facts are stated in the opinion.

Mr. T. T. Hicks, for appellants:

Judge Ward had no right against the objection and protest of defendants, to admit the present plaintiffs.

Asheville Div. No. 15, S. T. v. Ashton, 92 N. C. 588; Jones v. Asheville, 116 N. C. 817, 21 S. E. 691; Merrill v. Merrill, 92 N. C. 687; Ely v. Early, 94 N. C. 1; State ex rel. Clendenin v. Turner, 96 N. C. 416, 2 S. E. 51; Shell v. West, 130 N. C. 171, 41 S. E. 65; McNair v. Buncombe County, 93 N. C. 369; Robbins v. Harris, 96 N. C. 557, 2 S. E. 70; Hester v. Mullen, 107 N. C. 724, 12 S. E. 447; State ex rel. Goodwin v. Caraleigh Phosphate & Fertilizer Co. 123 N. C. 162, 31 S. E. 373.

Messrs. Tasker Polk, Andrew J. Harris, and Thomas M. Pittman, for appellees:

The wishes of the members of a religious society cannot be regarded, unless expressed in a valid form, in conformity with the by-laws and charter, at a regularly conducted meeting.

Juker v. Com. 20 Pa. 484; 34 Cyc. Law & Proc. p. 1127.

In church organizations those who adhere and submit to the regular order of the church, local and general, though a minority, are the true congregation.

Roshi's Appeal, 69 Pa. 462, 8 Am. Rep. 280; Gable v. Miller, 10 Paige, 627.

Acts of a majority to be binding must be conformable to the laws and principles of the church, or they are of no effect against a dissenting minority.

34 Cyc. Law & Proc. p. 1159.

If a religious society be composed of several branches or bodies, whether co-ordinate or subordinate, the rules of the society for management of its internal affairs, and for the adjustment of the relations between its branches, constitute the rules by which they should be governed.

Harrison v. Hoyle, 24 Ohio St. 254; 34 Cyc. Law & Proc. p. 1139, note 54.

Where rights to church property are dependent upon the rules, usages, and discipline of the church or denomination, the civil courts will always give effect to such rules, usages, and discipline.

34 Cyc. Law & Proc. p. 1170; White Lick Quarterly Meeting v. White Lick Quarterly Meeting, 89 Ind. 136; Gartin v. Penick, 5 Bush, 110; Morris Street Baptist Church v. Dart, 100 Am. St. Rep. 745, note; Pound-33 L.R.A. (N.S.)

er v. Ashe, 36 Neb. 564, 54 N. W. 847; Prickett v. Wells, 117 Mo. 502, 24 S. W. 52; Ferrara v. Vasconello, 31 Ill. 25; Smith v. Pedigo, 145 Ind. 366, 19 L.R.A. 433, 33 N. E. 777.

Clark, Ch. J., delivered the opinion of the court:

In 1871 a voluntary association known as "Shiloh Association" was formed by several missionary Baptist churches for colored people. In 1883 the association purchased land for \$2,500, and established a school called Shiloh Institute. Said school was chartered (Priv. Laws 1891, chap. 321), the aforesaid association procuring the charter and naming the trustees. The charter was amended (Priv. Laws 1903, chap. 49). In August, 1907, the association was composed of fifty-eight churches. At the annual meeting held at that time, the Church of Blessed Hope at Henderson was named as the place for the next meeting of the association. But, subsequently, the officers of the association called an extra session to be held at Manson, December 27, 1907. The churches were notified, and forty-four of them sent delegates. At that meeting it was decided to withdraw fellowship from Blessed Hope Church, and the resolution to hold the next annual session at that church was rescinded, and it was decided to hold it at Ridgeway. The plaintiffs claim that they were duly elected trustees of the school by the representatives of ten or twelve churches who assembled at Blessed Hope in 1908, in accordance with the resolution passed at the regular annual meeting of 1907, and at subsequent meetings in pursuance of its action, and that the called meeting at Manson in December, 1907, was without authority and void.

The judge below held that there was no provision in the by-laws or constitution of the association for calling the extra session at Manson in December, 1907, and that the proceedings at said meeting were irregular and void, as were all the subsequent meetings held in pursuance thereof and the election of trustees at such meetings, and that the annual meeting held at Blessed Hope in 1908 was the regular meeting of the association, and that the trustees chosen thereat, and at the subsequent meetings held in pursuance of the resolutions adopted thereat, are the legally chosen trustees.

The question presented, then, is whether the action of a minority of the churches, who met at the regular time and place, or that of the seceding majority, held at an irregular time and place, is valid. The constitution of the association provides: "Art. 11. This constitution may be altered or amended at any regular meeting of the

association by a two-thirds vote of the members present." There is no provision which required a majority to constitute a quorum, nor which authorized the calling by certain officers of the meeting at Manson in December, 1907. The association is not incorporated, and the constitution, which is the contract between the parties, contemplates that a majority of the members present at any regular meeting should be the association.

A corporation has only such powers as are conferred by the charter creating or the laws regulating it, and a voluntary association has no existence or power, except as contained in its formal articles of agreement, or established by custom acquiesced in by the parties to it. When the association consists, as here, of the annual meeting of delegates from its constituent members,—the churches,—to further certain common interests, the organization is dissolved, upon adjournment, into its individual elements, until reassembled pursuant to the common agreement. "In church organizations those who adhere and submit to the regular order of the church, local and general, though a minority, are the true congregation." *Roshi's Appeal*, 69 Pa. 462, 8 Am. Rep. 280; *Gable v. Miller*, 10 Paige, 627. This was recently held by the House of Lords in England as to the Free Church of Scotland Overtown [1904] A. C. 515, 91 L. T. N. S. 395, 20 Times L. R. 730, where a very small per cent of the "regulars" were adjudged entitled to hold the entire property of the organization. The courts will not decide such controversies beyond ascertaining which is the "regular" organization.

We concur, therefore, with his Honor, that the regular meeting held in 1908 at Blessed Hope, in pursuance of the resolution adopted at the regular annual meeting in 1907, constituted the legal association, though the representatives of only a minority of the original fifty-eight churches attended, and that the action of the seceding majority held at Manson in December, 1907, had no legal force or effect. There has been a regular succession of meetings, and the election of trustees of Shiloh Institute thereat, in pursuance of the action taken at Blessed Hope, the regular meeting, in 1908, and his Honor properly held that the plaintiffs, being such trustees, are entitled to administer the school known as Shiloh Institute.

This action was originally instituted by the state, on relation of the solicitor, under Revisal 1905, §§ 3922-3924. The 33 L.R.A. (N.S.)

amendment to the charter in 1903 provided that the trustees of Shiloh Institute should be elected by Shiloh Baptist Association, two at each annual meeting of the association. The defendants in the action were the trustees elected at the Manson meeting and at the other meetings held in pursuance thereof. It appearing that the real parties in interest were the trustees which had been elected at the regular meeting held at Blessed Hope in 1908 and at the successive meetings held in pursuance thereof, his Honor properly granted their application to be made parties plaintiff, so that the whole matter might be decided upon its merits, and refused to dismiss the action. It could have been no advantage to either plaintiffs or defendants to have dismissed the action that was then pending, which was brought to decide who were entitled to administer the trust, and the court in its discretion admitted the real parties in interest to be joined. Revisal 1905, § 507. No appeal lay from the refusal to dismiss. *Johnson v. Grand Fountain*, U. O. T. 135 N. C. 385, 47 S. E. 463. And the entry of appeal, though not perfected, will be treated as an exception on this appeal from the final judgment. *Bernard v. Shemwell*, 139 N. C. 446, 52 S. E. 64.

The defendants were already in court, the subject of the controversy was not changed by the amendment, and the additional parties, being the beneficiaries for whom the action was brought, were properly made parties. Revisal 1905, § 400. Even if it be conceded that the solicitor was an unnecessary party, that is not ground for exception. The object of the Code system is to decide cases upon the merits. Here the cause of action from the beginning was to determine which set of trustees should administer Shiloh Institute. The defendants were regularly made parties, and had full opportunity to present their side of the question. If there was a defect of parties plaintiff originally, it was cured by the amendment, which allowed the beneficiaries of the action, the other set of trustees, to be made parties plaintiff.

This case differs from *Simmons v. Allison*, 118 N. C. 774, 24 S. E. 716, where the congregation was permitted to vote as to its choice. There the congregation was the constituent body. Here by the constitution,—the contract of the association,—a "majority of the members present" at a regular meeting was the organic body, and had the right to elect the trustees.

No error.

UNITED STATES CIRCUIT COURT
OF APPEALS, SECOND CIRCUIT.

EMILY L. PRATT, Plff. in Err.,

v.

NORTH GERMAN LLOYD STEAMSHIP
COMPANY.

(106 C. C. A. 445, 184 Fed. 303.)

**Carrier — steamship company — state
of decks — measure of care.**

1. The exercise of reasonable care with respect to the condition of its decks as to their slipperiness is the measure of duty which a steamship company owes a passenger, and the court cannot be required to instruct the jury that it must exercise the greatest care.

**Evidence — fall on deck — condition of
other decks.**

2. Evidence of observations as to the washing of decks in respect to leaving them in a slippery condition, which one injured by falling upon a steamer deck had made on other voyages, is not admissible upon the question of negligence in respect to the one on which she fell.

**Note. — Duty of steamship company to
passengers as to condition of decks.**

A case somewhat analogous to that of *PRATT v. NORTH GERMAN LLOYD S. S. Co.* is *Mulvana v. The Anchoria*, 27 C. C. A. 650, 51 U. S. App. 608, 83 Fed. 847, where it was held that no negligence rendering the ship liable was shown from the fact that there was a wet spot under the water cooler in the steerage, and that the steward slipped on such spot and spilled hot gruel upon a passenger. The court said: "The libellant invokes the proper and rigorous obligations of care and caution which the law imposes upon carriers of passengers for hire, and which are stated in *Pennsylvania Co. v. Roy*, 102 U. S. 451, 26 L. ed. 141; *New Jersey S. B. Co. v. Brockett*, 121 U. S. 637, 30 L. ed. 1049, 7 Sup. Ct. Rep. 1039; and *The City of Panama*, 101 U. S. 462, 25 L. ed. 1064, and says that the carelessness of the steward in permitting the existence of a wet spot upon the floor was an act of negligence which renders the ship liable. It is probably true that a carrier of passengers for hire is bound to use care to overcome or obviate the known ordinary carelessness of the passengers, and, if a wet floor was dangerous, it would not be an adequate excuse for not guarding against the danger that it was caused by their known and continuous carelessness. The reason which excuses liability for this accident was presented by the district judge, and it is that no danger was to be apprehended, and that the danger of a grown man's slipping by reason of a wet spot upon the floor, and hurting a passenger in his fall, was so remote that the failure to keep the floor in a state of perpetual dryness, 33 L.R.A. (N.S.)

**Evidence — questions — ridiculing wit-
ness — excluding.**

3. The court may, in its discretion, exclude questions which are calculated to ridicule the witness to whom they are propounded.

Same — opinion — cause of fall.

4. A witness cannot give his opinion as to the cause of the fall of one upon the deck of a vessel to his injury.

**Appeal — exclusion of opinion evi-
dence.**

5. It is not reversible error to refuse to permit a witness who has testified as to the condition of weather on a certain day, to state whether or not he would call it a fair day, since the jury are able, from his description, to determine that fact for themselves.

(January 9, 1911.)

ERROR to the Circuit Court for the United States for the Southern District of New York to review a judgment in defendant's favor in an action brought to recover damages for personal injuries

while it may be evidence that passengers were not prevented from a disagreeable tendency to a lack of neatness, is no evidence of negligence on the part of the officers or stewards of the ship in the protection of passengers against injury."

So, in *Fearn v. West Jersey Ferry Co.* 143 Pa. 122, 13 L.R.A. 366, 22 Atl. 708, it was held that the mere existence, during the storm which caused it, of snow on the deck of a ferryboat raised no presumption of negligence on the part of the ferry company, rendering it liable to a passenger who was injured by falling on the slippery deck.

And the placing on the main stairway of a boat of a brass plate which is corrugated save where it turns over the edge of the step, where it is left smooth and slippery, does not show such negligence as will warrant a recovery by a passenger who slips and falls thereon, where it appears that the stairs were finished in the same manner as the best boats of the period. *Crocheron v. North Shore Staten Island Ferry Co.* 56 N. Y. 656.

And where it appeared that a chain box on the deck of a steamer covering a necessary portion of the steering gear was the same as those commonly used on vessels of the size and age of the boat in question, and that such boxes had long been well known on vessels used for passengers, negligence on the part of the owner cannot be predicated of such construction, although there was testimony given to show that a sloping cover for such chains would have been less dangerous. *Savage v. New York, N. & H. S. S. Co.* 185 Fed. 778.

But the leaving of rudder chains exposed on the decks, where there is testimony that such construction is unusual and danger-

alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Argued before Lacombe, Coxe, and Ward, Circuit Judges.

Mr. George A. Strong, with Messrs. Duer, Strong, & Whitehead, for plaintiff in error.

Mr. Bertrand L. Pettigrew, for defendant in error:

Defendant was bound to use only reasonable care.

Taylor v. Pennsylvania Co. 50 Fed. 755; Green v. Pennsylvania R. Co. 36 Fed. 66; Scanlan v. Tenney, 72 Fed. 225; Behrens v. The Furnessia, 35 Fed. 799; The Burgundia, 29 Fed. 404; Kelly v. Manhattan R. Co. 112 N. Y. 443, 3 L.R.A. 74, 20 N. E. 383; Morris v. New York C. & H. R. R. Co. 106 N. Y. 678, 13 N. E. 455; Laffin v. Buffalo & S. W. R. Co. 106 N. Y. 136, 60 Am. Rep. 433, 12 N. E. 599; Moreland v. Boston & P. R. Corp. 141 Mass. 31, 6 N. E. 225; Palmer v. Pennsylvania Co. 111 N. Y. 488, 2 L.R.A. 252, 18 N. E. 859; Ganguzza v. Anchor Line, 97 App. Div. 352, 89 N. Y.

Supp. 1049, affirmed in 184 N. Y. 545, 76 N. E. 1095.

If the plaintiff was entitled to have the deck in a reasonably safe condition, the condition of the decks of other vessels had no bearing on the duty in question.

Harrison v. New York C. & H. R. R. Co. 195 N. Y. 86, 87 N. E. 802.

Mr. Franklin M. Clark also for defendant in error.

Ward, Circuit Judge, delivered the opinion of the court:

Mrs. Pratt, the plaintiff, a passenger upon the defendant's steamship Princess Irene, while walking on the promenade deck before the steamship had left her dock, fell, sustaining a fracture of her right ankle. The result was most painful. She was confined to a hospital for eleven weeks, during nine of which she was unable to walk without crutches, suffered and still suffers great pain, and was put to an expense of between \$700 and \$800. The plaintiff observed that the deck was wet, but complains that it was slippery both for

passengers sufficiently strong to carry them without breaking under their weight, and further that the falling of the roof was conclusive evidence that it was not built with that degree of care and strength which it was the defendant's duty to exercise, is erroneous. Evers v. Wiggins, 116 Mo. App. 130, 92 S. W. 118. The court said: "Instruction No. 1 is erroneous in that it makes defendant an absolute insurer of the strength and safety of its boat. A common carrier of passengers is, to use the oft-repeated ruling of the appellate courts of this state, required 'so far as it is capable by human care and foresight, to carry them safely, and it is responsible for all injuries resulting to its passengers from even the slightest negligence on its part.'"

And where such chain box on the deck is obvious to a passenger for some hours before her injury on a clear day, the carrier's failure to warn her of the obstruction is not actionable negligence. Savage v. New York, N. & H. S. S. Co. supra.

And a steamer is liable where a passenger is injured by a fall caused by the slipping of a mat placed at the head of a stairway, where the mat was too small to fit properly into its place. Mohns v. Netherlands-American Steam Nav. Co. 104 C. C. A. 551, 182 Fed. 323.

And where a passenger on a ferryboat is injured by falling into a coal hole in the deck, which was open for the purpose of coaling the boat, he may recover where there was no device to prevent persons from walking into it, or guard to warn them. The Lackawanna, 151 Fed. 499.

And an instruction in an action by a passenger injured through the falling of the deck, that the falling of the deck was prima facie evidence of defendant's negligence, and shifted the burden of proof, is proper. Evers v. Wiggins Ferry Co. 116 Mo. App. 130, 92 S. W. 118, subsequent appeal 127 Mo. App. 236, 105 S. W. 306.

But an instruction that it was the duty of a ferry company to build the part of its boat designed and used for the carrying of 33 L.R.A. (N.S.)

passengers sufficiently strong to carry them without breaking under their weight, and further that the falling of the roof was conclusive evidence that it was not built with that degree of care and strength which it was the defendant's duty to exercise, is erroneous. Evers v. Wiggins, 116 Mo. App. 130, 92 S. W. 118. The court said: "Instruction No. 1 is erroneous in that it makes defendant an absolute insurer of the strength and safety of its boat. A common carrier of passengers is, to use the oft-repeated ruling of the appellate courts of this state, required 'so far as it is capable by human care and foresight, to carry them safely, and it is responsible for all injuries resulting to its passengers from even the slightest negligence on its part.'"

. . . But a common carrier is not an insurer of passenger. . . . The same rules of law apply in respect to the equipment a carrier provides for the carriage of passengers as to its management of that equipment when carrying them. . . . The instruction is also erroneous for the reason it told the jury that the falling of the roof was conclusive evidence that it was not built with that degree of care and strength which it was defendant's duty to exercise. . . . From the fact that the roof of the boat fell, the law presumes negligence (if the plaintiff was rightfully upon it), but this presumption is not a conclusive one. It may be overthrown or explained away by evidence showing that the defendant exercised proper care. The instruction deprived defendant of the right of such explanation, and cut up by the roots all of its evidence tending to exculpate it from blame."

J. T. W.

...to include in this note
...the specific enforcement of
...to real estate, creat-
...with reference
...connection, however, at
...Shickinger v. Shaw, 87
...134, 22 Am. St. Rep.
...and Blankenship v.
...400, 57 Pac. 79, which
...in oral agreement by the owner
...to give an adjoining owner
...for irrigation purposes
...a ditch on the prom-
...and, in consideration of the adjoining
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property upon the death of the life tenant, if the former will build a home for the life tenant on the property, builds the home, and has no adequate remedy at law for his reimbursement.

Same — absence of legal remedy.

2. Where one of several cotenants places improvements upon the common property at the instance of another, under a parol contract for an interest therein void under the statute of frauds, he cannot compel the other contracting party to reimburse him for the improvements, since such party is liable only for such portion of the cost as his share of the property bears to the whole, and therefore his remedy at law is not adequate so as to prevent specific performance of the contract to convey.

Cotenancy — incompetence — contribution to improvements.

3. A tenant in common cannot compel incompetent cotenants to contribute to the cost of improvements which he has put upon the property.

Implied contract — payment for services — benefit.

4. One who performs services for another, based upon a contract void under the statute of frauds, can recover from him only so much as he has been enriched by the transaction.

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possession as was possible under the circumstances had been exercised by the promisee, and he had used the water from the ditch in question.

Generally, in specifically enforcing an oral contract for the sale or purchase of real estate, when the contract has been in part performed, equitable interposition rests upon the fact that the promisor has induced or permitted the promisee to place himself in such a position, in reliance upon the contract to convey, that specific performance is necessary to prevent the perpetration of a fraud by the promisor or vendor, the circumstances being such that there is no adequate remedy at law for the promisee or vendee to recover, either for the injury occasioned him, or the benefit received by the promisor or vendor. Hence, while it is the general rule that possession is necessary in order to enable the vendee of real estate, under an oral contract of purchase, to secure the specific performance thereof, yet this rule is not adhered to where there has been such performance on the part of the vendee that to deny him relief by specific performance would result in enabling the vendor to perpetrate a fraud upon him. Of course, it follows that, in order that this exception to the rule apply, the remedy at law must be inadequate. One of the exceptions to this general rule is illustrated in the note to *Grindling v. Reyhl*, 15 L.R.A. (N.S.) 466, wherein are gathered cases considering the question of specific performance of oral contracts to devise or convey land in con-

A PPEAL by plaintiff from a judgment of the Circuit Court for Pierce County in defendant's favor in an action brought to enforce specific performance of an oral contract to convey real estate. Reversed.

Statement by Kerwin, J.:

This action was brought to enforce specific performance of an oral contract to convey real estate. After certain admissions and denials, the defendant set up affirmatively a general settlement and satisfaction of all matters of difference between the parties, including matters set forth in the complaint, and that the plaintiff accepted \$1 and other valuable consideration in satisfaction and discharge of all causes of action, suits, or controversies, claims and demands against the defendant. The facts sufficiently appear from the findings.

The court found that on or about May 12, 1901, Paul C. Henrikson, the father of plaintiff and defendant, died intestate at the town of Gilman, county of Pierce, and at the time of his death was the owner in fee simple of the lands described in the complaint; that at the time of his death said Paul left him surviving his widow, then sixty-eight years of age, and eight children, including the parties hereto, all of

sideration of performing services or furnishing support, where no possession is taken or improvements made.

HENRIKSON v. HENRIKSON also makes, as an exception to this general rule, a case where the promisee has made valuable improvements upon the real estate which the promisor has orally contracted to convey in consideration of such improvements, and for the recovery of which the promisee has no adequate remedy at law. The theory of the court in this case is that possession was not taken by the vendee, although he made improvements upon the property. In this connection it is of interest to compare *Townsend v. Vanderwerker*, 160 U. S. 171, 40 L. ed. 383, 16 Sup. Ct. Rep. 258, which is very similar as to the facts. In this case, although there was no distinct allegation of possession in the vendee, in his bill in equity to recover one half the value of certain real estate, under circumstances such that the court said that the bill must be maintained upon the same principles and with the same cogency of proof as if it were in fact, as well as in substance, a bill for specific performance, yet the court said that an allegation that the plaintiff gave his personal attention to the selection and purchase of the materials for the improvements to be made under the contract (a dwelling house), and the erection of the same upon the land, and paid a large amount of money in defraying the cost thereof, sufficiently showed facts inconsistent with any other theory than that the purchaser took possession of the land for

that reason and because it was old and worn, and apparently, also, because it was greasy or slimy. The trial judge having charged the jury very fully to the effect that the defendant was bound to exercise reasonable care under the circumstances, the plaintiff asked him to charge that the defendant owed the plaintiff "very great care." He declined to charge otherwise than he had charged. We think the charge was right. "Very great care" is an unmeaning phrase, and the jury, in determining what was reasonable care with reference to the circumstances, would necessarily determine whether it was great or very great. Such expressions as "the utmost care" or "the highest degree of care," and so forth, are appropriate to the seaworthiness or road-worthiness of the vehicle of transportation, or to things inherently dangerous. Obviously the degree of care appropriate to boilers or to the sufficiency of the hull of a steamer or the body of a car or stage is very different from the degree of care required with reference to the washing of decks or the maintenance of a window sash or a curtain hook. *Kelly v. New York & S. B. R. Co.* 109 N. Y. 44, 15 N. E. 879. Such cases as *The City of Panama*, 101 U. S. 453, 25 L. ed. 1061 (in which a concealed hatch was left open in a passageway), and *Pennsylvania Co. v. Roy*, 102 U. S. 451, 26 L. ed. 141 (where a berth in a Pullman car, which the company's servants knew to be out of order, fell upon a passenger), have no application here.

The plaintiff, having testified that she had been to Europe twice and once to Jamaica, offered to show "what she noticed as to the decks of the vessels of these lines," which testimony the court excluded. The better way to raise exceptions is to propound definite questions; upon these the court can pass more intelligently. This offer was very vague. What the plaintiff may have noticed in respect to washing decks on these six voyages would be no evidence of the defendant's care or lack of care on this particular occasion. The subject was one which the jury were entirely competent to pass upon with reference to the actual circumstances proved.

One of the defendant's witnesses having testified that the deck was not worn, wet, or slippery, was asked upon cross-examination two questions, which were excluded: "Q. The plaintiff must have fallen on purpose, didn't she? Q. How do you account for her falling then?"

The first question was one calculated to ridicule the witness, and it was quite within the discretion of the trial judge to exclude it. The second was improper, as calling for the opinion of the witness upon 33 L.R.A. (N.S.)

the very question to be decided by the jury.

A witness from the United States Weather Bureau, having testified to the humidity of the air and the condition of the sky with respect to clouds on the day of the accident, was asked: "Q. This is what you would call, if you were reporting it for a paper, a fair day, would you not?"

This was objected to as calling for a conclusion, and excluded. The jury were able to say from the facts testified to by the witness whether the day was fair or not. It is the sort of question which may or may not be admitted, largely within the discretion of the trial judge. This ruling, if error, was harmless.

There are some other exceptions, but we think them either without merit or unimportant because relating to the question of damages.

Judgment affirmed, with costs.

WISCONSIN SUPREME COURT.

RASMUS N. HENRIKSON, Appt.,

v.

C. J. HENRIKSON, Resp't.

(143 Wis. 314, 127 N. W. 962.)

Specific performance — absence of possession.

1. Specific performance of an oral contract to convey real estate will be decreed, although possession was not taken, where one remainderman accepts the offer by another to convey his interest in the common

Note. — *Specific performance of oral contract to convey real estate in consideration of making improvements, where possession not taken.*

It is not intended to include in this note cases involving the specific enforcement of contracts in relation to real estate, creating a license or easement with reference thereto. In this connection, however, attention is called to *Flickinger v. Shaw*, 87 Cal. 126, 11 L.R.A. 134, 22 Am. St. Rep. 234, 25 Pac. 268, and *Blankenship v. Whaley*, 124 Cal. 300, 57 Pac. 79, which hold that an oral agreement by the owner of real estate to give an adjoining owner the right to use for irrigation purposes water flowing from a ditch on the promisor's land, in consideration of the adjoining owner assisting in constructing and maintaining a ditch, will be specifically enforced in behalf of such adjoining owner, where he has performed his part of the contract and for sometime has received and used the water for irrigating purposes. In these cases, however, it is to be noted that actual possession in the promisee was impossible, owing to the nature of the interest created in the real estate, although such

property upon the death of the life tenant, if the former will build a home for the life tenant on the property, builds the home, and has no adequate remedy at law for his reimbursement.

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2. Where one of several cotenants places improvements upon the common property at the instance of another, under a parol contract for an interest therein void under the statute of frauds, he cannot compel the other contracting party to reimburse him for the improvements, since such party is liable only for such portion of the cost as his share of the property bears to the whole, and therefore his remedy at law is not adequate so as to prevent specific performance of the contract to convey.

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possession as was possible under the circumstances had been exercised by the promisee, and he had used the water from the ditch in question.

Generally, in specifically enforcing an oral contract for the sale or purchase of real estate, when the contract has been in part performed, equitable interposition rests upon the fact that the promisor has induced or permitted the promisee to place himself in such a position, in reliance upon the contract to convey, that specific performance is necessary to prevent the perpetration of a fraud by the promisor or vendor, the circumstances being such that there is no adequate remedy at law for the promisee or vendee to recover, either for the injury occasioned him, or the benefit received by the promisor or vendor. Hence, while it is the general rule that possession is necessary in order to enable the vendee of real estate, under an oral contract of purchase, to secure the specific performance thereof, yet this rule is not adhered to where there has been such performance on the part of the vendee that to deny him relief by specific performance would result in enabling the vendor to perpetrate a fraud upon him. Of course, it follows that, in order that this exception to the rule apply, the remedy at law must be inadequate. One of the exceptions to this general rule is illustrated in the note to *Grinding v. Reyhl*, 15 L.R.A.(N.S.) 466, wherein are gathered cases considering the question of specific performance of oral contracts to devise or convey land in con-

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The court found that on or about May 12, 1901, Paul C. Henrikson, the father of plaintiff and defendant, died intestate at the town of Gilman, county of Pierce, and at the time of his death was the owner in fee simple of the lands described in the complaint; that at the time of his death said Paul left him surviving his widow, then sixty-eight years of age, and eight children, including the parties hereto, all of

sideration of performing services or furnishing support, where no possession is taken or improvements made.

HENRIKSON v. HENRIKSON also makes, as an exception to this general rule, a case where the promisee has made valuable improvements upon the real estate which the promisor has orally contracted to convey in consideration of such improvements, and for the recovery of which the promisee has no adequate remedy at law. The theory of the court in this case is that possession was not taken by the vendee, although he made improvements upon the property. In this connection it is of interest to compare *Townsend v. Vanderwerker*, 160 U. S. 171, 40 L. ed. 383, 16 Sup. Ct. Rep. 258, which is very similar as to the facts. In this case, although there was no distinct allegation of possession in the vendee, in his bill in equity to recover one half the value of certain real estate, under circumstances such that the court said that the bill must be maintained upon the same principles and with the same cogency of proof as if it were in fact, as well as in substance, a bill for specific performance, yet the court said that an allegation that the plaintiff gave his personal attention to the selection and purchase of the materials for the improvements to be made under the contract (a dwelling house), and the erection of the same upon the land, and paid a large amount of money in defraying the cost thereof, sufficiently showed facts inconsistent with any other theory than that the purchaser took possession of the land for

whom were of full age and competent, except Hannah Henrikson, now about fifty-six years of age, blind from infancy and mentally undeveloped, and Soren Henrikson, now about thirty-five years of age, who is also mentally incompetent; that on the day Paul C. Henrikson died, the dwelling house upon the premises described in the complaint was totally destroyed by fire, and the members of the family then at home were left without a house in which to live; that the family residing on the farm at that time consisted of the widow of Paul C. Henrikson and the said Hannah and Soren; that after the burning of the dwelling house, the premises described in the complaint were worth about \$2,000, and there was some personal property upon the farm, the value of which was not shown, and money belonging to said Paul to the amount of \$700; that after the death of said Paul and the burning of said dwelling, a consultation was had between the widow and various of the children of the family, and it was arranged that the widow and Hannah and Soren should live temporarily in the granary upon said farm, and some talk was had as to the construction of a new house upon the premises; that it seems to have been agreed among the children that the widow and said Hannah and Soren should remain upon the farm, and some provisions should be made for their maintenance upon the farm, being the premises described in the complaint; that a few days after the said 12th day of May, 1901, the defendant, then being a storekeeper in a village in Dunn county, had a conversation with the plaintiff, who was a farmer in Dunn county, at that time living and boarding with the defendant, concerning the rebuilding of a house upon the farm above mentioned, and making

provision for their mother and the incompetent children; that as a result of said conversation, it was agreed between plaintiff and defendant that the plaintiff should go to Pierce county, and provide upon the farm a comfortable and convenient home for the mother of the parties and the family remaining upon the farm; it being understood that the \$700 then on hand should be used in the building of a house upon said premises, and that plaintiff should put in time and money and labor with said \$700 sufficient to make a comfortable and convenient home for the family; that in consideration of the performance on the part of the plaintiff of said agreement, the defendant promised on his part that, when the mother was dead, he would transfer to the plaintiff his one-eighth share in said farm, as a remuneration to the plaintiff for the things to be done and performed by said plaintiff under said agreement, but no part of said agreement was ever reduced to writing; that thereafter, and during the summer of 1901, the plaintiff caused to be built upon said farm a good and substantial dwelling house, the \$700 above mentioned being expended toward the building of said house, and the plaintiff doing a considerable amount of labor by way of digging the basement, hauling material with his team, and otherwise, probably spending two months or more in said work, although the matter is left somewhat indefinite by the testimony; that in addition to the labor so expended, plaintiff purchased several hundred dollars' worth of material which was used in the construction of said house, probably more than \$500, although the testimony is quite indefinite as to the exact amount; that in the summer of 1902, plaintiff spent considerable time and money in

the purpose of erecting the house. The court further said that if the plaintiff subsequently and after the completion of the house allowed the vendor to take possession of the land, in view of the intimate relations between them, he lost no rights as against her which he obtained by his original entry and erection of the house, and added: "The possession thus taken was evidently in performance of and in reliance upon the original agreement with the owner, and, we think, taken in connection with the improvements made by him, it makes a case of part performance sufficient to remove the bar of the statute. His subsequent relinquishment of such possession was evidently with no intention to abandon the interest he had already acquired in the property."

Compare with *Ward v. Stuart*, 62 Tex. 333, which holds that where possession under an oral contract for the purchase of real estate is not exclusive in the purchaser, 33 L.R.A. (N.S.)

but is jointly with the vendor, the making of improvements by the purchaser is not sufficient to take the case out of the statute of frauds, and authorize a specific performance of the oral contract. It was, however, also held in this case that the oral contract relied upon was not sufficiently clear and explicit in essential respects to entitle one of the parties thereto to invoke the aid of equity for its specific enforcement.

In *Toe v. Toe*, 3 Grant, Cas. 74, specific performance of an oral contract to convey land was denied where it did not appear that any possession had been taken under the contract, and maintained notoriously and exclusively, although valuable improvements had been made thereon by the purchaser, such improvements, however, having been fully compensated by the produce of the property. The case was also disposed of upon the theory that the purchaser failed to prove any oral contract of purchase.

A. G. S.

constructing an additional cistern upon the premises, and bought and erected a windmill, all at considerable expense of time and money; that on the 16th day of April, 1908, the widow died, and thereafter plaintiff demanded of defendant that he convey to plaintiff his share in said farm, being one eighth thereof; but this the defendant refused to do; that no demand has ever been made by plaintiff of the defendant, except as above, for any remuneration for his services, performed by plaintiff pursuant to said agreement, in or about the erection of said house, cistern, or windmill, or for repayment to plaintiff of any sum expended by him in connection therewith; that on or about the 17th day of January, 1905, a settlement was had between plaintiff and defendant of certain differences then existing between them, and the plaintiff made and signed and delivered to defendant a writing to that effect; but the materials furnished and services performed in making the improvements in question were not considered or taken into account or settled for in said settlement, nor was the transfer of defendant's interest to the plaintiff on account of said improvements considered or settled. That after the death of said Paul C. Henrikson, the widow remained in full and complete possession of the premises described in the complaint up to the time of her death, and the plaintiff, between the 12th day of May, 1901, and the beginning of this suit, never in any manner occupied the farm or buildings thereon, and never had possession thereof during the time he worked upon said farm in the construction of the house and other improvements mentioned in these findings; that during said period he simply lived as a member of his mother's family in the same way as is ordinarily done by any person employed to do work of the kind he was doing.

The court concluded that the contract between plaintiff and defendant was void, because it was not in writing, and that there was never any such part performance on the part of plaintiff as would entitle him to specific performance of the contract. Judgment was ordered against the plaintiff for dismissal of the complaint, with costs. Judgment was entered accordingly, from which this appeal was taken.

Mr. N. O. Varnum for appellant.

Mr. Warren P. Knowles for respondent.

Kerwin, J., delivered the opinion of the court:

The question presented is whether, upon the established facts, the plaintiff is entitled to specific performance of the oral 33 L.R.A. (N.S.)

contract set out in the case. It is settled by the findings, and not denied, that the defendant agreed orally with the plaintiff to convey to plaintiff his one-eighth interest in the real estate described in the complaint, upon the death of the mother of plaintiff and defendant, in consideration of the erection on said real estate of certain permanent improvements, and furnishing the material and doing the work necessary therefor; that plaintiff performed and furnished in accordance with such agreement, and duly performed all the conditions of such agreement on his part to be performed; that, after the death of the mother, defendant refused to convey to plaintiff. The contention on the part of the respondent is that, although the appellant fully performed on his part in pursuance of the contract, he cannot compel specific performance, because he did not take possession, and has an adequate remedy at law. The general rule is that part performance by the purchaser under an oral agreement to convey is not sufficient to take the contract out of the statute of frauds, unless possession is taken by such purchaser. The general rule has often been laid down by this court. *Smith v. Finch*, 8 Wis. 245; *Brandeis v. Neustadt*, 13 Wis. 142; *Ellis v. Cary*, 74 Wis. 176, 4 L.R.A. 55, 17 Am. St. Rep. 125, 42 N. W. 252; *Blanchard v. McDougal*, 6 Wis. 167, 70 Am. Dec. 458; *Koch v. Williams*, 82 Wis. 186, 52 N. W. 257; *Popp v. Swanke*, 68 Wis. 364, 31 N. W. 916; *Harney v. Burhans*, 91 Wis. 348, 64 N. W. 1031; *Horn v. Ludington*, 32 Wis. 73. In the above and similar cases, it will be seen that the purchaser or party complaining because of failure to carry out the oral agreement could be restored to his former position in an action at law. In other words, equity will not enforce an oral agreement, where possession has not been taken, though partly or even fully performed by one party, because he has an adequate remedy at law.

It is true strong language is used in some of the cases in stating the general rule, to the effect that part or even full performance of an oral contract to convey real estate by the purchaser is not sufficient, without possession on the part of the purchaser. As, for example, in *Popp v. Swanke*, supra, 68 Wis., at page 368, quoting from *Smith v. Finch*, 8 Wis. 245, the court said: "It is only in cases where the defendant would be enabled to practise a fraud upon the complainant unless the contract is specifically executed, that a court of equity will interfere. If the purchaser has gone into possession of the land, so as to render him liable as a trespasser if the agreement is held void, the court

will enforce performance." But it is also true that there is another class of cases, resting upon the well-settled doctrine that where there is performance or part performance by the purchaser under and in pursuance of an oral contract to convey land, though no possession be taken by the purchaser, and the vendor after performance by the vendee refuses to convey, equity will enforce specific performance, where the vendee has no adequate remedy at law, and the refusal to perform on the part of the vendor would work a fraud upon the vendee. The following are some of the authorities illustrative of this rule: *Cutler v. Babcock*, 81 Wis. 195, 29 Am. St. Rep. 882, 51 N. W. 420; *Martineau v. May*, 18 Wis. 54; *Ingles v. Patterson*, 36 Wis. 373; *Littlefield v. Littlefield*, 51 Wis. 25, 7 N. W. 773; *Wall v. Minneapolis, St. P. & S. Ste. M. R. Co.* 86 Wis. 48, 56 N. W. 367; *Brown v. Hoag*, 35 Minn. 373, 29 N. W. 135; *Bennett v. Dyer*, 89 Me. 17, 35 Atl. 1004; *Seaman v. Aschermann*, 51 Wis. 678, 37 Am. Rep. 849, 8 N. W. 818; *Scheuer v. Cochem*, 126 Wis. 209, 4 L.R.A.(N.S.) 427, 105 N. W. 573; *Freeman v. Freeman*, 43 N. Y. 34, 3 Am. Rep. 657.

The cases in this court which lay down the doctrine that possession is necessary recognize the exception. In *Harney v. Burhans*, 91 Wis., at page 352, the court says: "It was early decided by this court (*Smith v. Finch*, supra) that the full payment of the purchase money is not sufficient to take a case out of the statute, so that specific performance will be decreed, unless accompanied by actual possession, or some act whereby the vendee has received an injury for which a court of law cannot give a complete remedy." And in *Wall v. Minneapolis, St. P. & S. Ste. M. R. Co.* supra, the court, after laying down the general rule that payment of purchase money alone is not sufficient to take the case out of the statute of fraud, but that payment of any considerable part of the purchase price, and the vendee's entry into possession and making valuable improvements, would constitute such part performance as will take the case out of the statute of frauds, and justify the enforcement of specific performance, further says (page 58 of 86 Wis.): "So, where there has been such part performance by the vendee that it would operate as a fraud upon him to allow the vendor to repudiate the contract, the same will be enforced in equity." And in *Littlefield v. Littlefield*, supra, it was held to be the settled doctrine of this court that the mere payment of the consideration, unaccompanied by any other act, is not such part performance of a parol contract for the conveyance of land as will

authorize specific enforcement, but that there must be some other act done to raise an equity, "such as the taking of possession of the lands sold under the contract by the purchaser, or one party must have induced the other so to act that if the contract be abandoned he cannot be restored to his former position, and a refusal to perform the contract will operate as a fraud." To the same effect are cases in other courts. *Bennett v. Dyer* and *Brown v. Hoag*, supra.

The making of valuable permanent improvements on the land by the vendee, in pursuance of the agreement, and with the knowledge of the other party, is always considered to be the strongest and most unequivocal act of part performance by which a verbal contract to sell land is taken out of the statute. *Pom. Spec. Perf. of Contracts*, §§ 126-130, and cases cited; *Scheuer v. Cochem*, 126 Wis. 209, 4 L.R.A.(N.S.) 427, 105 N. W. 573; *Littlefield v. Littlefield*, 51 Wis. 25, 7 N. W. 773. In the case before us the plaintiff made valuable and permanent improvements on the land in question, under and in pursuance of the oral agreement that defendant would convey his one-eighth interest as specified. Now, unless plaintiff has an adequate remedy at law, the refusal on the part of defendant to carry out the agreement operates as a fraud upon the plaintiff. The question therefore arises whether the plaintiff has such remedy. This turns upon whether he can be placed in his former position by recovering compensation for the improvements made upon the land. The defendant owned a one-eighth and the plaintiff a one-eighth interest in the land; the remaining six eighths being owned one eighth by each of the other six heirs, two of whom were incompetent. So, unless plaintiff can recover from defendant the full value of the improvements made, he has not an adequate remedy at law. The improvements made, so far as they benefited the property, benefited the whole, and the interest of each owner in the real estate would be enhanced in value by the services performed and money expended by the plaintiff, and the question is whether the plaintiff can recover damages beyond what defendant has been enriched by the improvements. The oral contract being void, it cannot serve as a basis for the recovery of damages. *Brandeis v. Neustadt*, 13 Wis. 158; *Ellis v. Cary*, 74 Wis. 176, 4 L.R.A. 55, 17 Am. St. Rep. 125, 42 N. W. 252; *Rowell v. Barber*, 142 Wis. 304, 27 L.R.A.(N.S.) 1140, 125 N. W. 937. As was said by this court in *Brandeis v. Neustadt*, supra, in a case of oral contract for purchase of land: "A contract declared void

by statute is in all respects a nullity." Such a contract is not voidable, but absolutely void, and affords no protection to the party claiming under it. *Ibid.*

The person receiving money, however, under a void contract for the sale of land, is bound to return it, on the theory that it is the money of the other party to the void contract, and which the holder is bound to return. This rule would require a defendant who had become enriched by valuable improvements placed upon his land under a void contract, to respond to the extent of such enhancement, upon the principle that the law implies a promise to pay for them. But the law imposes no liability on one who has under a void contract caused such improvements to be made upon another's land, because, the contract being void and the defendant receiving no benefit, there could be no implied promise to respond for a benefit bestowed upon another. *Dowling v. McKenney*, 124 Mass. 478; *Keener*, *Quasi Contr.* pp. 279-282; *Browne*, *Stat. Fr.* 5th ed. § 118a; *Dunphy v. Ryan*, 116 U. S. 491, 29 L. ed. 703, 6 Sup. Ct. Rep. 486; 2 *Page*, *Contr.* § 751; *Banker v. Henderson*, 58 N. J. L. 26, 32 Atl. 700; *Gazzam v. Simpson*, 52 C. C. A. 19, 114 Fed. 71; *Day v. New York C. R. Co.* 51 N. Y. 583. The doctrine is well stated in *Browne on Statute of Frauds*, 5th ed. § 118a, as follows: "The rule that, where one person pays money or performs services for another upon a contract void under the statute of frauds, he may recover the money upon a count for money paid, or recover for the services upon a *quantum meruit*, applies only to cases where the defendant has received and holds the money paid or the benefit of the services rendered; it does not apply to cases of money paid by the plaintiff to a third person in execution of a verbal contract between the plaintiff and defendant, such as by the statute of frauds must be in writing. Such payment is not a payment to the defendant's use in the sense of the rule. It is a payment to his use only if he chooses to abide by the contract, and it is his right to refuse to do that." So, in *Keener on Quasi Contracts*, pp. 278, 279, the rule is laid down that where one renders services under a contract void by the statute of frauds, in order to recover, he must show that the defendant, if he is not compelled to pay the plaintiff for that which he has received, unjustly enriched himself at the plaintiff's expense.

The defendant here, owning one-eighth interest, could be enriched by the improvements only in the ratio of his interest to the interest of other owners, and therefore could not in an action at law be compelled to respond for the whole improvement. 33 L.R.A. (N.S.)

The plaintiff, of course, could not recover for the benefits, if any, to his own one-eighth interest, the expense of which improvements he might never have incurred but for the promise of defendant to convey. Nor does it seem from the record that there is any basis for recovery at law from any of the other owners for any part of the expense of the improvements. There is certainly none for recovery from the incompetents. Independent of statute, the general rule is that a tenant in common cannot recover at law against his cotenant for improvements made upon the common property. 1 *Wash. Real Prop.* § 894, and cases cited. Whether plaintiff could have any allowance against any of the tenants in common of the property in an action of partition or other equitable action or proceeding, we need not consider, and do not decide, because that would be an equitable action, and not an action at law, and no answer to the plaintiff's present action. In order to warrant the court in denying specific performance in the instant case, it must appear that the plaintiff has a remedy at law, and such legal remedy must be "as adequate, comprehensive, and effectual as that afforded by a court of equity." *Butterick Pub. Co. v. Rose*, 141 Wis. 539, 124 N. W. 649. Even if an action at law could be maintained against all the heirs to recover for the benefits received, it is by no means clear that such action would afford an adequate remedy, because the reasonable cost of the improvements might not turn out to be the measure of their enrichment.

The theory of the liability of the defendant in the instant case is that the law raises an implied obligation on the part of defendant that he return that which he has received under the void contract; and this obligation requires him to respond only for what he has received, and not for what others have received because of the void agreement. The obligation rests upon the benefit received, and the extent of the obligation is measured by the benefit. It is true that there are some cases holding a different doctrine, and appear to hold that the liability is not measured by the benefit received. *Parker v. Tainter*, 123 Mass. 185, belongs to this class. However, in *Dowling v. McKenney*, 124 Mass. 478, the question was squarely met by the court, and it was held that, where one advances money to or performs services for another, based upon a contract void under the statute of frauds, he can only recover against such other so much as defendant has been enriched by the transaction. This we believe to be a sound doctrine, and the only logical basis of recovery in such a case. Upon that doc-

trine, of course, the plaintiff here has no adequate remedy at law, and therefore is entitled to specific performance of the contract. It follows, therefore, that the judgment must be reversed.

The judgment of the court below is reversed, and the cause remanded, with directions to enter judgment for plaintiff for specific performance.

CALIFORNIA SUPREME COURT.

LOUISE HARVEY et al., Exrx., etc., of
Joseph Harvey, Deceased, et al., Respts.,
v.

EDWARD WEISBAUM et al., Appts.

(— Cal. —, 113 Pac. 656.)

Landlord and tenant — destruction of property — recovery of advance rent.

Rent paid in advance cannot be recovered upon accidental destruction of the tenement, although the statute and lease provide that such destruction terminates the lease.

(January 11, 1911.)

Note. — Destruction of premises as affecting rent paid or payable in advance.

Right of lessee to recover rent paid in advance.

Where a lease contains no provision on the question, or provides merely that in case the premises are destroyed during the term the lease or tenancy shall terminate, and there is no provision showing an intention that in such case a portion of the rent paid in advance should be returned, it is generally held that no recovery of such rent can be had.

Thus, it has been held that no recovery could be had by the lessee of any part of the rent paid in advance, although the premises had been destroyed:

—where a written lease of a room in a store building, and part of a lot back of the building, contained no covenant on the part of lessor to refund any portion of rent paid in advance in case the demised premises were rendered untenable by fire or other casualty. *Lieberthal v. Montgomery*, 121 Mich. 369, 80 N. W. 115;

—where the lease stipulated that rent should be paid quarterly in advance, and that for such time as lessees should be deprived of any portion of the building destroyed, a corresponding deduction should be made and allowed in the rent of the premises. *Cross v. Button*, 4 Wis. 468;

—where a lease of two mills stipulated for payment of rent yearly in advance, and provided that the term should immediately cease upon destruction of both mills, and for a deduction of a certain sum per annum in event of destruction of one of them, no 33 L.R.A. (N.S.)

APPEAL by defendants from a judgment of the Superior Court for the City and County of San Francisco in plaintiffs' favor, and from an order denying a new trial, in an action to recover rent paid in advance under a written lease of premises destroyed by fire. Reversed.

The facts are stated in the opinion.

Mr. A. L. Well, for appellants:

Rent paid in advance cannot be recovered.

Werner v. Padula, 49 App. Div. 135, 63 N. Y. Supp. 68, affirmed in 167 N. Y. 611, 60 N. E. 1122; *Tarkovsky v. George H. Hess Co.* 64 Ill. App. 513; *Stautz v. Protzman*, 84 Ill. App. 434; *Felix v. Griffiths*, 56 Ohio St. 39, 45 N. E. 1092; *Gross v. Button*, 4 Wis. 468; *Copeland v. Goldsmith*, 100 Wis. 436, 76 N. W. 358; *Lieberthal v. Montgomery*, 121 Mich. 369, 80 N. W. 115.

Messrs. Knight & Heggerty, for respondents:

In the case of a lease of buildings only, their destruction both terminates the lease and relieves the tenant from payment of rent.

Ainsworth v. Ritt, 38 Cal. 89; *Porter v.*

recovery was allowed upon the destruction of one of the mills before expiration of the half year for which rent had been paid in advance. *Cornock v. Dodds*, 32 U. C. Q. B. 625;

—where a lease provided for rent of \$1,500 per year, payable \$150 per month in advance, and further that in case any building should be destroyed or injured so as to be unfit for occupancy, without the lessee's fault or neglect, he should not be liable to pay rent after a surrender of possession, lessee was not entitled to recover portion of month's rent where, before expiration of month, building was rendered untenable and possession surrendered. *Felix v. Griffiths*, 56 Ohio St. 39, 45 N. E. 1092;

—under a lease providing for the payment of rent in advance on the 1st of each month, and providing that if the premises during the term should be so damaged by fire that the landlord should decide to rebuild, the term should cease, and the accrued rent should be paid up to the time of the fire, where a fire occurs on the 10th of the month, and landlord decides not to rebuild, a complaint in an action to recover a portion of the rent paid for the month, alleging the above facts, does not state a cause of action. *Brunswick-Balke-Collender Co. v. Wallace*, 65 Misc. 27, 119 N. Y. Supp. 287;

—where rent had been paid in advance under an oral lease, there being no evidence to show that the landlord had agreed to refund any part of rent in case the building was burned. *Stautz v. Protzman*, 84 Ill. App. 434.

In *Cross v. Button*, supra, the court said:

Tull, 6 Wash. 408, 22 L.R.A. 613, 36 Am. St. Rep. 172, 33 Pac. 965; Waite v. O'Neil, 34 L.R.A. 550, 22 C. C. A. 248, 47 U. S. App. 19, 76 Fed. 408; McMillan v. Solomon, 42 Ala. 364, 94 Am. Dec. 654; Adams v. Washington Brick Lime & Mfg. Co. 38 Wash. 243, 80 Pac. 446; Harrington v. Watson, 11 Or. 143, 50 Am. Rep. 465, 3 Pac. 173; Humiston v. Wheeler, 175 Ill. 519, 51 N. E. 893; Nashville, C. & St. L. R. Co. v. Heikens, 112 Tenn. 378, 65 L.R.A. 298, 79 S. W. 1038; Shawmut Nat. Bank v. Boston, 118 Mass. 125; Wattles v. South Omaha Ice & Coal Co. 50 Neb. 251, 36 L.R.A. 424, 61 Am. St. Rep. 554, 69 N. W. 785.

Per Curiam:

This cause was decided by the district court of appeal for the first district in favor of the appellants, and the judgment and order appealed from were reversed. On petition of the respondents the judgment of the district court of appeal was vacated, and the appeals were transferred to this court for further consideration. Upon a re-examination of the case, we find

"It seems to us as quite plain that there is no covenant to refund any portion of the rent already paid, but that the covenant relied on has reference to rent to accrue in the future not yet paid, from which the deduction should be made. As time advanced, after and during the continuance of the privation, the rate of deduction would or could be noted, and when the next quarter day arrived, a proportionate deduction would be made up to that time; if it still continued, a corresponding deduction would continue to be made until the repair should be completed and the use restored. But this is a very different matter from refunding rent already due and paid."

And one who hires land planted with asparagus, and pays rent in advance, cannot recover a portion of such rent where the asparagus crop was destroyed by water caused by the breaking of a levee without the fault of either party, where the asparagus bed was not destroyed, even although a statute provided that the hirer might terminate the hiring before the end of the agreed time in case the greater part of the thing hired perished from any other cause than ordinary negligence. Meek v. Cunha, 8 Cal. App. 98, 96 Pac. 107.

And where an assignee of a lease, upon the lessor agreeing to the assignment, paid a certain sum to him under a further agreement that the assignee should have the option to purchase the property within a year, and that in case he so elected the sum paid should apply on the purchase price, otherwise it should be absorbed in rent, the assignee cannot, where he did not elect within the year to purchase, recover a portion of such sum in an action for money had and received, where the property is de-

stroyed before the rent amounts to hardly one fourth of the amount paid, although the original lease contained a provision that, in the event of the house being burned, the rent should cease, since he had had the benefit of a part of the consideration, including the option to purchase, and also because the rent already paid could not cease, and a recovery would therefore override the terms of the lease. Pulver v. Williams, 3 U. C. C. P. 56.

no ground for differing from the conclusions reached by the district court. The opinion and the judgment of that court, written by Mr. Justice Cooper, is hereby adopted as the opinion and judgment of this court. It is as follows:

"This action was brought by plaintiff Daroux and the other plaintiffs, as executors of the last will and testament of Joseph Harvey, deceased, to recover of defendants rent paid in advance by said Daroux and said Harvey, deceased, under a written lease; the leased premises having been destroyed by fire on April 18, 1906, as a result of the earthquake of that date. The case was tried before the court without a jury, and findings filed upon which judgment was entered for plaintiff for the amount claimed in the complaint. This appeal is from the judgment and the order denying defendants' motion for a new trial.

"On the 28th day of February, 1906, plaintiff Daroux and said Harvey, deceased, entered into a contract in writing, whereby they leased from defendants certain space and rooms in the second story of a brick building on Glasgow street, in the city and

stroyed before the rent amounts to hardly one fourth of the amount paid, although the original lease contained a provision that, in the event of the house being burned, the rent should cease, since he had had the benefit of a part of the consideration, including the option to purchase, and also because the rent already paid could not cease, and a recovery would therefore override the terms of the lease. Pulver v. Williams, 3 U. C. C. P. 56.

And where a lease provides for the payment of rent in advance, and contains a provision that if, during the term of the lease, the lessor shall rent any office on the street front for a less sum than the lessees were paying, "such reduction shall also be made to lessee for term of this lease," no proportionate recovery can be had for the amount paid prior to the rental of the other premises at the reduced rent. Copeland v. Goldsmith, 100 Wis. 436, 76 N. W. 358. The court said: "They had paid their rent to the lessor at the old rate, and now claim that, under the clause of the lease quoted, they may recover from him the difference between the amount they have paid and what they would have paid at the reduced rate. In other words, they insist that this clause in the lease must be construed into a covenant to refund rent collected at the old rate. In support of this contention, they say there cannot be a reduction 'for term of this lease,' unless they are paid back a portion of the rent collected. We cannot agree with this construction. It seems to us quite plain that there was no covenant to refund any portion of the rent paid, but that the covenant relied upon has reference to rent to accrue during the remainder of the term."

county of San Francisco, 'for the term of two years from the 1st day of March, 1906, at the total rent or sum of \$5,400, payable one half thereof in advance on the signing of this lease, and the remaining one half payable monthly in advance at the rate of \$225 per month, beginning March 1st, 1907.' The lease contained the following clause as to the liability of the respective parties in case of the destruction of the premises by fire, to wit: 'It is further agreed between the parties hereto that in case the said demised premises shall be destroyed, or become damaged to such an extent as to render the same untenable, by reason of fire or the act of God or the public enemy, then this lease shall terminate and be at an end; but if such damage shall not be greater than can be repaired in one month, if the parties of the first part shall, at their own cost and expense, repair such damage, and put said premises in good tenable condition within one month from the time of the occurrence of such damage,

then this lease shall continue in force; but the parties of the second part shall be allowed a proportionate reduction in the rent while such repairs are being made.' At the time the said lease was so made and executed, the defendants were paid the first year's rental, \$2,700, by said Daroux and said Harvey, deceased, and thereupon and thereafter said lessees entered into the possession of the said leased premises, and so continued in such possession until the premises were destroyed by fire on the day before mentioned.

"The question, and the only question, that need be decided, is as to whether or not a tenant who has taken possession of the leased premises and paid his rent, or a part of it, in advance, as required by the terms of the lease, can, in the absence of any covenant in the lease, recover the rent so paid in case of the total destruction of the premises by fire without any fault of either party to the lease.

"The common-law rule applicable where

See also *Werner v. Padula*, 49 App. Div. 135, 63 N. Y. Supp. 68, affirmed in 167 N. Y. 611, 60 N. E. 1122, and *Tarkovsky v. George H. Hess Co.* 64 Ill. App. 513, which are set out at length in *HARVEY v. WEISBAUM*.

But the provisions of some leases and statutes have been held to show an intention that a part of rent paid in advance should be returned in case the premises were destroyed.

This result was reached in *Rich v. Smith*, 121 Mass. 328, where a lease upon which rent had been paid in advance provided that, in case of destruction by fire "during said term," "the rent hereinbefore reserved, or a just and proportionate part thereof, shall be suspended or abated, until the said premises shall be put in proper use and habitation by the said lessor," and the lessee was held entitled to recover back a proportionate part of the rent paid, where the premises burned during the term and the lessor elected not to rebuild.

So, in *Carley v. Liberty Hat Mfg. Co.* — N. J. —, post, 545, 79 Atl. 447, the same result was reached under a statute providing that, in case of total destruction of the premises, the rent should be paid up to the time of destruction, and then the lease should cease and come to an end.

And where a lease providing for payment of rent half yearly in advance contains a provision that, in case of total destruction of the property, the term should at once cease, and the rent should be adjusted at what, on a just apportionment, should be found to be the due proportional part thereof up to that time, and should be apportioned between the parties thereto accordingly, the following averments were held to state a good cause of action, i. e., the due payment until destruction by fire of all rent up to that time, including the 33 L.R.A. (N.S.)

half yearly payment due in advance for the half year commencing the June before the October in which the property was destroyed, the total destruction by accidental fire in October, whereupon the term immediately ceased, and plaintiff became entitled to have the rent adjusted and apportioned as aforesaid, and defendant became liable to refund and repay so much of the rent paid in advance by the plaintiff as, upon a just apportionment, should be found to be in excess of said rent beyond the due proportional part thereof down to the date of the fire, and that on that day a certain named sum was the sum which, upon a just apportionment of the rent reserved, would be and was the amount of said rent so paid in advance over and above a due proportional part of said rent paid down to the date of the fire, yet defendant had not paid the same. *Hortop v. Taylor*, 21 U. C. C. P. 56.

And in *Porter v. Tull*, 6 Wash. 408, 22 L.R.A. 613, 36 Am. St. Rep. 172, 33 Pac. 965, it was held that a tenant of a portion of a building might recover back rent paid in advance in accordance with the lease, upon the total destruction of the building by fire, such a requirement being held merely a prudential act to secure the lessor the rent, and to protect him against losing it.

And where a lessor rebuilds after the property is destroyed, and rents to a third person, the lessee who had paid his rent in advance, and who abandoned the property after its destruction by fire, can recover back the rent paid by him from the time the other lease was executed. *Ward v. Bull*, 1 Fla. 311.

Where a lease provides that, in case of the destruction of the premises by fire during the term, the landlord should refund rent paid in advance for the unexpired term, the tenant waives his right to such

land is the subject of the lease is that, where there is a covenant on the part of the lessee to pay rent for the term, and the buildings are destroyed by fire, the tenant is not relieved from the payment of rent, unless he has protected himself by a covenant in the lease. This rule was based, as stated by the common-law writers, upon the reason that, as the destruction is usually by means of an accident, for which neither lessor nor lessee is responsible, it is but equitable to divide the loss; and as the lessor must lose the property, the lessee should lose the term; and upon the further reason that exemption from loss would tend to make the tenant less careful, as in many cases he would be benefited by the destruction of the premises, if the result would be to free him from the lease. In most states, however, the common-law rule has been superseded by either Code or statutory provisions. In this state the rule has been changed (Civil Code, § 1933) by direct provision that the hiring of a thing

terminates by the destruction of the thing hired. *Ainsworth v. Ritt*, 38 Cal. 89. But there is no provision of the Code, and no well-considered case to which our attention has been called, making the lessor liable to the lessee, in case of destruction of the premises by fire, for rent paid in advance, in the absence of any such provision in the agreement of lease. In such case the contract has been executed, and the estate or premises leased delivered to the lessee. The fact that rent was to be paid in advance might have been the controlling factor in the mind of the lessor when he executed the lease and delivered the possession of the premises to the lessee. The consideration for the advance payment is not only the use of the premises for the month during which the lessee is to use them under the lease, but the conveyance by way of lease and the obtaining possession of the premises. The lease is an interest in real property passing from the lessor to the lessee. In many cases the landlord may

recovery by remaining in possession of the premises after a fire, and deriving all the benefits to be had from possession of the property, although the landlord had made no demand for possession. *Chamberlain v. Godfrey*, 50 Ala. 530.

Recovery by lessor after destruction of premises of rent payable in advance.

The question of intention as shown in the lease or statute also controls in cases where the lessor seeks to recover rent payable in advance after the premises have been destroyed.

An interesting case upon the question here considered is that of *Craig v. Butler*, 83 Hun, 286, 31 N. Y. Supp. 963, affirmed in 156 N. Y. 672, 50 N. E. 962, which arose under the New York statute providing that the lessees of any building which shall, without any fault or neglect on the lessees' part, be destroyed or so injured by the elements or any other cause as to be untenable and unfit for occupancy, shall not be liable to pay rent to the lessors after such destruction or injury, unless otherwise expressly provided by written agreement, and that the lessees upon such injury occurring might thereupon quit and surrender possession of the premises. In this case the rent reserved for a summer hotel was payable in equal portions the 1st of May, June, July, and August, and the balance of the amount on the 1st of September; the hotel burned at 6 o'clock A. M. September 1st, which was Sunday, and the lessee on September 3d, Labor Day coming on the 2d, notified the lessor that he surrendered possession of the premises pursuant to the provisions of the statute. It was held that the rent balance became due at all times during the day of September 1st, that the fact that Sunday and Labor Day intervened

only extended the time of payment, and that the rent having accrued before the burning of the property, the full amount might be recovered. This case was affirmed on the opinion of the lower court in 156 N. Y. 672, Chief Justice Parker and another justice dissenting. In an opinion filed by the chief justice, he said: "The construction of the statute which the respondents contend for would enable a landlord to recover of his tenants the yearly rent in advance, if the rent became due a day before the destruction of the premises. The appellant insists that a proper construction of the statute would enable a tenant, at a yearly rent payable at the end of the term, to escape payment entirely if the house should burn down on the 364th day of the term. It does not seem to me that the statute should be given the construction contended for by either party. Midway between these extremes may be found a natural and ordinary construction which will harmonize with the intent of the legislature as generally understood. The purpose of this statute was to abrogate the severe rule of the common law, holding the tenant to the payment of rent notwithstanding the building rented should be destroyed or rendered untenable during the running of the lease, and to permit him in such event to quit and surrender possession of the demised premises. The object of the legislature is accomplished when the tenant pays for such portion of a term as he occupies the demised premises, and is relieved from paying for such part thereof as he is prevented from enjoying without fault on his part. So, if the tenant occupies the demised premises for the greater part of the term, the rent of which is payable at the expiration thereof, he shall not have the premises free for the time actually occupied, even if they shall be destroyed

have expended more money than the advanced rent, and for the very reason that he is receiving rent in advance. It may have been the very inducement to the lease. The destruction of the premises by fire being unforeseen, and without the fault of either party in contemplation of law, they each must suffer, and being equally innocent, why should the law interfere to aid the lessee in a case where he has not taken the precaution to provide in his lease for the contingency? The lessee has only paid the money he agreed to pay at the time he agreed to pay it; and, as he has not seen fit to have any provision inserted in the lease as to the recovery of the advanced rent, or a part thereof, in case the premises are destroyed by fire, the law will not insert such provision for him, particularly as in many cases it might work a great hardship on the lessor.

"In the state of New York the statute provides that where any leased building is destroyed by fire so as to be untenable, the lessee may quit and surrender possession, and in such case he shall not be liable to rent subsequent to the surrender. It is held, however, that where rent is paid in advance, it cannot be recovered, notwithstanding the provision of the statute. *Werner v. Padula*, 49 App. Div. 135, 63 N. Y. Supp. 68. It was there said: 'If by the terms of his lease rent is to be paid in advance, the tenant comes under an absolute engagement to pay it on the day fixed, and he is not relieved from that engagement by the fact that the property is destroyed by fire, and he is liable to pay the rent due in advance, even though the destruction takes place on the very day it falls due. . . . Under the statute therefore, the plaintiff would have been compelled to pay the first instalment of rent, although the premises had been de-

stroyed on the day after this lease was signed. But it is said that if this construction be given to her contract, she gets no more benefit from the contract than she would have had, had she relied upon the statute. That is undoubtedly true. If she had written into her lease the exact words of the statute, they would have received there the same construction which the statute itself has received, and the fact that she has written words in her contract which have the same meaning gives her no other or different rights. When, therefore, on the day the lease was signed, she paid the rent in accordance with its terms, that payment was final and absolute, and she was not entitled to recover it back in the event of the destruction of the premises before the whole of that rent had been earned.'

"This case was affirmed in 167 N. Y. 611, 60 N. E. 1122, and again in *Einstein v. Tutelman*, 59 Misc. 462, 110 N. Y. Supp. 1025.

"In *Tarkovsky v. George H. Hess Co.* 64 Ill. App. 513, the lease contained the provision: 'Upon the destruction of said premises by fire the term hereby created shall cease and determine.' The premises were totally destroyed by fire, and the action was brought to recover part of a month's rent which had been paid in advance under the terms of the lease. The court held that such rent could not be recovered. In the opinion the court said: 'Can a proportionate part of such payment be recovered back? We think not. The contract of the parties ought to govern. They provided by their agreement how the rent should be paid, but did not agree that the rent should be abated for any part of the term for which it should be paid, in case the premises should be destroyed. Their only agreement with reference to the

without his fault prior to the end of the term; nor, on the other hand, shall the landlord compel the payment of the yearly rent in advance if pay day shall arrive a few hours before the total destruction of the premises. The natural and ordinary use of the words employed in the statute seems to incline in favor of a construction which, in either event, would compel the payment of such value as the tenant has actually received out of the premises, and no more."

And where, by the terms of a lease, the rent is payable quarterly in advance, and there is a provision that, if the property is accidentally burned, the rent is from thenceforth to cease, the destruction of the property early in the quarter will not prevent the lessor recovering the full amount. *Ryerse v. Lyons*, 2 U. C. Q. B. 12.

And where a lease containing a provision

for the suspension or abatement of rent in case of the destruction of the premises by fire was surrendered to the lessor in consideration of three notes made by the lessee, the latter is liable for all of the notes, although the premises are destroyed before the date on which the last falls due, the consideration being the surrender of the lease. *Brooks v. Cutter*, 119 Mass. 132.

But where rent is payable in advance on the 1st of every month, and there is a provision in the lease that in case of fire, if the premises be so damaged that the landlord should decide to rebuild, the term should cease, and the accrued rent be paid up to the time of the fire, the landlord, after a fire occurring on the 12th of the month and an election to rebuild, can recover rent only up to the date of the fire. *Hecht v. Heerwagen*, 14 Misc. 529, 36 N. Y. Supp. 271.

J. T. W.

destruction of the premises was that the lease should thereupon terminate, and, impliedly, that no more rent should accrue. Such was probably the law without any agreement. But as to rent previously paid they made no provision, and we do not feel called upon to make one for them. As we view the case, the risk of the lease being terminated before the time expired for which rent was paid was upon the party paying. That was in effect what his contract was when he agreed to pay in advance.'

"The same ruling has been made by the supreme court of Ohio (*Felix v. Griffiths*, 56 Ohio St. 39, 45 N. E. 1092); of Wisconsin (*Cross v. Button*, 4 Wis. 468; *Copeland v. Goldsmith*, 100 Wis. 436, 76 N. W. 358); and of Michigan (*Lieberthal v. Montgomery*, 121 Mich. 369, 80 N. W. 115).

"The only case cited which appears to be directly in point, holding the contrary rule, is *Porter v. Tull*, 6 Wash. 408, 22 L.R.A. 613, 36 Am. St. Rep. 172, 33 Pac. 965. The reasoning of that case, however, is not convincing, and the opinion states that the court has not been cited to any adjudicated cases on the question. The cases to which we have referred, and which have been cited herein, evidently were not called to the attention of the court.

"We are aware that there may be cases in which the rule that we have adopted may work injustice; but we apprehend that to hold to the contrary would work greater injustice in many cases. In our opinion it is better to let the rights of the parties rest upon their contract as they have made it, and not by judicial construction place a covenant in the lease which the parties have neglected to insert there themselves. It is better to have the rule uniform and certain, and any such contingency may be provided for in the lease.

"The judgment and order are reversed."

NEW JERSEY COURT OF ERRORS AND APPEALS.

EMILY F. CARLEY, Exrx., etc., of Thomas S. Carley, Deceased.

LIBERTY HAT MANUFACTURING COMPANY, Plff. in Err.

(— N. J. —, 79 Atl. 447.)

Landlord and tenant — destruction of property — recovery of advanced rent.

The supplement of 1874 to the landlord and tenant act (P. L. 1874, p. 27; 2 Gen. Stat. 1895, p. 1923, § 35), in case of the

total destruction of the building or buildings erected on leased premises by fire or otherwise, without the fault of the lessee, permits a recovery by the tenant from the lessor of such portion of an instalment of rent that has been paid in advance as would have been earned after such destruction.

(Gummere, Ch. J., and Reed, Bergen, and Minturn, JJ., dissent.)

(March 6, 1911.)

ERROR to the Supreme Court to review a judgment affirming a judgment of the Second District Court of the City of Newark in plaintiff's favor in an action brought to recover an instalment of rent after the destruction of the premises by fire, alleged to be due under a lease requiring payment of rent monthly in advance. Reversed.

The facts are stated in the opinion.

Mr. Samuel F. Leber, for plaintiff in error:

The legislature intended that the rent reserved should be apportioned up to the time of the destruction.

Craig v. Butler, 156 N. Y. 672, 50 N. E. 963; *Werner v. Padula*, 49 App. Div. 135, 63 N. Y. Supp. 68.

There is no justice nor force in the argument that the month's rent was due and payable in advance on the 1st day of May, and consequently had accrued prior to the destruction.

Porter v. Tull, 22 L.R.A. 613, and note, 6 Wash. 408, 36 Am. St. Rep. 172, 33 Pac. 965; *Craig v. Butler*, 156 N. Y. 672, 50 N. E. 963.

By the terms of the lease the plaintiff in error took no interest in the soil upon which the demised buildings and machinery stood, and the common-law rule does not apply because the reason for the rule does not exist.

Jones, Land. & T. §§ 675-677; *le Taverner's Case*, 1 Dyer, 56; *Rich v. Smith*, 121 Mass. 328; *Taylor v. Hart*, 73 Miss. 22, 30 L.R.A. 716, 18 So. 546; *Coogan v. Parker*, 2 S. C. 255, 16 Am. Rep. 659; *Cutlar v. Potts*, 3 N. C. (2 Hayw.) 26; *Ripley v. Wightman*, 4 McCord, L. 447; *Lanpher v. Glenn*, 37 Minn. 4, 33 N. W. 10; *Whitaker v. Hawley*, 25 Kan. 674, 37 Am. Rep. 283; *Womack v. McQuarry*, 28 Ind. 103, 92 Am. Dec. 306; 24 Alb. L. J. 365; *Salmon v. Matthews*, 8 Mees. & W. 827, 11 L. J. Exch. N. S. 59.

Mr. Charles L. Williams, with Messrs. Sommer, Colby, & Whiting, for defendant in error:

Note. — See note to *Harvey v. Weisbaum*, ante, 540 for destruction of premises as effecting rent paid or payable in advance.

Where land, together with buildings or improvements situated thereon, is demised, the accidental destruction of the buildings or improvements does not relieve the tenant from liability for future rent, but his liability therefor continues to the same extent as if the destruction of the buildings or improvements had not occurred.

Sheets v. Selden, 7 Wall. 416, 19 L. ed. 166; *Coles v. Celluloid Mfg. Co.* 39 N. J. L. 326, affirmed in 40 N. J. L. 381.

The construction of the landlord and tenant act is supported by the decisions of the courts of other states.

Craig v. Butler, 83 Hun, 286, 31 N. Y. Supp. 963, affirmed in 156 N. Y. 672, 50 N. E. 962; *Werner v. Padula*, 49 App. Div. 135, 63 N. Y. Supp. 68, affirmed in 167 N. Y. 611, 60 N. E. 1122; *Gugel v. Isaacs*, 21 App. Div. 503, 48 N. Y. Supp. 594; *Felix v. Griffiths*, 56 Ohio St. 39, 45 N. E. 1092; *Cross v. Button*, 4 Wis. 468; *Copeland v. Goldsmith*, 100 Wis. 436, 76 N. W. 358; *Lieberthal v. Montgomery*, 121 Mich. 369, 80 N. W. 115.

Release from liability operates only as to subsequently accruing rent, and not from rent which has accrued prior to the time of such surrender, eviction, dispossession, and condemnation.

Learned v. Ryder, 61 Barb. 552; *Barkley v. McCue*, 25 Misc. 738, 55 N. Y. Supp. 608; *Weston v. Ryley*, 15 Misc. 638, 37 N. Y. Supp. 216; *Manning v. Ferrier*, 27 Misc. 522, 58 N. Y. Supp. 332; *Copeland v. Luttgen*, 17 Misc. 604, 40 N. Y. Supp. 653; *Hunter v. Reiley*, 43 N. J. L. 480; *Giles v. Comstock*, 4 N. Y. 270, 53 Am. Dec. 374; *Johnson v. Barg*, 8 Misc. 307, 28 N. Y. Supp. 728; *Bernstein v. Heine-mann*, 23 Misc. 464, 51 N. Y. Supp. 467; *McNulty v. Duffy*, 28 Misc. 779, 59 N. Y. Supp. 592; *Adams v. Bigelow*, 128 Mass. 365; *Gugel v. Isaacs*, 21 App. Div. 503, 48 N. Y. Supp. 594.

Voorhees, J., delivered the opinion of the court:

This is a writ of error to the supreme court, which on appeal affirmed a judgment of the second district court of Newark rendered for the plaintiff for \$150 and costs. The suit was brought for \$150, being an instalment of rent due upon a written lease demising certain lands and premises, with the buildings thereon and appurtenances, at a yearly rental of \$1,800, payable in monthly instalments of \$150 each in advance, on the first secular day of each month. An instalment of rent became due for the month of May, 1909, on the 1st day of that month. It was not paid on the due date. The defendant remained in the undisturbed possession of

the premises until May 8, 1909, when, without his fault, the buildings on the premises were totally destroyed by fire. Since the fire the defendant has not occupied the premises. Some time after the fire, but before suit brought, the defendant made a tender to the plaintiff of eight days' rent, which was refused. The suit was then instituted to recover the rent for the entire month of May. The defendant interposed a recoupment against the plaintiff's demand for the portion of rent from the 8th day of May to the 1st day of June. Judgment was given for \$150 for the plaintiff for the whole month; the defendant's claim for the portion of the rent referable to the period after the fire being disallowed.

The solution of the question presented by the writ involves the construction of the act of March 5, 1874 (P. L. p. 27, Gen. Stat. 1895, p. 1923, § 35). It reads as follows: "That whenever any building or buildings erected on leased premises shall be injured by fire without the fault of the lessee, the landlord shall repair the same as speedily as possible, or in default thereof, the rent shall cease until such time as such building or buildings shall be put in complete repair; and in case of the total destruction of such building or buildings by fire or otherwise, the rent shall be paid up to the time of such destruction, and then and from thenceforth, the lease shall cease and come to an end; provided always, that this section shall not extend to or apply to cases where the parties have otherwise stipulated in their agreement of lease." Of course, this statute was a remedy for the harshness of the common-law rule which made the rent payable notwithstanding the destruction of the buildings upon the demised property. It provides for two cases: The first for injury to the buildings by fire, and makes it the duty of the landlord to repair, under penalty of having the rent cease until the buildings shall be put in complete repair. This does not contemplate the termination of the lease. The other case is where there is a total destruction of the buildings. In that case the rent shall be paid up to the time of the destruction, and then the lease shall cease and come to an end. Reading these two clauses together, it cannot be said that the statute offers an option to the tenant to be availed of by him within a reasonable time, whether he will terminate the lease or not. The language expressly provides that the lease shall terminate, and the word "then," in the clause "and then and from thenceforth," refers to the time of destruction. The severing of the relation between landlord and tenant

may prove to be of substantial benefit to the owner by leaving him free to allow the premises to remain without buildings, or to erect thereon new structures suited to the location and condition of the property. The termination is not made dependent upon the rent being paid to the time of the destruction. The statute means that there shall be a liability for the payment of the rent to the date of destruction and cessation of the term, and provides that the tenant shall pay it. This is most equitable and a just change of the former rule, and, being within the plain words of the act, should be the construction.

It has been suggested that this view would in some cases lead to injustice, and the case has been instanced where a plantation had been demised, having but a single structure upon it, the destruction of which would work a termination of the lease. The answer to that is that the parties contract with knowledge of the law, and may provide against such a contingency by agreeing upon the circumstances which shall terminate the lease. Great stress has been laid upon the fact that at common law rent is not apportionable, and therefore cannot be divided. It is strenuously argued that, when by agreement rent has been made payable in advance of the period for which it is to be earned, it is still a unit and indivisible, and, *a fortiori*, when paid, is not recoverable, although the term of the tenant may have come to an end before the end of the period for which it was paid. The statute in the plainest words as to rent not made payable in advance has changed the common-law rule in the cases mentioned in the statute. Rent thus payable under the given circumstances has been clearly made apportionable. The language, "paid up to the time of such destruction," means payment of the rent which is earned up to that time, and it is clear that rent not payable in advance of being earned, but at the end of the period for which it was reserved, could be recovered only for a period "up to the time of such destruction." The plaintiff concedes the soundness of this proposition.

Should a different effect be given to the statute when the fire occurs after an installment of the annual rent has become due and payable, but within the period for which it was reserved? We agree that the plaintiff is correct in insisting that the failure of the tenant to pay the rent promptly upon the 1st day of the month in advance can gain for it no advantage from the circumstances that, in fact, the rent was unpaid when the fire took place. To hold otherwise would be permitting the

lessee to profit by its own wrong. The case must be considered with reference to the right of the tenant to recover from the landlord, in case the rent had been paid in advance, the unearned portion thereof; that is, all that had not been earned at the time of the fire and after eviction under the statute. In debating this question, we must keep in mind what the statute avowedly intended to do and what it has in terms directed shall be done. First, it has provided that the fire shall mark a period down to which the tenant shall be liable to pay, and cancel his liability thereafter; secondly, that, after the fire, "the lease shall cease and come to an end." It thus not only puts an end to the enjoyment of the occupation, but, in consequence, causes a failure of the consideration for which the rent had been paid in advance. Thus, every obstacle to the recovery by the tenant of previously paid rent is removed. The rent is divisible and the consideration has failed. This result seems to attend the natural and ordinary meaning of the words of the enactment. It enforces payment on the part of the tenant for the value he has received in the enjoyment of his possession. It prevents the landlord from retaining that for which he has given no value.

The argument is that liberality of construction should not be accorded to the statute because it is in derogation of the common law. All statutes which change the common law are in a sense in derogation thereof; yet there is another rule which is likewise recognized, prescribing for remedial statutes a liberal interpretation. The case of *Coles v. Celluloid Mfg. Co.* 39 N. J. L. 326, cited as sustaining this principle, does not seem to be in point. While it referred to this statute, it was to show its inapplicability to the case then under consideration, because enacted after the cause of action in that case had arisen. *Tinsman v. Belvidere Delaware R. Co.* 26 N. J. L. 148, 69 Am. Dec. 565, also cited, is clearly distinguishable for the contention sought, for the enactment was quite without its terms and its reason and spirit as well. *State v. Lash*, 16 N. J. L. 380, 32 Am. Dec. 397, was a penal statute, and so clearly within the imperative rule requiring strict construction. The fundamental canon of construction is that the intention of the legislature shall prevail, and that it shall be gotten from the plain meaning of the enactment. That meaning, however, once ascertained, a remedial enactment will extend so as to advance the remedy provided by it, and suppress the mischief which preceded its passage. No one can doubt that in the plainest terms

this act includes the objects above set forth. Nor can it be denied that the mischief which lurked within the old law, and was designed to be suppressed, was the great injustice that oftentimes happened to tenants by being obliged to pay rent after the possibility of the beneficial enjoyment of the premises had ceased. The statute is therefore highly remedial, and its scope should be held to include a complete remedy for the recognized wrong it was intended to right. That object is plainly within its words. We think, therefore, that the statute, in case of the total destruction of the building or buildings erected on leased premises, by fire or otherwise, without the fault of the lessee, permits a recovery by the tenant from the lessor of such portion of an instalment of rent that has been paid in advance as would have been earned after such destruction.

We have no direct authority in this state construing this statute. Turning to the cases in other states referred to by the plaintiff, we first notice *Craig v. Butler*, 83 Hun, 286, 31 N. Y. Supp. 963, affirmed in 156 N. Y. 672, 50 N. E. 962. The wording of the New York statute is: "Shall not be liable to pay rent. . . . after such destruction." The court says: "Of course, the purpose of the statute is to relieve the tenant from payment of rent which accrues after the destruction, not from the payment of rent which was due, but unpaid at that time. So that the question here is narrowed whether . . . the rent sought to be recovered had accrued when the fire occurred," and concluded that the rent had accrued before the fire. The New York statute is not as strong as ours. It is confined to the payment of rent after the destruction. Our statute says that the rent shall be paid up to the destruction,—clearly contemplating an apportionment. The New York court, in speaking of the rent having "accrued," evidently uses that word in the sense of "become due and payable," and thereby brings the case within the literal language of their statute. We think the true meaning of the word "accrue" is "to grow," and in that sense the rent accrues from day to day. It is on that principle that interest is apportionable as it accrues on a note or other interest-bearing obligation. *Manning v. Randolph*, 4 N. J. L. 145; *Re Lackawanna Iron & Coal Co.* 37 N. J. Eq. 26. In the latter case it is said: "Interest due on a bond and mortgage was always apportionable on the ground that it accrued from day to day." The New York statute differs from ours in the fact that the former makes it optional with the tenant whether he will end the term.

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In *Johnson v. Oppenheim*, 55 N. Y. 280, at page 285, the New York statute is declared to be remedial, and to permit the tenant to quit and surrender. "It gives to the tenant the option, when the demised premises are no longer capable of beneficial enjoyment, to terminate and annul the lease." It requires the surrender of the possession as a release to the tenant from the payment of rent, if he elects to avail himself of its provisions. Our statute, as above pointed out, destroys the estate of the tenant, and thereby takes away from him all enjoyment of the premises,—a pointed distinction which must be made in comparing the two enactments, regarding the right of recovery of a *pro rata* of rent previously paid. The logical dissenting opinion of Parker, Ch. J., in *Craig v. Butler*, supra, is referred to as showing that even the less rigorous New York statute may well be construed to allow such recovery. The next case is *Werner v. Padula*, 49 App. Div. 135, 63 N. Y. Supp. 68, affirmed in 167 N. Y. 611, 60 N. E. 1122. That case arose upon the wording of a lease, and not upon the statute, which wording follows almost literally and quite substantially the language of our own act. The New York court held that the terms of the lease and their statute amount to precisely the same thing, and had exactly the same meaning, and therefore held that the case was governed by *Craig v. Butler*. The variation above pointed out between the two statutes received no attention or comment.

The case of *Felix v. Griffiths*, 56 Ohio St. 39, 45 N. E. 1092, arose likewise upon the construction of a lease. It was agreed that, in case the building from any cause should grow unfit for occupancy, the parties should not be liable to pay rent after the tenant should have surrendered possession of the premises. The court said that, by this agreement, the tenant exempted himself from payment of rent after surrender. Without comment upon the conclusion of the court as being a correct disposition of the case, it has no great bearing upon our statute. As the court said the parties "in distinct language limited that exemption to exoneration of the lessee after the surrender." The surrender was voluntary, and the selection of the time when it should be made.

A Wisconsin case—*Cross v. Button*, 4 Wis. 468—was also a covenant in a lease providing for a deduction to be made for rent for the time the tenant should be deprived of the use of the building destroyed. The court held that the deduction should be made, but from the unpaid

rent falling due from the next quarter, and not from the rent already paid, and therefore would not construe it into a covenant to refund the rent already due and paid. It will be observed that it did not provide for a termination of the lease by fire, and therefore the question of refunding as here presented was not necessarily involved. But the apportionment of the rent was indirectly conceded. The case of *Copeland v. Goldsmith*, 100 Wis. 436, 76 N. W. 358, does not differ from *Cross v. Button*, and was decided on the authority of that case. *Lieberthal v. Montgomery*, 121 Mich. 369, 80 N. W. 115, was also on a covenant in a lease. It was there held that payment in advance was voluntary under the covenant, and that the earlier cases above referred to were conclusive upon the court. These cases thus cited by the plaintiff fail to overcome the theory which we advance, for our statute necessarily implies an apportionment as well as an enforced cessation of the lease. The mere fact that the parties in the lease agreed that the rent should be payable in advance will not be construed to mean that, under the proviso reading, "provided always that this section shall not extend or apply to cases where the parties have otherwise stipulated in their agreement of lease," they have assented that the statute shall not apply. There is no reference in the lease to the statute or to its subject-matter. Concededly advance payments merely modify the operation of the act. It is not claimed that such payments would avert its action in terminating the lease. They have not stipulated that the "section shall not extend to or apply" to the lease.

Of the cases cited by the defendant, it is admitted that *Porter v. Tull*, 6 Wash. 408, 22 L.R.A. 613, 36 Am. St. Rep. 172, 33 Pac. 965, is in point. *Rich v. Smith*, 121 Mass. 328, has to this extent a bearing in the defendant's favor that, in the absence of a direct covenant to repay, a repayment may be enforced upon a construction of a clause of a lease providing for the "suspension and abatement" of a just and proportionate part of the rent. *Taylor v. Hart*, 73 Miss. 22, 30 L.R.A. 716, 18 So. 546; *Coogan v. Parker*, 2 S. C. 255, 16 Am. Rep. 659; *Lanpher v. Glenn*, 37 Minn. 4, 33 N. W. 10, and *Whitaker v. Hawley*, 25 Kan. 674, 37 Am. Rep. 277, seem not to be specially instructive upon the questions involved.

To the plaintiff's contention that she is supported by cases involving surrender, eviction, dispossession, and condemnation, and those between heir and personal representative and life tenant and remainder—33 L.R.A. (N.S.)

man, a complete answer lies in the fact that the common-law doctrine that rent will not be apportioned in these cases has not been changed by statute. In the present case, as before remarked, the statute by fair construction makes rent apportionable, not generally, but only when the occasion therefor arises by reason of the destruction of the buildings.

The judgment of the Supreme Court will be reversed, to the end that a new trial may be granted.

Gummere, Ch. J., and Reed, Bergen, and Minturn, JJ., dissent.

WEST VIRGINIA SUPREME COURT OF APPEALS.

STATE OF WEST VIRGINIA

v.

WILEY BAKER et al., Plffs. in Err.

(— W. Va. —, 71 S. E. 186.)

Gaming — keeping house — misdemeanor.

1. The keeping of a common gaming house is a misdemeanor at common law, and consequently a violation of the law of this state. Same — select company.

2. That only those who gamble are admitted to the room where the gambling is carried on, and the rest of the public are excluded therefrom, does not affect the crime.

Same — gaming lawful.

3. The keeping of a common gaming house is unlawful, whether the gambling therein be lawful or unlawful.

Same — profit.

4. It is not material that a common gaming house should be kept for lucre or profit.

Same — publicity.

5. It is not essential, to constitute the offense of keeping a common gaming house, that the gambling therein should be in view of the public, or that the public should be disturbed by noise therein.

(April 25, 1911.)

Note. — Offense of keeping a gaming house as affected by restrictions on admission.

The holding in *STATE v. BAKER*, to the effect that the fact that only those who desired to gamble were admitted does not prevent the place from being a common gaming house, is in accord with the prior decisions upon the question.

Thus, where an incorporated club having 150 members occupied rooms which were commonly used for gambling by members of

ERROR to the Circuit Court for Cabell County to review a judgment convicting defendants of keeping a common gaming house. Affirmed.

The facts are stated in the opinion.

Messrs. Marcum & Shepherd for plaintiffs in error.

Mr. Jean F. Smith, for the State:

At common law, a common gaming house is a nuisance, and persons who are in the occupation and control of such a house are guilty of maintaining a nuisance.

Com. v. Western U. Teleg. Co. 112 Ky. 355, 57 L.R.A. 614, 99 Am. St. Rep. 299, 67 S. W. 59; State v. Morgan, 133 N. C. 743, 45 S. E. 1033; Thrower v. State, 117 Ga. 753, 45 S. E. 128, 15 Am. Crim. Rep. 315; Jones v. State, 120 Ga. 185, 47 S. E. 561; Bryan v. State, 120 Ga. 201, 47 S. E. 574; Christ v. State, 33 Ind. App. 488, 69 N. E. 269; State v. Nease, 46 Or. 433, 80 Pac. 897; Groves v. State, 123 Ga. 570, 51 S. E. 627; People v. Weithoff, 93 Mich.

631, 32 Am. St. Rep. 532, 53 N. W. 784; St. Louis Fair Asso. v. Carmody, 151 Mo. 566, 74 Am. St. Rep. 571, 52 S. W. 365; People v. Jackson, 3 Denio, 101, 45 Am. Dec. 449; Lord v. State, 16 N. H. 325, 41 Am. Dec. 729; McClain, Crim. Law, § 1306, p. 606; Bishop, New Crim. Law, §§ 505, 655, 1135; 1 Russell, Crimes, 323; Clark & M. Crimes, 2d ed. 715; State v. Ehrlick, 65 W. Va. 700, 23 L.R.A.(N.S.) 691, 64 S. E. 935; Bishop, Statutory Crimes, 3d ed. 558, § 847.

Mr. William G. Conley, Attorney General, also for the State.

Williams, P., delivered the opinion of the court:

Wiley Baker and Dick Rader were indicted, tried, and convicted, and adjudged by the circuit court of Cabell county to pay a fine of \$50 each and the costs of their prosecution, for keeping a common gaming

the club and such persons as they invited there, it was held to be a common gaming house. Com. v. Blankinship, 165 Mass. 40, 42 N. E. 115. The court said: "Gaming houses in this country and in England are seldom open to all the public. Usually only those persons are admitted who are supposed to be willing to have the law violated in this way. Often strong doors and double locks are used to keep out, not only officers of the law, but all others who are not known to the proprietor or vouched for by his friends. The word 'common' as applied to a gaming house does not necessarily mean that it is open to all the public. The rulings requested and refused in the present case assume that the building was commonly resorted to, . . . not only by the members of the club, but by such other persons as they chose to invite there. If so resorted to, it might well be found to be a common gaming house."

And it was held in Jenks v. Turpin, L. R. 13 Q. B. Div. 505, 15 Cox, C. C. 486, 50 L. T. N. S. 808, 53 L. J. Mag. Cas. N. S. 161, 49 J. P. 20, that the fact that gaming was limited to the subscribers and members of a club, and that it was not open to all desirous of entering, did not prevent the club from being a common gaming house.

And in Cochran v. State, 102 Ga. 631, 29 S. E. 438, the evidence was held sufficient to warrant a verdict of guilty against the defendant for keeping a gambling house, where it appeared that he was an officer of a social club and knew that gambling was going on, and that part of the losses went to the use of the club.

So, in Com. v. Warren, 161 Mass. 281, 37 N. E. 172, it was held that there was sufficient evidence that the building in question was a common gaming house, although a part of the evidence showed that it was protected by a thick oak door which was fastened with an oak bar, and that the of-

ficers were unable to gain admission by knocking.

And it was held in State v. Black, 94 N. C. 809, that whether few or many were allowed to resort to a house for gambling purposes was immaterial.

And in State v. Mosby, 53 Mo. App. 571, where the defendant was indicted for keeping a common gaming house, and there was evidence that the playing was in a room used as a bedroom, and that the one handiest the door opened it to anyone who knocked, a conviction was upheld, the court saying that a gaming house could consist of a single rented room, and that it need not necessarily be open to the whole public in common.

And a verdict of guilty of keeping a gaming house is warranted by evidence that a social, genial man, fond of company and a glass, keeps his sleeping apartment with the doors "blanketed" in a fit condition for privately gaming therein, that he invites his friends at night to refresh themselves with beer, and has in the room a table suitable for gaming, a number of packs of cards, two boxes of "chips" and a memorandum book with names and numbers entered therein, and that some of his guests retire under the bed when the police visit the room at 1 o'clock in the morning. Pacetti v. State, 82 Ga. 297, 7 S. E. 867.

But an act providing that no house, office, room, or other place shall be opened, kept, or used for the purpose of the owner, occupier, or keeper thereof, or any person using the same, betting with persons resorting thereto, does not apply to a case where only members of a regular club bet with each other, such act being aimed at houses receiving money from improvident persons. Downes v. Johnson [1895] 2 Q. B. 203, 64 L. J. Mag. Cas. N. S. 238. 15 Reports, 466, 72 L. T. N. S. 728, 43 Week. Rep. 556, 59 J. P. 487.

J. T. W.

house; and they have brought the case here by writ of error.

Is the keeping of a common gaming house a violation of the law of this state? We think it is. It was certainly an offense at the common law. "Common gaming houses are a public nuisance at common law, being detrimental to the public, as they promote cheating and other corrupt practices, and incite to idleness and avaricious ways of gaining property persons whose time might otherwise be employed for the good of the community." 2 Russell, Crimes, 7th Eng. ed. 1897; 1 Bishop, New Crim. Law, § 504. In § 1135, Bishop says: "A common gaming house is a species of disorderly house; the disorder consisting of its allurements tending to evil." Its unlawfulness does not depend upon the unlawfulness of the games which may be therein played. The keeping of a common gaming house is forbidden because it is a public nuisance, tending to evil consequences. All the text writers say that it is in indictable offense at the common law. Joyce, Nuisances, § 395; 1 Wood, Nuisances, § 45; Bacon, Abr. p. 223; 14 Am. & Eng. Enc. Law, p. 666; 20 Cyc. Law & Proc. p. 893; Woods v. Cottrell, 55 W. Va. 476, 65 L.R.A. 616, 104 Am. St. Rep. 1004, 47 S. E. 275, 2 A. & E. Ann. Cas. 933; State v. Ehrlick, 65 W. Va. 700, 23 L.R.A. (N.S.) 691, 64 S. E. 935; Com. v. Warren, 161 Mass. 281, 37 N. E. 172; Thrower v. State, 117 Ga. 753, 45 S. E. 126, 15 Am. Crim. Rep. 315.

The common law of England was made a part of the law of Virginia, and later, the law of this state. In May, 1776, Virginia passed an ordinance providing that "the common law of England, all statutes or acts of Parliament made in aid of the common law prior to the fourth year of the reign of King James the First, and which are of a general nature, not local to that Kingdom, together with the several acts of the general assembly of this colony now in force, so far as the same may consist with the several ordinances, declarations, and resolutions of the general convention, shall be the rule of decision, and shall be considered as in full force until the same shall be altered by the legislative power of this colony." 9 Henning's Statutes at Large, 127. The general assembly by act passed December 27, 1792, repealed so much of the above ordinance as relates to the English statutes made in aid of the common law; but that part of the ordinance making the common law a part of the law of Virginia was not repealed, and the common law of England continued to be the law of Virginia. 1 Min. 51. The first Constitution (1861-63) of West Virginia, which became 33 L.R.A. (N.S.)

the law of the state upon its admission into the Union (§ 8, art. 11), declares: "Such parts of the common law and of the laws of the state of Virginia as are in force within the boundaries of the state of West Virginia when this Constitution goes into operation, and are not repugnant thereto, shall be and continue the law of this state until altered or repealed by the legislature." And § 21 of article 8 of the present Constitution (Code 1906, lxiii.) also declares the common law to be the law of this state until altered or repealed by the legislature. There is no statute in this state which repealed the common law in relation to the offense of keeping a common gaming house; and the common law relating thereto is the law of this state. The statutes against gaming do not repeal by implication the common-law offense of keeping a common gaming house.

The demurrer to the indictment was properly overruled. The offense of keeping a common gaming house is sufficiently alleged. The fact that the indictment alleges that the games which were played in the house kept by defendants were unlawful games is immaterial. Such allegation may be treated as surplusage. It is not necessary that the games which were played should have been unlawful in order to constitute the offense with which defendants are charged.

The state produced a number of witnesses who testified that they had gambled in the room kept by defendants, and that they sometimes lost money, and sometimes won money, at a game played with cards called "stud poker." It does not appear that any greater amount of money than \$1 or \$2 was ever won or lost by one person at any one game or sitting. But the amount won or lost is immaterial, as the amount of money or value of the thing gambled for constitutes no part of the offense of keeping a common gaming house.

It appears that the gambling room was over Rau's barber shop in the city of Huntington, and had to be reached by way of an alley. A stairway led from the alley up to a door opening into a hall or anteroom; and, in order to obtain admission, the visitor had to knock on this outer door, and, if the guard or keeper of the door was satisfied that he was a gambler, he was then admitted. From this hall or anteroom, another door led into another and still more private room, where the gambling was carried on. There was a hole in the door leading into this room, through which the keeper inside could look out in order to determine whether the visitor was a proper person to be admitted. If he was known to the gambling fraternity as a

gambler, he was admitted, if not too drunk. Only those who wished to gamble were admitted. The room was kept closed, and the gambling could not be seen except by those in the room. Some of the witnesses were advised of the location of this gambling room by persons on the street who knew its location, and who would tell them when a game was going on. It appears that this room was only kept and used for the purpose of gambling. It does not appear that the room was used for any other purpose than as a gambling place. Neither does it appear that the defendants kept this gaming house for gain or lucre. It is testified to by at least one witness, who says he used to run the place himself, that the defendants kept this gaming house in the year 1909 prior to October. The indictment was found on the 28th of October, 1909. Defendants offered no testimony, and there is no conflict in the evidence. Defendants rested upon their motion to strike out the state's evidence. This motion was overruled by the court, and the case allowed to go to the jury, and defendants excepted.

The fact that it is not proven that defendants kept the room for lucre is not material. True, some authorities hold that, to constitute the offense of keeping a common gaming house, it must be alleged and proven that it was kept for gain or lucre; but the better opinion, as well as the weight of authority, is to the contrary. The offense consists in the keeping of a gaming house. The keeping of such house is, in law, a public nuisance. Its character as a nuisance in no wise depends upon the matter of profit to those who maintain it. 1 Bishop, Crim. Law, §§ 1086, 1137; 14 Am. & Eng. Enc. Law, p. 715.

That the game was not carried on in view of the outside public, or that the public was not disturbed by noise from within, does not affect the case. These are not necessary elements of the offense. 14 Am. & Eng. Enc. Law, p. 697, and cases cited in notes 3 and 4.

It is none the less a common gaming house because only those who desired to gamble were admitted within its walls. Says Hawkins, J., in *Jenks v. Turpin*, L. R. 13 Q. B. Div. 515: "To no gaming house is the public at large invited to go without restriction of some sort or other. The keeper of such a house has always the right to admit or refuse admission to anyone he pleases, or to make such rules as he may think fit for the regulation of such admission." Again, on the same page, the learned judge further says: "It is true that no annoying interference in the public street can be pointed to, so that in that sense a public nuisance can be said to have 33 L.R.A. (N.S.)

been created; but that is not necessary,"—citing *Reg. v. Rice*, L. R. 1 C. C. 21, 35 L. J. Mag. Cas. N. S. 93, 12 Jur. N. S. 126, 13 L. T. N. S. 382, 14 Week Rep. 56, 10 Cox, C. C. 155, which we do not find in the library. *Com. v. Blankinship*, 165 Mass. 40, 42 N. E. 115; *Com. v. Warren*, 161 Mass. 281, 37 N. E. 172; 14 Am. & Eng. Enc. Law, p. 679; 20 Cya. Law & Proc. p. 893.

Counsel for defendants cite *State v. Maynard*, 66 W. Va. 522, 66 S. E. 688, as authority for the proposition that, in order to constitute the offense of keeping a common gaming house, it must be shown that it was carried on in a public place. That case was an indictment under § 4 of chapter 151, Code 1906, for playing cards in a public place, and the proof showed that the playing was carried on in a secluded place. It was quite a different case from the present one. There the player was indicted for playing cards at a public place, a statutory offense; here the keepers are indicted for keeping a common gaming house, a common-law offense, and it matters not whether the gambling carried on in the house was visible to the general public, or was lawful or unlawful. This case is not controlled by that one.

We find no error in the judgment of the court below, and it will be affirmed.

MASSACHUSETTS SUPREME JUDICIAL COURT.

ROSA G. BOYLE

v.

BOSTON ELEVATED RAILWAY COMPANY.

(208 Mass. 41, 94 N. E. 247.)

Evidence — paper in possession of adversary.

1. One party cannot make a paper otherwise incompetent as evidence competent in

Note. — Effect of calling for and inspecting document to make it competent.

The question as to the effect of putting part of a document in evidence is not included. As to the effect of putting in evidence part of books of account, see the note to *Smith v. Smith*, 52 L.R.A. 600.

In favor of party calling.

In *BOYLE v. BOSTON ELEV. R. Co.* the court persuasively contends that the language of the rule laid down by *Greenleaf* and in some of the cases was mere looseness of expression, and not intended to mean that an incompetent document in the opponent's hands could be made evi-

his favor against his adversary, by calling for and inspecting it on its being produced on his call.

Appeal — incompetent evidence — curing by instructions.

2. Error in admitting in evidence a written statement of those in charge of a street car which was in an accident, in an action to hold the street car company liable for injuries thereby, is not cured by a charge to the effect that it is admitted only to contradict such persons' testimony as witnesses in the case, where, as to one of the witnesses, it was not admissible for that purpose because he had never adopted it by signing it, and it contains matters prejudicial to the objecting party other than those which are merely contradictory while, in a portion of the charge, the jury are authorized to use it as substantive evidence.

(February 28, 1911.)

dence against him, against his objection, by merely calling for it, and inspecting it.

No other case has been found in which this question has arisen as to the competency of the contents of the document, but there are some English cases upon the question whether the caller for an instrument in the hands of the opposing party was compelled to prove its execution.

In *Pearce v. Hooper*, 3 Taunt. 60, it was held by Lord Mansfield and the whole court, that it was not necessary for the defendant to prove the due execution of a lease to the plaintiff, by a third party produced by the plaintiff on call.

So, in *Rex v. Middlezoy*, 2 T. R. 41, it was held that an indenture of apprenticeship produced on call by the other party did not require proof of execution (it had no subscribing witness). Buller, J., said that in civil cases a deed thus produced was prima facie taken as duly executed, as the opposite party, not knowing who were the subscribing witnesses, could not be prepared with the proof. In *Bowles v. Langeworthy*, 5 T. R. 366, Buller, J., refers to the *Middlezoy* Case as law.

But in *Gordon v. Secretan*, 8 East, 548, Lord Ellenborough said: "That the case of *Rex v. Middlezoy*, which was much questioned at the time, had been since overruled. And that it was not enough to give notice to the opposite party in a cause to produce an instrument in his hands, in order to dispense with any further proof of it by the party giving the notice; but that the production of it at the trial, in pursuance of such notice, did not supersede the necessity of proving it by one of the subscribing witnesses, if any, as in ordinary cases. And Lawrence, J., said that this had been so ruled by Lord Kenyon in a subsequent case respecting a will, which the adverse party, in whose hands it was, had notice to produce, and did produce at the trial, when it appeared that there were subscribing witnesses to it; and Lord Kenyon held that the party calling 33 L.R.A. (N.S.)

EXCEPTIONS by defendant to rulings of the Superior Court for Suffolk County made during the trial of an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence, which resulted in a verdict in plaintiff's favor. Sustained.

The facts are stated in the opinion.

Messrs. William G. Thompson, George E. Kimball, and F. Delano Putnam, for defendant:

Such portions of the paper produced and examined as would not otherwise be legally admissible are not made legally admissible against the objection of the party producing it, by the mere fact of such production.

Wharam v. Routledge, 5 Esp. 235; *Clark v. Fletcher*, 1 Allen, 53; 3 Wigm. Ev. § 2125, p. 2883; *Lawrence v. Van Horne*,

for it was bound to call one of the subscribing witnesses to prove the instrument. Lord Ellenborough, Ch. J., added that the case of a will showed strongly the necessity of adhering to the strict rule of proof." See also *Wetherston v. Edgington*, 2 Campb. 94.

In favor of producer—mere notice to produce.

It is universally held that the mere notice to produce a paper will not make it evidence for the producer. *Randel v. Chesapeake & D. Canal Co.* 1 Harr. (Del.) 284; *Hutchinson v. Gordon*, 2 Harr. (Del.) 179; *Morrison v. Whiteside*, 17 Md. 452, 79 Am. Dec. 661; *Anderson v. Root*, 8 Smedes & M. 362; *Com. v. Davidson*, 1 Cush. 33; *Joost v. Scott*, 19 Tex. 474; *Riocker Nat. Bank v. Brown*, — Tex. Civ. App.—, 43 S. W. 909; see also to the same effect, *Blight v. Ashley*, Pet. C. C. 15, Fed. Cas. No. 1,541, where, however, it does not seem clear that there was no inspection.

In *State v. Wisdom*, 8 Port. (Ala.) 511, the appellate court, in sustaining the exclusion of a bill of sale offered by the producer without proof of its authenticity, said: "If produced on the motion it may be read by the party who has requested its production, but if he does not choose to give it in evidence, the mere notice will not have the effect to allow the party in whose possession it has been, to read it without proof. 2 Starkie, Ev. 360."

—rule that inspection renders paper admissible.

The so-called "English rule" is that if one party calls for a paper and inspects it, it is thereby made evidence in favor of the producer. For cases sustaining this rule, see *Edison Electric Light Co. v. United States Electric Lighting Co.* 45 Fed. 55; *Coote v. Bank of United States*, 3 Cranch, C. C. 50, Fed. Cas. No. 3,203 (as

1 Caines, 276; Sayer v. Kitchen, 1 Esp. 209.

Messrs. W. Flaherty, D. H. Coakley, and J. F. Creed for plaintiff.

Loring, J., delivered the opinion of the court:

We are of opinion that the exception must be sustained which was taken to the admission in evidence of a typewritten statement of an examination of the motorman and conductor of the car here in question. This examination was made by one Shea, who was employed in the defendant's claim department, a few days after the accident.

Just before the end of the direct examination of the motorman (who was called

as a witness by the defendant), this statement of Shea's examination and the accident report made by the same two employees were marked for identification. At the end of the motorman's examination, counsel for the plaintiff asked for the "report," by which he must be taken to have meant the accident report. The counsel for the defendant objected to giving it to him then, saying that he had not a right to read it until he cross-examined, and the presiding judge said to the counsel for the plaintiff that he had no right to it unless it went in evidence. Thereupon a colloquy ensued, the meaning of which is not altogether clear. But as we construe it, counsel for the defendant said that if the report which counsel for the plaintiff called

suggesting the rule); *Rahdel v. Chesapeake & D. Canal Co.* 1 Harr. (Del.) 284; *Hutchinson v. Gordon*, 2 Harr. (Del.) 179; *Blake v. Russ*, 33 Me. 360; *Morrison v. Whiteside*, 17 Md. 452, 79 Am. Dec. 661 (as implying the rule); *Anderson v. Root*, 8 Smedes & M. 362.

See also cases cited *infra*.

"The reason for this rule is that it would give an unconscionable advantage to a party to enable him to pry into the affairs of his adversary, without at the same time subjecting him to the risk of making whatever he inspects evidence for both parties." *Ellison v. Cruser*, 40 N. J. L. 444.

The English foundation for this rule is by no means satisfactory. It was upheld by Lord Ellenborough in *Wharam v. Routledge*, 5 Esp. 235.

So, in *Calvert v. Flower*, 7 Car. & P. 386, where Kelly, the defendant's counsel, called for the ledger of the plaintiff's intestate, Lord Denman said and held: "I ought now to say that if Mr. Kelly looks at the book, he will be bound to put it in as his evidence."

But in *Wilson v. Bowie*, 1 Car. & P. 8, Park, J., having looked at the paper produced, said that it need not be read, as it was not material to the case at all; and observed that if the plaintiff's counsel call for a paper, and look at it, they must read it in evidence if it is at all material to the case; but if it does not bear on the case, they need not read it.

And in *Sayer v. Kitchen*, 1 Esp. 209, Lord Kenyon held, "if the counsel on one side called for the other's books, and made no use of them, that it was only matter of observation to the counsel on the other side, that the entries there were in favor of his client, but did not entitle him to use them as evidence to be offered to the jury." It would appear that this means that after inspection the books were not evidence to the producing party.

In Massachusetts the rule was not at first certain. Thus, in *Com. v. Davidson*, 1 Cush. 33, the court said "that whether calling for the books of the opposite

party and inspecting them, and doing nothing more, makes the book evidence, is a mooted point."

In *Clark v. Fletcher*, 1 Allen, 53, the rule was sustained, also, following this case, in *Long v. Drew*, 114 Mass. 77.

As is stated in *BOYLE v. BOSTON ELEV. R. Co.*, the rule in New Hampshire is practically the same as that in Massachusetts. The New Hampshire cases hold that the party producing a document may offer it upon the condition that if it is inspected it becomes evidence for the producer. *Huckins v. People's Mut. F. Ins. Co.* 31 N. H. 238; *Austin v. Thomson*, 45 N. H. 113, where, however, the court, after stating that the English cases do not support the "English rule," says further: "As the party notified is not obliged to produce the papers, and as he may, if he produces them, decline to allow them to be examined, except upon the condition that, if examined, they shall be read in evidence (*Huckins v. People's Mut. F. Ins. Co.* 31 N. H. 238), parties notified seem amply protected from any such unconscionable advantage, and the reason stated entirely fails; and we see no sufficient reason for a rule that is at variance with the general course of our practice, and that can hardly facilitate the administration of justice, since, if it has any practical effect in addition to the rules for the admission of competent evidence, it must be to compel the court to allow incompetent evidence to go to the jury. See *Gordon v. Secretan*, 8 East, 548."

In *Wentworth v. McDuffie*, 48 N. H. 402, it was held that as the defendant had a right to refuse to produce his memorandum book, except upon the condition that if the plaintiff examined the memorandum, it should be read in evidence, if he did not annex that condition, he could not complain of only a part of it being read in evidence by the other party, and he was not allowed to put the rest of it in evidence.

Where the plaintiff had taken a deposition referring to a book of accounts in his possession, the question and answer referring to the book were stricken out upon the trial on the defendant's motion, but

for was to be put in evidence he would produce "the whole paper." Then the counsel for the plaintiff said that he would like the "reports and all the rest of them." Thereupon the defendant's counsel handed the plaintiff's counsel the accident report and the typewritten statement of the examination conducted by Shea. Later the counsel for the plaintiff began to read the Shea statement to the jury, and, the defendant's counsel objecting, the presiding judge ruled that if a paper is called for and used "as a basis for cross-examination, it goes in." To this ruling the defendant took an exception. The counsel for the plaintiff then had the conductor recalled to the witness stand, and proceeded to read from the typewritten statement of

Shea's examination this question, as a question put by Shea to the conductor at the time Shea examined him as to the accident: "The cause of the accident in your opinion was what?" He also began to read the conductor's answer to it, when the defendant's counsel objected on the ground that it was "mere theorizing." The counsel for the plaintiff stated that he proposed "to contradict his [the conductor's] statement, by showing [that] he made a different statement." The defendant's counsel said that as to fact he had no objection, but that the conductor's theories were not competent. The presiding judge then made this ruling: "I think, so far, he has not made any statement that tends to contradict anything he has said here. It is competent

were restored later when the defendant inspected the book. *Merrill v. Merrill*, 67 Me. 70.

—limits of rule.

In *Reed v. Anderson*, 12 Cush. 481, it was held that for a party to bring his case within the rule which enabled him to put in evidence a document which he had produced at the request of the other party, which has been inspected, but not used by the other party, it must appear that the document is the identical one which was called for by the other party.

So, in *Harper v. Ely*, 70 Ill. 581, where a party notified to produce his books, produced his ledger, but not his books of original entry, and, on the ledger being inspected by the opposite party, the producer claimed it had become evidence by such inspection, this was denied by the court, as it was not the book called for, the court stating that if the claim had been made that a book which had been called for was thus made evidence, a different question would have been presented, which was not decided.

It was, however, held in *Clark v. Fletcher*, *supra*, that the rule is not altered by the fact that the party calling for the paper misapprehended the nature of its contents.

It has been held that the rule does not apply on a second trial to documents called for on the first trial, but that in such case they must be called for again to admit of the rule. *Ellison v. Cruser*, 40 N. J. L. 444. The contrary was held in *Wooten v. Nall*, 18 Ga. 609.

In *Cushman v. Coleman*, 92 Ga. 772, 19 S. E. 46, it was held that the production of such writings will not suffice to make them evidence for the producing party on the trial of another and entirely different case, though brought by the same plaintiffs against the same defendants, and for the same cause of action.

—rule that inspection does not make paper admissible.

Other cases have held that inspection of 33 L.R.A. (N.S.)

a document produced on call does not make it evidence for the producer. *Price v. Garland*, 3 N. M. 505, 6 Pac. 472.

Where, in an action against a street car company for personal injuries from negligence, it appeared on cross-examination of two of the employees of the defendant, that they had made reports to it about the matter, and the plaintiff called for these reports, and put in evidence only a part of one of them, it was held that the defendant was limited to offering any part of this particular report, and, as to it, could offer only such part as had relation to the matters in it which the plaintiff had already put in evidence. *Laufer v. Bridgeport Traction Co.* 68 Conn. 475, 37 L.R.A. 533, 37 Atl. 379.

The leading authority in New York is *Smith v. Rentz*, 131 N. Y. 169, 15 L.R.A. 138, 30 N. E. 54, where the court said, in holding that the calling for and inspection of the ledger of the defendant's testator did not make it evidence for the plaintiff: "The party who has in his possession books or papers which may be material to the case of his opponent has no moral right to conceal them from his adversary. If, on inspection, the party calling for them finds nothing to his advantage, his omission to put them in evidence does not prevent the party producing them from proving and introducing them in evidence, if they are competent against the other party. The party calling for books and papers would be subjected to great hazard if an inspection merely, without more, would make them evidence in the case. That rule tends rather to the suppression, than the ascertainment, of truth, and the opposite rule is, as it seems to us, better calculated to promote the ends of justice."

This case was followed in *Reed v. Zimmerman*, 1 Misc. 189, 20 N. Y. Supp. 665.

The same principle was sustained in *Caradine v. Hotchkiss*, 120 N. Y. 608, 24 N. E. 1020, and in *Rumsey v. Lovell*, *Anthon*, N. P. 17.

In *Smith v. Rentz*, *supra*, the court points out that in *Lawrence v. Van Horn*, 1 Caines, 276, the judges were not agreed

on that ground." To this the defendant excepted. The Shea statement then was admitted in evidence under the defendant's exception, and was read to the jury and was sent with them into the jury room.

The Shea statement was signed by Leach, the conductor, but not by Ridge, the motor-man. So far as Leach's statements there set forth contradicted the testimony given by Leach on the witness stand, it was competent as a written statement signed by Leach which contradicted his testimony, and the defendant's counsel did not object

to so much of the Shea statement being admitted in evidence. But so far as the Shea statement contradicted Ridge, it was not competent, because it never had been adopted by Ridge as his statement.

It is now contended by the plaintiff's counsel that the Shea statement was produced by the defendant upon the promise of the plaintiff to put it in evidence. While the bill of exceptions on this point is not entirely clear, we do not on the whole so construe it. And we are confirmed in this by the fact that when it was admitted in

in opinion, and that in *Kenny v. Clarkson*, 1 Johns. 385, 3 Am. Dec. 336, Spencer, J., said: "I must not be understood as sanctioning the course adopted at the trial in admitting the paper to be read without proof because notice had been given to produce it, and it had been called for and perused."

The opinion in *BOYLE v. BOSTON ELEV. R. Co.* seems to be in error as to Pennsylvania. In *Summers v. M'Kim*, 12 Serg. & R. 405, the "English" rule seems to have been squarely denied. In that case the court said: "In the present instance, it appears that the paper produced by the defendant, on the call of the plaintiffs, contained something which they had no reason to expect, and which could not have been given in evidence by the defendant. In such case, without laying down any general rule, I think it most conducive to justice, to permit the plaintiffs to waive the reading of it, and leave the defendant to make such use of it as he lawfully may, without regard to the call which was made on him."

The observations of the court in *Farmers' & M. Bank v. Israel*, 6 Serg. & R. 293, are too general and immaterial to be of much value.

In Texas also, while it was held in *Saunders v. Duval*, 19 Tex. 467, that production of papers upon notice does not make them evidence unless the party calling for them inspects them, and in *Ricker Nat. Bank v. Brown*, — Tex. Civ. App. —, 43 S. W. 909, that a notice to produce, where the documents are not offered, will not make an incompetent document evidence for the producer, in *Ellis v. Randle*, 24 Tex. Civ. App. 475, 60 S. W. 462, the court said: "We regard the question . . . as an open one in this state, and are inclined to the opinion that sound reason and the weight of authority is against the English rule." In that case, a number of letters had been produced on demand and examined by the other party, and some of them not put in evidence, and the producer was not allowed to put in the omitted letters. There was, however, other evidence of the facts recited in the letters so omitted, and the court held that there was no error in ruling.

Miscellaneous.

While the effect of putting in evidence
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part of a document called for is without the scope of this note, reference may be here made to cases relating to the effect of putting in evidence one or more of several produced documents.

Thus, where the plaintiff called for one paper, and the defendant tendered four, the court said if any other papers were offered, he was not obliged to take them unless he wished to do so; that those not called for did not become evidence without his inspection. *Rea v. Randel*, 2 Harr. (Del.) 500.

In *Heaffer v. New Era L. Ins. Co.* 101 Pa. 178, where, in an action of a policy of life insurance, the plaintiff called upon the defendant to produce all proofs of death of the insured, meaning thereby the proofs of death with which he had furnished the defendant, and the defendant's counsel thereupon handed to the plaintiff a package of papers from which the latter selected those he desired, the other papers produced by defendant being certain letters purporting to be denials by the beneficiary of any application for the policy, it was held that it was error to compel the plaintiff to offer all the papers produced.

But it was held in *Re Thorn*, 2 Pa. St. 331, where two papers were produced on call, that it was proper to prohibit that one be read without the other.

And in an early case in New York, where the defendant, by an order of court compelled the plaintiff to produce all letters which he had relating to a certain voyage, and proposed to read only two of them, it was held that the plaintiff had the right to read any of the letters in evidence. *Lawrence v. Ocean Ins. Co.* 11 Johns. 241. This case was followed in *Raymond v. Howland*, 17 Wend. 389.

In *Boudinot v. Winter*, 190 Ill. 394, 60 N. E. 553, the court said: "We know of no principle that will enable a party to a suit to call upon his adversary for the production of documentary evidence, and, when it is so produced, claim the benefit of such part or portion thereof as may be to his advantage, and, at the same time, reject such part as tends against him and also deprive his opponent of the right to its use."

B. B. B.

evidence it was not admitted by the presiding judge on that ground.

It is stated in *Clark v. Fletcher*, 1 Allen, 53, and *Long v. Drew*, 114 Mass. 77, on the authority of 1 Greenleaf on Ev. § 563, that if a paper is called for by one party, and is inspected by him, it becomes evidence for both parties at the trial. We assume that the ruling of the presiding judge was made on the authority of that statement. But that statement of Prof. Greenleaf does not mean that a party can make a paper (not otherwise competent as evidence) competent evidence in his own behalf by calling for it, and inspecting it on its being produced on his call. All that is meant by that statement is that, if one party calls for a paper and inspects it, it is thereby made evidence in favor but not against the party who produces it. When Prof. Greenleaf said that if it is produced and inspected it becomes evidence for both parties, he had in mind the case of a paper which was evidence against the party producing it, and, speaking of such a case, he said that if the paper is called for and inspected it becomes evidence for both parties. As we have said, there is no basis for the contention that if a paper is not competent as evidence, a party can make it so by calling for it and inspecting it.

The English rule on which *Clark v. Fletcher* and *Long v. Drew*, *supra*, were founded, was, without question, that if a paper was called for and inspected it became evidence for but not against the party producing it. See *Calvert v. Flower*, 7 Car. & P. 386; 3 Wigmore, Ev. p. 2885, § 2125, note 2.

Under the Massachusetts rule the plaintiff had no right to put the Shea statement in evidence, against the objection of the defendant. The presiding judge in one portion of his charge told the jury that "the statements of two of the men have been presented to you. They are offered upon the theory, coming in that way, that they precent contradictions to the statements that the witnesses have had [made] here. Whatever they contain, they are not substantive and affirmative evidence of the truth of what they contain, but they are only evidence to enable you to judge as to how much credibility you will give to the testimony upon this witness stand of that same witness whose statements they contain or purport to contain. So that, in considering those, they have to be considered in conjunction with the witness who is said to have made the statement, and it is out of the statement and his whole testimony that the truth of that witness as to the story he tells, and just 33 L.R.A. (N.S.)

what effect and weight you give to it, is to be determined."

This did not cure the error in admitting the whole of the Shea statement for several reasons. In the first place none of the Shea statements was admissible to contradict Ridge. In the second place, so far as Leach is concerned, from what is stated in the bill of exceptions, the statement must be taken to have contained matters prejudicial to the defendant, other than the parts which contradicted Leach's testimony. And lastly, in a later part of his charge the judge told the jury that the Shea statement could be used as substantive evidence. He said: "In the papers that are to be submitted to you, and here and there through the evidence in the case, there are and there have been references to injuries to other people in this same accident. Those are not of any consequence as far as you are concerned, except in one single respect, and that is whether they indicate to your minds, with the other description of the falling of the car, etc., that the force that was applied to this plaintiff's person would be adequate to account for the things that she says have come to her since."

We have been asked by the defendant to reconsider the rule of practice established in *Clark v. Fletcher* and *Long v. Drew*, *supra*, on the ground that it is not founded on principle and is against the weight of modern practice. It seems to be law in Delaware, Georgia, Maine, Mississippi, Pennsylvania, and Texas (see 3 Wigmore, Ev. p. 2885, § 2125, note 4). It has been decided not to be law in New York and Connecticut, and has been repudiated by statute in California, Idaho, Iowa, Montana, and Nebraska (see 3 Wigmore, pp. 2885, 2886, § 2125, note 5); and there is some reason to suppose that it is not now law in England (see 3 Wigmore, Ev. p. 2885, § 2125, note 3). It has been said that the rule has been repudiated in New Hampshire. But the result of the practice authorized in *Austin v. Thomson*, 45 N. H. 113, is in effect the same as the Massachusetts rule. It is not necessary to go into this question in the case at bar, for, if calling for and perusing a paper does not make it evidence for either party, the presiding judge was wrong in admitting the Shea statement.

We ought to add, in view of a possible new trial, that we do not agree with the defendant's counsel in his contention as to the statement made by Leach that in his opinion the cause of the accident was oscillation. He testified on the stand that as the car left the bridge and began to go down grade, he "observed a grating sound, and immediately the car tipped,

took an unusual tip, and settled on its side," and it went off the bank "immediately." A jury would be warranted in finding that Leach would not have said that in his opinion the cause of the accident was oscillation, if he had heard the grating sound which he testified to.

Exceptions sustained.

NEW MEXICO SUPREME COURT.

FRANZ SCHMIDT, Trustee, etc., of Jasper N. Broyles, Bankrupt,

v.

BANK OF COMMERCE, Appt.

(15 N. M. 470, 110 Pac. 613.)

Bankruptcy — preference — absence of intent.

1. The intent of an insolvent in paying a debt is immaterial under § 60b of the bankruptcy act making voidable preferences given within four months of bankruptcy pro-

Note. — Intent on part of bankrupt to create a preference as a condition of a voidable preference under § 60b.

Allied closely with this question is that of the validity of a transfer to secure a pre-existing debt within four months of the bankruptcy, in the absence of any intent on part of the debtor to hinder, delay, or defraud creditors, or of reasonable cause on the part of the creditor to believe that it was intended as a preference,—which was the subject of annotation in 15 L.R.A.(N.S.) 372.

For the discussion of analogous questions in this series, attention is directed to the following notes:

Voidability of transfer within four months, period, pursuant to executory agreement antedating that period. 17 L.R.A.(N.S.) 935.

Voidability, as preference, of transfer made in satisfaction of claim for misappropriation of property. 30 L.R.A.(N.S.) 1053.

Delivery of property on eve of bankruptcy to one holding executory contract therefor, made within the four months' period, as a preference. 21 L.R.A.(N.S.) 901.

Payment of debt by a bankrupt as a preference to a surety therefor. 18 L.R.A.(N.S.) 860.

Preference of firm creditor by a partner out of his own property as an act of bankruptcy by the firm. 16 L.R.A.(N.S.) 656.

Application of partnership assets, with consent of all partners, to payment of individual debt of partner, as a voidable preference under the bankruptcy act. 17 L.R.A.(N.S.) 1040.

Set-off by bank against bankrupt's deposit as a preference within the bankruptcy law, 20 L.R.A.(N.S.) 863.
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ceedings, if the person benefited had reasonable cause to believe that he intended thereby to give a preference.

Same — payment to bank — set-off.

2. A bank which induces an insolvent to make a payment to it upon indebtedness cannot, in an action by his trustee in bankruptcy to recover the same as a voidable preference, claim the right of set-off, on the theory that the fund was a deposit in due course of business.

(August 10, 1910.)

APPEAL by defendant from a judgment of the District Court for Bernalillo County in plaintiff's favor in an action brought to recover the amount of a payment made by Jasper N. Broyles, bankrupt, to the defendant bank on an indebtedness, as a voidable preference. **Affirmed.**

Statement by Parker, J.:

This was an action brought by appellee against appellant under subdivision "b" of § 60 of the bankruptcy act (act July 1,

The cases which come within the scope of this note are confined to a discussion of intent upon the part of the debtor as an essential element of a preference under § 60b, and § 57g since the amendment of 1903. The latter section provides as follows, the language in quotation marks indicating the amendment of 1903: The claims of creditors who have received preferences "voidable under § 60, subdivision b, or to whom conveyances, transfers, assignments, or encumbrances void or voidable under § 67, subdivision e, have been made or given" [32 Stat. at L. 799, chap. 487, U. S. Comp. Stat. Supp. 1909, p. 1314], shall not be allowed, unless such creditors shall surrender "such" preferences, "conveyances, transfers, assignments, or encumbrances." It should be noted that, for the purposes of this note, no benefit is to be derived from the consideration of the cases determining whether intent is an element of a fraudulent conveyance under § 67e, for that section expressly provides that the debtor must have made the transfer "with the intent and purpose on his part to hinder, delay, or defraud creditors." The same is true of cases involving § 3 (a) 2, declaring a transfer made with intent to prefer creditors, an act of bankruptcy.

Since nothing in § 60a, defining preferences, makes the intent of the debtor an essential element thereof, the question discussed in this note is to be determined by a consideration of § 60b. Originally, that is, in the act of 1898, this section provided that if a bankrupt should give a preference, and the person receiving it, or to be benefited thereby, or his agent acting therein, should have reasonable cause to believe that it was intended thereby to give a preference, it should be voidable by the trustee, and he might recover the property or its value from such person.

1898, chap. 541, 30 Stat. at L. 562, U. S. Comp. Stat. 1901, p. 3445), as follows: "If a bankrupt shall have given a preference within four months before the filing of a petition, or after the filing of the petition and before the adjudication, and the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person."

The case was tried by the court without a jury, and resulted in a judgment in favor of appellee. The court made, among others, the following findings of fact:

"(4) That the said Jaspar N. Broyles on the said 16th day of April, 1908, was insolvent, and as a reasonable man should have known from the circumstances that he was so insolvent.

"(5) That the said defendant on the said 16th and 17th days of April, 1908,

in the person and through the medium of its cashier and attorney, persuaded and induced the said Jasper N. Broyles to pay and to remit to the said defendant the sum of \$2,283.45, for the express purpose and with the intent to apply the same upon the indebtedness then owing by the said Broyles to the defendant.

"(6) That the effect of said payment was to enable the said defendant to secure and obtain a greater percentage of its debt than would be secured by any other of the creditors of the said Broyles of the same class.

"(7) That the said Jasper N. Broyles intended to do, and did, that which constituted giving a preference within the meaning of the bankruptcy law, namely, made a transfer to the defendant of some of his property with the effect of enabling the defendant to obtain a greater percentage of its debt than any other creditor of the same class, but he did not intend that result in the sense that he wished

By the amendment of 1910, whose enactment is probably to be accounted for by the conflict among the decisions as to whether an intent to prefer upon the part of the debtor was necessary under § 60b in the form in which it had previously existed, such section was amended so as to eliminate the provision that the creditor must have had reasonable cause to believe that a preference was intended, and to make it read that the creditor must have had reasonable cause to believe that the enforcement of such judgment or transfer "would effect a preference." While no cases have been found to involve the amendment, it would seem that the language of the amendment is so clear as to leave it beyond doubt that Congress meant to declare that an intent upon the part of the debtor to create a preference is not necessary in order to render a particular transaction a preference under § 60b.

However, cases involving § 60b as it stood before the amendment are hereto subjoined, for the purpose of showing the state of the law which doubtless moved Congress to pass the amendment.

On one hand, the view was taken that to bring a preference within § 60b, so that it must be surrendered as a prerequisite to proof of claims under § 57g as amended by the act of 1903, a preference must actually have been intended by the debtor, or there must have existed what the law regards as the equivalent thereof, the court reasoning that reasonable cause for the transferee to believe that a preference is intended cannot exist, unless the intent itself is in existence. *Hardy v. Gray*, 75 C. C. A. 562, 144 Fed. 922, 16 Am. Bankr. Rep. 387.

For, it is argued, if the payment is made by the bankrupt without thought of injuring other creditors, and in the belief that he will be able to pay them all, the transferee cannot be charged with reasonable cause to

believe that a preference was intended, so as to render the transaction voidable under § 60b. *Tumlin v. Bryan* (5th Circuit) 21 L.R.A. (N.S.) 960, 165 Fed. 166, 21 Am. Bankr. Rep. 319, followed in *Pounds v. Bryan* (5th Circuit) 91 C. C. A. 203, 165 Fed. 169.

It was expressly held in *Re Mayo Contracting Co.* (D. C. Mass.) 157 Fed. 469, 19 Am. Bankr. Rep. 551, following *Hardy v. Gray*, that to make a transfer such a preference as is voidable under § 60b, and therefore a preference which must be surrendered under § 57g, it must have been actually intended on the debtor's part, or there must have existed what the law regards as the equivalent of such an actual intent on his part, and that such an intent is not to be conclusively presumed from the mere fact that the debtor knows himself to be insolvent according to the definition in the bankruptcy act.

And a referee writing in *Re Ebert*, 1 Am. Bankr. Rep. 340, gave it as his opinion that to render a preference voidable under § 60b, it must have been given with a view to creating a preference, although it seems that the statement was not necessary to a decision of the case, for the reason that there was no evidence that the transferee had reasonable cause to believe that preference was intended.

And in *Re First Nat. Bank* (6th Circuit) 84 C. C. A. 16, 155 Fed. 100, 18 Am. Bankr. Rep. 766, the court inclined to the opinion that the reasonable implication of the language of § 60b, requiring that the creditor have reasonable cause to believe that the debtor was intending to give him the preference, is that the debtor himself must have intended the preference; but the real ground upon which the court held a preference not voidable was that there was in fact no preference and that the transaction consti-

or proposed to have the defendant obtain a greater percentage of its claim than any other creditor of its class.

"(8) That the defendant and its cashier, being the same officer who secured the payment on the said 16th day of April, 1908, had reasonable ground to believe that the said Jaspar N. Broyles was insolvent, and that it was the purpose of the defendant, and was intended by the transaction, to grant and secure to the said defendant a preference.

"(9) That the said Jaspar N. Broyles thereafter, and within four months of the said 16th day of April, 1908, was duly adjudicated a bankrupt, and the plaintiff duly appointed his trustee in bankrupt."

Mr. E. W. Dobson, for appellant:

The bank had the right to charge said check against the Broyles account.

Clark v. Northampton Nat. Bank, 160

Mass. 26, 35 N. E. 108; West v. Bank of Lahoma, 16 Okla. 328, 85 Pac. 469; Hooks v. Gila Valley Bank & T. Co. 12 Ariz. 315, 100 Pac. 806; New York County Nat. Bank v. Massey, 192 U. S. 138, 48 L. ed. 380, 24 Sup. Ct. Rep. 199; Hough v. First Nat. Bank, 4 Biss. 349, Fed. Cas. No. 6,721; Re Petrie, 5 Ben. 110, Fed. Cas. No. 11,040; Blair v. Allen, 3 Dill. 101, Fed. Cas. No. 1,483; Re Meyer, 107 Fed. 86; Re Philip Semmer Glass Co. 67 C. C. A. 551, 135 Fed. 77; Tomlinson v. Bank of Lexington, 76 C. C. A. 400, 145 Fed. 824.

Intent to create a preference is necessary to avoid the transaction.

Hardy v. Gray, 75 C. C. A. 562, 144 Fed. 922; Grant v. First Nat. Bank, 97 U. S. 81, 24 L. ed. 972; Barbour v. Priest, 103 U. S. 296, 26 L. ed. 480; Van Iderstine v. National Discount Co. 98 C. C. A. 300, 174 Fed. 518; J. W. Butler Paper Co. v. Goembel, 74 C. C. A. 433, 143 Fed. 295.

tuted a bona fide transaction supported by sufficient consideration.

And the view was taken in Rutland County Nat. Bank v. Graves (D. C. Vt.) 156 Fed. 168, 19 Am. Bankr. Rep. 446, that to render a preference voidable under § 60b, so as to make it subject to surrender under § 57g, the intent upon the part of the debtor to prefer must be present, as well as the reasonable cause upon the part of the creditor to believe that a preference was intended; but it is to be observed that the court held that both elements were lacking in this case, and, of course, want of reasonable cause upon the part of the creditor to believe that a preference was intended is sufficient to exclude the transaction from § 60b, and therefore any statement that intent upon the part of the debtor to prefer is necessary is little more than *obiter dictum*.

In Re Leech (6th Circuit) 96 C. C. A. 424, 171 Fed. 622, 22 Am. Bankr. Rep. 599, affirming 171 Fed. 591, it was declared that a petition for the avoidance of a preference must allege, among other things, that the transfer was intended as a preference by the debtor; but, as a matter of fact, there was such an allegation in the petition, which was held insufficient for failure to allege that the bankrupt was insolvent at the time of the transfer, and that the transferee had reason to believe that a preference was intended.

In Sparks v. Marsh (D. C. E. D. Ark.) 177 Fed. 739, it was declared that, to avoid a conveyance under § 60b, it must appear that it was intended as a preference; and in this case it was held that the transaction in question was not voidable, for the reason that the evidence, while sufficient to show that the bankrupt intended to give a preference, was insufficient to show that the creditor had reasonable ground to believe that a preference was intended.

It was held in Lynch v. Bronson, 80 Conn. 566, 69 Atl. 538, that, in determining 33 L.R.A.(N.S.)

whether a preference within the meaning of subdivision a has been created, the intention of the debtor is entirely immaterial, but that it is material in ascertaining whether the preference is voidable under § b, the court saying that the word "intended" in subdivision b is used in its ordinary sense, and means an actual intention, although in determining the existence of such intent, the court may, of course, apply the rule that one is supposed to have intended the probable results of his own acts, but that this is a rule of evidence, and not of law.

Other state courts took the view, before the amendment of 1910, that, to render a preference voidable under § 60b, intent upon the debtor to prefer was necessary. Bacon v. Merchants' Bank, 146 Ala. 521, 40 So. 413; Herzberg v. Riddle, — Ala. —, 54 So. 635; Baden v. Bertenshaw, 68 Kan. 32, 74 Pac. 639, 11 Am. Bankr. Rep. 308; Peck v. Connell, 21 Pa. Super. Ct. 22, 8 Am. Bankr. Rep. 500.

On the other hand, it was held that a particular transaction was none the less a voidable preference because the debtor did not intend it to have that effect. Western Tie & Timber Co. v. Brown, 64 C. C. A. 256, 129 Fed. 728, 12 Am. Bankr. Rep. 112. In reversing this case, the United States Supreme Court, in 196 U. S. 502, 49 L. ed. 571, 25 Sup. Ct. Rep. 339, 13 Am. Bankr. Rep. 447, did not expressly declare itself upon the question whether an intent to prefer upon the part of the debtor is an essential element of a voidable preference, but, in speaking of the finding that there was no such intention, said that if the inevitable result of the transaction will have the effect to create a preference, then the law will conclusively impute to the debtor the intention to bring about the result necessarily arising from the nature of his act. The precise ground of the reversal was that the transaction in question was not a voidable preference, for the reason that it brought about

Where a bank allows a customer to overdraw on the express agreement that a good account shall be assigned to the bank for collection to pay the overdraft, the subsequent actual assignment of the account does not constitute a preference.

Tomlinson v. Bank of Lexington, 76 C. C. A. 400, 145 Fed. 824; *McDonald v. Clearwater Shortline R. Co.* 164 Fed. 1007; *Ridge Ave. Bank v. Sundheim*, 16 Am. Bankr. Rep. 866; *New York County Nat. Bank v. Massey*, 192 U. S. 138, 48 L. ed. 380, 24 Sup. Ct. Rep. 199.

Messrs. Marron & Wood, for appellee:

If the bank accepted a check from the bankrupt, that is not applying one debt against another, but is accepting payment of a debt by check.

Traders' Nat. Bank v. Campbell, 14 Wall. 87, 20 L. ed. 832.

It is not necessary that the bankrupt should have purposed and wished to benefit

the defendant over his other creditors, in order to constitute a voidable preference under the bankruptcy act.

Western Tie & Timber Co. v. Brown, 64 C. C. A. 256, 129 Fed. 728, 196 U. S. 502, 49 L. ed. 571, 25 Sup. Ct. Rep. 339; *Re Andrews*, 135 Fed. 599; *Brewster v. Goff Lumber Co.* 164 Fed. 124; *Benedict v. Deshal*, 177 N. Y. 1, 68 N. E. 999.

Parker, J., delivered the opinion of the court:

The appellant contends for a construction of subdivision "b" of § 60 of the bankruptcy act, to which we cannot give our consent. It contends that an actual intent on the part of the bankrupt to create a preference, as well as the fact that the creditor preferred shall have reasonable cause to believe that the transaction was intended thereby to give preference, is necessary in order to authorize the re-

no preference whatever, and this seems to have been placed upon the ground that an agreement between the debtor and the creditor in respect of funds of the former in the hands of the latter afforded the latter no alternative but to pay them over to the debtor in pursuance of the agreement, such being the necessary result of the finding that there was no intent upon the part of the debtor to create a preference, and that therefore, so far as such funds were concerned, the relation between them was not that of debtor and creditor, but that of trustee and *cestui*, the precise decision in the case being that a sum retained by a corporate creditor with knowledge of the debtor's insolvency, and within four months of the filing of the petition, which sum was due and owing the bankrupt under an agreement by which the corporation, in paying its employees, was to deduct from their wages the amounts due from such employees to the bankrupt for supplies furnished them by him, and was to remit to him the amount so deducted, irrespective of any indebtedness otherwise due by him to the corporation, was not a voidable preference under §§ 57g and 60b, which must be surrendered before the corporation could prove its claim against the bankrupt debtor's estate.

In *Brewster v. Goff Lumber Co.* (D. C. M. D. Pa.) 164 Fed. 124, 21 Am. Bankr. Rep. 106, the court cited the decision of the United States Supreme Court in *Western Tie & Timber Co. v. Brown*, and held that where the inevitable effect of the transaction is to give the transferee a greater advantage than other creditors, it will be conclusively presumed that it was so intended, even though it may be that the debtor had no idea in reality of treating the creditor any differently than any other creditor, but that the trustee must go further to make out a case for avoidance of the transfer, and show that the transferee had reasonable cause to believe that he was getting a preference.

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And in *Re C. J. McDonald & Sons* (D. C. S. C.) 178 Fed. 487, 24 Am. Bankr. Rep. 446, affirmed without opinion in 25 Am. Bankr. Rep. 948 (4th Circuit), the court took issue with the decision in *Tumlin v. Bryan* (C. C. A. 5th C.) 21 L.R.A. (N.S.) 960, 165 Fed. 166, 21 Am. Bankr. Rep. 796, and held that the better rule was that where the inevitable effect of the transfer is to give a preference, it must be conclusively presumed that such was the intention, thus leaving as the only question in the case, the inquiry whether the transferee had reasonable cause to believe that it was so intended.

As is said in *Chiam v. Citizens' Bank*, 77 Miss. 599, 27 So. 637, the motive of the bankrupt is not a matter of consideration, for, however good the motive may be, it does not affect the question, the point of inquiry being the intent, which is taken to arise out of the act; and if a payment is made by an insolvent, knowing himself to be an insolvent, the intent to prefer is conclusively presumed.

And in *Re Bloch* (Second Circuit) 74 C. C. A. 250, 142 Fed. 674, 15 Am. Bankr. Rep. 750, § 57g was construed to mean that before a creditor could prove a claim, he must surrender, on the one hand, a preference voidable under § 60b, upon the ground that he had reason to believe that a preference was intended, and, on the other hand, a transfer voidable under § 67e, upon the ground that the debtor made the transfer with intent to hinder, delay, or defraud creditors, the court saying that the test of such preference is the payment out of the bankrupt's property of a greater percentage to one creditor than is received by others of the same class, and that it is not necessary, in order to constitute a preference "under § 60a," that there should have been any intent to prefer on the part of a bankrupt. While the court confined its express declarations with respect to the necessity for intent to § 60a, there seems to be a fair infer-

covery of the subject-matter of the preference by the trustee in bankruptcy. It cites *Hardy v. Gray*, 75 C. C. A. 562, 144 Fed. 922, in support of the contention, which case seems to support the same. That was a case arising under subdivision "g" of § 57 of the bankruptcy act (act July 1, 1898, chap. 541, 30 Stat. at L. 560, U. S. Comp. Stat. 1901, p. 3443), as amended by § 12, act Feb. 5, 1903, chap. 487, 32 Stat. at L. 799, U. S. Comp. Stat. Supp. 1909, p. 1314. The amendment of 1903 brought into the section the same terms as those employed in subdivision "b" of § 60, and therefore the case is in point upon the question in this case. We refuse, however, to follow this case, for the reason that we regard the same as unsound, and as being in conflict with the controlling and much greater weight of authority.

Appellee contends that, under the statute, the intent of the bankrupt in making a preference is wholly immaterial if the preferred creditor had reason to believe that the preference was intended; and cites *Western Tie & Timber Co. v. Brown*, 64 C. C. A. 256, 129 Fed. 728; *Re Andrews* (D. C.) 135 Fed. 599; *Brewster v. Goff Lumber Co.* (D. C.) 164 Fed. 124; *Western Tie & Timber Co. v. Brown*, 196 U. S. 502, 49 L. ed. 571, 25 Sup. Ct. Rep. 339; and *Benedict v. Deshel*, 177 N. Y. 1, 68 N. E. 999, in support of his contention. In the case in 129 Fed. 728 (the circuit court of appeals of the eighth circuit), it is said: "The preferences denounced by the statute are often secured by creditors without any desire or intention on the part of the debtors to give them, as in cases in which the creditors obtain judgments against their debtors over defenses made

to the action in good faith, and in cases like that at bar, where, without the consent of their debtors, creditors appropriate to the payment of their claims the property of their debtors which happens to be under their control. Such transactions are none the less voidable preferences, that the debtors do not intend them to have that effect. If they are conducted within the four months, and if they have the effect to give to the creditors who conceive and execute them larger percentages of their claims than other creditors of the same class receive, they fall as clearly under the ban of the law as transfers made by debtors with the intent on their part to give the preferences. Such a transaction is voidable by the trustee not only when the party receiving it has a reasonable cause to believe that it was intended by the debtor, but also when it was intended by the creditor, or by the actor who accomplished the result, to work a preference by means of the transactions."

The Supreme Court of the United States, in 196 U. S. 502, reversed this case, but upon another point, and upon the point in question said: "This conclusion, moreover, is the result of the finding that Harrison had no intention to give the tie company a preference, for if Harrison, being insolvent, to the knowledge of the company, within the prohibited period, gave to the tie company authority to collect the sums due to him by the laborers for goods sold them, with the right or even the option to apply the money to a prior debt due by Harrison to the company, the necessary result of the transaction would have been to create a voidable preference. And if the inevitable result of the trans-

ence from the whole case that the court did not regard an intent to prefer as a prerequisite to the avoidance of a preference under § 80b, for the reason that it said that one modification effected by the amendment of 1903 to § 57g was to limit the preferences which must be surrendered to those where the person to be then benefited, or his agent, shall have had reasonable cause to believe that a preference was intended.

And in *Benedict v. Deshel*, 177 N. Y. 1, 68 N. E. 999, 11 Am. Bankr. Rep. 20, the court, in differentiating between § 60b and the provision of § 3, making a transfer by a debtor while insolvent, with intent to prefer the transferee over other creditors, an act of bankruptcy, said that it was for Congress to decide whether the consequences to a debtor of being forced into bankruptcy so far transcended the consequences to a creditor of a surrender of his preference, as to make the former depend upon his intent to offend the provision of the statute, and the latter not so to depend; and that there was nothing unreasonable in the distinction. 33 L.R.A. (N.S.)

For other cases which held intent on part of debtor to create a preference not essential under § 60b, see *Parker v. Black*, 143 Fed. 580, 16 Am. Bankr. Rep. 202, affirmed in 80 C. C. A. 484, 151 Fed. 18, 18 Am. Bankr. Rep. 15 (essentially standing for this view); *Alexander v. Redmond*, 103 C. C. A. 446, 180 Fed. 92; *Gabriel v. Tonner*, 138 Cal. 63, 70 Pac. 1021; *Upton v. Mt. Morris Bank*, 103 App. Div. 367, 92 N. Y. Supp. 1011, 14 Am. Bankr. Rep. 6; *Harder v. Clark* (N. Y. City Ct.) 86 Misc. 584, 123 N. Y. Supp. 1102, 23 Am. Bankr. Rep. 756.

Perhaps it will not be amiss again to state that all the cases herein cited appeared to involve § 60b as it stood before the amendment of 1910, and that, as previously suggested herein, such amendment must have been designed to meet the conflict among the decisions, and to remove about the only justification for holding intent to prefer on the part of the debtor an essential of a voidable preference under this section.

A. W.

action would have been to create such a preference, then the law would conclusively impute to Harrison the intention to bring about the result necessarily arising from the nature of the act which he did." In the case in 135 Fed. 599, it is said: "It follows that a preference was given which must be surrendered before proof, if the creditor then had reasonable cause to believe that it was intended thereby to give a preference." If the debtor is insolvent, he intends preference by any payment of a pre-existing debt. If the creditor has reasonable cause to believe that the debtor is insolvent, then the creditor has reasonable cause to believe that a preference is intended." In the case of 164 Fed. 124, it is said: "That there was a preference in fact cannot, of course, be gainsaid; the firm, as well as the individual members of it, being insolvent, and the Goff Lumber Company securing by the transaction over one third of their bill, where other creditors will get practically nothing. This being the inevitable effect, it will be conclusively presumed that it was so intended, even though it may be that Moore had no idea in reality of treating the Goff Lumber Company any differently from, or of giving them any advantage over, other creditors." In the case of 177 N. Y. 1, it is said: "As to the debtor the statute declares that a payment under certain conditions shall be held to be preferential. He is not to be heard upon the question of his intent. The effect of his act is fixed by law." See also *Van Iderstine v. National Discount Co.* 98 C. C. A. 300, 174 Fed. 518; *Coder v. Arts*, 213 U. S. 223, 53 L. ed. 772, 29 Sup. Ct. Rep. 436, 16 A. & E. Ann. Cas. 1008.

We therefore hold that in an action brought by a trustee in bankruptcy to recover a voidable preference, the intent of the bankrupt in making the preference is immaterial.

2. Appellant contends that, as to all of the payments secured, it should have the right of set-off against the claim of appellee, by reason of the fact that the same were received in due course of business as a deposit in a bank, and as payments on notes and interest. The fifth finding of the court below, which seems to be supported, at least, by sufficient evidence, effectually cuts out this question from the case. The court finds that the appellant persuaded and induced the bankrupt to pay to them the amount of money involved in this action, for the express purpose and with the intent to apply the same upon the indebtedness then owing by the bankrupt to appellant. This being so, no question of the right of set-off for 33 L.R.A. (N.S.)

money deposited in the ordinary course of business arises.

There being no error in the record, the judgment of the lower court will be affirmed, and it is so ordered.

Pope, Ch. J., and McFie, Wright, and Mechem, JJ., concur. Abbott, J., did not participate, having tried the case below.

OKLAHOMA CRIMINAL COURT OF APPEALS.

E. C. CHILDS, Appt.,
v.
STATE OF OKLAHOMA.

(4 Okla. Crim. Rep. 474, 113 Pac. 545.)

County attorney — abrogation of office.

1. The office of county attorney is not embodied in the Constitution of this state; and it may therefore be abrogated, or the powers and duties pertaining to it enlarged or diminished or wholly or partially transferred to district or state officers, as the legislature may see fit.

Office — creation — implication.

2. It is not necessary to the creation of an office that the legislature declare in express words that such office is created. The use of any language which shows the legislative intent to create the office is sufficient. And an act which empowers the governor to appoint a person to an office, and which designates the qualifications which the incumbent of the office must possess, and the duties which he is to perform, is sufficient to create the office.

Same — term — pleasure of appointing power.

3. The general rule is that when an office is created to be filled by appointment, if the legislature does not designate the term of

Headnotes by RICHARDSON, J.

Note. — An extended search has disclosed but one other case upon the validity of legislation giving to a governor's counsel powers coextensive with prosecuting attorneys, — *State v. Maben*, — Okla. Crim. Rep. —, 114 Pac. 1122, a case in the same court and involving the same statute as *CHILDS v. STATE*. The decision in the *Maben* Case, while not overruling the *CHILDS* CASE, holds that the court in that case went as far as the law justified, and that, other than the power to appear and prosecute in cases involving the prohibitory law, the act in question does not confer authority to exercise the power of a county attorney.

As to the power of the legislature to delegate to the governor authority to create the office of special state attorney to prosecute infringements of the liquor laws, see *State ex rel. Young v. Butler*, 24 L.R.A. (N.S.) 744. W. A. S.

the office, the appointee will hold only during the pleasure of the appointing power.

Same — absence of incumbent — effect.

4. An "office" is a legal entity, and may exist in fact, although it be without an incumbent.

Same — necessity of compensation.

5. Compensation is not indispensable to an office; it is merely incident thereto, and is no part of the office.

Public prosecutor — liquor law — legality of acts.

6. Section 24, art. 3, chap. 69, Sess. Laws 1907-08 Snyder's Comp. Laws, 1909, § 4204), creating the office of counsel to the governor, and making it such officer's duty to assist in the enforcement of the prohibitory laws, is not unconstitutional; and such officer has the same power to sign and file an information charging a violation of the prohibitory laws as has the county attorney.

Pleading — sufficiency of information — raising question.

7. The question whether an information states facts sufficient to constitute an offense, is duplicitous, or is defective in the description of the offense, cannot be raised by motion to set aside, but only by demurrer.

Indictment — duplicity — possession and transportation of liquor.

8. An information which charges a defendant with having in possession intoxicating liquor with the intent to sell same, and with the intent to convey same from one place within the state to another place therein, does not charge two offenses.

Evidence — proceeding under search warrant.

9. In a prosecution for having in possession intoxicating liquor with intent to sell same, and to convey same from one place within the state to another place therein, evidence that previously a justice of the peace had caused the liquor to be seized under a search warrant, and, on the defendant's motion, has subsequently quashed the warrant and ordered the liquor redelivered to the defendant, is not competent or admissible in the defendant's behalf.

Same — possession of liquor.

10. In a prosecution for having in possession intoxicating liquor with intent to sell same, proof that the defendant kept large quantities of liquor concealed on his premises is competent as a circumstance tending to show the intent to sell.

(December 14, 1910.)

ERROR to the Seminole County Court to review a judgment convicting defendant of violating the prohibition law. Affirmed.

The facts are stated in the opinion.

Messrs. Davis & Davis for plaintiff in error.

Mr. Fred S. Caldwell for the State.

33 L.R.A. (N.S.)

Richardson, J., delivered the opinion of the court:

The information in this case was signed by Fred S. Caldwell as counsel to the governor, and charged plaintiff in error with having in possession intoxicating liquor with intent to sell the same, and to convey the same from one place within the state to another place therein. Plaintiff in error orally moved the court to set aside the information, because it was not signed by the county attorney. The court overruled the motion, and the ruling is assigned as error.

The legislature of 1907-08 enacted a prohibition law, which was approved March 24, 1908 (Sess. Laws, 1907-08, p. 594 [Snyder's Comp. Laws 1909, chap. 61]), § 24 of article 3 of which (§ 4204, Snyder's Comp. Laws) provides for the appointment of an attorney to be known as counsel to the governor. The section reads as follows: "The governor shall have power to appoint an attorney, who shall have been a resident in this state for at least two years, and shall have been a lawyer licensed by some court of record for at least five years, who shall be known as counsel to the governor. He shall, under the direction of the governor, assist in enforcing the provisions of this act and the other laws of the state, and shall perform such other duties as the governor may from time to time require. He shall have all the powers of county attorneys in their respective counties. He shall hold office during the pleasure of the governor, and shall give bond, to be approved by him, conditioned for the faithful discharge of his duties, in the sum of three thousand dollars (\$3,000), and shall receive a salary, to be fixed by the governor, of not more than twenty-five hundred dollars (\$2,500) per annum, payable monthly; Provided, that in lieu of, or in addition to, appointing such attorney, the governor may call upon the attorney general or his assistant to perform such service." Inasmuch as this section provides that such counsel to the governor shall have all the powers of county attorneys in their respective counties, it is plain that if the section is not unconstitutional, the counsel to the governor may sign and file an information for a violation of the prohibition law, since a county attorney may lawfully do so.

In 1907 the legislature of North Dakota passed an act (Laws 1907, chap. 187) somewhat like the one in question here, providing that the governor should appoint an enforcement commissioner, who should be an attorney at law, and who was authorized to exercise in any part of the state all the common-law and statutory powers of state's attorneys in their respective coun-

ties, in the enforcement of the law against the manufacture and sale of intoxicating liquors. Section 173 of the Constitution of North Dakota reads as follows: "At the first general election held after the adoption of this Constitution, and every two years thereafter, there shall be elected in each organized county in the state a county judge, clerk of court, register of deeds, county auditor, treasurer, sheriff, and state's attorney, who shall be electors of the county in which they are elected, and who shall hold their office until their successors are elected and qualified. The legislative assembly shall provide by law for such other county, township, and district officers as may be deemed necessary. . . ." And the supreme court of North Dakota, in *Ex parte Corliss*, 16 N. D. 470, 114 N. W. 962, held the act of the legislature void on the ground that the office of state's attorney was a constitutional office in that state; that the section of the Constitution above quoted unqualifiedly provided that the incumbent of that office should be elected by the people of each county; that by said section there was reserved to the people of each county the right to have the functions inherently pertaining to such office discharged only by the person of their own choosing, and that such right could not be infringed by a legislative enactment transferring any of the inherent powers of the state's attorney to a person appointed by central authority. There is a strong dissenting opinion in that case. We do not find it necessary, however, to express approval or disapproval of the reasoning used or the conclusion reached in either the prevailing or the dissenting opinion therein, for the reason that our constitutional provisions are wholly different from those of North Dakota with respect to the office of county attorney.

Section 2 of article 17 of our Constitution is as follows: "There are hereby created, subject to change by the legislature, in and for each organized county of this state, the offices of judge of the county court, county attorney, clerk of the district court, county clerk, sheriff, county treasurer, register of deeds, county surveyor, superintendent of public instruction, three county commissioners, and such municipal township officers as are now provided for under the laws of the territory of Oklahoma, except as in this Constitution otherwise provided."

By § 18 of the schedule to our Constitution, it is provided that, "until otherwise provided by law, the terms, duties, powers, qualifications, and salary and compensation of all county and township officers, not otherwise provided by this Con-

stitution, shall be as now provided by the laws of the territory of Oklahoma for like named officers. . . ." It will be seen from an examination of these two constitutional provisions that neither the office of county attorney, nor the duties and powers pertaining thereto, are embedded in the Constitution. The office may be entirely abrogated, or the powers and duties pertaining to it enlarged or diminished or wholly or partially transferred to district or state officers, as the legislature may see fit. And for that reason it cannot be urged that this act is unconstitutional and void, as depriving the office of county attorney of any of its constitutional powers and duties.

In the case of *State v. Butler*, 105 Me. 91, 24 L.R.A. (N.S.) 744, 73 Atl. 560, 18 A. & E. Ann. Cas. 484, the supreme court of Maine held unconstitutional an act somewhat similar to the one in question, on the ground that the act did not create the office, but professed to empower the governor to do so; and the court held that such power could not be delegated to the governor. That act was in part as follows: "The governor may, after notice to and an opportunity for the attorney for the state for any county to show cause why the same should not be done, create, to continue during his pleasure, the office of special attorney for the state in such county, and appoint an attorney to perform the duties thereof. Such appointee shall, under the direction of the governor, have and exercise the same powers now vested in the attorney for the state for such county in all prosecutions relating to the law against the manufacture and sale of intoxicating liquors, and shall have full charge and control thereof. . . ." Laws 1905, chap. 92.

And the commission issued by the governor of Maine under that statute was in the following words: "Know Ye, that I, William T. Cobb, Governor of the State of Maine, do hereby create, to continue during my pleasure, the office of Special Attorney for the State of Maine in the County of Somerset, all as provided by chapter 92 of the Public Laws of the State of Maine, for the year A. D. 1905, entitled 'At Act to Provide for the Better Enforcement of the Laws against the Manufacture and Sale of Intoxicating Liquors,' and especially as provided for under § 8 of said Chapter: And reposing special trust and confidence in the integrity, ability, and discretion of Amos K. Butler, of Skowhegan in the said County of Somerset, do hereby constitute and appoint the said Amos K. Butler Special Attorney for the State of Maine within and for said County of Somerset. . . ."

It will be observed that the act of the

legislature of Maine did not purport to create the office of special attorney for the state, but specifically empowered the governor to create such office; and the commission which the governor issued expressly professed to create the office. An examination of § 4204, Snyder's Comp. Laws 1909, quoted above, will disclose no such condition here. The section in question authorizes the governor to appoint an attorney who shall be known as counsel to the governor. The section fixes the qualifications of the person to be appointed, and prescribes his duties; and we think that was sufficient to create the office. Nineteenth of the offices created by the legislatures of the various states in the Union, and by the Congress of the United States, are created in just this way; that is, by a provision authorizing the appointment or election of some person, designating the qualifications which he must possess, to some office the powers and duties pertaining to which are prescribed by the act. It is not necessary to the creation of an office that the legislature declare in express words that such office is created. The use of any language which shows the legislative intent to create the office is sufficient. And an act which empowers the governor to appoint a person to an office, and which designates the qualifications which the incumbent of the office must possess, and the duties which he must perform, is sufficient to create the office.

It is true that the act in question does not fix the term of office, but provides that the appointee shall hold office during the pleasure of the governor; but we do not regard that as fatal. The general rule is that whenever an office is created to be filled by appointment, if the legislature does not designate the term of the office, the appointee will hold only during the pleasure of the appointing power. *Mechem, Pub. Off.* §§ 406, 445; *Throop, Pub. Off.* § 304; 29 *Cyc. Law & Proc.* pp. 1370, 1371, 1395, 1396. See also *Patton v. Vaughan*, 39 *Ark.* 211; *People ex rel. Atty. Gen. v. Hill*, 7 *Cal.* 97; *People ex rel. Stevenson v. Higgins*, 15 *Ill.* 110; *Peters v. Bell*, 51 *La. Ann.* 1621, 26 *So.* 442; *Parish v. St. Paul*, 84 *Minn.* 426, 87 *Am. St. Rep.* 374, 87 *N. W.* 1124; *Newsom v. Cocke*, 44 *Miss.* 352, 7 *Am. Rep.* 686; *People ex rel. Corrigan v. Brooklyn*, 149 *N. Y.* 215, 43 *N. E.* 554; *State ex rel. Moore v. Archibald*, 5 *N. D.* 359, 66 *N. W.* 234; *Williams v. Boughner*, 6 *Coldw.* 486; *Keenan v. Perry*, 24 *Tex.* 253; *Ex parte Hennen*, 13 *Pet.* 230, 10 *L. ed.* 138; *Smith v. Brown*, 59 *Cal.* 672; *People ex rel. Royal v. Fire Comrs.* 73 *N. Y.* 437. Nor is the act bad because it does not require that the office be filled, 33 *L.R.A.*(N.S.)

but provides that in lieu of appointing such officer, the governor may call upon the attorney general or his assistant to perform such service. In legal contemplation, an office is an entity, and may exist in fact, although it be without an incumbent. *People ex rel. Madden v. Stratton*, 28 *Cal.* 382; *State ex rel. Coleman v. Rose*, 74 *Kan.* 262, 6 *L.R.A.*(N.S.) 843, 86 *Pac.* 296, 10 *A. & E. Ann. Cas.* 927; *Heard v. Elliott*, 116 *Tenn.* 150, 92 *S. W.* 764. In the last-mentioned case the syllabus is as follows: "Acts 1875, p. 51, chap. 55, abolished the office of county entry taker, and Acts 1879, p. 65, chap. 46, entitled, 'An Act to Establish the Entry Taker's Office,' provided that there should be elected by the justices of the county courts at the April term of the court, or any quarterly term, every four years, an entry taker for any county in the state desiring to have an entry taker. Held, that such act of 1879 created the office of entry taker throughout the state, whether a county elected to fill the same or not."

Neither is the section void because it provides that the counsel to the governor shall receive a salary, to be fixed by the governor, of not more than \$2,500 per annum, payable monthly. Assuming that the power to fix the salary of an office cannot be delegated to the governor, and that this provision is therefore void, yet it does not follow that the whole section is void, or that the office was not in fact created. Salary is merely incident to an office, and constitutes no part of the office; the office may exist without provision for compensation of any kind or character. Compensation is not indispensable to an office. *Throop, Pub. Off.* § 8; *Mechem, Pub. Off.* § 7; *State ex rel. Clark v. Stanley*, 66 *N. C.* 59, 8 *Am. Rep.* 488; *State ex rel. Howerton v. Tate*, 68 *N. C.* 547; *State ex rel. Atty. Gen. v. Kennon*, 7 *Ohio St.* 546; *United States v. Hartwell*, 6 *Wall.* 385, 18 *L. ed.* 830.

Whether that portion of the section which provides that, in addition to enforcing the provisions of the prohibition law, the counsel to the governor shall assist in enforcing the other laws of the state, and shall perform such other duties as the governor may from time to time require, and shall have all the powers of county attorneys in their respective counties, is void as not being within the title of the act, we shall not attempt to determine here; for it is certain that the creation of this office was primarily for the purpose of securing the better enforcement of the prohibition law, and, the other powers granted to the incumbent of such office being merely additional, they may fall without affecting the main purpose of the section. *Const. art. 5, § 57.* In the

instant case the counsel to the governor was acting solely in the enforcement of the prohibition law; and we hold that, even though the act be not effective to confer any other powers upon such officer, that does not render it bad, but it is effective at least in so far as it grants the power to enforce that law. In our opinion the counsel to the governor had full power to sign the information in this case, and the motion to quash the information on this ground was properly overruled.

Another ground upon which plaintiff in error moved to quash or set aside the information was that it did not state facts sufficient to constitute a public offense. This defect, if it existed, was ground for demurrer by § 6747 of Snyder's Comp. Laws, and was not ground for setting the information aside. The demurrer, by § 6748, must be in writing, signed either by the defendant or his counsel, and filed. This question therefore was not properly raised in the court below. We have examined the information, however, and find that it properly charged an offense, and, even if plaintiff in error had demurred on this ground, the demurrer could only have been overruled.

It is next urged that the information charged two offenses, in that it alleged that plaintiff in error wrongfully and unlawfully had in his possession three cases and 5 pints of whisky, with the intent on his part to sell said whisky to divers and sundry persons, and with the intent then and there to convey the same from one place in said county to another place therein. The contention is that, inasmuch as the information alleged that plaintiff in error had the whisky in his possession with the intent to violate two provisions of the law, the information was duplicitous. If this contention were well taken, the matter could have been raised only by demurrer under § 6747, Snyder's Comp. Laws, and, as previously stated, no demurrer was filed. In the next place, only one possession of liquor was charged, and the fact that plaintiff in error may have intended to violate two provisions of the law with the liquor in his possession, and the fact that the information so alleged, would not make it duplicitous. It charged only one offense.

The information is further complained of for the reason that it does not allege that plaintiff in error's intent to sell and to convey the liquor in possession was wrongful and unlawful. This is a question, also, that could be raised only by a demurrer. But, however raised, the information alleges that the possession of the liquor was wrongful and unlawful, and with the intent to violate

certain designated provisions of the laws of Oklahoma, and that was sufficient.

An instruction of the court is complained of wherein the jury were told that they should convict if they found from the evidence, beyond a reasonable doubt, first, that the defendant was in the possession of the liquor, and, second, that he intended to sell the same in violation of the law, or that he intended to convey the same from his residence to his pool hall. There was no error in the instruction given.

It is next urged that the court erred in not sustaining plaintiff in error's demurrer to the state's evidence. There was no error in this. Snyder's Comp. Laws, § 6848; Cox v. State, — Okla. Crim. Rep. —, 111 Pac. 668. Plaintiff in error introduced a justice of the peace as a witness in his behalf, and undertook to prove by the justice and his records that theretofore he had issued a search warrant for certain liquor in plaintiff in error's possession, and that afterwards on the latter's motion had quashed the warrant and ordered the liquor redelivered to him. This the court ruled out, and plaintiff in error contends that such action was erroneous, for the reason that the evidence of the justice of the peace tended to establish an adjudication that the defendant's possession of the liquor in question was lawful. The court properly ruled out the evidence. It was not competent under any phase of the case. The justice had no jurisdiction of this case, and his action in the proceeding before him could not bind the county court in the trial of this cause. Also, it was not shown that the liquor which the justice ordered returned to plaintiff in error was the same liquor in controversy in this case, and, if it was, we know of no rule of law that would forbid the state from proving that the defendant had subsequently formed an intent to violate the law with the liquor in possession, even if the state were precluded by the justice's order from proving that the intent existed at the time the justice made the order in question.

It was proved by the sheriff that on the day this offense was charged to have been committed, he was about to search the plaintiff in error for liquor under a search warrant, when the latter pulled from his pocket two bottles of whisky and broke them. And plaintiff in error contends that the admission of this evidence was erroneous, as also the admission of evidence tending to show that he kept a large quantity of liquor concealed in his house, in a side of the wall, and that he had numerous bottles and cartons around the premises. The latter evidence was competent as a circumstance tending to show plaintiff in error's

intent to sell the liquor in possession, and the evidence in regard to his breaking the bottles in the presence of the sheriff was competent as tending to show an attempt on his part to destroy evidence against him.

Complaint is made of the action of the court in refusing to give two instructions specially requested, but the court committed no error in this respect. The instructions given were just and correct, and fairly and properly stated the law. The evidence as a whole conclusively shows plaintiff in error to have been a wilful and confirmed violator of the prohibition law, and indisputably establishes his guilt of the present offense.

His conviction was right, and it is affirmed.

Furman, P. J., and Doyle, J., concur.

OKLAHOMA CRIMINAL COURT OF APPEALS.

T. D. HARTGRAVES, Appt.,
v.

STATE OF OKLAHOMA.

(— Okla. Crim. Rep. —, 114 Pac. 343.)

Grand jury — private counsel — effect on indictment.

1. Where counsel privately employed to prosecute a case appear before a grand jury and assume to represent the state upon the

Headnotes by FURMAN, P. J.

Note. — Appearance of special attorney or private counsel before grand jury.

This note does not cover the question of right and effect of appearance of duly appointed officers and their regular deputies before the grand jury, but it is confined to cases in which the appearance was by a special attorney or private counsel.

Right of appointment and appearance.

It has been held that the court has inherent power in the absence of the prosecuting attorney, to appoint an attorney to appear before the grand jury and examine witnesses. *State v. Tyler*, 122 Iowa, 125, 97 N. W. 983.

And in case of vacancy in the office of district attorney or in case of temporary disability, it has been held that the court may authorize any competent person to act in preparing indictments. *State v. Gonzales*, 26 Tex. 197.

It was held in *United States v. Cobban*, 127 Fed. 713, that under a statute providing that "the attorney general shall . . . employ and retain . . . such attorneys and counselors at law as he may think necessary, to assist the district at- 33 L.R.A. (N.S.)

investigation of a case then pending before said grand jury, an indictment found by said grand jury as the result of such investigation should upon motion of the defendant be set aside.

Same — disqualification of prosecutor — substitute.

2. If the county attorney is disqualified from representing the state in the prosecution of a party charged with crime, said county attorney is without authority to appoint a special attorney to represent him before the grand jury in the investigation of said cause, and an indictment found as the result of such investigation upon motion of the defendant should be set aside.

Same — presence of stranger.

3. No person has a right to be in a grand jury room during any of their proceedings while investigating a criminal charge, except the witness then being examined and the attorney authorized by law to represent the state in such examinations; and if any other person is in the grand jury room during any part of their investigations, an indictment found by them as the result of such investigation should, upon motion of the defendant, be set aside.

Indictment — receiving stolen goods — name of person.

4. An indictment for receiving stolen goods should allege the name of the person from whom such goods were so received, and if the name of such person is unknown, that fact should be alleged.

Instructions — absence of evidence.

5. Where the plea of a former acquittal is interposed, but no evidence is introduced

torneys in the discharge of their duties," the assistance contemplated is not limited to the trial of the case, but includes proceedings before the grand jury.

And a statute prescribing the duties of the prosecuting attorney, and authorizing the employment of additional counsel in cases of felony, does not prohibit the employment of special counsel to assist before the grand jury, when, in the judgment of the board of supervisors, the prosecuting attorney, and the court, such additional counsel is necessary. *People v. O'Neill*, 107 Mich. 556, 65 N. W. 540.

But it has been held that where a statute gives the attorney general power to employ attorneys "to assist the district attorneys in the discharge of their duties," and further provides that the attorneys appointed "to assist in the trial of any case" shall receive a commission, etc., the attorney general has no power to appoint special attorneys to assist a district attorney before a grand jury. *United States v. Virginia-Carolina Chemical Co.* 163 Fed. 66.

And it was held in *United States v. Rosenthal*, 121 Fed. 862, that where a statute empowered the attorney general to appoint a special attorney "to assist in the trial of any case," the trial of a case con-

to support it, it is not improper for the court to decline to instruct the jury on that issue.

(March 21, 1911.)

APPEAL by defendant from a judgment of the District Court for Custer County convicting him of receiving stolen goods, and sentencing him to imprisonment. Reversed.

The facts are stated in the opinion.

Mr. R. J. Shive for appellant.

Messrs. Charles West Attorney General, and Smith C. Matson, for the State:

It is immaterial whether the defendant bought or received stolen personal property, or in what manner he received or bought it, or what was the consideration therefor,

or the value thereof, provided only it has been stolen from another, and this defendant knows.

State v. Feeback, 3 Okla. Crim. Rep. 508, 107 Pac. 442; Com. v. Harris, 13 Allen, 534; 22 Cyc. Law & Proc. p. 340; Moore v. State, — Tex. —, 12 S. W. 407.

The indictment need not name the thief.

People v. Avila, 43 Cal. 199; People v. Ribolsi, 89 Cal. 492, 26 Pac. 1082.

Allegation of fraudulent intent is not a part of the crime, and hence is unnecessary.

Gandolpo v. State, 33 Ind. 439; State v. Hartleb, 35 La. Ann. 1180; State v. Hodges, 55 Md. 127.

Defendant's plea of former acquittal was insufficient.

templated does not include the proceedings before the grand jury.

And it has been held that a statute authorizing the county attorney, with the approval of the court, to appoint an assistant to aid him in the trial, is not broad enough to authorize the selection of an assistant before the grand jury. State v. Tyler, 122 Iowa, 125, 97 N. W. 983.

It was held in United States v. Kilpatrick, 16 Fed. 765, that the court cannot authorize an examiner of the department of justice to appear before the Federal grand jury and assist them in their investigation.

Where an act authorizing the governor to appoint a deputy excise enforcement commissioner, who is an attorney, is unconstitutional in attempting to have such duties performed by one appointed by the governor, instead of by officers of the people's selection, one appointed under the act has no right to be present in the grand jury room, and is guilty of contempt if he violates an order excluding him from the grand jury room. Ex parte Corliss, 16 N. D. 470, 114 N. W. 962.

And one whose employment by the county commissioners was for a nominal consideration, and was not a good faith employment for the purpose of assisting the state's attorney before the grand jury, but merely for the purpose of gaining admission to the proceedings for the purpose of discharging his duties under a private employment, has no right to be present in the grand jury room. Ibid.

So, one whose appointment as assistant state's attorney is void because of his non-residence has no right to be present in the grand jury room, and is guilty of contempt in violating an order excluding him from such room. Ibid.

And a plea which merely states that a counsel who appeared before the grand jury is "the retained private counsel of H. B. G." (the person from whom defendant was accused of embezzling) does not present the question of whether counsel who have been employed by a private individual to prosecute a supposed criminal can properly be 33 L.R.A. (N.S.)

procured by the state attorney, with the consent of the court, to go before the grand jury for the purpose of securing the indictment, since great strictness must be used in framing such pleas, and no intentions will be indulged in their favor. Miller v. State, 42 Fla. 266, 28 So. 208.

Effect of appearance of special or private counsel.

There is some conflict among the decisions as to the effect of the appearance of special or private counsel before the grand jury. The weight of authority seems to hold that the fact that a special attorney was present before the grand jury, and assisted in examining witnesses, will not avoid the indictment, if he was not present during the deliberations of the grand jury and was not guilty of any further misconduct.

Thus, the appearance of the special or private attorneys before the grand jury under the circumstances indicated has been held not to avoid the indictment:

Blevins v. State, 68 Ala. 92 (attendance of an attorney at request of solicitor where he merely assisted in examining witnesses); United States v. Cobban, 127 Fed. 713 (appearance of a special assistant to aid the district attorney appointed by the attorney general); State v. Sullivan, 110 Mo. App. 75, 84 S. W. 105 (appearance of attorney general directed by the governor under statutory authority to assist prosecuting attorney); United States v. Reed, 2 Blatchf. 435, Fed. Cas. No. 16,134 (a son of the United States district attorney, not sworn, present, and participating in the proceedings, no abuse being committed while present); State v. Whitney, 7 Or. 386 (presence of attorney employed to assist prosecution at the request of the district attorney, and examination of witnesses by him, such appearance not being mentioned among the statutory grounds for setting aside an indictment); State v. Fertig, 98 Iowa, 139, 67 N. W. 87 (presence of attorney who assisted county attorney, the statute allowing certain persons in grand jury room, and

12 Cyc. Law & Proc. p. 280; Foster v. State, 39 Ala. 229; Pat v. State, 116 Ga. 92, 42 S. E. 389, 15 Am. Crim. Rep. 290; George v. State, 59 Neb. 163, 80 N. W. 486; United States v. Harmison, 3 Sawy. 556, Fed. Cas. No. 15,308; Dominick v. State, 40 Ala. 680, 91 Am. Dec. 496; State v. Larkin, 49 N. H. 36, 6 Am. Rep. 456; Morris v. Territory, 1 Okla. Crim. Rep. 617, 99 Pac. 760, 101 Pac. 111.

Furman, P. J., delivered the opinion of the court:

First. Defendant filed a motion in the lower court to set aside the indictment in this case upon the ground that F. A. Snodgrass was the duly elected and qualified county attorney of Custer county, and

it not being shown that attorney in question was not duly authorized to act as deputy); State v. Gonzales, 26 Tex. 197 (one acting as district attorney not lawfully authorized to act); Shattuck v. State, 11 Ind. 473 (presence of two assistants of prosecuting attorney, neither of whom was sworn to act as assistant of such attorney, or appointed in writing); Jones v. State, 150 Ala. 54, 43 So. 179 (appearance of attorney appointed to act in place of the county attorney, who was disqualified from acting); State v. Kovolosky, 92 Iowa, 498, 61 N. W. 223 (same as last); State v. Corcoran, 7 Idaho, 220, 61 Pac. 1034 (presence of attorney appointed by court, under authority given by statute in case the county attorney was disqualified); Raymond v. People, 2 Colo. App. 329, 30 Pac. 504 (appearance of special counsel appointed by the court, the record failing to show prejudice or injury to defendant); State v. White, 37 La. Ann. 172 (special attorney appointed by the court to represent the state in a different case than that in question); People v. Bradner, 44 Hun, 233, modified on other points in 107 N. Y. 1, 13 N. E. 87 (counsel assisting prosecution appeared as witness before grand jury, was sworn as such, and gave no advice other than that which he gave the district attorney outside the grand jury room); People v. Nall, 242 Ill. 284, 89 N. E. 1012 (appearance of one of special counsel for state, it appearing that he was called before such jury, but was asked no questions with reference to the indictment in question); Wilson v. State, 41 Tex. Crim. Rep. 115, 51 S. W. 916; McElroy v. State, 49 Tex. Crim. Rep. 604, 95 S. W. 539 (attorney employed as private prosecutor appeared before grand jury and examined witnesses, there being no suggestion that he was present when they were deliberating); United States v. Haskell, 169 Fed. 449 (appearance of two special assistant attorneys, one examining the witnesses and the other making a stenographic report of the testimony); State v. Harris, 39 La. Ann. 228, 1 So. 446 (final 33 L.R.A. (N.S.)

was in attendance upon the court and the grand jury when his presence was required during the term of the court at which this indictment was found, and there was no physical or mental disqualification which incapacitated said Snodgrass from performing his duty as such county attorney at said time, but that R. P. Phillips, a member of the bar, who was not the county attorney or deputy county attorney of Custer county, Oklahoma, and was not the attorney general or deputy attorney general of the state of Oklahoma, and was not authorized or empowered by law to appear before said grand jury when they were considering this accusation against defendant, but was privately employed by the prosecuting witness in this

report of the grand jury drawn up by a counsel other than the district attorney).

The court in Blevins v. State, 68 Ala. 92, said: "It is not consistent with the theory of the proceedings and privileges of the grand jury, that one bearing no official relation, bound by no oath, should, on the request or merely by the authority of the solicitor, be permitted to appear before them. The office of solicitor is a public trust, and its duties are incapable of delegation; and that the person introduced into the grand jury room is styled his deputy or his clerk cannot cure the wrong of the introduction. If it did not appear affirmatively that Clark did no more than examine witnesses—if it appeared that he counseled the finding of the bill against the appellant, or expressed any opinion favorable to its findings,—we should be inclined to the opinion the motion to quash the indictment ought to have prevailed. State v. Addison, 2 S. C. 356. But it appearing that he gave the jury no counsel, expressed to them no opinion unfavorable to the appellant, did no act affecting their deliberations, the appellant has suffered no injury from his presence in the jury room, and has no greater reason to complain of it than any other citizen."

And the fact that an attorney, with the consent of the district attorney, was present in the grand jury room and examined witnesses, is not sufficient ground for quashing the indictment, where he was not present during the deliberations, and it was not shown that anything was said by him to influence their finding, although a statute provides that "no person except the prosecuting attorney and the witnesses under examination are permitted to be present while the grand jury are examining a charge, and no person whatever shall be present while the grand jury are deliberating or voting on a charge." Bennett v. State, 62 Ark. 516, 36 S. W. 947.

And a motion made after a plea has been entered, to set aside an indictment because of the presence before the grand jury of an

cause to prosecute this defendant without warrant or authority of law, was present, and presented this case to the grand jury, and conducted the examination of the witnesses before the grand jury, when the grand jury was considering as to whether or not they should find an indictment against the defendant in this cause, and said R. P. Phillips insisted that said grand jury should indict this defendant. This motion was duly sworn to by the defendant. The court heard part of the evidence in support of this motion, to the effect that said F. A. Snodgrass was the county attorney of Custer county, and was disqualified from prosecuting the defendant because, prior to the election of said Snodgrass to the office of county attorney of

Custer county, Oklahoma, he had represented the defendant in some cases connected with the transaction in which the defendant is now indicted. It also appeared that said F. A. Snodgrass had verbally requested said R. P. Phillips to represent the state before the grand jury upon the investigation of this case, but that the said R. P. Phillips was not appointed as deputy county attorney, and did not have a commission from the district judge of Custer county to act as county attorney in this case. The district court thereupon declined to hear further testimony, and overruled the defendant's motion to set aside the indictment. As there was no denial of the other allegations contained in appellant's motion, they must be taken

attorney authorized by the court, upon the recommendation of the county attorney, to act as assistant prosecutor, will not be entertained. *State v. Tyler*, 122 Iowa, 125, 97 N. W. 983.

So, a plea which states that an attorney, without the procurement and against the objection of the state attorney, appeared before the grand jury, the state attorney being in attendance on the court, and not being unable to perform the duties of his office, but not being present with the grand jury, is bad on demurrer where it does not also allege that he was willing to perform his duties, since, if the state attorney refuses to perform his duties, the court has power to appoint another attorney to appear before the grand jury, and from the facts stated it will be presumed that the court permitted the attendance of the attorney in question. *Taylor v. State*, 49 Fla. 69, 38 So. 380.

And a plea for avoiding an indictment, setting forth that a person not a member of the grand jury or a sworn officer of the court was admitted before the grand jury and examined witnesses, is bad where it does not also allege that such person was not a witness. *Lawrence v. Com.* 86 Va. 573, 10 S. E. 840.

And the appearance of the counsel to the governor or his assistant before the grand jury, assuming the act authorizing his appointment to be void, does not render the recommendation of the grand jury, under a statute providing for the removal of county attorneys in case of failure to enforce the provisions of a law, invalid. *Leedy v. Brown*, — Okla. —, 113 Pac. 177.

The appearance of special attorneys or private counsel was held in the following cases, however, to invalidate the indictment:

Miller v. State, 42 Fla. 266, 28 So. 208 (special attorney procured by the prosecuting attorney with consent of court appeared and remained during examination of evidence and the deliberation of the jury, and urged and requested the finding of the bill); *Welch v. State*, 68 Miss. 341, 8 So. 33 L.R.A. (N.S.)

673 (attorney for prosecution procured himself to be summoned before the grand jury as a witness, and addressed them, and urged the finding of an indictment); *State v. Addison*, 2 S. C. 356 (counsel acting for absent solicitor entered grand jury room during their deliberations); *State v. Mabin*, — Okla. Crim. Rep. —, 114 Pac. 1122 (presence, during consideration of charges, of counsel for governor, who was not attorney general or county attorney); *United States v. Virginia-Carolina Chemical Co.* 163 Fed. 66; *United States v. Rosenthal*, 121 Fed. 862 (appearance and examination of witnesses by two attorneys appointed without authority by the attorney general to assist a district attorney in a particular case); *United States v. Kilpatrick*, 16 Fed. 765 (an examiner of the department of justice entered grand jury room and assisted them in their investigation); *Durr v. State*, 53 Miss. 425 (attorney employed to prosecute a case, with leave of the court, went into the grand jury room with his witnesses, and drafted bill which the grand jury then returned); *Wilson v. State*, 70 Miss. 595, 35 Am. St. Rep. 664, 13 So. 225 (attorney employed by one whom defendant was accused of defrauding to aid in prosecution went before grand jury with witnesses, and acted for district attorney in preparing indictment and procuring the same to be found; such attorney not having been selected as assistant district attorney or district attorney *pro tem.*); *People v. Scannell*, 36 Misc. 40, 72 N. Y. Supp. 449 (special counsel employed by district attorney appeared and conducted case before grand jury, it being provided by statute that an indictment must be set aside "when a person has been permitted to be present during the session of the grand jury, while the charge embraced in the indictment was under consideration," except according to provisions allowing regularly qualified assistants, etc., to appear).

The court in *Miller v. State*, *supra*, said: "Proceeding upon the theory that the attorney who went before the grand jury was

as confessed, and the only question before us is, Are the facts proven, and the allegations in the motion which were not controverted, sufficient to set aside the indictment?

Section 6683, Snyder's Comp. Laws (Okla.) 1909, is as follows: "The grand jury may at all reasonable times ask the advice of the court or of the district attorney. The district attorney may at all times appear before the grand jury for the purpose of giving information or advice relative to any matter cognizable before them, and may interrogate witnesses before them whenever he thinks it necessary, but no other person is permitted to be present during their sessions, except the members and a witness actually under examination, and no person whomsoever must be permitted to be present during the expression of their opinions or the giving of their votes upon any matter before them." This statute must be construed in connection with the other provisions of law with reference to county attorneys and their deputies, and the attorney general and

his deputies. We think the plain meaning and import of this statute is that no one should be permitted to be present during the sessions of the grand jury, except the witnesses and the officers duly authorized by law to so appear. Section 6738, Snyder's Comp. Laws (Okla.) 1909, provides that the indictment must be set aside on motion of a defendant for certain specified reasons. But the special grounds for setting aside an indictment contained in this section are not exclusive of other grounds, for it is expressly provided that an indictment must be set aside whenever it appears that it was not found, indorsed, presented, or filed as provided by the statutes of the state. It is true that a substantial compliance with the provisions of the statutes relating to grand juries and the manner in which indictments are to be found and presented is all that the law requires, but, whenever there has been a departure from the provisions of the statutes, which would deprive a defendant of a substantial right or would be dangerous to justice, then an indictment so

procured by the state attorney as assistant, with the consent of the court, under the provisions of our statute, it appears to us that the pleas show such action on the part of the attorney in the deliberations of the grand jury in finding the bill as to come within the prohibition of the statute, and reasonably calculated to influence the jury to the prejudice of the accused. When this is affirmatively shown, the decided weight of judicial opinion in this country sustains the view that the indictment should be set aside. If we proceed upon the theory that the attorney who went before the grand jury did so without any sanction of the court, there is still less ground for sustaining the ruling of the court. No case that we have found sanctions the right of private counsel to assume the sole and exclusive charge and management of a case before a grand jury, and not only remain with them during the examination of evidence and their deliberations thereon, but request and urge them to find a true bill. The secrecy of the grand jury secured by our statute, and designed to preserve the freedom and independence of that body, forbids such action, and it could not be tolerated by the courts without impairing the usefulness of the grand inquest."

The court in *Wilson v. State*, supra, said: "It is a serious mistake to suppose that the right of one accused or suspected of crime to the orderly and impartial administration of the law begins only after indictment. Immunity from prosecutions for indictable offenses, except by presentment by the grand jury, is declared and preserved by the organic law of this and all the other states, and, though, by reason of the secrecy of the proceedings before that body, its action is seldom brought in review, it cannot

be doubted that one whose acts are there the subject of investigation is as much entitled to the just, impartial, and unbiased judgment of that body as he is to that of the petit jury on his final trial, nor that it is as essential before the one body as the other that private ill-will or malevolence shall be excluded."

And where a statute empowers the court to appoint special counsel when the prosecuting attorney fails from sickness or other cause to attend court, the court cannot appoint a special counsel to act before the grand jury where the prosecuting attorney is ready and willing to perform his duties, and an indictment found while such counsel was attending the grand jury will be set aside. *State v. Heaton*, 21 Wash. 59, 56 Pac. 843.

And it has been held that the fact that a paper prepared by private counsel for the prosecution, directing the foreman of the grand jury as to on what points the several witnesses will testify, was sent to the grand jury by the district attorney, is ground for quashing the indictment. The court said: "The district attorney, himself, as the official representative of a prosecution, may appear before the grand jury and examine witnesses for their assistance; but it is not proper for him to suggest what effect should be given to the testimony adduced, nor by any hint to control their deliberations. It is doubtful if private counsel for the prosecution has the same privilege to appear and examine witnesses before the grand jury; although he represents the commonwealth, he does not appear in an official and disinterested capacity. But this matter we do not decide." *Com. v. Frey*, 11 Pa. Co. Ct. 523.

J. T. W.

found must be set aside. Prior to statehood, no person could be prosecuted for a felony unless by indictment found by a grand jury. But the grand juries had indicted so many persons where convictions could not be obtained, that the people had in a great measure lost confidence in this institution. In fact, grand juries were by many regarded largely as repositories of malice, cowardice, and perjury, not on account of the men who composed the grand juries, but on account of their secret inquisitorial powers, which enabled cowardly, corrupt, and malicious men to go before a grand jury and prefer charges which they would not dare to make publicly. It gave such characters an opportunity from ambush to shoot their enemies in the back. Although a man so indicted would be acquitted, yet it would place an indelible stain upon his good name, however innocent he might be. So, the constitutional convention endeavored, as far as possible, to substitute in its place proceedings by information in felony cases, where the defendant would have a preliminary trial before an examining magistrate, unless he saw fit to waive such preliminary trial. The purpose of this was to give a defendant, where he demanded it, as far as possible, an opportunity to face his accusers and present his defense in open court, below he would even be placed upon final trial. Had it not been for the fact that cases sometimes arise in which it would be difficult, if not impossible, to institute criminal proceedings without a grand jury, the system doubtless would have been abolished entirely. Therefore § 18 was incorporated in our Bill of Rights, which is as follows: "A grand jury shall be composed of twelve men, any nine of whom concurring may find an indictment or true bill. A grand jury shall be convened upon the order of a judge of a court having the power to try and determine felonies, upon his own motion; or such grand jury shall be ordered by such judge upon the filing of a petition therefor, signed by 100 resident taxpayers of the county; when so assembled such grand jury shall have power to investigate and return indictments for all character and grades of crime, and such other powers as the legislature may prescribe: Provided, that the legislature may make the calling of a grand jury compulsory." From this it is seen that no grand jury can be convened unless upon order of the judge of the district court, either upon his own motion or upon a petition therefor, signed by at least 100 resident taxpayers of the county. While it is true that, when a grand jury has been so convened, it has power to find and return indictments

for all character and grades of crime, yet it was intended that grand juries should only be convened in cases of emergency. We cannot ignore these provisions of our Constitution, when we go to determine the policy of the state with reference to prosecutions by indictment. Section 19 of article 7 of our Constitution, among other things, provides: "All prosecutions shall be carried on in the name and by the authority of the state of Oklahoma."

We have heretofore had occasion to pass upon this clause of the Constitution in cases where this language was omitted from the indictments, and we have held that this constitutional provision does not relate to a matter of pleading, but that it secures to each inhabitant of this state a substantial right. In the case of *Caples v. State*, 3 Okla. Crim. Rep. 80, 26 L.R.A. (N.S.) 1033, 104 Pac. 497, this court said: "It is true that the Constitution requires that 'all prosecutions shall be carried on in the name and by the authority of the state of Oklahoma,' but it is nowhere required that this allegation shall appear in the information or indictment. This question was before this court in the case of *Arie v. State*, 1 Okla. Crim. Rep. 666, 100 Pac. 33, and we there held that, if it appears from the record that the prosecution was actually conducted in the name and by the authority of the state, the object and purpose of the Constitution is accomplished, even though no such allegation appeared in the information or indictment. Suppose that this allegation was in the information, and the record disclosed the fact that the prosecution was conducted by private parties without authority from the state, would the allegation of the information give the court jurisdiction? We do not profess to be infallible, but to our minds it is clear that the purpose of this provision in the Constitution is to protect the people of this state from private prosecutions which might degenerate into persecutions, and from prosecutions for any other foreign power save that of the state." The case before us is directly in point. Here the record shows that, while the prosecution was nominally being conducted in the name of the state, as a matter of fact it was in the hands of a private attorney, employed by the prosecuting witness. We think that such conduct is a direct violation of the Constitution of this state. If a county attorney can turn a defendant over to the paid counsel of private parties, or if private parties can usurp the powers of a county attorney before a grand jury, where the defendant cannot be heard and has no one to represent him, no man is safe from persecution in

Oklahoma, and the abuses of the grand jury system will be perpetuated among us. This is the evil that the people have tried to destroy. The law therefore prohibits all persons from being in the grand jury room except the officers authorized by law to examine witnesses, and the witness to be examined, and the presence of any other person in the grand jury room at any stage of the proceedings, when a witness is being examined, or when the grand jury are considering the advisability of finding an indictment, vitiates the entire proceedings. There is no exception to this rule. The sessions of the grand jury being secret, it is impossible for a defendant to protect himself against danger from this source. Therefore the law protects him by rigidly excluding from the grand jury room all persons except those expressly authorized by law to be present. Fairness and justice are the essential elements of every step taken in the prosecution of criminal causes in Oklahoma. We heartily indorse the statement contained in the case of *United States v. Edgerton* (D. C.) 80 Fed. 375, which is as follows: "It is beyond question that no person other than a witness undergoing examination and the attorney for the government can be present during the sessions of the grand jury. The rule is inherent in the grand jury system, with all the force of a statutory enactment. The cases where bailiffs and stenographers have on occasions been temporarily present in the grand jury room are only apparent exceptions. The rule in its spirit and purpose admits of no exception. In the present case it is suggested that the only testimony heard while the expert Flynn was present related to the production of certain books of account touching which the expert interrogated the witness who was testifying as to his possession of such books or other documents, and that this could not have prejudiced the defendant. The court cannot know that this suggestion represents the facts. The case as presented is one where an expert was not only present in the grand jury room while a witness was testifying, but took part in the investigation by interrogating the witness. The court cannot inquire as to the effect of this conduct. There must not only be no improper influence or suggestion in the grand jury room, but, as suggested in *Lewis v. Wake County*, 74 N. C. 194, there must be no opportunity therefor. If the presence of an unauthorized person in the grand jury room may be excused, who will set bounds to the abuse to follow such a breach of the safeguards which surround the grand jury? It is common knowledge that expert witnesses are more likely to

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testify from interest than any other class. They usually testify to support or overthrow a theory, and frequently, if not usually, after an *ex parte* investigation, which strongly predisposes them, in favor of the party or cause in whose services they are enlisted. In the case of *United States v. Kilpatrick* (D. C.) 16 Fed. 765, the court quashed an indictment upon motion upon a case much like the present as to this point."

We know that numerous and respectable authorities can be found holding to the contrary, but an investigation will show that in those cases the constitutional and statutory provisions upon which they are based, with reference to grand juries, are very different from ours. But, even if they were not, we would not hesitate to say that it is unfair, unjust, and illegal to allow any person to be in a grand jury room when witnesses are being examined, unless such person was before said grand jury as a witness, or was there as a regular officer of the law in the discharge of his duties as such. In the case at bar the attorney who appeared before the grand jury was not the deputy county attorney, and he had no appointment from the district judge to act in place of the county attorney on account of the disqualification of that officer. He was merely requested by the county attorney to go before the grand jury. While we are satisfied that neither the county attorney nor the attorney who appeared for him before the grand jury were actuated by improper motives in this case, yet this cannot cause us to sanction a proceeding which is unauthorized by law, is contrary to public policy, and which, if allowed to stand, would establish a precedent repugnant to reason and pregnant with danger to justice and innocence. A county attorney has no right to turn a defendant over to his enemies, after having first armed them with the entire power of the state to be used as they see fit in his prosecution. If such prosecutions were permitted, they would soon become a great scandal, and absolutely odious to a fair-minded and justice-loving people. Honest men against whom naught could be truthfully alleged have been greatly mortified, and have had their good names called in question, by just such proceedings as this, prompted alone by the malice and cowardice of their enemies, when if they had been faced by their accusers, and given the right of cross-examination, those who sought to destroy them through the secret inquisitorial proceedings of a grand jury would have been covered with defeat and infamy. In 1876, when the writer of this opinion was practising law in Texas, a

preacher who had some bitter enemies was indicted for stealing hogs. Upon the final trial it was conclusively shown that the parties who had caused his indictment were themselves the thieves. While the preacher was acquitted, yet he carried to his grave the stain upon his name of having been indicted for hog stealing. We are pleased to be able to say that these remarks do not apply to the county attorney of Custer county, or to the attorney who appeared for the private prosecution before the grand jury in this case. We call attention to these matters to illustrate the consequences which might grow out of this precedent if we allowed it to stand. The extreme illustration is always the test of a rule. Fairness and justice demand that a criminal prosecution should at all times be under the direction of a regularly constituted public officer, who is charged by law with the performance of this duty. We desire to say in addition that the county attorney, being disqualified in this case, was without power or authority to appoint any one to represent him. The appointment in such cases should come alone from the district judge, and should be of some member of the bar free from personal or private interest in the matter, who could be depended upon to act with fairness and impartiality as between the state and all of its citizens whose cases might come before the grand jury. Section 1598, Snyder's Comp. Laws of Okla. 1909, provides the only manner of appointing a special county attorney when the regular county attorney or his duly appointed deputy is unable to act, which is as follows: "Each of the district courts, whenever there shall be no county attorney for the county, or when the county attorney shall be absent from the court, or unable to attend to his duties, may, if the court may deem it necessary, appoint by an order to be entered in the minutes of the court some suitable person to perform for the time being the duties required by law to be performed by the county attorney, and the person so appointed shall thereupon be vested with all the powers of such county attorney for that purpose."

We believe that it is the plain meaning of the laws and Constitution of Oklahoma that regularly elected or appointed officers shall conduct all criminal prosecutions. It is true that it is entirely proper and legitimate for counsel to be employed to assist the county attorney in open court in the prosecution of a criminal case, but even then the county attorney should never lose control of the case, and such assistant counsel should discharge only such duties in the prosecution of the cause as are as-
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signed him by the county attorney. But it is highly improper for counsel employed to prosecute a case, to be permitted to go into the grand jury room, where the defendant cannot be heard and has no one to represent him. This duty should be performed alone by the proper officer of the law. The case of *Fooshee v. State*, 3 Okla. Crim. Rep. 677, 108 Pac. 554, does not conflict with the views here expressed. In that case the attorney who appeared before the grand jury was the regularly appointed deputy county attorney of Carter county, and his appointment was a matter of record in the county attorney's office of that county. We therefore hold that the trial court erred in not sustaining the motion made by the defendant to set aside the indictment.

Second. The indictment in this case is defective in not alleging the name of the person from whom the stolen property was received, or that the name of such person was unknown to the grand jury. See *Fletcher v. State*, 2 Okla. Crim. Rep. 300, 23 L.R.A. (N.S.) 581, 101 Pac. 599. It is not necessary, however, for such an indictment to allege from whom or by whom such property was stolen.

Third. Upon the trial of this cause the appellant entered a plea of former acquittal, but did not offer in evidence any testimony reasonably tending to sustain said plea. Upon this issue the court charged the jury as follows: "Gentlemen of the jury, you are further instructed that the defendant has introduced no evidence in support of his plea that he has already been acquitted of the offense charged in this indictment by the judgment of this court rendered at Arapaho on the 1st day of July, 1908. You are therefore instructed that, in your deliberations in this case, you will not consider this defense in arriving at your verdict in this case." Where there is evidence in the record reasonably tending to support an issue, the weight and effect of such evidence is exclusively for the jury, and it would be improper for the court to withdraw it from their consideration; but, where there is no evidence tending to support an issue presented, the court should not submit such issue to the jury. We therefore find that the court did not err in its instructions upon the subject of former acquittal.

For the errors hereinbefore pointed out, this cause is reversed and remanded, with directions to the lower court to sustain the motion to set aside the indictment.

Armstrong and Doyle, JJ., concur.

OKLAHOMA SUPREME COURT.

H. L. BOYES et al., Plffs. in Err.,
v.

GEORGE A. MASTERS et al.

(— Okla. —, 114 Pac. 710.)

Abatement — right to revive — discretion.

1. The right to revive an action under article 19, chap. 66, Wilson's Rev. & Anno. Stat. (Okla.) 1903, does not depend on the discretion of the court or of the judge making the order, but under the condition and within the time therein limited, is a matter of right.

Same — method — supplemental pleading.

2. Article 19 of chapter 66 of said statutes provides a summary remedy for reviving an action, but the remedy thus provided is not exclusive. The court has power

Headnotes by TURNER, Ch. J.

Note. — Exclusiveness of particular statutory method for revival of action.**At common law and under Codes.**

"By rule of the common law all pending actions abate upon the death of the plaintiff, and the right to revive and continue the same is a statutory creation." Welch v. Lynch, 30 App. D. C. 122.

"Revivor of actions being purely statutory in its origin, the modes provided by the Codes and statutes of the various states are exclusive, and the courts cannot grant such benefit by any other method." 18 Enc. Pl. & Pr. p. 1128, citing Lyon v. Park, 23 Jones & S. 539. And to the same effect are Welch v. Lynch, supra, and Wilson v. Darrow, 223 Mo. 520, 122 S. W. 1077.

The method of revival of an action at law is therefore determined by the statutes of the particular state where it is pending, and it is the purpose of this note, so far as actions at law are concerned, to consider only the question as to the exclusiveness of any particular statutory method in jurisdictions where, as in Oklahoma, more than one mode is provided.

As pointed out in the opinion in *BOYES v. MASTERS*, Ohio and Nebraska have statutes very similar to those of Oklahoma, which have been construed as providing co-existing methods of revivor.

The leading case of *Carter v. Jennings*, 24 Ohio St. 182, is fully set out in the opinion in *BOYES v. MASTERS*; and to the same effect, as applied to the revivor of proceedings in error, is *Black v. Hill*, 29 Ohio St. 86.

So, in *Pavey v. Pavey*, 30 Ohio St. 600, upon the authority of *Carter v. Jennings* and *Black v. Hill*, supra, an order was made, under § 39 of the Code, allowing the case to be continued against the represen-

under § 4238 of said statute, in the exercise of sound discretion, to allow the action to be prosecuted against the legal representatives of a deceased party defendant, and allow them to be brought in by supplemental petition, pursuant to § 4348 of said statute.

Same — lapse of time — effect.

3. Where, pending an action to foreclose a mortgage, W., the defendant mortgagor, died, leaving him surviving a widow and five children, three of whom were minors, all of whom by attorney appeared, and, after a guardian *ad litem* had been appointed for said minors, said widow and adult heirs for themselves, and said minors by their said guardian, answered; and where, after judgment in their favor, proceedings in error therein were commenced by plaintiff in the supreme court of Oklahoma territory, pending which said widow, a coexecutor of the will of said W., died, after the submission, but before a decision, of said cause in said court; and where, after mandate to the trial court, plaintiff by supple-

tative of a deceased defendant in error, although more than a year had elapsed from the death of such defendant to the time of making the application for a revivor.

And in *Foresman v. Haag*, 37 Ohio St. 143, it was held, on the authority of *Black v. Hill* and *Pavey v. Pavey*, supra, that, under § 39, proceedings in error could be revived against the legal representatives of the defendant in error by conditional order, although more than a year had elapsed.

Likewise, the method provided by title 13 of the Nebraska Civil Code for reviving actions by conditional order is not exclusive, but under § 45, providing that "in case of the death or other disability of a party, the court may allow the action to continue by or against his representative or successor in interest," the heirs of the plaintiff in an action to set aside certain conveyances may be permitted to file a petition and prosecute the suit in their own names, upon the death of the original plaintiff, and their admission as parties plaintiff, by order of the court, without complaint from anyone, is, in effect, a revivor of the action in their name by consent of the parties. *Rakes v. Brown*, 34 Neb. 304, 51 N. W. 848.

So, in *Hayden v. Huff*, 62 Neb. 375, 87 N. W. 184, an application in the appellate court after the granting of a rehearing, made by the administrator *de bonis non* of the plaintiff, by supplemental petition in the nature of a bill of revivor, after the death of the plaintiff's administratrix, who died more than a year after her appointment without having made application to have the action revived in her name, and after the action had been stricken from the docket on motion of the defendant, it was held that the Code provision for summary proceedings by a conditional order to revive an action within a year after the appointment of a representative of a deceased

mental petition filed sought to bring in the remaining executor of W. and her coexecutors as parties defendant, but was met with a motion to dismiss the cause on the ground of failure to revive against said minor heirs of said W., and that more than one year has expired since the death of said widow; and where by amended supplemental petition plaintiff seeks to bring in said heirs, together with said executor of W., and the coexecutor of said widow, as parties defendant,—held, no question of laches raised, that the court erred in refusing him permission so to do.

Appeal — death of party before judgment — effect.

4. The fact of the death of the defendant in error between the submission and decision of a cause in this court does not impair the validity of a judgment thereinafter rendered, but this court will, on proper showing, set aside the judgment, recall the mandate, and direct the clerk to refile the opinion, and enter judgment in the case

party was not exclusive, but that, under § 45, a right to revive, independent of that under the former provision, was given, to which the limitation as to time expressed in the former provision did not apply.

In *Missouri P. R. Co. v. Fox*, 56 Neb. 746, 77 N. W. 130, an action begun by a widow, as administratrix, to recover for the wrongful death of her husband, in which, after her remarriage and the cessation of her powers as administratrix from that fact, a conditional order of revivor was entered on application of her successor, and in due time made absolute, the court, holding that the right of such successor to proceed with the action was thereafter *res judicata*, said: "Under our system of practice, where a party dies or his authority as a representative ceases, two methods of revivor coexist. A conditional order of revivor may issue and be served, and the order made final, unless cause be shown against it, or the court may substitute the new party and supplemental pleadings may be filed and summons served. *Fox v. Abbott*, 12 Neb. 328, 11 N. W. 303; *Rakes v. Brown*, 34 Neb. 312, 51 N. W. 848. If the former method be pursued, the proper method of traversing the claim of the person in whose name revivor is attempted is by showing cause against the absolute order. An issue is thus tendered, and if the court make the order absolute, that order becomes *res judicata* as to the right of the person named to proceed with the action, and the issue cannot be again made and tried with the main case."

So, also, in *Fox v. Abbott*, 12 Neb. 328, 11 N. W. 303, on error from a proceeding for revivor of a judgment after the death of a plaintiff, under a statute providing for such revivor "in the same manner as is prescribed for reviving actions before judgment," holding that the judgment rendered in such revivor proceedings against a part, but not all, of several defendants, after

nunc pro tunc, as of the date when the same was submitted.

(March 21, 1911.)

ERROR to the District Court for Noble County to review a judgment refusing to allow plaintiffs to file their supplemental petition in an action to foreclose a mortgage on certain property, executed by defendant Wickard to secure an alleged indebtedness due to plaintiff Boyes. Reversed.

The facts are stated in the opinion.

Messrs. Harris & Wilson and Claude Nowlin, for plaintiffs in error:

The order of revival was made by consent of all the parties.

Wilson v. Smith, 22 Gratt. 493; *Clark v. Parish*, 1 Bibb, 547; *Maury v. Fitzwater*, 88 Fed. 768.

Actions to foreclose mortgages upon real

service on such part of them of a conditional order provided for by the statute as a summary remedy for reviving actions, was unauthorized because the revival of a joint judgment in that mode must be joint in form, the court said: "The chapter providing for a summary revivor of actions is not exclusive. The court undoubtedly has power, under § 45 of the Code, to allow the action to be prosecuted by or against the representatives of a deceased party, in which case supplemental pleadings may be filed and summons served, as in the commencement of an action."

And in *Hunter v. Leahy*, 18 Neb. 91, 24 N. W. 680, on error from a proceeding by motion to revive a judgment under the same statutory provision, where it was claimed that the right to revive was barred under the Code provision that "an order to revive an action against the representatives or successor of a defendant shall not be made without the consent of such representatives or successor, unless in one year from the time it could have been first made," the court said: "The mode of reviving actions by motion is not exclusive. A party may, after the expiration of a year, revive an action by bill or supplemental petition. . . . We do not think the restriction as to time applies to the revivor of judgments."

The statutes of some states provide methods of revivor which on their face are more clearly coexistent and supplementary. Thus, in New York, the Code of Procedure formerly provided as to the revivor of actions in case of the death or other disability of the party, the court might, on motion at any time within one year thereafter, or afterwards on a supplemental complaint, allow the action to be continued by or against his representative or successor in interest.

And in *Bornsdorff v. Lord*, 41 Barb. 211, affirming an order denying a motion of the

property of a deceased mortgagor should be brought against the administrator or executor of the estate, and the heirs are not even necessary parties.

Bayly v. Muehe, 65 Cal. 345, 3 Pac. 467, 4 Pac. 486; Dickey v. Gibson, 121 Cal. 276, 53 Pac. 704; Finger v. McCaughey, 119 Cal. 59, 51 Pac. 13; McCaughey v. Lyall, 152 Cal. 615, 93 Pac. 681.

A revivor may be had by supplementary pleading after the period within which a summary revivor may be had has expired. In such proceedings, laches, and not limitations, must be shown in order to defeat the right to revive.

Carter v. Jennings, 24 Ohio St. 182; Black v. Hill, 29 Ohio St. 86; Pavey v. Pavey, 30 Ohio St. 600; Foresman v. Haag,

37 Ohio St. 143; Maxwell's Pl. & Pr. 4th ed. 713; Fox v. Abbott, 12 Neb. 328, 11 N. W. 303; Hunter v. Leahy, 18 Neb. 81, 24 N. W. 680; Rakes v. Brown, 34 Neb. 304, 51 N. W. 848; Hayden v. Huff, 62 Neb. 375, 87 N. W. 184.

Mr. H. B. Martin for defendants in error.

Turner, Ch. J., delivered the opinion of the court:

On November 10, 1902, H. L. Boyes, one of the plaintiffs in error, sued S. A. Wickard, George A. Masters, and the First National Bank of Canute, Kansas, in the district court of Noble county, on a certain promissory note for \$2,564.75, theretofore made, executed, and delivered to plaintiff

plaintiff made more than a year after the death of the defendant, for leave to continue the action against the executor of the deceased defendant, by filing a supplemental complaint, the court, construing this Code provision, held that two distinct methods were provided, the one by motion within a year from the death of the deceased party, and the other by supplemental complaint after the expiration of the year, for leave to file which no motion or other application to the court was necessary or proper.

And to the same effect is Roach v. La Farge, 43 Barb. 616, also affirming an order denying a like motion, on the ground that the motion was unnecessary and improper.

Under the present New York Code of Civil Procedure it has been held that the provision of § 760 for the continuance of an action against the representative or successor in interest of a deceased defendant, that if the application be made on the part of the plaintiff, "the court may direct that a supplemental summons issue, and that supplemental pleadings be made," is not exclusive, but under § 758 an action may be revived at the instance of either a plaintiff or a defendant by order,—the provision of § 760 being merely to permit a supplemental summons to be issued at the instance of a plaintiff where the defendant to be brought in is a nonresident, upon whom an order cannot be effectively served out of the state.

Minnesota, South Carolina, and Wisconsin also seem to have had statutory provisions very similar to that of the former New York Code of Procedure, and under such provisions it has been held that a continuance in the name of his personal representative or heirs as parties, more than a year after the death of a party, unless stipulated, can be properly allowed only on supplemental complaint, and not upon motion. Lee v. O'Shaughnessy, 20 Minn. 173, Gil. 157; Arthur v. Allen, 22 S. C. 432.

But no leave of the court is necessary for the filing of a supplemental complaint

to revive the action. Arthur v. Allen, supra; Parnell v. Maner, 16 S. C. 348.

Under such a statute it has also been held that the mode of revival by motion within one year is not exclusive, although no complaint was served before the plaintiff died, but any complaint made by his representative is a "supplemental complaint," within the meaning of the statute, whereon the action may be continued after one year from the death of the plaintiff. Plumer v. McDonald Lumber Co. 74 Wis. 141, 42 N. W. 250.

In Stephens v. Magor, 25 Wis. 533, followed in Tarbox v. French, 27 Wis. 651, it was held that the mode of revivor provided by chap. 363, Laws of 1860, was merely cumulative, and that an action could still be revived and continued in the name of the administrator of the deceased plaintiff by an order made upon motion and order to show cause, under § 1, chap. 135, of the Revised Statutes.

In equity.

The methods provided by statutes for continuing a suit in equity on the death of a party are not, as a rule, exclusive of the old chancery methods. Thus, the summary method provided by § 15 of the Colorado Code, for continuing an action by the representative of a deceased plaintiff upon motion, is not exclusive of the chancery remedy by filing a complaint in the nature of a bill of revivor and supplement; and where matters occurring subsequent to the commencement of an action to set aside for fraud a pretended foreclosure of a trust deed necessitate the bringing in of new parties defendant, the latter method of reviving the action is the better procedure. Barlow v. Hitzler, 40 Colo. 109, 90 Pac. 90.

And in Maryland, § 146a, art. 16, supplement to the Code, providing a new and simpler method of reviving a suit in equity, does not abrogate the former mode of reviving a suit by a bill of revivor. Sinclair v. Auxiliary Realty Co. 99 Md. 223, 57 Atl. 664.

So, in Tennessee, it has been held that the

by said Wickard and Masters, and to foreclose a certain mortgage upon certain lots in the city of Perry, given plaintiff by Wickard to secure the payment of the same. The first National Bank of Canute, Kansas, was alleged in the petition to have some interest in or lien upon the lots junior to the mortgage of plaintiff, and was made a party defendant. The note and mortgage was attached as exhibits to his petition. Later defendants appeared and demurred, pending which the Farmers' & Merchants' Bank, the other plaintiff in error, was, by amended petition, made a party plaintiff. On April 28, 1903, de-

fendants demurred to said amended petition, and the First National Bank of Canute, Kansas, filed its answer thereto. On July 1, 1903, the death of S. A. Wickard was suggested, and the action, by consent, was by the court ordered revived against his heirs, Dan K. Wickard, Dora M. Wickard, Sarah K. Wickard, Jessie B. Wickard, Susan F. Wickard, and Robert M. Wickard, the three last named being minors, and a guardian *ad litem* appointed for them, who accepted the appointment and was sworn and qualified as such then and there in open court. Later all of said adult heirs for themselves, and said minor heirs by

statutory mode of reviving causes in equity by *scire facias* is not exclusive, but after the time limitation fixed by the statute for reviving a suit by *scire facias*, the suit stands as if no statute had ever been passed, and may be revived by bill of revivor as in the English chancery practice. *Cobb v. Conway*, 1 Overt. 294.

And where the parties against whom it is sought to revive are nonresidents, so that they cannot be brought before the court by the process of *scire facias*, either a bill of revivor or the remedy by motion and order may be resorted to, as the mode of revivor. *Foster v. Burem*, 1 Heisk. 783.

So, the remedy provided by the statutes of Virginia and West Virginia providing for the revival of chancery causes by *scire facias* or on motion without notice is not exclusive, but parties entitled to revive may resort to a bill of revivor if they chose. *Reid v. Stuart*, 20 W. Va. 382; *Bock v. Bock*, 24 W. Va. 586.

And the summary method of revivor prescribed by title 11 of the Kentucky Code does not impair the right to bring any necessary party before the court by other appropriate means after the time has passed for a summary Code revivor, where a party to an action, who had become a purchaser at a judicial sale therein, dies before the report of the sale has been confirmed. *Gardner v. Roberts*, 4 Ky. L. Rep. 614 (abstract).

The nonexclusiveness of the statutory mode of revival also appears inferentially in *Benson v. Wolverton*, 16 N. J. Eq. 110, where, in denying a motion by the defendant for an order to revive a suit in chancery on the death of the sole complainant, under a statute providing for substituting new parties and continuing suits by order, instead of resorting to a bill of revivor, but only at the instance of a plaintiff, the court said, without deciding whether it was a proper case for a revivor in any manner: "It is clear that it is not a case within the provisions of the statute, and if the suit be revived, it can only be by bill of revivor."

So, in *Hall v. Hall*, 1 Bland, Ch. 130, holding that a statutory mode of revival of suits in chancery provided, in place of bills of revivor, in cases of abatement by

the death of a party, could not be resorted to therein, as it was a case of abatement by the marriage of a female plaintiff, the court said: "The act has neither expressly nor impliedly abrogated the mode of reviving a suit by bill of revivor, but has only given this new method of proceeding as an additional mode of attaining that object, which before could only be effected by a bill of revivor."

And in *Floyd v. Ritter*, 65 Ala. 501, an appeal from a bill in chancery, holding that the mode in which the administrator and heirs of a deceased defendant had been made parties to the cause in the court of chancery was a substantial compliance with a provision of the 102d rule of practice, the court said: "It was, doubtless, very irregular, if conformity to the rules of practice originally prevailing in courts of chancery could now be required. . . . This practice may yet be pursued if parties so elect; or the chancellor may, if he deems it proper, compel parties to pursue it. But the parties, if not otherwise ordered by the chancellor, may revive in the mode pointed out in the 102d rule of practice."

But in *Keep v. Crawford*, 92 Ill. App. 587, it was held that the abatement act, providing that a suit in equity in which a sole complainant dies may proceed by suggesting the death upon the record, and substituting as complainant the one to whom the cause of action survives, if it did not repeal by implication the previously enacted chancery act, in so far as the abatement act provided a method of procedure different from that of the chancery act, at least excluded from operation the general provision of the chancery acts for procedure according to the usage and practice of courts of equity, in cases not otherwise provided for, as applied to the revival of suits in equity in case of the death of a sole complainant, for which the chancery act made no express method of procedure; and the mode of procedure prescribed by the abatement act excludes and renders improper a bill of revivor, which would have been made the mode of procedure under the general usage and practice of courts of equity in such case. A. C. W.

their said guardian, filed answers to plaintiffs' amended petition, to which plaintiffs replied. Upon the issues thus joined the cause was tried to the court, and judgment rendered and entered in favor of plaintiffs against the defendant George A. Masters for \$3,398.29, interest and principal due on said note. At the same time the court found that the mortgage sought to be foreclosed had been paid; that the defendant the First National Bank of Canute, Kansas, and said heirs of S. A. Wickard, deceased, were not indebted to plaintiffs, and judgment was entered accordingly.

After motion for a new trial filed and overruled, plaintiffs commenced proceedings in error in the supreme court of the territory of Oklahoma. There, on September 6, 1905, the judgment of the district court was reversed, and the cause remanded for a new trial. *Boyes v. Masters*, 17 Okla. 460, 89 Pac. 198. After the submission and before the decision of the cause in the supreme court, to wit, on March 19, 1905, Dora M. Wickard died. As soon as the fact of her death became known to plaintiffs, they, on June 3, 1907, after the return of the mandate, suggested her death in the district court, and, it appearing to the court to be true, that she was one of the executors of the last will of S. A. Wickard, that Dan K. Wickard and Sarah (Wickard) Clemens were coexecutors of her last will and testament, and that Dan K. Wickard was then sole executor of the last will and testament of said S. A. Wickard, deceased, it was ordered by the court that Dan K. Wickard and Sarah K. (Wickard) Clemens, as the coexecutors of Dora M. Wickard, be and they were made parties defendant, and ordered served with summons, and plaintiffs were given leave to file a supplemental petition, setting forth their cause of action against said defendants.

On June 7, 1907, pursuant to leave thus granted, plaintiffs filed their supplemental petition against the defendants Dan K. Wickard, as sole executor of the last will of S. A. Wickard, deceased, and against Dan K. Wickard and Sarah K. (Wickard) Clemens, coexecutors of the last will of Dora M. Wickard, deceased, and embodied therein their original amended petition, and prayed judgment against said defendants as in said original and amended and supplemental petitions set forth, and for general relief. After service by publication, on September 16, 1907, defendants' attorney appeared, and to the court in substance stated that theretofore, at the time of the revivor against the heirs of S. A. Wickard, deceased, three of said heirs were minors;

that no service of a motion to revive said action had ever been served on them, by reason of which said pretended order of revivor against them was void; that after the death of Dora M. Wickard, said proceeding in the supreme court of the territory of Oklahoma was not thereafter revived in said court; that all subsequent proceedings in said court were void; that at the time of the revivor of the cause in the district court against the heirs of Dora M. Wickard, deceased, more than one year had elapsed from the time of her death, and for that and the further reason that said order of revivor was entered without the consent of the defendants in said action, the same was void; and moved to dismiss the cause at plaintiffs' cost.

On October 11, 1907, plaintiffs brought into court their amended supplemental petition, therein made reference to their petition, amended petition, and supplemental petition, made the contents thereof a part of their amended supplemental petition, and asked leave to file the same. After stating therein that at the time the revivor was had against the heirs of S. A. Wickard, deceased, they believed the attorneys therein appearing for them had authority so to do, and that said revivor was good; that their opinion then was that said minors could not be bound by consent of their attorneys: that since said attempted revivor all of said heirs, except Robert M. Wickard, had become of age and continued to appear in said cause; that neither plaintiffs nor their attorneys knew of the death of Dora M. Wickard until more than one year thereafter; that she died a nonresident, after which her attorneys continued to appear for her in said cause; that, notwithstanding Jessie B. Wickard and Susan F. Wickard have since said attempted revivor appeared as parties defendant in said cause, out of an abundance of caution they are included as such in the amended supplemental petition; that all parties against whom the revivor is sought are nonresidents of the state, and claim no interest in the mortgaged property, except as devisees of said S. A. and Dora M. Wickard, deceased; that George A. Masters is the duly appointed and qualified guardian of the person and estate of Jessie B. Wickard, Susan F. Wickard, and Robert M. Wickard. They prayed that said heirs and Dora K. Wickard, as executor of the last will of S. A. Wickard, and Dan K. Wickard, and Sarah K. (Wickard) Clemens, and George A. Masters, as guardian of said minor heirs of S. A. Wickard, be made parties defendant; that they be required to set up what interest, if any, they have in the property in controversy, and for leave to

make service on them and to carry on this cause against said parties as parties in interest, and for judgment as prayed in their original petition. At the time said application was filed, there was filed by defendants a motion to dismiss the cause, both of which were submitted together, but no action was taken thereon until March 27, 1908, at which time they came on for hearing in the district court of Noble county. There, on April 23, 1908, both the application and motion to dismiss were overruled, and plaintiffs bring the case here. As Dan K., Dora M., and Sarah K., Wickard were of age at the time of the death of S. A. Wickard, and the propriety of the subsequent revivor against them by consent being unquestioned, the same will be no further noticed.

It is assigned for error that the court abused its discretion in refusing to permit plaintiffs to file their said supplemental petition. Having heretofore decided in *Goldborough v. Hewitt*, 26 Okla. 859, 110 Pac. 906, that the fact of the death of a defendant in error between the submission and decision of a cause in this court does not impair the validity of the judgment thereafter rendered, and that this court will, on proper showing, set aside the judgment, recall the mandate, and direct the clerk to refile the opinion and enter judgment in the case *nunc pro tunc*, as of the date when the same was submitted, we are of the opinion that the death of Dora A. Wickard did not affect the judgment of reversal by the supreme court of the territory of Oklahoma (*Boyes v. Masters*, 17 Okla. 460, 89 Pac. 198), and hence the controversy before us may be considered eliminated of that fact. Assuming, out of an abundance of caution, as plaintiffs' counsel has done, that, upon the suggestion of the death of S. A. Wickard, the suit was not properly revived in the district court against his minor heirs by consent, and the order of court thereupon entered, and further assuming with counsel for both sides that said heirs and the executors of the last will of said Wickard and Dora M. Wickard, his wife, are necessary parties to the action of foreclosure set forth in the original petition, the only question passed on by the trial court, and which is for us to determine, is whether the summary method of revivor of actions prescribed by article 19 of chapter 66 of Wilson's Revised and Annotated Statutes of Oklahoma is exclusive, and, if not, whether, under §§ 4238 and 4348 of said statute, the court should have permitted by this proceeding a revivor of this action against said heirs and the executors of said Wickard and Dora M., his wife. Section 4238 of Wil-

son's Revised and Annotated Statutes of Oklahoma provides: "An action does not abate by the death or other disability of a party, or by the transfer of any interest therein during its pendency, if the cause of action survive or continue. In case of the death or other disability of a party, the court may allow the action to continue by or against his representatives or successor in interest. In case of any other transfer of interest, the action may be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action."

Article 19, chap. 66, provides in substance for the revivor of the action, when it survives, by a conditional order of court to be made in term, or by a judge if in vacation. It provides a method of service of the order, and, if sufficient cause is not shown against the revivor, the action stands revived. It further provides, in substance, that the order cannot be made except by consent within one year from the time it could have been first made. The right to revive under this article does not depend on the discretion of the court or judge making the order, but, under the conditions and within the time therein limited, is a matter of right. *Kilgore v. Yarnell*, 24 Okla. 525, 103 Pac. 698. Section 4348 reads: "Either party may be allowed, on notice, and on such terms as to costs as the court may prescribe, to file a supplemental petition, answer, or reply, alleging facts material to the case, occurring after the former petition, answer, or reply." Construing similar statutes, the following cases hold that the method provided in article 19 of chapter 66, supra, is not exclusive of the right of the court to permit it to be prosecuted against the representatives of a defendant, as provided in § 4238, supra, and to revive it by supplemental petition, as provided for in the last section of the statute cited: *Carter v. Jennings*, 24 Ohio St. 182; *Black v. Hill*, 29 Ohio St. 87; *Fox v. Abbott*, 12 Neb. 333, 11 N. W. 303; *Rakes v. Brown*, 34 Neb. 304, 51 N. W. 848; *Hunter v. Leahy*, 18 Neb. 81, 24 N. W. 680; *Missouri P. R. Co. v. Fox*, 56 Neb. 746, 77 N. W. 130.

The leading case on the subject seems to be *Carter v. Jennings*, 24 Ohio St. 182. That was a suit for the cancellation of a note and mortgage. Subsequent to the filing of the report of the referee, the defendant died, and letters of administration were granted on his estate. After more than one year had expired from the date of his death, plaintiff applied for an order to revive the action against his administrators. The order was granted, as also was

leave to plaintiff to file a supplemental petition to revive the action against said administrators. Among the defenses pleaded was that there was no motion for a conditional order of revivor within one year from the time the suit could have been first revived, and that there was no revivor of the same, either actual or conditional, within one year after the appointment of said administrators, and that said administrators did not consent to revive the action. On the hearing the district court found the facts as stated, and that neither plaintiff nor his attorneys had knowledge of the appointment of the administrator until about the time application was first made to revive. The case went to the supreme court on a question reserved. There the court, speaking to title 13, chap. 1, of the Code (2 Swan & C. Rev. Stat.), substantially the same as our article 19, chap. 66, supra, said: "That chapter of the Code provides for reviving the action, where the right of action survives, by a conditional order of the court if made in term, or by a judge if in vacation. The order is to be served in the mode prescribed, and if sufficient cause be not shown against the revivor, the action stands revived. The order cannot be made, except by consent, unless within one year from the time it could have been first made. When, under the provisions contained in the chapter, an action stands revived, the trial is not to be postponed by reason of the revivor, if the action would have stood for trial in case no revivor had become necessary."

Speaking to a section of the Code almost identical with our § 4238, supra, the court said: "Title 3 of the Code treats of the general rules in regard to parties, and of the authority of the court to allow a change of parties, and to require others to be brought in, when necessary to a determination of the controversy. Under this title, § 39 provides, among other things, that an action does not abate by the death of a party during its pendency, if the cause of action survive or continue. 'That in case of the death . . . of a party the court may allow the action to continue by or against his representative or successor in interest.' . . . While we have not found the question free from difficulty, we have arrived at the conclusion that a fair construction of the Code warrants us in laying down the following propositions as applicable to the case: (1) The right to revive an action, under title 13, chap. 1, of the Code, is not dependent on the discretion of the court or of the judge making the order, but, under the conditions and within the time therein limited, is a matter of right. (2) The chapter of the Code above referred to provides a summary remedy for reviving an action, but the remedy thus provided is not exclusive. The court has power, under § 39 of the Code, in the exercise of a sound discretion, to allow the action to be prosecuted by or against the representatives or successor in interest of a deceased party. For this purpose supplemental pleadings may be allowed and process served as in the commencement of an action. (3) The court, in the exercise of this discretion, is governed by the equitable principle which requires reasonable diligence and good faith on the part of those invoking its action; and where the time has elapsed within which an action can be revived by a conditional order, as provided for in title 13, chap. 1, of the Code, the application for leave to continue the suit by supplemental pleading may be granted or refused, according to the nature and circumstances of the case. . . . On the supplemental petition, the action is ordered to be revived against the administrators of Jennings. As to all other matters, the cause is remanded to the district court for further proceeding." Although the court did not speak of it, § 142, chap. 7, title 7, identical with our § 4348, supra, was in force in that jurisdiction at that time. To the same effect is the holding of the supreme court of Nebraska construing similar statutes.

Maxwell's Pleading and Practice, 5th ed. 713, says: "The summary mode of reviving actions provided by the Code is not exclusive. The court has power under § 45 of the Code to allow the action to be prosecuted by or against the representatives or successors in interest of a deceased party. For this purpose supplemental pleadings may be allowed and process served as in the commencement of an action,"—citing *Carter v. Jennings*, supra; *Fox v. Abbott*, 12 Neb. 328, 11 N. W. 303.

Section 45 of the Code referred to is substantially the same as our Code; § 4238, supra, and article 19, chap. 66, supra, are substantially the same, if not identical, with title 13 of their Code of Civil Procedure (Neb. Comp. Stat. 1889). Construing said statutory provisions, the court, in *Fox v. Abbott*, 12 Neb. 328, 11 N. W. 303, said: "Title 13 of the Code provides a summary remedy for reviving actions by a conditional order of the court if made in term time, or by a judge if in vacation. . . . The court undoubtedly has power under § 45 of the Code to allow the action to be prosecuted by or against the representatives of a deceased party, in which case

it is a matter of right. (2) The chapter of the Code above referred to provides a summary remedy for reviving an action, but the remedy thus provided is not exclusive. The court has power, under § 39 of the Code, in the exercise of a sound discretion, to allow the action to be prosecuted by or against the representatives or successor in interest of a deceased party. For this purpose supplemental pleadings may be allowed and process served as in the commencement of an action. (3) The court, in the exercise of this discretion, is governed by the equitable principle which requires reasonable diligence and good faith on the part of those invoking its action; and where the time has elapsed within which an action can be revived by a conditional order, as provided for in title 13, chap. 1, of the Code, the application for leave to continue the suit by supplemental pleading may be granted or refused, according to the nature and circumstances of the case. . . . On the supplemental petition, the action is ordered to be revived against the administrators of Jennings. As to all other matters, the cause is remanded to the district court for further proceeding." Although the court did not speak of it, § 142, chap. 7, title 7, identical with our § 4348, supra, was in force in that jurisdiction at that time. To the same effect is the holding of the supreme court of Nebraska construing similar statutes.

supplemental pleadings may be filed and summons served as in the commencement of an action. And this is the practice in Ohio under a similar statute. *Carter v. Jennings*, 24 Ohio St. 182." To the same effect, see *Stephens v. Magor*, 25 Wis. 533; also *Tarbox v. French*, 27 Wis. 651.

We are therefore of opinion that article 19 of chapter 66 is not a method of revivor exclusive of all others; that, as in equity a suit becomes in one way defective by the death of a party, so this cause became defective on the death of Wickard and later upon the death of his wife, but did not abate by reason of § 4238, supra; that, not abating after the remedy afforded by said article was not available by reason of lapse of time, it could only be revived by pursuing the procedure afforded by § 4348, supra, prescribing a remedy concurrent with that prescribed by said article and analogous to that afforded under the old chancery system, which was that on the death of a party, the action not abating, the same could be revived only by a bill of revivor, a bill of revivor and supplement, and by an original bill in the nature of a bill of revivor. *Mite. Eq. Pl. *57 and 61.*

To make a supplemental petition the proper procedure to secure the relief theretofore obtainable under those old forms, § 4348, supra, was enacted. Concerning said section the court, in *Kimble v. Seal*, 92 Ind. 276, said: "This section of the statute is in the spirit of the Code practice abolishing the distinctions in pleading and practice between actions at law and suits in equity, and combines the provisions of the old chancery supplemental bill with the ancient plea of *pais darrein continuance*. Facts existing at the time of filing a pleading may be made a part thereof by way of amendment. If they have occurred since the filing of the pleading, they can only be made a part thereof by a supplemental pleading. *Bicknell, Pr.*, pp. 108 & 109. See authorities therein cited."

We are also of opinion, the object of the original petition being to foreclose a mortgage on realty, executed by Wickard to secure an alleged indebtedness due to the plaintiff Boyes, that upon his death and the death of his wife, plaintiff had the right and should be permitted to pursue his remedy against their legal representatives, and to that end should have been permitted, no question of laches raised, as here, to bring them in by supplemental petition. The court erred in refusing his permission so to do. We have not been favored with a brief for defendant in error.

For the reason stated, the judgment is 33 L.R.A. (N.S.)

reversed and remanded, with directions, to proceed in accordance with this opinion.

All the Justices concur, except Kane, J., who concurs in the result.

WEST VIRGINIA SUPREME COURT OF APPEALS.

HENRY RAINES, Plff. in Err.,

v.

CHESAPEAKE & OHIO RAILWAY COMPANY.

(68 W. Va. 694, 70 S. E. 711.)

Carrier — premature embarkation — responsibility.

Where one intending to become a passenger, and while the work of preparing the train on which he intends to take passage is going on, necessitating dangerous switchings and coupling of the cars, of which he has notice, and at a point where the carrier is not accustomed to receive passengers, and without notice to or invitation by any officer or agent of the carrier with authority, enters one of the coaches, and, in attempting to go from one coach to another, is injured by a jolt or impact given to the coaches in making such switchings or couplings, the carrier is not liable to him in damages for his injuries thus sustained.

(February 21, 1911.)

Headnote by MILLER, J.

Note. — Liability of carrier for injuries to intending passenger who enters car prematurely.

This note is not intended to cover cases of boarding a moving train, as where a person intending to become a passenger attempts to board the train before it had come to a stop. As to negligence of passengers in getting on or off a moving train, see note to *Hoyleman v. Kanawha & M. R. Co.* 22 L.R.A. (N.S.) 741.

The decisions in the cases cited in this note turn largely upon the particular facts and circumstances, and seem to admit of no generalization other than that the high degree of care ordinarily owed by a carrier to a passenger does not obtain in favor of one who, without the carrier's knowledge and in the absence of any custom to that effect, boards a car prematurely, before it is ready for the reception of passengers.

Thus, it was said in *Farley v. Cincinnati, H. & D. R. Co.* 47 C. C. A. 156, 108 Fed. 14, that the obligations of a carrier to exercise that high degree of care for the safety of its passengers does not exist with respect to one who, without the knowledge of the carrier, boards a car knowing that

ERROR to the Circuit Court for Raleigh County to review a judgment in favor of defendant in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Messrs. A. A. Lilly and M. F. Matheny, for plaintiff in error:

One intending to take passage on a railway passenger train, who goes to the station a reasonable time before the departure of the train, is from the time of his arrival at the place a passenger.

2 Wood, Railway Law, p. 1046; Norfolk & W. R. Co. v. Galliher, 89 Va. 639, 16 S. E. 935; Boggess v. Chesapeake & O. R. Co. 37 W. Va. 297, 23 L.R.A. 777, 16 S. E. 525;

the car is not ready for receiving passengers, and that it is not expected or intended that it should be entered at that time or place. As to the effect of a custom or usage to establish a carrier's liability where a person has entered a train before it was ready, the court said: "The difficulty to a railroad company in exercising a high degree of care towards persons on cars in motion in its switch yards, and the increased liability from obligation to do so, are so manifest that a usage or custom relied on to create the relation of carrier and passenger, and impose on the railroad company this high duty, ought, under such conditions, upon the plainest principles of justice, to be established by evidence which shows, or strongly tends to show, a well-defined, definite, and continuous practice, from which knowledge on the part of the company may be fairly inferred."

In Curry v. Georgia Midland & G. R. Co. 92 Ga. 293, 18 S. E. 422, it was held that the railroad company was not liable for an injury to a person who boarded a train at a place where the conductor had distinctly announced to persons assembled that passengers would not get aboard, but that the train would move up and stop for them at another place.

But the fact that a train is being made up and is not ready for the reception of passengers is not available as a defense where it is customary for passengers to board the train at that time and place, and plaintiff in fact did so at the express invitation, or at least with the implied consent, of the carrier's employees. Wise v. Wabash R. Co. 135 Mo. App. 230, 115 S. W. 452.

A carrier is not liable as such to one who goes upon the train before it is ready to depart, if such person knew, or under the circumstances ought to have known, that it was not ready; but if under the condition and situation of the train, and the actions and conduct of the train officers, viewed in the light of the circumstances surrounding them at the time, the intending passenger was justified in believing, and did honestly believe, that the train

Gillingham v. Ohio River R. Co. 35 W. Va. 588, 14 L.R.A. 798, 29 Am. St. Rep. 827, 14 S. E. 243.

The duty was imposed upon the company to use the utmost care for his safety.

2 Enc. Dig. 695; Claiborne v. Chesapeake & O. R. Co. 46 W. Va. 363, 33 S. E. 262; Gillingham v. Ohio River R. Co. 35 W. Va. 588, 14 L.R.A. 798, 29 Am. St. Rep. 827, 14 S. E. 243; Smith v. Norfolk & W. R. Co. 48 W. Va. 69, 35 S. E. 834; Barker v. Ohio River R. Co. 51 W. Va. 423, 90 Am. St. Rep. 808, 41 S. E. 148; Credle v. Norfolk & S. R. Co. 151 N. C. 50, 65 S. E. 604; Hulbert v. New York C. R. Co. 40 N. Y. 146; Troy v. Cape Fear & Y. Valley R. Co. 99 N. C. 298, 6 Am. St. Rep. 521, 6 S. E. 77; Bradley v. Ohio River

when he boarded it was about departing, and it was impracticable for him to get off after discovering his mistake, then he was a passenger, and entitled to his rights as such. Brown v. Scarboro, 97 Ala. 316, 12 So. 289.

Where a carrier receives a person into its car or train before such train is made up, it is bound, in making up its train, to couple its cars and manage and control its cars and engines in such a careful, skilful, and prudent manner as to carry the person so received as a passenger with reasonable safety. Hannibal & St. J. R. Co. v. Martin, 111 Ill. 225.

And so, in Miller v. Atlanta & C. Air Line R. Co. 143 N. C. 115, 55 S. E. 439, it was held that an instruction to the jury to the effect that if the plaintiff boarded the rear car of a freight train before it was coupled to the engine, that is, before the train was made up, he boarded such car wrongfully, and for this reason could not recover for his injury, was erroneous, because the liability of the railroad company did not depend exclusively upon whether the car was coupled to the engine when plaintiff got aboard, there being, at least, some evidence that the plaintiff had gone to the car and entered it with the knowledge of the company's servants, if not with their implied consent; and even if then at first to blame for boarding the car, the company might not have exercised the care which the plaintiff's position under the circumstances required,—which questions were for the jury to determine.

The evidence was held sufficient to sustain a finding that one became a passenger, in Missouri, K. & T. R. Co. v. Simmons, 12 Tex. Civ. App. 500, 33 S. W. 1096, where it was shown that the cars intended for passengers were standing a short distance from the platform, waiting for the freight train of which they were to be a part to be coupled on; that several men, among them the plaintiff, intending to become passengers, without having purchased tickets, but having money to pay their fare, entered one of these coaches without notifying the conductor, but with the knowledge

& C. R. Co. 126 N. C. 735, 36 S. E. 181; Emery v. Raleigh & G. R. Co. 102 N. C. 234, 10 S. E. 141; Ray v. Aberdeen & R. F. R. Co. 141 N. C. 84, 53 S. E. 622; Layne v. Chesapeake & O. R. Co. — W. Va. —, 31 L.R.A.(N.S.) 414, 69 S. E. 700.

Messrs. Simms, Enslow, Fitzpatrick, & Baker, for defendant in error:

Even where an intending passenger holds a ticket, the duty from the carrier to him does not arise until he has come under the charge of the carrier in some way.

Radley v. Columbia Southern R. Co. 44 Or. 332, 75 Pac. 212, 1 A. & E. Ann. Cas. 447; McLaurin v. Atlanta & W. P. R. Co. 85 Ga. 504, 11 S. E. 840; Coleman v. Georgia R. & Bkg. Co. 34 Ga. 1, 10 S. E. 498; Berry v. Missouri R. R. Co. 124 Mo.

223, 25 S. W. 229; Toledo, W. & W. R. Co. v. Brooks, 81 Ill. 245; Chicago & E. R. Co. v. Field, 7 Ind. App. 172, 52 Am. St. Rep. 444, 34 N. E. 406; O'Brien v. Boston & W. R. Co. 15 Gray, 20, 77 Am. Dec. 347; 4 Elliott, Railroads, § 1581.

The liability of the carrier is not absolute. The passenger assumes the risks ordinarily incident to the coupling of cars.

St. Louis Southwestern R. Co. v. Morrow, — Tex. Civ. App. —, 93 S. W. 164; Ft. Worth & D. C. R. Co. v. Rogers, 24 Tex. Civ. App. 382, 60 S. W. 61; Texas & P. R. Co. v. Adams, 32 Tex. Civ. App. 112, 72 S. W. 81; Choate v. San Antonio & A. P. R. Co. 90 Tex. 82, 36 S. W. 247, 37 S. W. 319; Louisville & N. R. Co. v.

of the brakeman. It appeared also that after the switching was completed, the train was to be moved up opposite the platform to receive passengers, and that the ticket office and waiting room were open and some passengers waiting there to take the train.

Contributory negligence.

An intending passenger who boards a train or car before it has been put in readiness to receive passengers is not guilty of negligence which will bar his recovery for an injury received under such circumstances, when his act was in accordance with a custom which has been acquiesced in by the company.

Thus, a recovery for an injury received in boarding a passenger coach attached to a freight train, while the coach was 200 to 400 feet from the station, was allowed in Jones v. New York C. & H. R. R. Co. 46 App. Div. 470, 61 N. Y. Supp. 721, although it appeared that at the station in question there was more or less shifting of the cars, and when the train was finally made up the conductor had the train pull up to the station and stop for passengers if there were any. The following from the opinion best explains the holding: "In the prevailing opinion of Chief Judge Parker written upon the reversal of the former judgment, it was held that no custom was shown to take passengers on except at the station, and that, without evidence sufficient to authorize a finding of such a custom, the defendant did not owe the duty to use care at that point to protect anyone who might be boarding the train without authority. Upon this trial, however, the plaintiff has produced evidence from which a jury could find that such custom existed, with the acquiescence, if not the encouragement, of the defendant's employees."

It is not negligence *per se* to enter, with other passengers, a car detached from a train, and in apparent readiness except that it was detached, at the time designated for the departure of the train, and without

known objection from the carrier; and one who entered a car under such circumstances was held not guilty of contributory negligence, in Root v. Catskill Mt. R. Co. 33 Fed. 858.

In affirming a recovery against the defendant railroad company for injuries received while the plaintiff was on board one of the company's trains, the court said, in Yazoo & M. Valley R. Co. v. Roberts, 88 Miss. 80, 40 So. 481: "Nor do we think that the fact that the passengers boarded the train before the train was ready to start upon its run such negligence as could debar them of recovery. They were prospective passengers, the schedule time for the departure of the train had arrived, the coach was on the track ready for their reception, and they were permitted to board the train with the knowledge and tacit acquiescence of the employees in charge. We think these facts establish the relation of carrier and passenger. At most, it can but be said that in so boarding the train they were guilty of 'mere contributory negligence,' and this is not sufficient to defeat a recovery where the injury is caused by a kicking switch made within a municipality, as was the case in the instance here under review."

It was held in Western Maryland R. Co. v. Herold, 74 Md. 510, 14 L.R.A. 75, 22 Atl. 323, that a woman who entered a car left standing with brakes set, on the grounds of a sanatorium, a few minutes before the time set for it to start, and when no one was in charge of it, but when others were already on board, was not guilty of negligence, as matter of law, which would prevent her recovery for injuries occasioned by the starting of the car when a boy released the brakes, especially where rules against entering the car before notice to do so had never been published or posted, and she had no actual knowledge of them.

It was held in St. Louis Southwestern R. Co. v. Morrow, — Tex. Civ. App. —, 93 S. W. 162, that where an intending passenger was directed by the ticket agent to his train, then standing on the track, but not entirely made up, and was also told

Hale, 102 Ky. 600, 42 L.R.A. 293, 44 S. W. 213; Elliott, Railroads, ¶ 1589.

It was plaintiff's duty, if he was a passenger, to have exercised reasonable and ordinary care for his own safety, and when in a safe place, knowing that the engine would recouple to the train at any moment, to have stayed there.

Elliott, Railroads, § 1630; Chicago, B. & Q. R. Co. v. Hazzard, 26 Ill. 373; Hite v. Metropolitan Street R. Co. 130 Mo. 132, 51 Am. St. Rep. 555, 31 S. W. 262, 32 S. W. 33; Illinois C. R. Co. v. Green, 81 Ill. 19, 25 Am. Rep. 255.

Miller, J., delivered the opinion of the court:

In an action for personal injuries the court below, on its motion directed the jury to find for the defendant, and the jury found accordingly; and to review the judgment of *nil capiat* thereon, plaintiff brings error to this court.

The correctness of the judgment below depends upon the question whether the evidence adduced before the jury proved, or in an appreciable degree tended to prove, such a case made by the pleadings as entitled plaintiff to have the evidence submitted to the jury on any issuable fact, or whether the facts proven presented but a question of law for the court, as the court below necessarily determined in directing the verdict.

It is alleged and proven that plaintiff sustained the injuries of which he complains at Lester, in Raleigh county, the terminus, so far as passenger traffic is concerned, of a branch line operated by defendant company and connecting with its main line at Prince station. It is also alleged that at the time plaintiff sustained his injury he had become a passenger on the defendant's railway train, and, as such,

entitled to all the care and protection which the law imposes upon a carrier of passengers. The court below, however, on certain facts proven, and as to which there is no conflicting evidence, held that at the time plaintiff received his injury, the relationship of carrier and passenger had not begun; that the plaintiff was then a mere intruder, having gone upon the train without the knowledge or invitation of the defendant or of its employees in charge of the train, and before the train had been prepared to receive passengers, which was well known to plaintiff, and at a place where the defendant was not accustomed to receive passengers. In this conclusion we think the court below was clearly right, and that the verdict was properly directed.

The facts are that after the defendant's train had reached Lester, about 10:50 A. M. of the day of the alleged injuries, and as the custom was, after discharging the passengers, the engine had been cut loose and sent around on a loop switch to be brought back in front of and coupled back to the coaches for the return trip. In making its round on the loop, a freight car was encountered which had to be shoved in front of the engine clear around on the main track, and then brought back in front of the engine and set back on the switch out of the way of the train. To do this the custom was, as was well known to plaintiff, to make what is called a running switch, that is, the car was pushed down the main track, and as the engine came back to be hooked up to the train, the car was cut loose before reaching the switch, the switch thrown quickly, and the freight car in this way kicked off or thrown off on the side track. On this occasion plaintiff, who lived but a short distance away, on the arrival of the train that morning, went immediately down to

by the porter of the car he entered that it was his train and to go right in, the facts did not call for a charge on assumed risk.

But in *Hodges v. New Hanover Transit Co.* 107 N. C. 576, 12 S. E. 597, the plaintiff, with other persons, having spent the day at a seaside resort, went to the platform constructed by the defendant for its passengers, from a half to three quarters of an hour before the time their train was to depart, and, in order to avoid the crowds, immediately attempted to board the train, but without invitation or suggestion by defendant's employees. There was no depot or station house to accommodate passengers, but they were allowed as of right to sit and walk on the hotel piazza and in the hotel office. At the time plaintiff went to the cars, lights were burning about the platform and the hotel, but the cars were not lighted nor in readiness for starting, though they stood alongside the platform. 33 L.R.A. (N.S.)

Prior to starting, two signals were to have been given, one fifteen and one five minutes before the time. In attempting to board a car the plaintiff fell and was injured, and the liability of the defendant company therefore was most emphatically denied by the court. The act of the plaintiff was said to have been incautious, imprudent, and grossly negligent. While there is no such suggestion in this case, it would seem that the absence of a proper station for the convenience of waiting passengers might, under some circumstances, be held to justify a passenger in entering his car or train before it was actually in readiness.

Upon the question of the termination of a passenger's relation as such upon reaching his destination, see notes to *Powell v. Philadelphia & R. R. Co.* 20 L.R.A. (N.S.) 1019, and *Glenn v. Lake Erie & W. R. Co.* 2 L.R.A. (N.S.) 873. W. A. S.

the railroad, which was in full view, and without ticket or payment of fare, and, so far as the record shows, without the knowledge or consent of the officers of the train, and before the train had been prepared to receive passengers, and before it had been pulled up to the place where passengers were usually received, and before any announcement by the conductor, as his custom was, calling for passengers to get aboard, entered and took a seat in one of the coaches, followed soon afterwards by two other men. At the suggestion of one of these men, plaintiff left his seat in the car which he had entered followed by the other two men, and started to go into the rear coach. Just as plaintiff stepped upon the platform of the car which he had first entered, in his journey to the rear car, the engine came back, followed closely by the freight car, which the switchman had failed to turn into the switch, and bumped into the passenger coaches in making the coupling, knocking the plaintiff down on the platform, the man immediately behind him falling upon him, the third falling on the second man, and in which fall plaintiff alleges he sustained the injuries complained of. Whether or not the engine as it was driven back in the usual way, or by the added force of the freight car coming in contact with it, gave the passenger coaches any unusual jolt, the evidence is conflicting; but we do not think this point of conflict material; nor do we think it material that it may have been negligence to make running switches as the defendant was accustomed to do, and did do on this occasion, for if plaintiff had not been received as a passenger, the law is that he assumed all the risks of danger incident to the way in which switches and couplings were usually made, before the train was prepared to receive passengers at that point. Besides, if he had remained in his seat in the car which he first entered, he would have sustained no injuries. With knowledge, however, of all the facts which should have put him upon his guard, and knowing that at any moment the engine was liable to be brought back and coupled to the coaches, and without taking any precautions for his own safety, he undertook to enter the coaches and pass from one to the other without notice to or, so far as the evidence shows, knowledge of the train men thereof, and thereby contributed to the injuries sustained.

The proposition cannot be questioned that when one has been received as a passenger the utmost care which human skill, diligence, and foresight can provide to protect him from danger is required of the carrier, and the slightest negligence on the 33 L.R.A. (N.S.)

carrier's part is regarded gross negligence. This proposition was lastly affirmed in *Kennedy v. Chesapeake & O. R. Co.* — W. Va. —, 70 S. E. 359. But as a proposition of law applicable to this case we think that, where one intending to become a passenger, and while the work of preparing the train on which he intends to take passage is going on, necessitating dangerous switchings and couplings of the cars, of which he has notice, and at a point where the carrier is not accustomed to receive passengers, and without notice to or invitation by any officer or agent of the carrier with authority, enters one of the coaches, and, in attempting to go from one coach to another, is injured by a jolt or impact given to the coaches in making such switches or couplings, the carrier is not liable to him in damages for his injuries thus sustained. *Moore, Carriers*, 549; *St. Louis Southwestern R. Co. v. Morrow* — (Tex. Civ. App. —), 93 S. W. 162; *Hannibal & St. J. R. Co. v. Martin*, 11 Ill. App. 386; *Dewire v. Boston & M. R. Co.* 148 Mass. 343, 2 L.R.A. 166, 19 N. E. 523; *Choate v. San Antonio & A. P. R. Co.* 90 Tex. 82, 36 S. W. 247, 37 S. W. 319; *Radley v. Columbia Southern R. Co.* 44 Or. 332, 75 Pac. 212, 1 A. & E. Ann. Cas. 447; *Illinois C. R. Co. v. Green*, 81 Ill. 19, 25 Am. Rep. 255; 4 Elliott, Railroads, §§ 1581, 1630. While the cases cited are not exactly parallel, we think they fully support this proposition, and that the principles enunciated therein control this case.

Finding no error in the judgment below, it will be our duty to affirm it, and it will be so ordered.

Brannon, J., absent.

WEST VIRGINIA SUPREME COURT OF APPEALS.

DOLLAR SAVINGS & TRUST COMPANY

v.

E. T. CRAWFORD et al. Plffs. in Err.

(— W. Va. —, 70 S. E. 1089.)

Note — recital of consideration — effect.

1. A recital of the consideration in a note otherwise negotiable in form does not render it non-negotiable.

Same — rights of assignee.

2. The rights of a bona fide assignee of such a note in due course are not affected by the equities of the maker.

Same — notice of consideration — effect.

3. Knowledge by an assignee in due course of a negotiable note, that it was given for

Headnotes by WILLIAMS, P. J.

the purchase price of a specified quantity of land at a specified price per acre, is not notice to him of failure of title or shortage in quantity.

Same — payable to trustee — effect.

4. The use of the word "trustee" following the name of the payee in a negotiable note does not destroy its negotiability, if the trustee has the right to sell it and receive the proceeds; its only effect is to put the purchaser upon notice concerning the trustee's title and authority in respect to the note.

Same — assignment without recourse.

5. The fact that a note is assigned without recourse casts no suspicion upon the holder's title.

Pleading — note — failure of consideration.

6. Whenever failure of consideration is a proper defense in an action of assumpsit upon a negotiable note, it need not be specially pleaded, but may be proven under the general issue.

Same — application of payment.

7. The holder of a note has the right to apply a partial payment received thereon, first to a discharge of the interest then due, and the balance, if any, to the payment of the principal *pro tanto*. A memorandum made by him on the note at the time of receiving the partial payment, "Indorsement on principal," followed by the amount received, does not estop him from afterwards applying enough of the payment to discharge the interest then due.

(April 4, 1911.)

ERROR to the Circuit Court for Kanawha County sustaining a demurrer to a special plea and directing a verdict for plaintiff in an action brought to recover the amount alleged to be due on a promissory note. Affirmed.

The facts are stated in the opinion.

Messrs. Brown, Jackson, and Knight, for plaintiffs in error:

When a purchaser of land, upon taking a bond for title, gives in payment therefor a note expressing on its face that it is so given, the note itself will be notice of his equity in case the title of the land shall prove defective, and an assignee or holder of the note cannot, in case of such defect in the title of the land, recover on the note, though he took it before it became due.

Note. — As to effect of knowledge of consideration for note to put a purchaser upon notice of defenses, see note to *Mee v. Carlson*, 29 L.R.A.(N.S.) 351, 380.

As to the effect of an indorsement "without recourse" to put a purchaser on inquiry, see page 378 of the note just referred to.

33 L.R.A.(N.S.)

Howard v. Kimball, 65 N. C. 175, 6 Am. Rep. 739.

If the purchaser knows at the time of his purchase that the consideration for which the note was given has failed, if he be informed that the validity of the consideration is a question yet to be tested, or if he knows or has legal constructive notice that the consideration is illegal, he cannot be considered a bona fide holder.

7 Cyc. Law & Proc. pp. 943, 947; 4 Am. & Eng. Enc. Law, p. 303; Dan. Neg. Inst. § 795.

Smith v. Lawson, 18 W. Va. 236, 41 Am. Rep. 688; *Roberts v. Tavenner*, 48 W. Va. 632, 37 S. E. 576.

A note payable to the order of one as "trustee" is not negotiable.

Third Nat. Bank v. Lange, 51 Md. 138, 34 Am. Rep. 304; *Hazeltine v. Keenan*, 54 W. Va. 602, 102 Am. St. Rep. 953, 46 S. E. 609; *Noxon v. Smith*, 127 Mass. 485.

Messrs. Linn & Byrne, also for plaintiffs in error.

Messrs. Price, Smith, Spilman, & Clay, for defendant in error:

Recital of consideration in the note does not affect its negotiability.

Dan. Neg. Inst. § 797; *Biegler v. Merchants' Loan & T. Co.* 164 Ill. 197, 45 N. E. 512; *Bank of Commerce v. Barrett*, 38 Ga. 126, 95 Am. Dec. 384; *Heard v. Dubuque County Bank*, 8 Neb. 10, 30 Am. Rep. 811; *Siegel v. Chicago Trust & Sav. Bank*, 131 Ill. 569, 7 L.R.A. 537, 19 Am. St. Rep. 51, 23 N. E. 417; *Ferriss v. Tavel*, 87 Tenn. 386, 3 L.R.A. 414, 11 S. W. 93; *Fox v. Citizens' Bank & T. Co.* — Tenn. —, 35 L.R.A. 678, 37 S. W. 1102; *Buchanan v. Wren*, 10 Tex. 560, 30 S. W. 1077; *State Nat. Bank v. Cason*, 39 La. Ann. 865, 2 So. 881; *Beardslee v. Horton*, 3 Mich. 560; *Guilford v. Minneapolis, S. Ste. M. & A. R. Co.* 48 Minn. 560, 31 Am. St. Rep. 694, 51 N. W. 658; *Doherty v. Perry*, 38 Ind. 15; *Davis v. McCready*, 17 N. Y. 230, 72 Am. Dec. 461; *Taylor v. Curry*, 109 Mass. 36, 12 Am. Rep. 661.

Knowledge by plaintiff of consideration of the note did not put it on inquiry as to whether there was or would be a failure of consideration.

State Nat. Bank v. Cason, 39 La. Ann. 865, 2 So. 881; *Hudson v. Best*, 104 Ga. 131, 30 S. E. 688; *Merchants' & P. Bank*

For use of word "trustee" as affecting negotiability or notice of right of beneficiary of negotiable paper, see note to *Ford v. Brown*, 1 L.R.A.(N.S.) 188.

For reference to extrinsic agreement as affecting negotiability of bill or note, see note to *Klots Throwing Co. v. Manufacturers' Commercial Co.* 30 L.R.A.(N.S.) 40.

v. Penland, 101 Tenn. 445, 47 S. W. 693; Borden v. Clark, 26 Mich. 410.

Assignment of the note without recourse does not affect plaintiff's title.

Borden v. Clark, 26 Mich. 410; Kelly v. Whitney, 45 Wis. 110, 30 Am. Rep. 697; Stevenson v. O'Neal, 71 Ill. 314.

Plaintiff's title was not affected by the interest, if any, of certain officers in the Hazlett trust.

Morse, Banks & Bkg. §§ 134, 136; First Nat. Bank v. Christopher, 40 N. J. L. 435, 29 Am. Rep. 262; Merchants' Nat. Bank v. Lovitt, 114 Mo. 519, 35 Am. St. Rep. 770, 21 S. W. 825; Waynesville Nat. Bank v. Irons, 8 Fed. 1.

The addition of the word "trustee" to payee's name does not affect the negotiability of the note.

Perry, Tr. 5th ed. § 225, p. 327; Fox v. Citizens' Bank & T. Co. 35 L.R.A. 678, and note, — Tenn. —, 37 S. W. 1102; Tradesmen's Nat. Bank v. Looney, 99 Tenn. 278, 38 L.R.A. 837, 63 Am. St. Rep. 830, 42 S. W. 149; Central State Bank v. Spurlin, 111 Iowa, 187, 49 L.R.A. 661, 82 Am. St. Rep. 511, 82 N. W. 493; Bush v. Peckard, 3 Harr. (Del.) 385; Downer v. Read, 17 Minn. 493, Gil. 470; Davis v. Garr, 6 N. Y. 124, 55 Am. Dec. 387; Hazeltine v. Keenan, 54 W. Va. 602, 102 Am. St. Rep. 953, 46 S. E. 609.

Williams, P., delivered the opinion of the court:

Plaintiff recovered a judgment against E. T. Crawford and W. L. Ashby in the circuit court of Kanawha county on the 20th day of March, 1909, for the sum of \$15,411.08, in an action of assumpsit upon a promissory note executed by defendants to Howard Hazlett, trustee, and by him indorsed to plaintiff. To this judgment a writ of error and supersedeas was awarded. Defendants pleaded the general issue, partial payment, and also filed a special plea, setting up failure of consideration. The court sustained plaintiff's demurrer to the special plea; and on the issues joined on the remaining pleas, after hearing the evidence, directed a verdict for plaintiff.

The case has been very carefully briefed, and the points of law relied on are elaborately and ably argued by counsel on both sides. There is no dispute as to facts, and the questions of law are clear cut, and we have only to determine their applicability to the facts in the case.

The first assignment of error relates to the action of the court in sustaining the demurrer to the special plea. This plea

alleged failure of consideration for the note. The note reads as follows:

\$35,021.

Wheeling, West Virginia,

April 16, 1904.

Two years . . . after date we promise to pay to the order of Howard Hazlett, trustee, thirty-five thousand and twenty-one 00-dollars, with interest from date until paid, at the rate of 6 per cent per annum, in part payment for land . . . in Logan and Boone counties, and upon which a lien has been reserved to secure this note, payable at the National Exchange Bank, Wheeling, West Virginia.

E. T. Crawford.

W. L. Ashby.

The following indorsements appear on the back of the note, viz.: "This note does not begin to bear interest until May 20, 1904. Howard Hazlett, Trustee." "Wheeling, W. Va., April 29, 1905, for value received, assigned, and transferred to the Dollar Savings & Trust Company, of Wheeling, without recourse. Howard Hazlett, Trustee." "Balance due on principal \$13,030.90." "Indorsement of principal, May 7, 1906, \$26,000."

The special plea avers that the note was executed as part of the purchase price for an undivided one-half interest in 30,018 acres of land purchased of Howard Hazlett, trustee, in Logan and Boone counties, at the price of \$7 per acre; that after defendants' purchase of the land, they caused a survey of it to be made, and ascertained that it contained only 27,545.41 acres, thus making a shortage in quantity of 2,472.59 acres; that by virtue of this shortage they were entitled to set off against the note, as of May 20, 1904, the time said note began to bear interest, the sum of \$8,654.06; that being a sum representing one half the shortage at \$7 an acre. The contract of sale by Hazlett, trustee, and D. F. Frazee, trustee, to Crawford and Ashby, dated February 20, 1904, and also the deed from Hazlett, trustee, dated April 16, 1904, which conveys to Crawford and Ashby the undivided half interest in said land, and which was made pursuant to the contract of sale, are made exhibits with the plea. The plea also contains the following additional averments: "And these defendants further show that the said note was afterwards assigned by said Hazlett, trustee, to the plaintiff without recourse, and with full notice to the plaintiff of the consideration and conditions of said note, and

that the said plaintiff at the time of said assignment and transfer had notice that said note was given pursuant to said contract and deed for land at \$7 per acre, and was subject thereto and contingent upon the acreage aforesaid, passed by said deed, being equal to 30,018 acres, and that these defendants had full right to set off against said note \$3.50 per acre for each acre said tract was short of or less than 30,018 acres."

It is stubbornly urged by counsel for defendants that the recital in the note that it was "in part payment for land in Logan and Boone counties, and upon which a lien has been reserved to secure this note," was sufficient to put plaintiff upon inquiry which, if pursued, would have led to a discovery of defendants' equities. But the plea does not allege that plaintiff actually knew, when the note was assigned to it, that the consideration had in part failed, nor does it allege that anyone knew at that time that there was a shortage. The demurrer admits the truth of the averments, but they are not sufficient to charge plaintiff with notice, or to put it upon inquiry respecting defendants' equities against Hazlett, trustee. Plaintiff knew that the note was given in part payment for land,—the note so informed it; and grant that it knew all the facts which the plea alleges it knew, and also that it knew all the facts that would be disclosed by a reading of both the contract and the deed exhibited with the plea, still they are not sufficient to disclose that there was a shortage in the quantity of land. The contract is not for a supposed or estimated quantity of land, subject to be corrected or modified by future survey; but it was made for the sale of a definite quantity,—a specified number of acres. Is it not reasonable, then, to presume that the contracting parties had satisfied themselves concerning the quantity of land before making the contract and the deed? Does the recital in the contract and deed that the land contains 30,018 acres convey any notice that there is a shortage? Certainly not; it is rather an assurance that it does contain the quantity, than that it does not. The plea does not aver that anyone, not excepting defendants themselves, knew when the note was assigned to plaintiff that there was a shortage. Therefore, so far as it appears from the plea and its exhibits, there is nothing to indicate that plaintiff knew, or could have ascertained by any amount of diligent inquiry, short of having an actual survey made of the land, and there was or would be a shortage.

Unless the note is rendered non-negotiable, either by the recital of the consid-

eration or by the fact that it is payable to, and assigned by, Hazlett in the capacity of trustee, and the defense of equities thereby let in, there is nothing in the plea or its exhibits which is sufficient to affect plaintiff with such notice as to let them in. The note is payable at the National Exchange Bank, and is negotiable in form.

The recital of the consideration for which it was given does not render it non-negotiable; neither does it put plaintiff upon notice of defendants' equities, there being nothing to indicate a failure of the consideration, either in whole or in part.

The equities between the makers and the payee are secret or latent, and there is nothing to affect the assignee with notice of their existence. A negotiable note, reciting that it is for the purchase price of a horse, a house, or lands, does not render it uncertain, and is no notice whatever to the assignee that the payee's title to the property will fail. 1 Dan. Neg. Inst. § 797; 7 Cyc. Law & Proc. p. 947. In fact, we know of but one court which has taken a different view, and that is the supreme court of North Carolina, in the case of *Howard v. Kimball*, 65 N. C. 175, 6 Am. Rep. 739. But that decision has been criticized by text writers, and seems to be generally regarded as unsound; it is not followed by other courts. Daniel, in his excellent work on *Negotiable Instruments*, vol. 1, § 797, says: "The mere statement of the consideration in a bill or note does not put the holder upon inquiry whether or not it really passed, or has failed in any respect. It is rather assuring than otherwise, for it is evidence, if the note be genuine, that it was given for value; and the specification of what value can no more challenge the holder's investigation than the omission of such specification. In legal effect it does not qualify the paper in any manner."

The true rule applicable in the case of an indorsee who has acquired the paper in regular course, and the maker of a note, as to the effect to be given to a recital of the consideration, is briefly stated in 7 Cyc. Law & Proc. p. 947, as follows: "If the purchaser knows at the time of his purchase that the consideration for which the note was given has failed, if he is informed that the validity of the consideration is a question yet to be tested, or if he knows or has legal constructive notice that the consideration is illegal, he cannot be considered a bona fide holder. But a failure of the consideration, in whole or in part, after a bona fide transfer, does not affect the character of the purchaser, although he had full knowledge of the orig-

inal consideration for which the note was given." See also, 4 Am. & Eng. Enc. Law, p. 305.

Counsel for defendants cite Studebaker Mfg. Co. v. Dickson, 70 Mo. 272. But that case differs materially from the case in hand. As in this case, that was an action brought by the assignee of negotiable paper, and the defense was failure of consideration. But in that case it appears that before the note was assigned, the indorsee received the following telegram from the maker: "The note mentioned will be good if consideration for which it was given has not been misrepresented; this is not tested yet." The court there properly held that the plaintiff "thereby became chargeable with notice that the validity of the note was a question which remained to be tested, and, if it was procured by fraud or by misrepresentation, he could not enforce it." But in the case which we are reviewing nothing appears which was sufficient to arouse the least suspicion of a failure of consideration; and, consequently, nothing which would call for an investigation. Furthermore, it is not made to appear that, if an investigation had been made at the time the note was assigned, it would have led to a discovery that a shortage existed in the land. It required a survey of the land to ascertain this. Whether the survey was made before or after the note was assigned to plaintiff the plea does not aver. Nothing appears in the pleadings or in the evidence, to indicate that anyone knew at the time the note was transferred that there was an actual shortage.

The fact that the note was made payable to Hazlett in the capacity of trustee, and that it was so assigned by him, does not affect its negotiability, nor oblige the purchaser to inquire into the matter of its consideration. According to nearly all the authorities, the most that could be required of the purchaser in such case is the exercise of proper diligence to ascertain the authority of the trustee to sell the note and to receive the proceeds. Further than this we do not see that its negotiability is affected by its being made payable to a trustee. Hazlett's authority to dispose of the note is not questioned. Perry, Tr. § 225. Such words as "trustee," "agent," "executor," etc., are generally held to be merely *descriptio personæ*. 1 Dan. Neg. Inst. §§ 271 & 301; 7 Cyc. Law & Proc. p. 563, and numerous cases cited in note. In Fox v. Citizens' Bank & T. Co. — Tenn. —, 35 L.R.A. 678, 37 S. W. 1102, it is held: "The addition of the word 'trustee' to the name of the payee of a note does not destroy its negotiability." 33 L.R.A. (N.S.)

Central State Bank v. Spurlin, 111 Iowa, 187, 49 L.R.A. 661, 82 Am. St. Rep. 511, 82 N. W. 493.

Third Nat. Bank v. Lange, 51 Md. 138, 34 Am. Rep. 304, is the only authority to which our attention has been called which holds a contrary doctrine. But that case seems to stand by itself, as does the case of Howard v. Kimball, supra, from North Carolina, which holds the converse of the other proposition, above discussed, that the recital of the consideration in a negotiable note is not notice to the assignee in due course, of original equities.

Hazeltine v. Keenan, 54 W. Va. 600, 102 Am. St. Rep. 953, 46 S. E. 609, does not decide the question of negotiability. It goes no further than to hold that the designation of the payee as attorney is sufficient to put the purchaser on notice that other persons were interested in the fund, and to put him upon inquiry respecting the right of the payee to sell the note. This is in line with the majority of adjudicated cases. The effect of such holding is, no doubt, to restrict, in a measure, the free circulation of such commercial paper, but we do not understand that it is thereby rendered non-negotiable. It does not follow that because a note is made payable to a person as trustee, it is not of the class known as negotiable paper. The rights of the assignee in due course of such a note depend upon the authority of the trustee to sell it and to receive the proceeds. If we have such authority the note is negotiable; otherwise it is not. Because, having no right to sell, he can confer no title on his assignee. We do not think any of the authorities, outside of the court of Maryland, in Third Nat Bank v. Lange, supra, go further than to hold that the use of words which show the fiduciary character of the payee puts the purchaser upon inquiry respecting the payee's right to sell. 1 Dan. Neg. Inst. § 795a; Fox v. Citizens' Bank & T. Co. 35 L.R.A. 678. In a footnote the annotator says: "The little authority there is on this question is almost unanimous in support of the rule adopted in Fox v. Citizens' Bank & T. Co. The exception is the Maryland case of Third Nat. Bank v. Lange, supra, which held that a note given to a person as trustee is not negotiable." Davis v. Garr, 6 N. Y. 124, 55 Am. Dec. 387; Downer v. Read, 17 Minn. 493, Gil. 470; Bush v. Peckard, 3 Harr. (Del.) 385; Westmoreland v. Foster, 60 Ala. 448; Chadsey v. McCreery, 27 Ill. 253; Pierce v. Robie, 39 Me. 205, 63 Am. Dec. 614.

But Hazlett's right to sell the note is not questioned; hence the word "trustee," following his name, is only *descriptio per-*

sona, and does not in any sense affect plaintiff's title, or put it upon inquiry as to equities. The fact that the note was assigned without recourse casts no suspicion upon plaintiff's title. 4 Am. & Eng. Enc. Law, 2d ed. p. 276.

There was no error committed in sustaining the demurrer to defendants' special plea; it avers no matter that is a defense to plaintiff's action. But even if the defense of failure of consideration could have been made, it would have been proper to prove it under the general issue of nonassumpsit. 4 Cyc. Law & Proc. p. 355; 4 Minor, Inst. 3d ed. 770; Morgantown Bank v. Foster, 35 W. Va. 357, 13 S. E. 996; Blessing v. Miller, 102 Pa. 45; Dawes v. Peebles' Sons (C. C.) 6 Fed. 856; 2 Greenl. Ev. 16th ed. § 135; Mason v. Eldred, 6 Wall. 231, 18 L. ed. 783; Craig v. Missouri, 4 Pet. 410, 7 L. ed. 903, opinion by Marshall, Ch. J.

Mr. Peterson, president of the Dollar Savings & Trust Company, testified that he advised with Joseph Speidel and Henry M. Russell, members of the executive committee for the bank, in regard to purchasing the note; that he was advised by them that the note was good; that Mr. Russell told him that the note was negotiable in form, and that he (Russell) knew that two other notes which had been given for the purchase money on the land had been paid. It is argued in brief, but upon what evidence we do not know, unless it be upon the evidence of Mr. Peterson as to what Mr. Russell told him, that Mr. Russell and Mr. Speidel were interested in the proceeds of the note, and that the land deal was in fact by the bank itself under cover of the trust. There is no evidence to support such theory. Mr. Peterson was asked the question whether Mr. Hazlett was not acting as trustee in the transaction for Henry M. Russell, Joseph Speidel, and others, and he replied that he did not know; that he made no inquiry of Mr. Hazlett. But if it had been proven that Russell and Speidel were interested in the land deal, that fact could not affect the rights of the bank, even if the advice of Russell had been given in bad faith, as to which there is not the slightest evidence. If a director have knowledge of a matter which affects the bank's interest, but which it is to his interest to conceal, it is not notice to the bank. First Nat. Bank v. Lowther-Kaufman Oil & Coal Co. 66 W. Va. 505, 28 L.R.A. (N.S.) 511, 68 S. E. 713.

There was paid on the note, on May 7, 1906, \$26,000, and the following memorandum was indorsed on it: "Balance due on principal \$13,030.90. Indorsement of principal, May 7, 1906, \$26,000." It is in 33 L.R.A. (N.S.)

sisted that this establishes an election by the bank to apply the payment to the principal, rather than to the interest then due, and that it is bound by such election. We do not think so. Mr. Peterson, who is the only witness for either party, testified that the memorandum was in the handwriting of the note clerk, and that, in point of fact, the money had been applied on interest and principal. Plaintiff evidently had a right to so apply it. It was not bound by the memorandum made on the note by its clerk. Moreover, there was only one debt to which the payment could be applied, and consequently there was no occasion for election. Donally v. Wilson, 5 Leigh. 329; Smith v. Lawson, 18 W. Va. 242, 41 Am. Rep. 688, opinion by Judge Green. There was no agreement as to how the payment should be applied, and plaintiff had a right to apply enough of it to discharge the interest then due, and the balance to reduce the principal.

The law and the evidence was with the plaintiff, and there was no error in the court's instruction to the jury to find for it, and no error in refusing to set the verdict aside.

The judgment will be affirmed.

Brannon, J., absent.

KENTUCKY COURT OF APPEALS.

JOSEPH L. RODMAN, Exr., etc., of Armilda U. Booth, Appt.,
v.

COMMONWEALTH OF KENTUCKY EX REL. JOSEPH SELLIGMAN.

(130 Ky. 88, 113 S. W. 61.)

Succession tax — Constitution.

1. Special constitutional authority is not necessary to validate a collateral inheritance tax, where general legislative power has been conferred on the legislature.

Same — constitutional right.

2. The constitutional right of acquiring and protecting property does not include

Note. — Constitutionality of succession taxes.

Rule of uniformity and equality.

Those provisions found in almost all, if not all, the Constitutions of the several states, requiring uniformity and equality of taxation, seem to have furnished the weapon of attack upon the validity of inheritance taxation more frequently than any other constitutional provision. It may, however, be laid down as a general rule that the states may tax the privilege of succeeding to the property of the

the mere privilege, right, or expectancy of inheritance, so as to prevent the legislature from placing a tax upon such privilege.

Same — authority.

3. Constitutional authority to impose a special or excise tax includes power to levy an inheritance tax.

Same — uniformity.

4. A collateral inheritance tax does not violate constitutional requirements of uniformity or equality in taxation, although it is a definite per centum upon the amount of the inheritance; nor is it invalid because it may result in discrimination between relatives and strangers.

Same — property tax.

5. A collateral inheritance tax is not upon property, so as to be subject to constitutional provisions governing such taxes, by reason of the fact that it is made a certain per centum on the value of the estate, so that the property pays it.

Same — discrimination.

6. An exemption from a collateral inher-

itance tax when the estate is less than a certain value is not an unconstitutional discrimination, which will invalidate the tax.

Same — conflict — exemption.

7. A succession tax is not invalid because it applies to inheritances in favor of institutions which are subject to general tax exemption.

Same — interpretation.

8. A provision in a statute imposing a collateral inheritance tax, that the first \$500 of every estate shall not be subject to the tax, refers to the estate passing to each recipient, and not to the whole estate of the testator.

Same — burden.

9. A succession tax is not placed upon decedent's estate by the fact that the executor is required to pay it, where he is also required to deduct it from the estate passing to the legatee or collateral heir.

(October 27, 1908.)

former owner upon his death, discriminate between relatives and between these and strangers, and give exemptions, and are not precluded from this power by the constitutional provision just referred to: A proposition that finds support not only in nearly all of the cases reviewed herein, but also *Re Benton*, 234 Ill. 366, 18 L.R.A. (N.S.) 458, 84 N. E. 1026, 14 A. & E. Ann. Cas. 107; *Union Trust Co. v. Wayne Probate Judge*, 125 Mich. 487, 84 N. W. 1101; *Re Touhy*, 35 Mont. 431, 90 Pac. 170; *Re McPherson*, 104 N. Y. 306, 58 Am. Rep. 507, 10 N. E. 685; *Re Morris*, 138 N. C. 259, 50 S. E. 682; *Dixon v. Ricketts*, 26 Utah, 215, 72 Pac. 947; *State v. Clark*, 30 Wash. 439, 71 Pac. 20.

One phase of the question of the constitutionality of inheritance taxation,—that of the validity of the classification of inheritances or gifts for the purpose of such a tax, on the basis of amount, is discussed in the note to *State ex rel. Foot v. Bazille*, 6 L.R.A. (N.S.) 732. From the authorities there reviewed, it may be laid down as a general proposition that an inheritance tax law providing for an increased rate of taxation upon inheritances as the amount of the inheritances increased does not violate the constitutional provision as to uniformity and equality. Since the preparation of that note the same conclusion was reached in *Nunnemacher v. State*, 129 Wis. 190, 9 L.R.A. (N.S.) 121, 108 N. W. 627, 9 A. & E. Ann. Cas. 711, where the law in question, in fixing the amount at which the rate of taxation would increase, provided that the excess only over such amount should be liable for the increased rate.

The South Dakota supreme court went even further than the case last cited, and in *Re McKennan*, — S. D. —, 130 N. W. 33, reversing their former opinion in the same case, 24 S. D. post, 606, 126 N. W. 611, declared that the imposition of increased rates of taxation upon the whole

amount taken, whenever a portion of a decedent's estate passing to a successor exceeded a certain amount, and not merely upon the excess over the amount fixed, was not unconstitutional as being unequal taxation, though it might give recipients of sums slightly above the division line a less net estate than those whose shares were just under the division line.

In *State ex rel. Slabaugh v. Vinson-haler*, 74 Neb. 675, 105 N. W. 472, it was held that the power of the legislature to impose inheritance taxes was not invalidated by a constitutional provision that revenue be secured "by levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her, or its property and franchises."

And in *Tyson v. State*, 28 Md. 577, an inheritance tax law was held not to be in conflict with that clause of the Declaration of Rights that all persons ought to contribute their proportion to the public taxes, according to his actual worth in real or personal property.

But in *Re Pell*, 171 N. Y. 48, 57 L.R.A. 540, 89 Am. St. Rep. 791, 63 N. E. 789, reversing 60 App. Div. 286, 70 N. Y. Supp. 196, it was held that an inheritance tax law imposing a tax on remainders or reversions which vested prior to a certain date, but which should not come into possession until after the passage of the act, thus leaving the estate which vested after that date untaxed, and discriminating among the owners thereof by imposing different rates on some than on others, was invalid, as not bearing equally upon the entire class to which the property belonged.

—discrimination between relatives.

Nor will these constitutional provisions as to uniformity and equality invalidate reasonable discriminations among relatives,

APPPEAL by the executor of Armilda U. Booth, deceased, from a judgment of the Chancery Branch of the Second Division of the Circuit Court for Jefferson County affirming a judgment of the County Court which assessed a collateral inheritance tax upon property passing under her will. Affirmed.

The facts are stated in the opinion.

Messrs. Trabue, Doolan, & Cox and Grubbs & Grubbs, for appellant:

The \$500 exemption in the 1st section of the act should be allowed each legacy.

Re Cager, 111 N. Y. 343, 18 N. E. 866; Re Howe, 112 N. Y. 103, 2 L.R.A. 825, 19 N. E. 513; Re Hoffman, 143 N. Y. 327, 38 N. E. 311; People v. Koenig, 37 Colo. 283, 85 Pac. 1129, 11 A. & E. Ann. Cas.

or between relatives and strangers.

In *Bilings v. People*, 189 Ill. 472, 59 L.R.A. 807, 59 N. E. 798, affirmed in 188 U. S. 97, 47 L. ed. 400, 23 Sup. Ct. Rep. 272, it was held that an inheritance tax law discriminating between life tenants with remainder to lineal descendants, and life tenants with remainder to collateral heirs or strangers, by making the first liable to the tax and exempting the second, was not unconstitutional for lack of uniformity.

And in *State ex rel. Fath v. Henderson*, 160 Mo. 190, 60 S. W. 1093, it was held that an inheritance tax law laying a tax upon collateral successions only, and exempting transfers to lineals, both ascending and descending, and to husband, wife, and adopted children, did not make an unlawful or arbitrary classification, and hence did not violate the constitutional rule of uniformity, prescribing the same taxes upon the same class of subjects within the territorial limits of the authority levying the tax, such tax being in fact uniform upon the entire class upon which it was levied, which was all that the Constitution required.

So, in *Re Wilmerding*, 117 Cal. 281, 49 Pac. 181, it was held that a statute imposing a tax upon inheritances of the children of a deceased brother or sister, while the inheritances of the surviving brothers and sisters were exempt from the tax, did not contravene the state Constitution because applicable to only a special class of persons arbitrarily selected from others standing in the same relation to the subject of the law, though another statute provided that, in cases of intestacy, the estate of the decedent should in certain instances "go in equal shares to the brothers and sisters of the decedent, and to the children of any deceased brother or sister by right of representation."

And the constitutionality of discrimination in inheritance tax legislation between relatives and strangers, and between different classes of relatives, was upheld in the following cases: *Magoun v. Illinois Trust Sav. Bank*, 170 U. S. 283, 42 L. ed. 33 L.R.A. (N.S.)

140; *State v. Hamlin*, 86 Me. 495, 25 L.R.A. 632, 41 Am. St. Rep. 569, 30 Atl. 76; *State ex rel. Garth v. Switzler*, 143 Mo. 287, 40 L.R.A. 280, 65 Am. St. Rep. 669, 45 S. W. 245.

The legislature has no authority to levy an inheritance tax. The tax is not uniform.

Knowlton v. Moore, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747; *State ex rel. Garth v. Switzler*, 143 Mo. 287, 40 L.R.A. 280, 65 Am. St. Rep. 653, 45 S. W. 245; *Plehn, Public Finance*, p. 102; *George Schuster & Co. v. Louisville*, 124 Ky. 189, 89 S. W. 689; *State ex rel. Garth v. Switzler*, 143 Mo. 287, 40 L.R.A. 280, 65 Am. St. Rep. 653, 45 S. W. 245; *Cope's Estate*, 191 Pa. 1, 45 L.R.A. 316, 71 Am. St. Rep.

1037, 18 Sup. Ct. Rep. 594; *Wallace v. Myers*, 4 L.R.A. 171, 38 Fed. 184; *Re Magnes*, 32 Colo. 527, 77 Pac. 853; *Nettleton's Appeal*, 76 Conn. 235, 56 Atl. 565; *State v. Hamlin*, 86 Me. 495, 25 L.R.A. 632, 41 Am. St. Rep. 569, 30 Atl. 76; *State v. Dalrymple*, 70 Md. 294, 3 L.R.A. 372, 17 Atl. 82; *Minot v. Winthrop*, 162 Mass. 113, 26 L.R.A. 259, 38 N. E. 512; *Re Fox*, 154 Mich. 5, 117 N. W. 558; *Drew v. Tift*, 79 Minn. 175, 47 L.R.A. 525, 79 Am. St. Rep. 446, 81 N. W. 839; *Gelsthorpe v. Furnell*, 20 Mont. 299, 39 L.R.A. 170, 51 Pac. 267; *Re Opinion of Justices*, — N. H. —, 79 Atl. 490; *Pullen v. Wake County*, 66 N. C. 361; *Hagerty v. State*, 55 Ohio St. 613, 45 N. E. 1046, affirming 12 Ohio C. C. 606, 5 Ohio C. D. 701; *Com. v. Randall*, 225 Pa. 197, 73 Atl. 1109; *State v. Alston*, 94 Tenn. 674, 28 L.R.A. 178, 30 S. W. 750; *Eyre v. Jacob*, 14 Gratt. 427, 73 Am. Dec. 367; *State v. Clark*, 30 Wash. 439, 71 Pac. 20; *Black v. State*, 113 Wis. 205, 90 Am. St. Rep. 853, 84 Pac. 522; *Nunnemacher v. State*, 129 Wis. 190, 9 L.R.A. (N.S.) 121, 108 N. W. 627, 9 A. & E. Ann. Cas. 711; *Beals v. State*, 139 Wis. 544, 121 N. W. 347.

On the other hand, in *Curry v. Spencer*, 61 N. H. 624, 60 Am. Rep. 337, a statute imposing a tax upon all successions except those to husband or wife, children or grandchildren of the decedent, was held to be invalid, as violative of those provisions of the state Constitution limiting the power of the legislature to impose taxes to "proportional and reasonable assessments, rates and taxes upon all the inhabitants and residents within the said state, and upon the estates within the same," and declaring that every inhabitant was bound to contribute only his share of taxation. The court added that if the tax was to be regarded as a tax on property, it was open to the objection of unequal and double taxation, and that if it was to be regarded as a tax of a civil right or privilege, it was discriminating and disproportional. It was also declared, in reply to the argument that the law should be sustained because its object was to defray the cost of probate

749, 43 Atl. 79; Hager v. Walker, 128 Ky. 1, 15 L.R.A.(N.S.) 195, 129 Am. St. Rep. 238, 107 S. W. 254.

Messrs. Charles M. Lindsay, Percy N. Booth, Isaac T. Woodson, and George L. Everbach, also for appellant:

The statute provides essentially taxation of property, and is unconstitutional.

State ex rel. Schwartz v. Ferris, 53 Ohio St. 325, 30 L.R.A. 218, 41 N. E. 579; State ex rel. Garth v. Switzler, 143 Mo. 287, 40 L.R.A. 280, 65 Am. St. Rep. 653, 45 S. W. 245; Cope's Estate, 191 Pa. 1, 45 L.R.A. 316, 71 Am. St. Rep. 749, 43 Atl. 79; Rogers-Ruger Co. v. Murray, 115 Wis. 267, 59 L.R.A. 737, 95 Am. St. Rep. 901, 91 N. W. 657; Employers' Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S.

463, 52 L. ed. 297, 28 Sup. Ct. Rep. 141; James v. Bowman, 190 U. S. 127, 47 L. ed. 979, 23 Sup. Ct. Rep. 678.

The tax is not an "excise tax."

11 Am. & Eng. Enc. Law, p. 579, 1 Cooley, Taxn. 3d ed. p. 6.

The tax must possess the requisite uniformity, and be free from exemptions.

Hager v. Walker, 128 Ky. 1, 15 L.R.A.(N.S.) 195, 129 Am. St. Rep. 238, 107 S. W. 254; Holtzhauer v. Newport, 94 Ky. 407, 22 S. W. 752; Cope's Estate, 191 Pa. 1, 45 L.R.A. 319, 71 Am. St. Rep. 749, 43 Atl. 79.

Discrimination is unconstitutional.

Sams v. Sams, 85 Ky. 396, 3 S. W. 593; Com. v. Reynolds, 89 Ky. 147, 12 S. W. 132, 20 S. W. 167.

courts, that, if the legislature deemed it expedient to defray the expense of probate courts by a tax upon the recipients of estates therein adjudicated, such tax should be proportional, and constitute only the just share of those upon whom it was imposed, and that it could not lawfully make discriminations, and cast the burden upon one class of beneficiaries, and exempt all other classes from its operation, and that it could not, therefore, for purposes of taxation, exempt legacies and successions to husband, wife, and descendants, and include only those to collaterals and strangers.

But the Constitution of New Hampshire was changed in 1903, and property passing by will or inheritance was specifically designated as a source of revenue. Accordingly, in Thompson v. Kidder, 74 N. H. 89, 65 Atl. 392, 12 A. & E. Ann. Cas. 948, a statute taxing all successions except those to certain relatives of the deceased, and those for charitable, educational, religious, and public purposes, was held not to be violative of other provisions of the Constitution requiring equality and uniformity in taxation.

—exemptions.

Nor do these provisions as to uniformity and equality prevent exemptions.

In Nettleton's Appeal, 76 Conn. 235, 56 Atl. 565, it was held that an inheritance tax law was not unconstitutional because, in imposing death duties, it made an arbitrary difference between estates of \$10,000 and those of a greater amount, so that a legatee of an estate of \$10,000 paid no tax, but a legatee of an estate of more than \$10,000 was taxed. The court said that such result was "a mere incident to the operation of a law enacted solely for the purposes of taxation, and clearly within the legislative power of taxation, and is not an attempt, either in form, substance, or purpose, to exercise that power of favoring some persons and punishing others, at the mere will of the legislature, which the Con- 33 L.R.A.(N.S.)

stitution excludes from the grant of legislative power."

And in the following cases the exemptions from inheritance taxes of estates not exceeding a certain sum in value, but not exempting that sum in large estates, were held not to violate the constitutional requirement of equality and uniformity: Minot v. Winthrop, 162 Mass. 113, 26 L.R.A. 259, 38 N. E. 512; Gelsthorpe v. Furnell, 20 Mont. 299, 38 L.R.A. 170, 51 Pac. 267; State v. Alston, 94 Tenn. 674, 28 L.R.A. 178, 30 S. W. 750; Re Hickok, 78 Vt. 259, 62 Atl. 724, 6 A. & E. Ann. Cas. 578.

So, in Re Fox, 154 Mich. 5, 117 N. W. 558, a statute exempting from an inheritance tax those lineal heirs inheriting personal property of less than \$2,000 in value, and taxing the entire inheritance to such heirs, without an exemption, where its value exceeded that sum, was held not to violate the Federal and state constitutional requirement of uniformity.

And in Re Morris, 138 N. C. 259, 50 S. E. 683, the exemption from liability for inheritance taxes of persons receiving less than a certain sum was declared not to be unconstitutional.

And in State ex rel. Fath v. Henderson, 160 Mo. 190, 60 S. W. 1093, an inheritance tax law was held not to be unconstitutional because it exempted property bequeathed or devised to educational, charitable, and religious institutions.

So, in Re Speed, 216 Ill. 23, 108 Am. St. Rep. 189, 74 N. E. 809, an inheritance tax law exempting from the tax property devised to the use of religious, educational, or charitable corporations was held not to be violative of the constitutional rule of uniformity of taxation, because it did not extend the exemption to foreign corporations.

On the other hand, in State ex rel. Frye v. Bazille, 87 Minn. 500, 94 Am. St. Rep. 718, 92 N. W. 415, it was held that the constitutional provision requiring uniformity and equality of taxation applied to inheritances exactly as it did to other

The right of succession is not a right dependent upon legislative fiat.

Black v. State, 113 Wis. 205, 90 Am. St. Rep. 853, 89 N. W. 526; *Nunnemacher v. State*, 129 Wis. 190, 9 L.R.A.(N.S.) 121, 108 N. W. 627, 9 A. & E. Ann. Cas. 711.

Messrs. James Breathitt, Attorney General, *John F. Lockett*, and *George R. Hunt*, with *Mr. Joseph Selligman*, for appellee:

The power to tax is inherent in the legislature, if not forbidden by the Constitution.

State ex rel. Schwartz v. Ferris, 53 Ohio St. 314, 30 L.R.A. 218, 41 N. E. 579; *State ex rel. Taylor v. Guilbert*, 70 Ohio St. 229, 71 N. E. 636, 1 A. & E. Ann. Cas.

25; *State v. Hamlin*, 86 Me. 495, 25 L.R.A. 632, 41 Am. St. Rep. 569, 30 Atl. 76.

The inheritance tax is not one upon the property, but one on the succession, and is valid.

Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594; *State ex rel. Fath v. Henderson*, 160 Mo. 190, 60 S. W. 1093; *State ex rel. Schwartz v. Ferris*, 53 Ohio St. 314, 30 L.R.A. 218, 41 N. E. 579; *State ex rel. Taylor v. Guilbert*, 70 Ohio St. 229, 71 N. E. 636, 1 A. & E. Ann. Cas. 25; *Minot v. Winthrop*, 162 Mass. 113, 26 L.R.A. 259, 38 N. E. 512; *State v. Alston*, 94 Tenn. 674, 28 L.R.A. 178, 30 S. W. 750; *Re Wilmerding*, 117 Cal. 281, 49 Pac. 181; *United States v. Perkins*, 163 U. S. 625,

property, and that the statute which taxed transfers of property to collaterals to the full value when such transfers exceeded \$5,000, while it taxed transfers to lineals only upon the excess over and above such amount, was unconstitutional and void.

And in *Drew v. Tift*, 79 Minn. 175, 47 L.R.A. 525, 79 Am. St. Rep. 446, 81 N. W. 839, an inheritance tax statute allowing a larger exemption to lineals than to collaterals was held to be invalid where the Constitution of the state authorized only one uniform exemption to all persons and corporations.

And in the following Pennsylvania cases, it was held that the exemption of a specified amount in all estates, from liability for inheritance taxation, by a statute imposing a tax upon all personal property passing by will or by the intestate laws, after deducting debts and costs of administration, violated that constitutional provision which required all taxes to be uniform upon the same class of subjects: *Cope's Estate*, 191 Pa. 1, 45 L.R.A. 316, 71 Am. St. Rep. 749, 43 Atl. 79; *Hagy's Estate*, 191 Pa. 26, 43 Atl. 1101; *Graff's Estate*, 191 Pa. 28, 43 Atl. 1101; *Portuondo's Estate*, 191 Pa. 28, 43 Atl. 1102, affirming 20 Pa. Co. Ct. 209; *Lacy's Estate*, 191 Pa. 56, 43 Atl. 1102; *D'Almbert's Estate*, 191 Pa. 66, 43 Atl. 1101; *Smith's Appeal*, 191 Pa. 67, 43 Atl. 1103; *Bell's Estate*, 191 Pa. 68, 43 Atl. 1100; *Blight's Estate*, 6 Pa. Dist. R. 459.

And in *Black v. State*, 113 Wis. 205, 90 Am. St. Rep. 853, 84 N. W. 522, it was held that a statute authorizing an inheritance tax where the whole estate was of a specified amount or more, but not authorizing such tax where the estate was less than that amount in value, the beneficiaries being in the same class, and the tax being levied without regard to the amount received by the individual beneficiary, was unconstitutional as being an arbitrary and unlawful discrimination between beneficiaries of the same class.

In *Drew v. Tift*, 79 Minn. 175, 47 L.R.A. 33 L.R.A.(N.S.)

525, 79 Am. St. Rep. 446, 81 N. W. 839, an inheritance tax statute was held invalid because it laid a tax upon the entire devise, bequest, or distributive share, if of the specified value, but not upon the excess above a fixed specified exempted sum, as required by the Constitution of that state.

In *State ex rel. Russell v. Harvey*, 90 Minn. 180, 95 N. W. 764, a statute taxing inheritances was declared to be unconstitutional because it made the rate of taxation in the case of collateral heirs and strangers double the amount limited in the Constitution.

In *Drew v. Tift*, supra, and *State ex rel. Frye v. Bazille*, 87 Minn. 500, 94 Am. St. Rep. 718, 92 N. W. 415, an inheritance tax statute making personal inheritances alone liable for the tax was held to be invalid where the Constitution of the state provided for a tax upon all inheritances of every kind and description.

On the other hand, in *Re Morris*, 138 N. C. 259, 50 S. E. 682, an inheritance tax law was held not to be unconstitutional merely because it imposed such tax on personal property only.

Due process of law.

In *Cahen v. Brewster*, 203 U. S. 543, 51 L. ed. 310, 27 Sup. Ct. Rep. 174, 8 A. & E. Ann. Cas. 215, affirming 115 La. 377, 8 L.R.A.(N.S.) 1181, 39 So. 37, 5 A. & E. Ann. Cas. 871, it was held that a Louisiana inheritance tax law imposing a tax on all successions not finally closed and administered upon, and on all successions thereafter opened, did not deprive universal legatees under the will of a person who had died before the enactment of the law, of their property without due process of law, though under the Louisiana Civil Code the ownership of the property passed to such legatees upon the death of the testator.

In *Trippet v. State*, 149 Cal. 521, 8 L.R.A.(N.S.) 1210, 86 Pac. 1084, it was

41 L. ed. 287, 16 Sup. Ct. Rep. 1073; Strode v. Com. 52 Pa. 181; Eyre v. Jacob, 14 Gratt. 422, 73 Am. Dec. 367; Schoolfield v. Lynchburg, 78 Va. 366; State v. Dalrymple, 70 Md. 294, 3 L.R.A. 372, 17 Atl. 82; Re Merriam, 141 N. Y. 479, 36 N. E. 505; Gelsthorpe v. Furnell, 20 Mont. 299, 39 L.R.A. 170, 51 Pac. 267; State v. Clark, 30 Wash. 439, 71 Pac. 20; Re Morris, 138 N. C. 259, 50 S. E. 682; Union Trust Co. v. Wayne Probate Judge, 125 Mich. 487, 84 N. W. 1101; Ferry v. Campbell, 110 Iowa, 290, 50 L.R.A. 92, 81 N. W. 604; Re Hickok, 78 Vt. 259, 62 Atl. 724, 6 A. & E. Ann. Cas. 578; Re Magnes, 32 Colo. 527, 77 Pac. 853; State ex rel. Foot v. Bazille, 97 Minn. 11, 6 L.R.A. (N.S.) 732, 106 N. W. 93, 7 A. & E. Ann.

Cas. 1056; State ex rel. Slabaugh v. Vinsonhaler, 74 Neb. 675, 105 N. W. 472.

Mr. Isaac Morrison also for appellee.

Settle, J., delivered the opinion of the court:

Mrs. Armilda U. Booth, a childless widow and resident of Jefferson County Kentucky, died in December, 1906, leaving a will by which legacies of various amounts were bequeathed to her collateral kindred and to strangers. The executor appointed by the will, on December 24, 1906, duly qualified as such, and has since had charge of the estate. Shortly thereafter, and before the payment of any of the legacies bequeathed by the will, the commonwealth of Kentucky, on relation of the county

held that a statute which vested the interest of the state in a succession tax at the time of the decedent's death did not take property without due process of law, where it provided for an appraisal after notice to all persons known to be interested, and afforded them an opportunity to be heard before the tax could be collected.

And in *Billings v. People*, 189 Ill. 472, 59 L.R.A. 807, 59 N. E. 798, affirmed in 188 U. S. 97, 47 L. ed. 400, 23 Sup. Ct. Rep. 272, it was held that an inheritance tax law which discriminated between life tenants with remainder to lineal descendants, and life tenants with remainder to collateral heirs or strangers, by imposing the tax on the first, and excluding the second from its operation, was not unconstitutional as depriving the class affected of their property without due process of law.

And in *Re Speed*, 216 Ill. 23, 108 Am. St. Rep. 189, 74 N. E. 809, affirmed in 203 U. S. 553, 51 L. ed. 314, 27 Sup. Ct. Rep. 171, 8 A. & E. Ann. Cas. 157, an inheritance tax law exempting from its provisions property devised to religious, educational, or charitable corporations, and not extending such exemption to nonresident corporations, was held not to violate the due process provision of the 14th Amendment to the Constitution of the United States.

And in *State v. Hamlin*, 86 Me. 495, 25 L.R.A. 632, 41 Am. St. Rep. 569, 30 Atl. 76, it was held that an inheritance tax law which provided for an appraisal of the estate subject to the tax upon application to the probate court by anyone interested in the estate, and gave that court jurisdiction to hear and determine all questions that might arise, subject to appeal as in other cases, satisfied the requirement of due process of law.

And in *Union Trust Co. v. Wayne Probate Judge*, 125 Mich. 487, 84 N. W. 1101, a succession tax law was held not to be unconstitutional as taking property without due process of law, because it did not provide for personal notice and opportunity to resist the assessment, upon the

ground that it was not taking the property of the legatee, but was only imposing a condition upon the acquisition of property.

In *Gelsthorpe v. Furnell*, 20 Mont. 299, 39 L.R.A. 170, 51 Pac. 267, it was held that a succession tax did not take property without due process of law, when it was imposed upon all property which passed by will or intestate laws except when the estate was less than a specified sum.

And in *Gelsthorpe v. Furnell*, supra, an inheritance tax statute was held not to take property without due process of law, where it made provision for notice to the persons interested, and an opportunity was given to be heard in relation to the value of the property and the amount of the tax.

And in *Re Vanderbilt*, 50 App. Div. 246, 63 N. Y. Supp. 1079, affirmed without opinion in 163 N. Y. 597, 57 N. E. 1127, and in *Re Potter*, 51 App. Div. 212, 64 N. Y. Supp. 1013, an inheritance tax law taxing the exercise of the power of appointment derived from the disposition of property made before the passage of the act, as though the property belonged absolutely to the donee of the power, was held not to take property without due process of law.

In *Hostetter v. State*, 26 Ohio C. C. 702, reversed on other grounds in 72 Ohio St. 448, 74 N. E. 650, an inheritance tax statute was held not to take property without due process of law, though it gave the probate court power to order an appraisal of the property of a deceased for the purpose of fixing the tax to which the same was liable, without giving notice to the executors or next of kin, where other sections thereof provided for a review of all matters before such court and for an appeal, and where, by general law, certain courts had jurisdiction to enjoin the illegal levy of tax assessments, and to entertain actions to recover them back when collected.

On the other hand, in *Ferry v. Campbell*, 110 Iowa, 290, 50 L.R.A. 92, 81 N. W. 604, a collateral inheritance tax law which failed to provide for any notice to the per-

attorney of Jefferson county, filed in the Jefferson county court a statement against the executor of the will of Mrs. Booth, claiming for the commonwealth an inheritance tax of 5 per cent upon the face value of each legacy in excess of \$500 bequeathed by her will; the demand for its payment being based upon the provisions of article 19 of the revenue act of 1906 (Acts 1906, chap. 22, p. 240). The executor filed a demurrer to the statement, mainly upon the ground that the act was unconstitutional; but in argument upon the demurrer certain questions of construction were also raised. The county court overruled the demurrer, thereby upholding the constitutionality of the act, but construed it to impose a tax of 5 per cent upon the net value of each

legacy passing to each legatee over the sum of \$500.

An appeal was taken to the circuit court by both the executor and the commonwealth, and that court, concurring in the construction given the statute by the county court, entered judgment imposing the tax as that court had done; and from the latter judgment the executor has appealed, thereby bringing the case to this court for final adjudication. The questions upon which the decision of this court is asked are: First, does the act in question violate any provision of the state Constitution? Secondly, if the act is not unconstitutional, does the exemption in the 1st section refer to the entire estate of the decedent, or to each legacy? Thirdly, is the tax upon the

sons interested was held to be unconstitutional as taking property without due process of law.

Equal protection of the laws.

In *Billings v. Illinois*, 188 U. S. 97, 47 L. ed. 400, 23 Sup. Ct. Rep. 272, affirming 189 Ill. 472, 59 L.R.A. 807, 59 N. E. 798, an Illinois statute taxing certain life estates when the remainder is to lineal descendants of the decedent, but not when the remainder is to collateral heirs or strangers to the blood, was held not to be unconstitutional, as violating the equal protection of the laws clause of the 14th Amendment.

In *Campbell v. California*, 200 U. S. 87, 50 L. ed. 382, 26 Sup. Ct. Rep. 182, affirming 143 Cal. 627, 77 Pac. 674, a California inheritance tax statute was held not to deny the equal protection of the laws guaranteed by the 14th Amendment to the brothers and sisters of a decedent, though it subjected them to the burden of an inheritance tax, and did not impose any taxation on such strangers to the blood of the decedent as the wife or widow of a son or the husband of a daughter of the decedent.

In *Cahen v. Brewster*, 203 U. S. 543, 51 L. ed. 310, 27 Sup. Ct. Rep. 174, 8 A. & E. Ann. Cas. 215, affirming 115 La. 377, 8 L.R.A.(N.S.) 1181, 39 So. 37, 5 A. & E. Ann. Cas. 871, it was held that a Louisiana statute imposing a tax on all successions not finally closed and administered upon, and all successions thereafter opened, thus exempting successions which had been closed, did not make an arbitrary classification which amounted to denial of the equal protection of the laws.

In *Re Speed*, 216 Ill. 23, 108 Am. St. Rep. 189, 74 N. E. 800, affirmed in 203 U. S. 553, 51 L. ed. 314, 27 Sup. Ct. Rep. 171, 8 A. & E. Ann. Cas. 157, an inheritance tax law exempting from the tax property devised to religious, educational, or charitable corporations, and not extending such exemption to nonresident corporations, was held not to violate that provision of the natural constitution forbidding a state to deny to any person within its jurisdiction

the equal protection of the laws, since a foreign corporation was not a person within the jurisdiction of the state, within the meaning of that provision.

In *Beers v. Glynn*, 211 U. S. 477, 53 L. ed. 290, 29 Sup. Ct. Rep. 186, affirming 186 N. Y. 549, 79 N. E. 1110, it was held that a New York statute imposing a tax upon certain bequests of personalty by a nonresident decedent owning both real and personal property within the state was not unconstitutional as denying equal protection of the laws, though there was no provision for such tax where the only property belonging to the decedent situated within the state was personalty.

In *Humphreys v. State*, 70 Ohio St. 67, 65 L.R.A. 776, 101 Am. St. Rep. 888, 70 N. E. 957, 1 A. & E. Ann. Cas. 233, it was held that an inheritance tax exempting charitable institutions from the operation of its provisions, but not exempting foreign corporations of such nature, even though some of their charitable work was carried on within the state, was not repugnant to the provision of the United States Constitution, 14th Amendment, against the denial of the equal protection of the laws, or to a similar provision in the Ohio Bill of Rights.

In *Gelsthorpe v. Furnell*, 20 Mont. 299, 39 L.R.A. 170, 51 Pac. 267, the court declared that it was unable to see how an inheritance tax statute which it was called upon to consider denied to persons within the state the equal protection of the laws.

Impairing obligation of contract.

In *Orr v. Gilman*, 183 U. S. 278, 46 L. ed. 196, 22 Sup. Ct. Rep. 213, it was held that a succession tax, not being a direct tax upon property, but a charge upon a privilege exercised or enjoyed under the laws of the state, did not, when imposed in cases where the property passing consisted of securities exempt from taxation by statute, impair the obligation of a contract, within the meaning of the Constitution of the United States.

In *Chanler v. Kelsey*, 205 U. S. 466, 51

net amount actually received by each legatee, or upon the face of his legacy?

The 1st section of the act in question imposes the tax and specifies its objects. The remaining sections indicate the means by which the provisions of the 1st section are to be carried into effect. The 1st section reads as follows: "All property which shall pass, by will or by the intestate laws of this state, from any person who may die seized or possessed of the same while a resident of this state, or, if such decedent was not a resident of this state at the time of death, be within this state, or any interest therein, or income therefrom, which shall be transferred by deed, grant, sale, or gift made in contemplation of the death of the grantor or bargainor,

or intended to take effect in possession or enjoyment after such death, to any person or persons, or to any body politic or corporate, in trust or otherwise, or by reason whereof any person or body politic or corporate shall become beneficially entitled, in possession or expectancy, to any property, or to the income thereof, other than to or for the use of his or her father, mother, husband, wife, lawful issue, the wife or widow of a son, or the husband of a daughter, or any child or children adopted as such in conformity with the laws of the commonwealth of Kentucky, and any lineal descendant of such decedent born in lawful wedlock, shall be, and is, subject to a tax of \$5 on every \$100 of the fair cash value of such property, and at a proportionate

L. ed. 882, 27 Sup. Ct. Rep. 550, affirming 183 N. Y. 543, 76 N. E. 1093, it was held that a New York statute rendering liable to an inheritance tax the exercise by will of the power of appointment, conferred by a deed executed prior to the passage of such statute, did not impair the obligation of a contract.

In *Re Vanderbilt*, 50 App. Div. 246, 63 N. Y. Supp. 1079, affirmed without opinion in 163 N. Y. 597, 57 N. E. 1127, and in *Re Potter*, 51 App. Div. 212, 64 N. Y. Supp. 1013, it was held that an inheritance tax law did not constitute a contract between the state and a citizen that, if he should die while the law was in full operation and unchanged, his property might be disposed of by him without the imposition of any further or other tax upon any rights or interests acquired under his will, and that therefore a statute taxing the exercise of the power of appointment under the will of one who died before its passage, as if the property belonged absolutely to the donee of the power of appointment, was not invalid as impairing the obligation of a contract.

Privileges and immunities of citizens of the several states.

In *Re Johnson*, 139 Cal. 532, 96 Am. St. Rep. 161, 73 Pac. 424, an exemption of nieces and nephews of the deceased from a collateral inheritance tax, when residents of the state, was held to be constitutional and valid, overruling *Re Mahoney*, 133 Cal. 180, 85 Am. St. Rep. 155, 65 Pac. 389, in which it was held that such exemption was in conflict with § 2, art. 6, of the United States Constitution, providing that citizens of each state should be entitled to all the privileges and immunities of the citizens of the several states. In the later case, however, it was held that such provision of the United States Constitution would extend such exemption of nephews and nieces to all citizens in sister states, leaving as liable for the burden of the tax the property of all other nephews and nieces, aliens, and citizens of the United States not citizens of any particular state.
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In *Re Speed*, 216 Ill. 23, 108 Am. St. Rep. 189, 74 N. E. 809, affirmed in 203 U. S. 553, 51 L. ed. 314, 27 Sup. Ct. Rep. 171, 8 A. & E. Ann. Cas. 157, and in *Humphreys v. State*, 70 Ohio St. 67, 65 L.R.A. 776, 101 Am. St. Rep. 888, 70 N. E. 957, 1 A. & E. Ann. Cas. 233, an inheritance tax law exempting from the tax property devised to religious, educational, or charitable corporations, and not extending such exemption to nonresident corporations, was held not to be in conflict with that provision of the Constitution of the United States declaring that the citizens of each state should be entitled to all privileges and immunities of the several states, since a corporation is not a citizen, within the meaning of that provision.

In *State v. Hamlin*, 86 Me. 495, 25 L.R.A. 632, 41 Am. St. Rep. 569, 30 Atl. 76, it was held that an inheritance tax law which applied equally to citizens of the state of its origin and of other states was not in conflict with that provision of the 14th Amendment of the Federal Constitution, that no state should make or enforce any law abridging the privileges or immunities of the citizens of the United States.

14th Amendment in general.

In *Orr v. Gilman*, 183 U. S. 278, 46 L. ed. 196, 22 Sup. Ct. Rep. 213, it was held that a New York statute taxing the exercise of the power of appointment derived from the disposition of property made either before or after the passage of the act, as though the property belonged absolutely to the donee of the power, and had been bequeathed or devised to him by will, infringed none of the provisions of the 14th Amendment to the United States Constitution, although construed by the highest court in the state to apply to the exercise by a son among his children of a power of appointment given him in the will of his father, who, under the law as it stood at the time of his death, had a legal right to transfer the property to such appointee without any limitation imposed upon the exercise of that right.

In *Wallace v. Myers*, 4 L.R.A. 171, 38 Fed. 184, a tax on gifts, legacies, and col-

rate for any less amount, to be paid to the sheriff or collector of the proper county, as hereinafter defined, for the general use of the commonwealth; and all administrators, executors, and trustees shall be liable for any and all taxes until the same shall have been paid as hereinafter directed: Provided, that the first \$500 of every estate shall not be subject to such duty or tax." Counsel for appellant insist that the act is violative of the state Constitution, because of the alleged absence from that instrument of a provision authorizing the imposition of an inheritance tax; that the act is in conflict with that provision of the Constitution which requires that all taxes shall be uniform; and finally, that its operation will result in discrimination,

as well as inequality, which, it is claimed, makes it obnoxious to the provisions of the 14th Amendment of the Constitution of the United States.

The present Constitution of the state declares that the legislature may by general laws provide (1) for the levy and collection, for state, county, and municipal purposes, of an annual ad valorem tax on all property (§§ 171, 172); (2) a tax on incomes, licenses or franchises (§ 174); (3) license fees on franchises, stock used for breeding purposes, the various trades, occupations, and professions; and (4) "a special or excise tax." (§ 181). It may also be remarked that § 171 of the Constitution declares that "taxes shall be levied and collected for public purposes

lateral inheritances operating alike on all property and persons similarly situated, made by a judicial officer after notice and opportunity to be heard, was held not to conflict with the provisions of the 14th Amendment to the Constitution of the United States.

Conflict of state and Federal powers.

In *Knowlton v. Moore*, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747, it was held that though the transmission of property by death was exclusively subject to the regulating authorities of the several states, it was not beyond the power of Congress to levy a tax on inheritances or legacies, nor was it an interference by the national government with a matter which fell alone within the reach of state legislation.

In *Plummer v. Coler*, 178 U. S. 115, 44 L. ed. 998, 20 Sup. Ct. Rep. 829, affirming 30 Misc. 19, 62 N. Y. Supp. 1024, it was held that the New York statute imposing a tax upon the transfer of a decedent's property was not rendered unconstitutional because, when applied to property consisting of United States bonds, its remote effect was to impair the borrowing power of the national government.

In *Snyder v. Bettman*, 190 U. S. 249, 47 L. ed. 1035, 23 Sup. Ct. Rep. 803, it was held that Congress had the power to tax the transmission of property by legacy to states or their municipalities, and that the exercise of that power did not conflict with the proposition that neither the Federal nor the state government could tax the property or the agencies of the other, since the taxes imposed were not upon property, but upon the right to succeed to property; and that therefore the act of Congress of June 3, 1898, imposing a tax upon a bequest to a municipality for public purposes, was not unconstitutional as imposing a tax upon an agency of the state.

Local or special law.

In *Re Magnes*, 32 Colo. 527, 79 Pac. 853, an inheritance tax law was held not to be a local or special law within the meaning 33 L.R.A. (N.S.)

of that provision of the Constitution forbidding the legislature to pass local or special laws changing the law of descent.

In *Montague v. State*, 54 Md. 487, an act by which an exemption from a succession tax was extended to property passing from a deceased wife to a surviving husband, in all cases where the tax had been theretofore claimed of, but not actually paid by, the husband of any decedent, was held not to be a local or special law, within the meaning of the constitutional provision forbidding the legislature from passing such laws releasing persons from their debts or obligations to the state.

On the other hand, in *Cope's Estate*, 191 Pa. 1, 45 L.R.A. 316, 71 Am. St. Rep. 749, 43 Atl. 79, it was held that an act amending or supplementing the laws regulating succession to estates of decedents, which imposed a burden on so much of any estate only as was in excess of \$5,000, and left the law unchanged as to the residue, violated that provision of the Constitution which forbade the passing of any local or special law changing the law of descent or succession.

Attention may here be called to *State ex rel. Sanderson v. Mann*, 76 Wis. 469, 45 N. W. 526, 46 N. W. 51, though the court declared that the tax sought to be imposed was not a succession tax, in which a statute providing that, in counties having more than a stated number of inhabitants, a certain percentage of all estates of decedents should be paid to the county treasurer for the use of the county, was declared to violate a constitutional provision prohibiting the enactment of any special laws for the assessment or collection of taxes, there being as a matter of fact but one county to which the act was applicable.

Jurisdiction of probate courts.

In *Union Trust Co. v. Wayne Probate Judge*, 125 Mich. 487, 84 N. W. 1101, an inheritance tax law was held not to be unconstitutional as conferring duties not judicial upon the judge of probate.

In *State ex rel. Gage v. Probate Ct.* 112

only. They shall be uniform upon all property subject to taxation within the territorial limits of the authority levying the tax; and all taxes shall be levied and collected by general laws."

But, after all, the power of the legislature to tax is an inherent, rather than a conferred, power, although the legislative department of our state government, like the executive department and judicial department, is a creature of the Constitution. Thus, in § 29 of that instrument, it is said: "The legislative power shall be vested in a house of representatives and a senate, which together shall be styled the general assembly of the commonwealth of Kentucky." The words "the legislative power," as here employed, are a

comprehensive phrase, meaning all powers that appertain to or are usually exercised by a legislative body. Perhaps it would more accurately express our meaning to say that the power to tax is incident to, or arises from, the "legislative power," with which § 29 of the Constitution clothed the general assembly in creating that department of the state government. It cannot, therefore, be successfully maintained that the authority of the legislature to impose taxes is wholly derived from §§ 169 to 182, inclusive, of the Constitution, which relate to revenue and taxation. On the contrary, we think the provisions of those sections are, in the main, limitations upon the power of the legislature, making mandatory

Minn. 279, 128 N. W. 18, the court overruled the contention that the inheritance tax act of that state was unconstitutional because the proceedings prescribed by it in the probate court amounted to the levying, assessment, and collection of taxes, and the Constitution limited the probate court to jurisdiction over estates of deceased persons and persons under guardianship. It was declared that there could be no doubt that such jurisdiction included other matters necessarily connected with the administration of estates, and necessarily included the ascertainment of the inheritance taxes to which decedents' estates were liable.

In *Nunnemacher v. State*, 129 Wis. 190, 9 L.R.A.(N.S.) 121, 108 N. W. 627, 9 A. & E. Ann. Cas. 711, it was held that an inheritance tax law was not rendered unconstitutional by submitting to the court such matters as the fixing of the value of the property and the amount of the tax.

Miscellaneous cases.

In *Mager v. Grima*, 8 How. 493, 12 L. ed. 1170, affirming 12 Rob. (La.) 584, a Louisiana statute imposing a tax on legacies when the legatee was neither a citizen of the United States nor domiciled in that state was held not to be repugnant to the Constitution of the United States.

In *State ex rel. Fath v. Henderson*, 160 Mo. 190, 60 S. W. 1093, a statute was held not to be unconstitutional merely because it appropriated the money raised thereby in an inverse order to that laid down in the Constitution.

In *Re Tuohy*, 35 Mont. 431, 90 Pac. 170, it was held that an inheritance tax law providing that the tax should be levied and collected upon the increase of all property arising between the date of death and the date of distribution was not, when applied to mines and mining claims, violative of the constitutional provision requiring all such property to be taxed at the price originally paid the United States therefor, since the tax was not upon the property itself, but upon the privilege of taking the same.

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In *State ex rel. Slabaugh v. Vinsonhale*, 74 Neb. 675, 105 N. W. 472, it was held that the power of the legislature to provide for taxation upon inheritance was not denied by a constitutional provision enumerating the subjects of taxation, but omitting inheritance taxes.

In *Nunnemacher v. State*, 129 Wis. 190, 9 L.R.A.(N.S.) 121, 108 N. W. 627, 9 A. & E. Ann. Cas. 711, it was held that inheritance taxation was not prohibited by that provision of the Constitution that the legislature should provide for an annual tax sufficient to defray the expenses of the state for each year.

In *Chambe v. Durfee*, 100 Mich. 112, 58 N. W. 661, an inheritance tax law was held to be unconstitutional because it attempted to dispose of the proceeds of the tax in a different way than that prescribed by the Constitution.

Attention may be called to *Fatjo v. Pfister*, 117 Cal. 83, 48 Pac. 1012, in which a statute requiring a certain fee to be paid upon the filing of a petition for letters testamentary or of administration or guardianship, and requiring an additional sum for each additional \$1,000 of appraised valuation in excess of \$3,000, was held to violate that provision of the Constitution requiring all property in the state to be taxed in proportion to its value, since it imposed an extraordinary tax upon the property to which it applied, in addition to the equal and uniform tax to which alone all property in the state was liable, the court declaring that it was not at all analogous to an inheritance tax as was contended, inasmuch as it applied to estates of minors and incompetents as well as to decedents, and, as to the estate of decedents, it applied to an insolvent estate as well as to a solvent one.

And in *State ex rel. Davidson v. Gorman*, 40 Minn. 232, 2 L.R.A. 701, 41 N. W. 948, a statute prescribing, as a condition precedent to the settlement of estates of deceased persons, the payment of a "probate duty," which the court declared to be a tax "in the general and precise meaning of the word," it being graded in

the imposition of certain taxes, and forbidding or regulating the imposition of others.

We are told by Mr. Cooley in his work on Taxation (chapter 1) that, "the power of taxation is an incident of sovereignty, and is possessed by the government without being expressly conferred by the people. It is a legislative power, and when the people, by their Constitutions, create a department of government upon which they confer the power to make laws, the power of taxation is conferred as part of the more general power. . . . Everything to which the legislative power extends may be the subject of taxation, whether it be person or property, or possession, franchise, or privilege, or occupation, or right. Nothing but express constitutional limitation upon legislative authority can exclude anything to which the authority extends from the grasp of the taxing power, if the legislature in its discretion shall at any time select it for revenue purposes; and not only is the power unlimited in its reach as to subjects, but in its very nature it acknowledges no limits, and may be carried even to the extent of exhaustion and destruction, thus becoming in its exercise a power to destroy. If the power be threatened with abuse, security must be found in the responsibility of the legislature that imposes the tax to the con-

stituency which must pay it. The judiciary can afford no redress against oppressive taxation, so long as the legislature, in imposing it, . . . violate no express provision of the Constitution. The necessity for imposing it addresses itself to the legislative discretion, and it is or may be an urgent necessity, which will admit of no property or other conflicting right in the citizen while it remains unsatisfied." Cooley, Taxn. 3d ed. chaps. 1, 2, p. 7.

We fail to find in that part of our Constitution respecting revenue and taxation any declaration that the power of the legislature to impose taxes is expressly limited to such taxes as are therein mentioned. We do, however, find that § 181, in explicit terms, authorizes the imposition of a "special or excise tax;" but the legislature, without this express authority, could have imposed such a tax under the general legislative power before mentioned; there being no provision of the Constitution forbidding it. *State ex rel. Schwartz v. Ferris*, 53 Ohio St. 314, 30 L.R.A. 218, 41 N. E. 579; *State ex rel. Taylor v. Guilbert*, 70 Ohio St. 229, 71 N. E. 636, 1 A. & E. Ann. Cas. 25. As the privilege or right to take property by inheritance or devise is not a natural or inherent right of persons, but is a creature of the law, it is subject to regulation by statute; and

accordance with the valuation of the estate to be probated, was held void because violative of those provisions of the state Constitution requiring equality and uniformity of taxation, and the dispensation of justice "freely and without purchase, completely and without denial."

In the following cases, inheritance tax statutes were, with little or no discussion, declared to be constitutional: *Re Stanford*, 126 Cal. 112, 45 L.R.A. 788, 68 Pac. 462; *Re Damon*, 10 Cal. App. 542, 102 Pac. 684; *Walker v. People*, 192 Ill. 106, 61 N. E. 489; *Stauffer's Succession*, 119 La. 66, 43 So. 928; *State v. Dalrymple*, 70 Md. 294, 3 L.R.A. 372, 17 Atl. 82; *Crocker v. Shaw*, 174 Mass. 266, 54 N. E. 549; *Re McPherson*, 104 N. Y. 306, 58 Am. Rep. 502, 10 N. E. 685; *Re Embury*, 19 App. Div. 214, 45 N. Y. Supp. 881; *Dixon v. Ricketts*, 26 Utah, 215, 72 Pac. 747; *Beals v. State*, 139 Wis. 544, 121 N. W. 347; *State v. Pabst*, 139 Wis. 561, 121 N. W. 351.

The following cases, cited in *RODMAN v. COM.* as approving the conclusions expressed in *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594, and *State v. Hamlin*, 86 Me. 495, 25 L.R.A. 632, 41 Am. St. Rep. 569, 30 Atl. 76, did not refer to the question here discussed:

United States v. Fox, 94 U. S. 315, 24 L. ed. 192, in which the court "deemed the sole question" for its consideration to be 33 L.R.A. (N.S.)

the validity of a devise to the United States of real estate situated in the state of New York, no reference whatever being made to inheritance taxes.

Clapp v. Mason, 94 U. S. 589, 24 L. ed. 212, in which the specific holding was that a succession tax could not be imposed on property which did not vest in possession of the legatee until after the date when the repeal of the act imposing the tax went into effect.

Schoolfield v. Lynchburg, 78 Va. 366, in which the question was whether or not the authority to tax inheritances had been delegated to the defendant city, and was answered in the negative.

Power to impose tax retrospectively.

Another phase of the constitutionality of inheritance taxation,—that of the power to impose a succession tax retrospectively,—is treated in the note to *Levy's Succession*, 8 L.R.A. (N.S.) 1180, where the cases decided up to that time will be found reviewed. Since the preparation of that note, the power of the legislature to impose a succession tax retrospectively was denied in *Re Chapman*, 133 App. Div. 337, 117 N. Y. Supp. 670, citing *Re Pell*, 171 N. Y. 48, 57 L.R.A. 540, 89 Am. St. Rep. 791, 63 N. E. 789, which will be found reviewed in the note referred to.

As to nature of inheritance taxes, see note to *Re McKennan*, post, 606.

J. A. C.

the imposition of a tax as incident to the right is authorized under our governmental system, when not expressly forbidden by the state Constitution. Many authorities might be cited in support of this proposition, and our attention has been called to but one case that questions its correctness, viz., *Nunnenmacher v. State*, 129 Wis. 190, 9 L.R.A.(N.S.)121, 108 N. W. 627, 9 A. & E. Ann. Cas. 711. Yet in that case the tax upon an inheritance was held to be valid upon the sole ground that it could not be considered an unreasonable interference with that right. The right of property, however, is an inherent or inalienable right of the citizen, and "consists in the free use, enjoyment, and disposal of his acquisitions, without control or diminution, save only of the laws of the land." 1 Bl. Com. p. 138. But we venture to say that, among the absolute rights of individuals enumerated by Blackstone, no mention is made of a right to inherit property from another. All estates derived upon the death of another have been created by law, and are for that reason always subject to regulation by statute; indeed, frequent changes by legislative enactment have been and will doubtless yet be made in the law of descent and distribution. It is patent, therefore, that the guaranty in the Bill of Rights, and other provisions of the Constitution, with respect to the right of acquiring and protecting property, does not include the mere privilege, right, or expectancy of inheritance.

While express constitutional authority for the enactment by the legislature of the act under which the tax in question is sought to be collected was unnecessary, if the tax comes within the meaning of the words "special or excise tax" appearing in § 181 of the Constitution, it may then be said that instrument expressly authorized its imposition by the legislature. Although the state of Kentucky has had an existence of more than a century as a commonwealth, no effort, prior to the enactment of the present statute, has ever been made by her legislature to impose an inheritance tax upon her people. Therefore the novelty of the questions raised by the objections made to the statute, and the total absence of judicial light from previous decisions of this court, compel us to look for guidance to those of the courts of other states, and of the Federal courts, in which such laws have been construed and enforced. Perhaps a majority of the states of the Union impose an inheritance tax in one form or another. In some of these states the tax falls upon all persons, whether lineal descendants, collaterals, or strangers. In other states the tax is paid

by collaterals alone, or by collaterals and strangers; the latter, of course, taking the estate by devise. In some states the tax rate is uniform; in others, estates of less than a given value are exempt from the tax; in still others, the tax is imposed according to a graded rate, without regard to uniformity. We have been cited to no case in which there was a failure by the court to uphold an inheritance tax like that imposed in this state. The Constitutions of many of the states in which an inheritance tax is imposed are, in respect to questions of taxation, in meaning, if not in terms, closely akin to the Constitution of this state, and even a closer resemblance will be found to exist between the inheritance tax statutes of these states and that of this state; indeed, two or more of them are almost identical with ours, that the inheritance tax shall be paid by the persons or class designated upon all property passing to them by will or otherwise, and in every instance the courts, in construing the statutes, have held that the tax was not a tax upon property, but a "privilege," "special," or "excise tax."

In *State v. Hamlin*, 86 Me. 495, 25 L.R.A. 632, 41 Am. St. Rep. 569, 30 Atl. 76, a statute practically identical with that of this state was attacked upon the same constitutional grounds here urged; but it was held by the supreme court of that state that it did not violate a provision of the Constitution of that state, which required all taxes assessed upon personal and real estate to be apportioned and assessed equally according to the just value thereof. With respect to the character of the Maine inheritance tax, the court said: "The tax provided for in the statute under consideration is clearly an excise tax. *Scholey v. Rew*, 23 Wall. 346, 23 L. ed. 101. The whole tenor and scope of the act is one of excise, and not a tax upon property, as that term is used in the Constitution. It is not laid according to any rule of proportion, but is laid upon the interests specified in the act, without any reference to the whole amount required to be raised for public purposes, or to the whole amount of property in the state liable to be assessed for public purposes. It is true that the act contains some language indicating a tax upon property; but it should be construed according to its essential principle, object, and effect. Substance, and not form or phrase, is the important thing. . . . The tax under this statute is, once for all, an excise or duty upon the right or privilege of taking property by will or descent, under the law of the state. It is uniform in its rate as to the entire class of collaterals and strangers, which

satisfies the constitutional requirement of uniformity. . . . The Constitution guarantees to the citizen the right of acquiring, possessing, and protecting property (article 1, § 1), which includes also the right of disposal. But the guaranty ceases to operate at the death of the possessor. There is no provision of our Constitution, or that of the United States, which secures the right to anyone to control or dispose of his property after his death, nor the right to anyone, whether kindred or not, to take it by inheritance. Descent is a creature of statute, and not a natural right. 2 Bl. Com. pp. 10-13; *Strode v. Com.* 52 Pa. 181."

In *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594, the constitutionality of the Illinois statute, which is worded precisely as the Kentucky statute, was upheld. In that case substantially every objection was made to the statute that is urged in the instant case; but, after an exhaustive consideration of these objections and a critical review of the decisions of various state courts, the Supreme Court announced the following conclusions: First; An inheritance tax is not one on property by devise or descent. It is the creature of the law, and not a natural right or privilege; "and therefore the authority which confers it may impose conditions upon it. From these principles it is deduced that the states may tax the privilege, discriminate between relatives, and between these and strangers, and grant exemptions, and are not precluded from this power by the provisions of the respective state Constitutions requiring uniformity and equality of taxation."

The conclusions expressed in *Magoun v. Illinois Trust & Sav. Bank* and *State v. Hamlin*, supra, are approved by the following cases: *United States v. Perkins*, 163 U. S. 625, 41 L. ed. 287, 16 Sup. Ct. Rep. 1073; *Strode v. Com.* 52 Pa. 181; *Eyre v. Jacob*, 14 Gratt. 422, 73 Am. Dec. 367; *Schoolfield v. Lynchburg*, 78 Va. 368; *State v. Dalrymple*, 70 Md. 298, 3 L.R.A. 372, 17 Atl. 82; *Clapp v. Mason*, 94 U. S. 589, 24 L. ed. 212; *Re Merriam*, 141 N. Y. 479, 36 N. E. 505; *State v. Alston*, 94 Tenn. 674, 28 L.R.A. 178, 30 S. W. 750; *Re Wilmerding*, 117 Cal. 281, 49 Pac. 181; *Minot v. Winthrop*, 162 Mass. 113, 26 L.R.A. 250, 38 N. E. 512; *Gelsthorpe v. Furnell*, 20 Mont. 299, 39 L.R.A. 170, 51 Pac. 267; *Scholey v. Rew*, 23 Wall. 331, 23 L. ed. 99; *Mager v. Grima*, 8 How. 490, 12 L. ed. 1168; *United States v. Fox*, 94 U. S. 315, 24 L. ed. 192; *Plummer v. Coler*, 178 U. S. 117, 44 L. ed. 999, 20 Sup. Ct. Rep. 829; *Knowlton v. Moore*, 178 U. S. 33 L.R.A. (N.S.)

41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747; *State ex rel. Garth v. Switzler*, 143 Mo. 287, 40 L.R.A. 288, 65 Am. St. Rep. 653, 45 S. W. 245; 27 Am. & Eng. Enc. Law, p. 337. We think the numerous authorities, supra, answer every substantial objection made to the inheritance tax statute under consideration. For they clearly present the theory on which taxation on the devolution of estates at the death of their owners is based, and thereby uphold the validity of the statute, by demonstrating that the tax thereby imposed is not one on property, but one on the privilege or right of succession thereto, and that it is not obnoxious to any provision of the state or Federal Constitutions requiring uniformity or equality of taxation, or because its enforcement may result in discrimination between relations, or between relations and strangers.

It is, however, insisted for appellant that, as the tax is a certain per centum of the value of the estate, and the property pays it, it is therefore a tax on the property itself. This argument is answered by the opinion in *Eyre v. Jacob*, 14 Gratt. 422, 73 Am. Dec. 367, as follows: "But this is by no means a necessary logical conclusion. The intention of the legislature was plainly to tax the transmission of property by devise or descent to collateral kindred, and to require that a party thus taking the benefit of a civil right secured to him under the law should pay a certain premium for its enjoyment; and, as it was thought just and reasonable that the amount of the premium should bear a certain proportion to the value of the subject enjoyed, it is fixed at a certain per centum upon the value of the whole estate transmitted." The provisions with respect to equality and uniformity in taxation found in § 171 of the Constitution apply to a direct tax on property. They do not limit the power of the legislature as to the objects of taxation, but are more especially intended to prevent an arbitrary taxation of property according to kind or quality, without regard to value. We are, however, unable to see that the inequality and want of uniformity complained of by appellant exist in the statute under consideration, for every person not of the class exempted by the act from the payment of the tax, who takes from the estate of a decedent by succession or devise, pays a tax for the privilege, and this tax is proportioned to the value of the interest which he acquires. Nor does the exemption, where the estate is of the value of \$500 or less, constitute inequality or unjust discrimination. *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 288, 42 L. ed. 1040,

18 Sup. Ct. Rep. 594; *Eyre v. Jacob*, 14 Gratt. 422, 73 Am. Dec. 375.

In *Minot v. Winthrop*, 162 Mass. 113, 26 L.R.A. 264, 38 N. E. 512, it is said in reference to a complaint of inequality urged against an inheritance tax statute: "The tax imposed by the statute we are considering is said to be unequal because it is not imposed upon all estates and upon all heirs, devisees, legatees, and distributees. To make a distinction between collateral kindred, or strangers in blood and kindred in the direct line, in reference to the assessment of such a tax, either by exempting the kindred in the direct line, or by imposing on collaterals and strangers a higher rate of taxation, has the sanction of nearly all states which have levied taxes of this kind. It has a sanction in reason, for the moral claim of collaterals and strangers is less than that of kindred in the direct line, and the privilege is therefore greater. The tax imposed by this statute is uniformly imposed upon all estates and all persons within the description contained in it, and the tax is not plainly and grossly oppressive in amount." In *State v. Hamlin*, 86 Me. 495, 25 L.R.A. 632, 41 Am. St. Rep. 569, 30 Atl. 76, it is said: "The constitutional requirement of uniformity is satisfied by a tax on the transmission of property by will or descent to strangers and collaterals, when it is uniform in its rate as to the entire class affected, although other classes of persons are exempted from the tax." So, if the rule as to uniformity should be applied to the statute under consideration, we should say that it conforms to the rule; for it only requires the same means and methods to be applied impartially to all the constituents of a class, to the end that the law shall operate equally and uniformly upon all persons in similar circumstances, both in the privilege conferred and the liabilities imposed. In other words, the tax is uniform on what it is laid,—the value of the succession, after deducting the exemption on which no tax is laid. It is upon so much of the legacy received as exceeds \$500. No legacy of \$500 or less is taxed at all, and each legacy over \$500 is taxed equally as to the excess.

It is insisted for appellee that, as the inheritance tax in question is a "special or excise tax," the rule as to uniformity does not apply to it. On the other hand, appellant contends that the tax is not an "excise tax," in the meaning of that term as defined by Phlen on Public Finance and other text writers. While it is true that "excise" has been defined to be an inland duty or impost levied upon articles of manufacture or sale, and also upon licenses to

pursue certain trades or to deal in certain commodities, it is nevertheless a term of very general signification, meaning tribute, custom tax, tollage, or assessment, and in recent years the courts have so enlarged its meaning as to declare that an inheritance tax is an excise tax; indeed, it is so denominated in practically every case included in the list previously cited. While not more conclusive than similar statements in many of these cases, the following excerpt from *State ex rel. Garth v. Switzler*, 143 Mo. 287, 40 L.R.A. 288, 65 Am. St. Rep. 653, 45 S. W. 245, aptly supports the proposition last stated: "As already remarked, no doubt longer exists that it is competent for the legislature to levy a tax upon the succession of estates. It is quite universally held that such a tax is not a tax upon property, in the ordinary sense, but is in the nature of an excise or bonus, exacted by the state upon the privilege or right to inherit or succeed to an estate." But, in view of our conclusion that the act imposing the tax does not violate the provisions of the Constitution with respect to uniformity of taxation, it is not necessary to decide whether or not the rule as to uniformity applies to a special or excise tax such as this. Therefore that question is not decided.

It is further contended by appellant that the effect of the act is to tax property otherwise exempt from taxation; and as an instance in point, it is said that, in a companion case submitted with this, a religious institution of learning receiving a devise is sought to be taxed thereon, although its property is by law exempt from taxation. The answer to this complaint must be a restatement of the proposition that the tax is not imposed upon the property, but on the right of succession. Bonds of the United States are by act of Congress exempt from taxation; but in the cases of *Plummer v. Coler*, 178 U. S. 115, 44 L. ed. 998, 20 Sup. Ct. Rep. 829, and *Wallace v. Myers* (C. C.) 4 L.R.A. 171, 38 Fed. 184, a state inheritance tax upon legacies of such bonds was sustained upon the principle above stated.

We think the county and circuit courts gave correct answers to the questions of construction raised by appellant. Manifestly the provision of the act declaring "that the first \$500 of every estate shall not be subject to such duty or tax" refers to the estate passing by will to the collateral relative or stranger, or under the statute of descent and distribution to the collateral relative, and not to the estate of the testator or decedent, or, in other words, that an estate passing by will to the collateral or stranger, or under the

statute to the collateral, which is valued at \$500 or less, shall not be subject to the tax. The tax is upon the individual, and can be imposed only when the particular interest in the decedent's estate passing to him exceeds \$500. The tax is not, therefore, imposed on the estate of the decedent, but upon the beneficiaries' right of succession to his property. Nor does the fact that the executor or administrator is required by the act to pay the tax make it a tax against the estate of the testator or decedent, for it also requires him to deduct it from the estate passing to the legatee or collateral heir. *Re Hoffman*, 143 N. Y. 327, 38 N. E. 311; *Re Howe*, 112 N. Y. 103, 2 L.R.A. 825, 19 N. E. 513; *Re Cager*, 111 N. Y. 343, 18 N. E. 866. In the case at bar the exemption in the first section of the act should be allowed each legacy; and, as held by the court below, and said in *State ex rel. Garth v. Switzler*, 143 Mo. 287, 40 L.R.A. 288, 65 Am. St. Rep. 669, 45 S. W. 245: Where it is "that the tax is upon the succession, it is computed, not on the aggregate valuation of the whole estate of the decedent considered as the unit for taxation, but on the value of the separate interest into which it is divided."

We do not find that the cases of *George Schuster & Co. v. Louisville*, 124 Ky. 189, 89 S. W. 689, and *Hager v. Walker*, 128 Ky. 1, 15 L.R.A. (N.S.) 195, 129 Am. St. Rep. 238, 107 S. W. 254, militate against the conclusions expressed in this opinion. In the *Schuster* case the court had under consideration the amendment to the Constitution providing a system of assessment of personal property differing from the ad valorem system provided by § 171, and held, in substance, that it was not the object of the amendment to allow any exemption of personal property from taxation imposed upon all property uniformly by § 171, and, further, that the amendment, in authorizing a different mode of assessment of personal property from that theretofore provided for, did not, either expressly or by implication, permit a disregard of the rule imposed by § 171, requiring uniformity in taxes upon all property. In the case of *Hager v. Walker*, it was held by the court that a certain section of the revenue act of 1906, imposing a license tax upon agents of real estate, was invalid, because it graded the license according to the class of the city in which the licensee lived, exempting altogether real estate agents residing outside of an incorporated city. The license tax was declared invalid, not because it lacked uniformity, but upon the ground of unreasonable and unconstitutional discrimination between citizens, based upon no valid reason, and 33 L.R.A. (N.S.)

because the tax was not imposed by "general law," as required by the Constitution. The court, however, expressly held that the provision in § 171 of the Constitution, requiring that the tax rate upon property be uniform, does not directly and specifically apply to license taxes authorized by § 181 of the Constitution. The act was obnoxious to the Constitution because, in imposing a license tax upon a particular occupation, it attempted to exempt from its provisions and burdens certain persons engaged in the occupation, for no other reason than that they did not live in incorporated cities. The exemption was manifestly an unreasonable discrimination against the persons taxed, and in violation of § 3 of the Bill of Rights, which declares that "no grant of exclusive, separate, public emoluments or privileges shall be made to any man or set of men, except in consideration of public services."

It follows from what we have said that in our opinion the act imposing the inheritance tax is not unconstitutional or otherwise invalid. Therefore it is not our province to question the policy of the legislature in enacting it, or to refuse to sanction its enforcement.

Wherefore the judgment is affirmed.

SOUTH DAKOTA SUPREME COURT.

RE ESTATE OF HELEN G. McKENNAN,
Deceased.

E. A. SHERMAN, Exr., etc., of Helen G. McKennan, Deceased, et al, Appts.,
v.

STATE OF SOUTH DAKOTA.

(— S. D. —, 126 N. W. 611.)

Inheritance tax — how supported.

1. An inheritance or succession tax is a tax upon the exercise of the right to transmit property, and is based upon the right of

Note. — Nature of inheritance tax.

The authorities are unanimous upon the proposition that an inheritance tax is neither a property nor a personal tax, and in all the cases herein cited it is so declared; and though, as will hereafter appear, there is some little conflict as to what the tax is really levied upon, the overwhelming weight of authority supports the rule that such tax is a bonus in the nature of an excise or duty exacted by the state for the privilege granted by its laws of inheriting or succeeding to property on the death of the owner. The distinction sought to be made by Judge Whiting in the opinion delivered by him upon the first hearing in *RE McKENNAN*, between the right to in-

taxation, and not upon the right to regulate the succession of property.

Tax — designated object — application to inheritance tax.

2. A constitutional provision that no tax shall be levied except in pursuance of a law which shall distinctly state the object of the same to which the tax shall be applied has no application to an inheritance or succession tax.

Same — application of exemptions.

3. A constitutional exemption from taxation of property of the state and that devised to religious or charitable purposes does not apply to an inheritance or succession tax upon the transmission of property to the state or a religious body.

Same — constitution — voidness of exemption — effect.

4. A constitutional provision avoiding all laws exempting certain classes of property from taxation has no application to an exemption from a succession tax of property

herit or to succeed or to transmit, and the exercise of such right, has been specifically made in no other case, though there are a few opinions, the language of which, if taken literally, would seem to lend support to such distinction. It may be safely said, however, that in none of the cases did the practical results depend upon any such refined distinction; and hence the cases which employ language indicating that it is the right to succeed or the right to transmit, or that it is the passing of property, that is the subject of the tax, cannot be regarded as authority for or against Judge Whiting's view.

In *Scholey v. Rew*, 23 Wall. 331, 23 L. ed. 99, and in *Knowlton v. Moore*, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747, it was declared that an inheritance tax was not a direct tax upon property nor a capitation exaction, but was an excise tax or duty imposed by the state upon the right to become the successor of the owner of property upon his death.

In *Knowlton v. Moore*, *supra*, the court said: Inheritance taxes "are universally deemed to relate, not to property *eo nomine*, but to its passage by will or by descent in cases of intestacy, as distinguished from taxes imposed on property, real or personal, as such, because of its ownership and possession. In other words, the public contribution which death duties exact is predicated on the passing of property as the result of death, as distinct from a tax on property disassociated from its transmission or receipt by will or as the result of intestacy." The court sketched the history of these taxes, and then went on to say: "Thus, looking over the whole field, and considering death duties in the order in which we have reviewed them,—that is, in the Roman and ancient law, in that of modern France, Germany, and other continental countries, in England and those of her colonies where such laws have been enacted, in the legisla-

tion of the United States and the several states of the Union,—the following appears: Although different modes of assessing such duties prevail, and although they have different accidental names, such as probate duties, stamp duties, taxes on the transaction or the act of passing of an estate or a succession, legacy taxes, estate taxes, or privilege taxes, nevertheless tax laws of this nature in all countries rest in their essence upon the principle that death is the generating source from which the particular taxing power takes its being, and that it is the power to transmit, or the transmission from the dead to the living, on which such taxes are more immediately rested."

transmitted to a widow and certain heirs, since such tax is not one on property.

Same — provision as to uniformity.

5. A succession tax, not being a tax on property, is not affected by a constitutional provision that all taxes shall be uniform upon all real and personal property according to its value in money.

Statute — adoption — effect of construction.

6. The courts of a state adopting a statute from another state are not bound by any constitutional construction placed upon the statute by the courts of the latter state, although it was made before such adoption.

On Rehearing.

Inheritance tax — classification — validity.

7. A classification of inheritance taxes according to nearness of relationship of the recipient of the property to decedent, and according to amount received with increased

tion of the United States and the several states of the Union,—the following appears: Although different modes of assessing such duties prevail, and although they have different accidental names, such as probate duties, stamp duties, taxes on the transaction or the act of passing of an estate or a succession, legacy taxes, estate taxes, or privilege taxes, nevertheless tax laws of this nature in all countries rest in their essence upon the principle that death is the generating source from which the particular taxing power takes its being, and that it is the power to transmit, or the transmission from the dead to the living, on which such taxes are more immediately rested."

In *Nettleton's Appeal*, 76 Conn. 235, 56 Atl. 565, and in *Gallup's Appeal*, 76 Conn. 617, 57 Atl. 699, an inheritance tax was declared to be neither a tax upon property nor upon persons, but to be "an indirect tax or duty of the kind known as death duties; that is, an exaction to be paid to the state upon the occasion of death, and the consequent transfer of ownership in the property of the decedent, through the intervening custody and administration of the law, to the persons designated by the law, through the statutes regulating wills, descents, and distribution."

And in *Hopkins's Appeal*, 77 Conn. 644, 60 Atl. 657, the two cases last cited were declared to have settled that the Connecticut inheritance tax law did not provide for the taxation of any property left by the decedent, nor of any person interested in his estate, but that it did impose an exaction by the state to be collected from the property left by a deceased person while in its custody, prescribed upon the occasion of his death and the consequent devolution thereof by force of its laws.

In *State v. Alston*, 94 Tenn. 674, 23 L.R.A. 178, 30 S. W. 750, the court declared that an inheritance tax was not a tax upon property, but upon "the right or privilege

tax as relationship becomes remote, or as the property taken increases in amount, does not violate a constitutional provision that all taxation shall be equal and uniform.

Same — increased rates — entire amount taken.

8. The imposition of increased rates of taxation upon the whole amount taken whenever a portion of a decedent's estate taken by a recipient exceeds certain amounts, and not merely upon the excess above the amount fixed, is not unconstitutional as being unequal taxation, although it may result in giving recipients or sums only slightly above the division line a less net estate than would be received by those whose shares were just under the division line.

(Whiting, J., dissents in part.)

(May 10, 1910.)

of acquiring it by succession. "It is a condition upon which the person may take the estate of a deceased relative by inheritance, or testator by his will. It is a retention by the state of a part of a deceased person's property, which the state may take to meet its necessities, and which in certain cases it may take *in toto*, as in cases of escheated property. It is not a tax upon the right of alienation, but on the privilege of receiving by inheritance or will or otherwise at the death of a former owner."

And in *State ex rel. Garth v. Switzler*, 143 Mo. 287, 40 L.R.A. 280, 65 Am. St. Rep. 653, 45 S. W. 245, it was declared to be "quite universally held that such tax is not a tax upon property in the ordinary sense, but is in the nature of an excise or bonus exacted by the state upon the privilege or right to inherit or succeed to an estate."

An inheritance tax "is not a tax on persons." *Re Swift*, 137 N. Y. 77, 18 L.R.A. 709, 32 N. E. 1096.

"It is said that the tax is 'not a tax on the person who transmits, or the person who receives, but it is a tax on the right of transmission.' . . . The tax, . . . under the decisions of this and other courts, is a tax upon the transfer, transaction, or right to receive property. . . . The theory of an inheritance tax is that it is not one on property, but upon the right to succession." *Bullen's Estate*, 143 Wis. 512, 128 N. W. 109.

In *Re Inheritance Tax*, 23 Colo. 492, 48 Pac. 535, the court declared that, although designated as a tax in the statute, an inheritance tax was not a tax upon property, but was "rather a contribution which the state levies for itself as a condition upon which the title to property shall pass upon the death of its owner."

In *People v. Koenig*, 37 Colo. 283, 85 Pac. 1129, 11 A. & E. Ana. Cas. 140, the court declared that the tax or duty laid by the statute before it for construction was "upon the receipt of some beneficial interest 33 L.R.A. (N.S.)

A PPEAL by the executor et al. from an order of the Circuit Court for Minnehaha County affirming a judgment of the County Court declaring the estate of Helen G. McKennan, deceased, subject to an inheritance tax. Affirmed.

The facts are stated in the opinion.

Messrs. Boyce & Warren, Aikens & Judge, and Sioux K. Grisby for appellants.

Messrs. S. W. Clark, Attorney General, and Alpha F. Orr for the State.

Whiting, P. J., delivered the opinion of the court:

This action was brought to test the constitutionality of chapter 54 of the Session Laws of 1905, being the act commonly known as the "inheritance or succession tax law."

in property" passing by will or under the intestate laws of the state.

In *Strode v. Com.* 52 Pa. 181, the court below, whose judgment was affirmed, propounded itself the question whether the inheritance tax sought to be imposed on bonds of the United States was imposed on the bonds or on the owner of them, and declared that the collateral inheritance tax was a bonus exacted from the collateral kindred and others as the condition on which they might be permitted to take the estate left by a deceased relative or testator.

In *Clymer v. Com.* 52 Pa. 185, the court below, whose judgment was affirmed by the supreme court, declared that an inheritance tax was not to be viewed as a tax assessed upon the property of the deceased, but was a restriction upon the right of acquisition by those who, under the law regulating the transmission of property, were entitled to take as beneficiaries.

And in *Mixer's Estate*, 10 Pa. Co. Ct. 409, the court declared the collateral inheritance tax not to be a tax in the ordinary sense of the word or the meaning of the Constitution, but to be "rather in the nature of a taking or retention of a part of that which the state, if it saw proper, might claim and keep *in toto*."

The language used in most of the cases heretofore cited supports the rule enunciated in the beginning of this note, that an inheritance tax falls upon the privilege of succeeding to the property of the deceased person; but it must be admitted that the results thereof did not depend upon any distinction between the privilege of succeeding and that of transmitting, and that in none of the cases, except *State v. Alston*, was the attention of the court called to any such distinction. There are, however, a few cases in which it was specifically decided that it was upon the privilege of succeeding that an inheritance tax was levied.

In *Gelsthorpe v. Furnell*, 20 Mont. 299, 39 L.R.A. 170, 51 Pac. 267, the court said:

The will of one Helen G. McKennan was, on the 13th of October, 1906, admitted to probate by the county court of Minnehaha county. The provisions of such will were set forth in certain findings of fact made by such county court, which findings will be hereinafter referred to. It appears that in September, 1907, the executor of, and trustee under, the above-mentioned will, learning that the county court was about to appoint an appraiser under the provisions of the above-mentioned law, in order to have the property of the estate appraised for the purpose of assessing the tax under such law, presented to such court a petition setting forth the facts hereinafter stated, and, claiming that, under such facts, the property of

such estate was exempt from taxation under said inheritance tax law, asked the court to refrain from the appointment of an appraiser, and also asked the court to adjudge that certain lands conveyed to the city of Sioux Falls and to the First Congregational Church were not part of such estate. The court, in pursuance of such statute, issued a citation to all the parties interested, asking them to show cause why such property should not be appraised and the inheritance tax imposed upon such property. In answering such order, the interested parties raised, among others, the questions hereinafter discussed. A stipulation as to the value of the several parts of the estate was entered into, and thus the necessity for appointment of ap-

"The most exact rule is that which regards the tax as upon the right to receive property, rather than the right to dispose of it."

To the same effect is *Lacy v. State Treasurer*, — Iowa, —, 121 N. W. 179, in which it was held that an inheritance tax was not on the right to give or grant, but upon the right to receive.

But in the following cases, too, in which the tax was declared to be a tax not upon property, but upon the right or privilege of taking or succeeding to property upon the death of the former owner, it does not appear that any such distinction was considered: *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594; *Wallace v. Myers*, 4 L.R.A. 171, 38 Fed. 184; *Re Hite*, — Cal. —, 32 L.R.A.(N.S.) 1167, 113 Pac. 1072; *Re Macky*, 46 Colo. 79, 23 L.R.A.(N.S.) 1207, 102 Pac. 1075; *Re Speed*, 216 Ill. 23, 108 Am. St. Rep. 189, 74 N. E. 809; *Westfeldt's Succession*, 122 La. 836, 48 So. 281; *State v. Hamlin*, 86 Me. 495, 25 L.R.A. 632, 41 Am. St. Rep. 569, 30 Atl. 76; *Re Fox*, 154 Mich. 5, 117 N. W. 558; *Drew v. Tift*, 79 Minn. 175, 47 L.R.A. 525, 79 Am. St. Rep. 446, 81 N. W. 839; *State ex rel. Fath v. Henderson*, 160 Mo. 190, 60 S. W. 1093; *Re Tuohy*, 35 Mont. 431, 90 Pac. 170; *State ex rel. Slabaugh v. Vinsonhaler*, 74 Neb. 675, 105 N. W. 472; *Re Craig*, 97 App. Div. 289, 89 N. Y. Supp. 971, affirmed without opinion in 181 N. Y. 551, 74 N. E. 1116; *Re Whiting*, 2 App. Div. 590, 38 N. Y. Supp. 131; *Re Thomas*, 3 Misc. 388, 24 N. Y. Supp. 713; *Jackson v. Tailer*, 41 Misc. 36, 83 N. Y. Supp. 567, affirmed without opinion in 96 App. Div. 625, 88 N. Y. Supp. 1104; *Re Vanderbilt*, 2 Connolly, 319, 10 N. Y. Supp. 239; *Pullen v. Wake County*, 66 N. C. 361; *State ex rel. Schwartz v. Ferris*, 53 Ohio St. 314, 30 L.R.A. 218, 41 N. E. 579; *State ex rel. Taylor v. Guilbert*, 70 Ohio St. 229, 71 N. E. 636, 1 A. & E. Ann. Cas. 25; *Eury v. State*, 72 Ohio St. 448, 74 N. E. 650; *English v. Crenshaw*, 120 Tenn. 531, 17 L.R.A.(N.S.) 753, 127 Am. St. Rep. 1025, 110 S. W. 210; *Knox v. Emerson*, — Tenn. 33 L.R.A.(N.S.)

—, 131 S. W. 972; *Re Hickok*, 78 Vt. 259, 82 Atl. 724, 6 A. & E. Ann. Cas. 578; *Eyre v. Jacob*, 14 Gratt. 422, 73 Am. Dec. 367; *Miller v. Com.* 27 Gratt. 110; *Re Stixrud*, 58 Wash. 339, post, 632, 109 Pac. 343; *Black v. State*, 113 Wis. 205, 90 Am. St. Rep. 853, 89 N. W. 522.

Nor in the following cases, in which the tax was declared to be on the "right of succession," does any question appear to have been considered, except whether the inheritance tax was a tax on property, which was answered in the negative: *Orr v. Gilman*, 183 U. S. 278, 46 L. ed. 196, 22 Sup. Ct. Rep. 213, affirming 167 N. Y. 227, 52 L.R.A. 433, 88 Am. St. Rep. 508, 60 N. E. 439; *Re Wilmerding*, 117 Cal. 281, 49 Pac. 181; *Re Stanford*, 126 Cal. 112, 45 L.R.A. 788, 58 Pac. 462; *Re Kennedy*, 157 Cal. 517, 29 L.R.A.(N.S.) 428, 108 Pac. 280; *Kochersperger v. Drake*, 167 Ill. 122, 41 L.R.A. 446, 47 N. E. 321; *Merrifield v. People*, 212 Ill. 400, 72 N. E. 446; *Re Graves*, 242 Ill. 212, 89 N. E. 978; *People v. Griffith*, 245 Ill. 532, 92 N. E. 313; *Ferry v. Campbell*, 110 Iowa, 290, 50 L.R.A. 92, 81 N. W. 604; *Re Stone*, 132 Iowa, 136, 109 N. W. 455, 10 A. & E. Ann. Cas. 1033; *Union Trust Co. v. Wayne Probate Judge*, 125 Mich. 487, 84 N. W. 1101; *Re Stanton*, 142 Mich. 491, 105 N. W. 1122; *State ex rel. Foot v. Bazille*, 97 Minn. 11, 6 L.R.A.(N.S.) 732, 106 N. W. 93, 7 A. & E. Ann. Cas. 1056; *Re Merriam*, 141 N. Y. 479, 38 N. E. 505, affirmed in 163 U. S. 625, 41 L. ed. 287, 16 Sup. Ct. Rep. 1073; *Re Hoffman*, 143 N. Y. 327, 38 N. E. 311; *Re Seaman*, 147 N. Y. 69, 41 N. E. 401; *Re Davis*, 149 N. Y. 539, 44 N. E. 185; *Re Bronson*, 150 N. Y. 1, 34 L.R.A. 238, 55 Am. St. Rep. 632, 44 N. E. 707; *Re Westturn*, 152 N. Y. 93, 46 N. E. 315; *Re Sloane*, 154 N. Y. 109, 47 N. E. 978; *Re Harbeck*, 161 N. Y. 211, 55 N. E. 850; *Re Lansing*, 182 N. Y. 238, 74 N. E. 882; *Re Palmer*, 183 N. Y. 238, 76 N. E. 16; *Re Ramsdill*, 190 N. Y. 492, 18 L.R.A.(N.S.) 946, 83 N. E. 584; *Re Embury*, 19 App. Div. 214, 45 N. Y. Supp. 881; *Re Vanderbilt*, 50 App. Div. 246, 63 N. Y. Supp. 1079, affirmed without opinion in 163 N. Y. 507, 57 N. E. 1127;

praiser was waived. The said county court appraised the estate, and made findings of facts and conclusions of law.

Such findings of fact, so far as they are material, are, in substance, as follows: The deceased left a will which had been duly admitted to probate. An executor had been appointed, had qualified, and letters had issued to him. On September 6, 1906, the said Helen G. McKennan, in contemplation of death, had made and executed to the First Congregational Church of Sioux Falls, South Dakota, a warranty deed to certain lands therein described, which deed

was duly acknowledged and delivered in escrow, with definite and irrevocable instructions in writing that the same, immediately upon her death, be delivered to the grantee. She died on September 29, 1906. The deed was at once delivered and placed of record. Such church was a religious corporation, and the conveyance so made was made and received with the purpose and intent that such property should be used exclusively for religious and charitable purposes. The church society had since sold such lands for \$5,000, and had used the proceeds in the construction

Re Bishop, 82 App. Div. 112, 81 N. Y. Supp. 474; Re Craig, 97 App. Div. 289, 89 N. Y. Supp. 971, affirmed without opinion in 181 N. Y. 551, 74 N. E. 1116; Re Hess, 110 App. Div. 476, 96 N. Y. Supp. 990, affirmed without opinion in 187 N. Y. 554, 80 N. E. 1111; Re Linkletter, 134 App. Div. 309, 118 N. Y. Supp. 878; Cullom's Estate, 5 Misc. 173, 25 N. Y. Supp. 699, affirmed without opinion in 76 Hun. 610, 27 N. Y. Supp. 1105; Re Irish, 28 Misc. 647, 60 N. Y. Supp. 30; Re Hitchins, 43 Misc. 485, 89 N. Y. Supp. 472, affirmed in 101 App. Div. 612, 92 N. Y. Supp. 1128; Re Morris, 138 N. C. 259, 50 S. E. 682; Dixon v. Ricketts, 26 Utah, 215, 72 Pac. 947; Re White, 42 Wash. 360, 84 Pac. 831.

There are some cases, however, which have designated an inheritance tax as a tax upon the right to transfer property by will or by descent and distribution; and in these also the form of expression appears to have been accidental, rather than premediated. *United States v. Perkins*, 163 U. S. 625, 41 L. ed. 287, 16 Sup. Ct. Rep. 1073; *Plumber v. Coler*, 178 U. S. 115, 44 L. ed. 998, 20 Sup. Ct. Rep. 829; *Murdock v. Ward*, 178 U. S. 139, 44 L. ed. 1109, 20 Sup. Ct. Rep. 775; *Levy's Succession*, 115 La. 377, 8 L.R.A. (N.S.) 1180, 39 So. 37, 5 A. & E. Ann. Cas. 871; *State v. Dalrymple*, 70 Md. 294, 3 L.R.A. 372, 17 Atl. 82; *Frothingham v. Shaw*, 175 Mass. 59, 78 Am. St. Rep. 475, 55 N. E. 623; *Re Hull*, 111 App. Div. 322, 97 N. Y. Supp. 701, affirmed without opinion in 186 N. Y. 586, 79 N. E. 1107.

And in *Minot v. Winthrop*, 162 Mass. 113, 26 L.R.A. 259, 38 N. E. 512, the tax was declared to be "on the privilege of taking or transmitting property" at the death of the owner; while in *State v. Clark*, 30 Wash. 439, 71 Pac. 20, it was said to be "an impost or excise on the right to pass the estate, and the privilege of the devisee to take."

In the following groups of cases, the language taken literally tends to support Judge Whiting's view, but it must be remembered that the sole question the courts had in mind was whether an inheritance tax was a tax upon property, which here also was decided in the negative:

In the following cases, the tax was declared to be on the "succession" to the property of a deceased person; *Snyder v. Bett*, 33 L.R.A. (N.S.)

man, 190 U. S. 249, 47 L. ed. 1035, 23 Sup. Ct. Rep. 803; *Cahen v. Brewster*, 203 U. S. 543, 51 L. ed. 310, 27 Sup. Ct. Rep. 174, 8 A. & E. Ann. Cas. 215, affirming 115 La. 377, 8 L.R.A. (N.S.) 1181, 39 So. 37, 5 A. & E. Ann. Cas. 871; *Re Magnes*, 32 Colo. 527, 77 Pac. 853; *Billings v. People*, 189 Ill. 472, 59 L.R.A. 807, 59 N. E. 798, affirmed in 188 U. S. 97, 47 L. ed. 400, 23 Sup. Ct. Rep. 272; *People v. McCormick*, 208 Ill. 437, 64 L.R.A. 775, 70 N. E. 350; *Stauffer's Succession*, 119 La. 66, 43 So. 928; *Talmadge v. Seaman*, 85 Hun. 242, 32 N. Y. Supp. 906; *Re Cook*, 114 App. Div. 718, 99 N. Y. Supp. 1049, reversed without reference to this question in 187 N. Y. 253, 79 N. E. 991; *Orcutt's Appeal*, 97 Pa. 185; *Com. v. Herman*, 16 W. N. C. 210.

And in the following cases the tax was declared to be on the "devolution" of property: *Kohn's Succession*, 115 La. 71, 38 So. 898; *Neilson v. Russell*, 76 N. J. L. 27, 69 Atl. 476; *Re Hartman*, 70 N. J. Eq. 664, 62 Atl. 560; *Re Howard*, 5 Dem. 483; *Re Sherman*, 153 N. Y. 1, 46 N. E. 1032.

And in *Blackstone v. Miller*, 188 U. S. 189, 47 L. ed. 439, 23 Sup. Ct. Rep. 277; *State v. Pabst*, 139 Wis. 561, 121 N. W. 351; and *Beals v. State*, 139 Wis. 544, 121 N. W. 347, it was said to be a tax upon the "transfer" of property; and in *State ex rel. Sanderson v. Mann*, 76 Wis. 469, 45 N. W. 526, 46 N. W. 51, it was called a tax on the "transmission" of property; while in *Moore v. Ruckgaber*, 184 U. S. 593, 46 L. ed. 705, 22 Sup. Ct. Rep. 521, it was said to be a tax on the transmission or "devolution" of property; and in *Re Wolfe*, 89 App. Div. 349, 85 N. Y. Supp. 949, affirmed without opinion in 179 N. Y. 599, 72 N. E. 1152, it was said to be upon the "passing" of property.

This note does not include cases like *Bittinger's Estate*, 129 Pa. 338, 18 Atl. 132, and *Cope's Estate*, 191 Pa. 1, 45 L.R.A. 316, 71 Am. St. Rep. 749, 43 Atl. 79, in which the statute before the court was declared to impose a direct tax upon property, though it designated the same an inheritance tax, since in such cases no question was raised as to the general nature of inheritance taxation.

As to constitutionality of succession taxes, see the note to *Rodman v. Com.* ante, 592.

J. A. C.

of a church building for such society, which building was used exclusively for religious purposes. Said land so conveyed was and now is of the value of \$5,000. On said September 6, 1906, in contemplation of death, said Helen G. McKennan made and executed to the city of Sioux Falls, South Dakota, a deed to a certain tract of land, such deed conditioned that said land was to be used and kept as a public park for the benefit of the public, but with power on the part of the city to sell such part of the tract as should seem to it necessary for the purpose of improving the remainder. This deed was also placed in escrow under the same conditions as the deed above mentioned, and in the same manner was delivered and placed on record. Certain parts of said last-mentioned land have been sold under the power contained in such deed. The value of the land was and is \$17,000. At the time of her death said Helen G. McKennan left property, real and personal, other than above mentioned, to the value of \$32,000, some \$5,000 of which was money on hand. Certain claims have been filed against the estate, which claims are in litigation, and not yet adjudicated. The will provided that, after the payment of legacies and debts, the remainder of the property should be devised to one Sherman, who was the executor, to be held by him in trust, to be sold and converted, and the proceeds therefrom paid over to certain trustees, for the purpose of constructing and maintaining a public hospital in the city of Sioux Falls, South Dakota, which said trust was one exclusively for charitable purposes.

As conclusions of law, the court found that the property conveyed to the church society was subject to tax on the valuation of \$4,900 at the rate of 4 per cent; that the property conveyed to the city was subject to a tax on a valuation of \$15,000 at the rate of 6 per cent; that the real estate devised in trust was subject to a tax on a valuation of \$31,380, subject to a reduction by allowance of further claims, such tax to be at a rate of 8 per cent; that the church society was liable for the payment of the tax against the property conveyed to it; that the city was liable for the tax on its property; and the executor and trustee in his official capacity liable for tax on the residue. Decree was entered in conformity with such findings and conclusions; said decree containing a direction and an order to the church society and to the city to pay the tax to the county treasurer, and a direction and order to the trustee to retain the tax on the residue until the claims against the estate should be adjudicated.

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The city, church society, executor, and trustees appealed to the circuit court upon questions of both law and fact. In the circuit court it was stipulated that the case be determined upon the findings made by the county court, which findings were, in accordance therewith, adopted by the circuit court. The court made conclusions similar to those of the county court, except that it directed the sale of the lands conveyed to the city for the payment of the tax, and further provided, in relation to the tax upon the residue in the hands of the executor and trustees, that, if the claims thereafter allowed should reduce the net amount in his hands below \$20,000, but in excess of \$10,000, they should pay the tax at a rate of 6 per cent, and, if reduced to \$10,000, at a rate of 4 per cent, and a decree was entered in accordance with such findings and conclusions, from which decree appeal was taken to this court.

Several assignments of error are found in the record herein, nearly all of which are based upon the alleged unconstitutionality of the law herein involved. Several grounds of unconstitutionality are set forth, rendering it necessary to consider fully the said law.

Our law is, in a general way, similar to those of many other states; but it appears to have been copied after that of the state of Illinois. The parts material for our consideration in discussing the assignments hereinafter discussed provide for a division of the beneficiaries into three classes: First, those closely related to the deceased, and as to this class the rate of tax shall be \$1 on every \$100 of the clear market value of the property received by each person, with a proviso that, in case of estates of \$20,000 or less transferred to the widow of the deceased, or of \$5,000 to any one of the other parties named in such class, the same shall be exempt from such tax, and in any case there shall be such exemptions allowed from the estate passing to such parties; second, those persons more remotely related to the deceased, and, as to this class, the tax shall be \$2 on every \$100 of the clear market value of the property received by each person, with a proviso that there shall be an exemption from such tax in favor of each of said persons of \$500; third, all beneficiaries not included in either of the others, and, as to this class, the law provides that the rate shall be as follows: "On each and every \$100 of the clear market value of all property, and at the same rate for any less amount, on all estates of \$10,000 and less, \$4; on all estates of over \$10,000, and not exceeding \$20,000, \$6; on all estates

over \$20,000, and not exceeding \$50,000, . . . \$8; and on all estates over \$50,000, \$10. Estates of the clear market value of \$100, transferred to each of the parties mentioned in the last-named class, shall be exempt."

Before entering upon a discussion of the propositions raised by appellants' assignments, it is well to consider briefly the intrinsic nature of this method of raising revenues. The interpretation of, and construction to be put upon, the class of legislation now before us, has demanded the attention of the courts in probably the great majority of the states, as well as that of the Federal courts. This has been true especially in the more recent years, which fact might lead one to suppose that this is some new method of taxation. Such however, is far from the fact. An investigation shows that such method of raising revenue has been recognized and enforced for centuries, and especially in European countries; and that in this country it is found in state legislation as far back as the early part of the nineteenth century. Though it has not generally been resorted to by the states until quite recently, the Federal government has had legislation of this nature for nearly or quite a half century. No extensive historical review can serve any useful purpose herein; but to those interested therein, we would call attention to the case of *Knowlton v. Moore*, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747, wherein will be found a most interesting and exhaustive history of such legislation, together with a very exhaustive interpretation and construction of the Federal law, which law, as interpreted by the court in said case, is identical with the law at bar so far as theory of classification and progression in rates are concerned. Historically considered, it is enough to say that long before the establishment of the Constitution of this state, what were known as "probate fees," "death dues," "inheritance taxes," and "succession taxes" were generally recognized as proper and lawful sources of revenue. In fact, it must be conceded as thoroughly established that there is vested in the state, through its legislature, absolute power over all matters of taxation, save and except as the power of such legislature may be restricted by the people through the Constitution, or by some power delegated to the Federal government. Without such restrictions there would be no limit whatever upon methods of taxation, either in relation to the classes of property or other objects of taxation, the classification of such objects of taxation, the rates levied, or any of the matters becoming vital in view of the con-

stitutional provisions, state and Federal. *Re Watson*, 17 S. D. 486, 97 N. W. 463, 2 A. & E. Ann. Cas. 321; *State ex rel. Schwartz v. Ferris*, 53 Ohio St. 314, 30 L.R.A. 218, 41 N. E. 579.

It therefore follows as a necessary result that, in the interpretation of any law of our state relating to taxation, which is attacked as unconstitutional, every intendment must be in favor of its validity. As was well said by the court in the case of *Eyre v. Jacob*, 14 Gratt. 422, 73 Am. Dec. 367: "It has always been considered to be a most delicate office for a judge to undertake to pronounce an act of the legislature to be unconstitutional and void. It is substantially to repeal the obnoxious law, and thus in effect to exercise a power properly belonging to another department of the government. 'The question (says Judge Marshall) whether a law be void for its repugnancy to the Constitution is at all times a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative in a doubtful case.' 'It is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the Constitution and the law must be such that the judge feels a clear and strong conviction of their incompatibility with each other.'" Certainly, no court should declare any law unconstitutional simply because it conflicts with the views of the judges on its advisability or necessity. *Com. ex rel. Dy-sart v. M'Williams*, 11 Pa. 70. "But whether a statute is 'contrary to the genius of a free' people is a question for the legislator, not the judge. It cannot be annulled upon supposed natural equity, the inherent rights of freemen, or any general and vague interpretation of a provision of the Constitution beyond its plain and obvious import." *Davis v. State*, 3 Lea, 378. On the other hand, courts must not ignore the plain provisions of the Constitution, but should recognize that it is to the courts alone that the people can look to preserve for them those rights which have been guaranteed to them through restrictions placed upon legislation by such Constitution.

Much has been said and written in relation to the nature of the tax now in question. It has even been intimated that it is not a tax, but a mere condition imposed upon the right to receive an inheritance or to succeed to property, incident to the power to regulate transmission and succession; but this is certainly not true. *State ex rel. Schwartz v. Ferris* and *Knowlton v. Moore*, supra. Most of the de-

cisions speak of it as a tax on the right to inherit or succeed to property. *State ex rel. Schwartz v. Ferris*, supra; *Drew v. Tift*, 79 Minn. 175, 47 L.R.A. 525, 79 Am. St. Rep. 446, 81 N. W. 839; *Gelsthorpe v. Furnell*, 20 Mont. 299, 39 L.R.A. 170, 51 Pac. 267; *Re Fox*, 154 Mich. 5, 117 N. W. 558; *State ex rel. Foot v. Bazille*, 97 Minn. 11, 6 L.R.A. (N.S.) 732, 106 N. W. 93, 7 A. & E. Ann. Cas. 1056. It seems clear to us that this is incorrect, that it is not a tax upon the right to inherit or to succeed, nor upon the right to transmit, but a tax upon the exercise of such right,—upon the transmission of property. To illustrate: Every person owning property has the inherent right to sell such property, and every other person has the inherent right to purchase same. These rights are subject to regulation, but they could not be taxed unless considered as property, and, if property, must be taxed as such. Yet the Federal government has in quite recent years, by its act to raise revenue for the Spanish War, imposed a tax, not on land, not on right to sell or purchase land, but upon the transfer of land, upon the exercise of the right to sell and buy. Considered as a tax, either upon the land or upon the right to buy, sell, or own, it would clearly have been unconstitutional, not being properly apportioned among the states.

Most courts follow the old common-law doctrine that the so-called right to transmit property or to inherit or succeed to same is but a privilege granted by statute. Only one court, that of Wisconsin, holds it to be an inherent right. *Nunemacher Case*, 129 Wis. 190, 9 L.R.A. (N.S.) 121, 108 N. W. 627, 9 A. & E. Ann. Cas. 711. Courts holding it to be a statutory privilege, as well as the supreme court of Wisconsin in the above case, have held such a tax legal, though the Wisconsin court, in the case of *Beals v. State*, 139 Wis. 544, 121 N. W. 347, were confronted with the proposition that if it was an inherent right, it was not taxable. Treating it as the taxation of the exercise of the privilege or right, or, even more correctly, the taxation of the transmission of property, it is readily seen that it becomes absolutely immaterial whether we consider the transmission of, or succeeding to, property an inherent right or a statutory privilege. A corporation acquires its right to do business by the charter received. A natural person has an inherent right to do such business. If the state determines to tax the exercise of such right, it does so as to both the person and the corporation, utterly disregarding the nature or source of the right. That taxes of the nature under considera-

tion are upon the transmission of property is held in *Re Hickok*, 78 Vt. 259, 62 Atl. 724, 6 A. & E. Ann. Cas. 578; *United States v. Perkins*, 163 U. S. 625, 41 L. ed. 287, 16 Sup. Ct. Rep. 1073; *Knowlton v. Moore*, supra. This charge imposed on transmission of property is clearly a tax, and has nothing to do with, and is not at all dependent for its validity upon, the right to regulate the succession of property. *Knowlton v. Moore*, supra.

Appellants' first contention is that the law under consideration, being chapter 54 of the Session Laws of 1905, is void, in that it does not comply with § 8 of article 11 of the state Constitution, which provides that "no tax shall be levied except in pursuance of a law which shall distinctly state the object of the same to which the tax only shall be applied." Article 11 of the Constitution is entitled "Revenue and Finance," and relates to the ordinary methods of raising the revenues necessary for maintenance of government. Other states have articles in their Constitutions similar to article 11, supra, and sections similar to § 8 thereof. Has such section and article any relation to, or bearing upon, tax legislation of the nature under consideration? We think not. There is certainly inherent in this method of raising revenue good reason why the law should not provide for the application of such revenues. This source of revenue must necessarily be one uncertain as to its returns, and it can hardly be thought that the framers of our Constitution intended that the revenue derived from sources such as those provided for by this law, or by taxes on franchises, occupations, etc., should be relied on to meet those appropriations upon which the state must rely for existence. Regardless, however, of this, we are fully satisfied that § 8 of article 11 should be construed in connection with the other sections of such article, and that, when so construed, it clearly refers to the ordinary property tax, a tax which, at the time it is levied, can be levied with knowledge as to the probable amount of revenues that will be derived therefrom, and can thus well be rendered ample to meet the uses to which the same shall be applied. This question was raised in the case of *Re McPherson*, 104 N. Y. 315, 58 Am. Rep. 502, 10 N. E. 685, wherein an inheritance tax law was in question. The constitutional provision in New York contained in their article relating to revenues is, in substance, the same as § 8, supra. It provides specifically that the law must state the object to which the tax is to be applied. In New York, as in this state, the law directs the money to be paid "for the use of the

state" with no further direction. The New York court enters into a very full discussion of this matter, and, among other things, says, in relation to the contention now under consideration: "It is always uncertain upon whom it will fall, and how much revenue it will produce. It would have been impossible for the legislature, perhaps years in advance, to specify the particular objects to which the tax should be applied, and we are of opinion that this section of the Constitution was intended to apply to the annual recurring taxes known at the time of the adoption of the Constitution, and imposed generally upon the entire property of the state."

Appellants' second contention is that the conveyances to the Congregational Church and to the city of Sioux Falls, South Dakota, are exempt from the levy of an inheritance tax by force of self-executing provisions of the Constitution. Section 5 provides that the property of the United States, the state, county, and municipal corporations shall be exempt from taxation. Section 6 provides for the exemption of property used exclusively for religious and charitable purposes. Section 7 provides that all laws exempting other property from taxation shall be void. These sections are all found in article 11 of our Constitution, and they clearly relate to property exemptions. As we have already said, this is not a tax in any sense whatever, upon property, but a tax upon the transmission of property, so that the legislature is in no manner controlled by these sections in the imposing of taxes of the kind under consideration. It is the uniform holding of the courts that constitutional provisions relating to taxation of property in no manner bear upon taxation other than that of property. *Re Watson*, 17 S. D. 486, 97 N. W. 463, 2 A. & E. Ann. Cas. 321; *Nunnemacher v. State*, 129 Wis. 190, 9 L.R.A.(N.S.) 121, 108 N. W. 627, 9 A. & E. Ann. Cas. 711; *Re Fox*, 154 Mich. 5, 117 N. W. 558.

Appellants' third contention is that the statute provides for an exemption to the widow and other heirs enumerated in § 1 of the law, contrary to the above-mentioned § 7 of article 11 of our Constitution. What we have stated in reference to the second contention answers this. No property is exempted.

Appellants' fourth contention is that "the statute is void in that it violates § 2 of article 11 of the Constitution, which provides that all taxes to be raised in this state shall be uniform on all real and personal property according to its value in money, . . . so that every person and corporation shall pay a tax in proportion

to the value of his or her or its property; and § 17 of article 6, which provides that no tax or duty shall be imposed without the consent of the people, . . . and all taxes shall be equal and uniform." It must be conceded that this contention raises a serious question, not so far as § 2 of article 11 is concerned, for that section, like §§ 5, 6, and 7, *supra*, of the same article, relates only to property taxation, but as regards the effect of § 17 of article 6 of the Constitution. While the decisions of other courts have passed upon almost every conceivable question relating to legislation of the nature under consideration, yet they are either based upon statutes materially different, or else the constitutional provisions differ, from those of this state. In this state we have not only the usual provisions for equality and uniformity of taxation as found in the revenue articles of the other Constitutions, but we have, as § 17 of article 6 of our Constitution, being the article setting forth the Bill of Rights, the following: "No tax or duty shall be imposed without the consent of the people or their representatives in the legislature, and all taxation shall be equal and uniform." We have made a very thorough investigation to ascertain whether or not this provision was to be found in the Bill of Rights of any other state, and, in so far as we can ascertain after an examination of the Constitutions of practically every state in the Union, no state has any provision of this nature, other than such as is found in the revenue article of its Constitution, save and except the state of Oregon, which, in its present Constitution, adopted in 1857, has a § 32 of its Bill of Rights, a section identical to our section above quoted, except it uses the term "legislative assembly" for "legislature." In the present Constitution of Massachusetts, which was adopted in 1780, there occurs, in the Bill of Rights, a section similar to our section above, omitting therefrom the clause, "and all taxation shall be equal and uniform." The Massachusetts section was copied into the Bills of Rights in the several states of New Hampshire, Maryland, Maine, and North and South Carolina. These appear to be the only provisions to be found relating to taxation outside of the revenue articles, save and except as the general declarations guarding the equal rights of citizens, found in various Constitutions, may bear upon the matter of taxation. The state of Oregon has an inheritance tax law passed in the year 1903, but the same differs from ours in certain material particulars; it being similar, in those particulars,

to the Wisconsin law construed in the *Nunemacher Case*, 129 Wis. 190, 9 L.R.A. (N.S.) 121, 108 N. W. 627, 9 A. & E. Ann. Cas. 711. The Oregon statute does not seem to have received any construction by the courts of such state.

It will be seen that our statute divides parties receiving property by inheritance or succession into three classes: Those closely related to the former owner, those more remotely related, and those not included in either of the foregoing classes. It also provides for the last class a progressive rate dependent upon the value of the property transmitted. Cases are not lacking declaring any attempted classification unlawful. And authorities are to be found holding that a progressive tax based upon value of property transmitted is unconstitutional. On the other hand, there are many cases sustaining classification based upon kinship, and also sustaining progression as to rates within such classes; but the courts are divided as to the rule for progression. *Kochersperger v. Drake*, 167 Ill. 122, 41 L.R.A. 446, 47 N. E. 321; *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594; *Nunemacher v. State*, 129 Wis. 190, 9 L.R.A. (N.S.) 121, 108 N. W. 627, 9 A. & E. Ann. Cas. 711; *Eyre v. Jacob*, 14 Gratt. 422, 73 Am. Dec. 367; *State ex rel. Taylor v. Guilbert*, 70 Ohio St. 229, 71 N. E. 636, 1 A. & E. Ann. Cas. 25; *Nettleton's Appeal*, 76 Conn. 235, 56 Atl. 565; *Knowlton v. Moore*, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747; *Re Fox*, 154 Mich. 5, 117 N. W. 558. All taxes of this nature are levied upon the value of the property transmitted, and the statutes universally provide for the allowance of a certain amount from such valuation as exempt from the tax; such exemptions varying usually according to rules based upon kinship between recipient of property and the former owner. Statutes are uniformly upheld, where, like that of this state, they provide that such exemptions shall be allowed regardless of amount of property transmitted to the party receiving the property. *Re Wilmerding*, 117 Cal. 281, 49 Pac. 181; *State ex rel. Taylor v. Guilbert*, 70 Ohio St. 229, 71 N. E. 636, 1 A. & E. Ann. Cas. 25. But where transmission of small legacies is exempt from taxation, and, when the property transmitted is above the exemption, no part is exempted, the law is held invalid. *Drew v. Tift*, 79 Minn. 175, 47 L.R.A. 525, 79 Am. St. Rep. 446, 81 N. W. 839; *State ex rel. Schwartz v. Ferris*, 53 Ohio St. 314, 30 L.R.A. 218, 41 N. E. 579.

It is insisted by the appellants that, even conceding that the rulings of the Fed-

eral courts and those of the other states are correct in sustaining classification based upon a proper basis, and conceding that kinship of recipient is a proper basis for such classification, further conceding that the rulings of such courts sustaining some feature of progressive taxation or of exemptions, are correct, yet those decisions are entitled to no consideration, because not controlled by a constitutional provision such as found in our Bill of Rights. And, inasmuch as the courts of other jurisdictions have uniformly held, as hereinbefore noted, that restrictions in the revenue articles of their Constitutions had no application to taxation of this nature, and that, therefore, the rule of equality therein provided for did not control the legislature or courts, it is apparent that there is much weight to such claim of appellants, if we hold that the section in our Bill of Rights does apply to such taxation. We consider this not an open question in this state. In *Re Watson*, 17 S. D. 486, 97 N. W. 463, 2 A. & E. Ann. Cas. 321, this court held that the revenue article of the Constitution had no application to an occupation tax, which was the tax then under consideration. The question arose as to whether the classification provided for by the statute before the court conflicted with the rule requiring equality in taxation. The court said: "In many jurisdictions an answer to this inquiry has been avoided on the ground that the rule is applicable only to ad valorem taxes on property. Such position cannot be taken in this state. The clause, 'and all taxation shall be equal and uniform,' found in the Bill of Rights, cannot be ignored. Constitutions are supposed to be prepared with much care and deliberation. It will not do to assume that such important instruments contain any idle or meaningless phrases. On the contrary, it must be presumed that every word was advisedly selected, inserted for a purpose, and intended to have its due weight in determining what organic principles have been established. In this state, then, taxes on occupations must be equal and uniform." Certainly the said constitutional provision applies to an inheritance tax as well as to an occupation tax.

What, then, is the effect of this provision of our Constitution? The supreme court of Oregon has held that it does not prevent classification, but that, when there is classification, everything within a class must be governed thereby. *Crawford v. Linn County*, 11 Or. 482, 5 Pac. 738. And this has also been held by this court. *Re Watson*, supra. It is well also to note the difference in wording between the two constitutional provisions. That found in Bill

of Rights is "all taxation shall be equal and uniform." It will be noticed that this clause in no manner restricts the legislature in the methods or rules for assessments and levies which it must follow in legislating. It leaves with the legislature to determine the methods to be followed in order to render taxation uniform and equal. But the revenue article of the Constitution reads: "Taxes . . . shall be uniform on . . . property, according to its value in money, . . . so that every person and corporation shall pay a tax in proportion to the value of his, her, or its property." Such provision absolutely prohibits any distinctions, between classes, in rates of levy, whether such distinction were attempted upon a classification of persons, merely as persons, or upon the difference in ability to pay.

We are therefore of the opinion that our Constitution permits under the Bill of Rights, not only classification, but progression within classes, provided such classification and progression are based upon proper foundation, and result in substantial uniformity and equality. Classification "must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis.

. . . But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the 14th Amendment (Federal Constitution) forbids this. . . . No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government.

. . . In all cases it must appear, not only that a classification has been made, but also that it is based upon some reasonable ground,—some difference which bears a just and proper relation to the attempted classification,—and is not a mere arbitrary classification." On the other hand, in imposing taxes or duties of the nature now under consideration, there can only be equality where there is classification; in fact, absolute equality is an impossibility in this as in all taxation. As was said by this court in *Re Watson*, 17 S. D. 486, 97 N. W. 463, 2 A. & E. Ann. Cas. 321: "To determine the extent of contribution in each individual case, with equality and uniformity, is the design of every wise and just system of taxation. But so long as no two persons in the state are surrounded by precisely the same circumstances and possessed of precisely the same ability to bear the burdens of taxation, no absolutely

equal or just system of collecting revenues will be evolved. 'Perfectly equal taxation,' it has been said, 'will remain as unattainable good so long as laws and government and men are imperfect.' *Grim v. Weissenberg School Dist.* 57 Pa. 437, 98 Am. Dec. 237. Perfect equality is not possible. So, we construe the clause requiring all taxation to be equal and uniform as meaning, with reference to taxes on occupations, that the burden imposed shall fall alike on all persons who are in substantially the same situation,—a rule generally recognized, even in the absence of an express constitutional requirement as to uniformity. Within the boundaries of this limitation lie broad fields of legislative discretion, which should not be invaded by the courts. In seeking to secure equality and uniformity, the legislature may tax some trades, and not others; it may,—indeed, must—classify occupations for the purpose of taxation; and the more exhaustive its system of arrangement, the more nearly similar will be the situation of all who are embraced within any designated class."

Whether we consider taking of property by succession a right or a privilege, it is founded upon ideas of right and justice deepseated in the heart of every normal person. Certainly there is no inequality in the law of succession, that gives a widow a greater exemption than is given to the son of a deceased person; or in the law that says property shall pass to near relatives in preference to those distant. In order to pass upon the question of equality, we must first determine the situation of the parties between whom it may be claimed an unlawful distinction has been drawn. It is certainly a greater privilege for a person having no natural claims upon the deceased to inherit his property, than it is for the wife or the child, that has perhaps helped to acquire such property, and who would, during the life of deceased, have been legally bound to support him if he was in need of support. It may well be said that it is against public policy to allow large fortunes to be held together by their transmission undivided upon death of owner,—that it is a menace to the welfare of the country. This being true, it is then a greater privilege or right to take a large inheritance than a small, greater not merely in proportion to the value of the inheritance, but increasing out of such proportion, so that it can well be said that it is a greater privilege to take the second \$10,000 of an estate than the first \$10,000 thereof. Such matters as the above could certainly be considered by the legislature in determining what legislation would result in true "uniformity

and equality." And under the rules hereinbefore quoted, as laid down in *Eyre v. Jacob*, 14 Gratt. 422, 73 Am. Dec. 367, and *Davis v. State*, 3 Lea, 378, it is certainly not for us to overturn the work of the legislature unless some feature of it must necessarily result in lack of uniformity or inequality. We have no hesitancy in pronouncing the classification based on kinship constitutional. Not so, however, the method for progression from transmissions of less to those of greater value.

An examination of the authorities will reveal that two methods of progression are provided for in the statutes of the several states: One, that found in this state, wherein the higher rate, in case of transmission of a greater devise or bequest, is levied upon the whole value of property transmitted; the other, like that found in the Wisconsin statute, where the increased rate applies only to the excess in value of property transmitted, over the amount subject to the next lower rate. The difference can readily be seen by changing the section of our statute, hereinbefore quoted, so that it would provide that the first \$10,000 in value should be subject to rate of 4 per cent, the excess of \$10,000 up to \$20,000, 6 per cent, the excess of \$20,000 up to \$50,000, 8 per cent, and all excess over \$50,000, 10 per cent. Must our statute, in its application, result in inequalities not consistent with any reason or theory upon which progression is allowable? It seems to be quite uniformly held by the courts that one fact to be urged in support of a progressive tax, progressing as the amount transmitted increases, is that the recipient of the larger amount is able to pay a larger rate of tax than the recipient of a smaller amount. Conceding this to be a reasonable claim, can it be said that the increased ability to pay of a devisee receiving \$20,000 over that of one receiving \$10,000 comes from the receipt of his first \$10,000? Certainly not, the increased ability to pay comes solely from the receipt of the second \$10,000. It is ridiculous to say that a man who receive a devise or legacy of \$10,001 is as well able to pay a tax of \$594.06 as is the man who receives \$10,000 to pay \$396. We have never discovered any method of making \$1 pay \$198.06.

As we have hereinbefore stated, another basis for a progressive tax, and one that seems to us the more reasonable, is the fact that, it being against public policy to allow large estates to be held together by transmission after death of owners, it is a greater privilege to inherit a larger than a smaller estate, which privilege increases in ratio greater than the increase in value

of property inherited. But, as was said regarding the ability to pay as basis for progression, if one person receives \$20,000 and another \$10,000, it was no greater privilege for the first to receive his first \$10,000 than for the second; the increased privilege is all found in the receiving of the extra \$10,000, and it is the exercise of this extra privilege, the transmission of the extra \$10,000, that should receive the extra burden of taxation.

It must be conceded that, if the legislature can fix rates of taxation, it can increase such rates, and upon grounds of public policy it might place a limit in value above which all transmissions would go to the state. As rates would be raised, the inequalities in a law like ours becomes more apparent, as will appear from the following illustrations: Conceding that the state could pass a law taxing transmissions as follows: First \$10,000, 10 per cent; excess \$10,000 to \$20,000, 20 per cent; excess \$20,000 to \$30,000, 30 per cent; excess \$30,000 to \$40,000, 40 per cent; excess \$40,000 to \$50,000, 50 per cent; excess \$50,000 to \$60,000, 60 per cent; excess \$60,000 to \$70,000, 70 per cent; excess \$70,000 to \$80,000, 80 per cent; excess \$80,000 to \$90,000, 90 per cent; excess \$90,000, 100 per cent. Under such a law transmissions would net: \$10,000, \$9,000; \$20,000, \$17,000; \$30,000, \$24,000; \$40,000, \$30,000; \$50,000, \$35,000; \$60,000, \$39,000; \$70,000, \$42,000; \$80,000, \$44,000; \$90,000 and all above, \$45,000. It will be seen that under the above system there must always be an increase in net benefit wherever there is a greater transmission. Suppose the law to apply the greater rate, as the law under consideration does, not merely to the excess, but to the whole transmission, then, taking the above amounts and rates, we would find that the transmissions would net as follows: \$10,000, \$9,000; \$20,000, \$16,000; \$30,000, \$21,000; \$40,000, \$24,000; \$50,000, \$25,000; \$60,000, \$24,000; \$70,000, \$21,000; \$80,000, \$16,000; \$90,000, \$9,000; \$90,001 or any sum greater net recipient \$0. If further illustration of unsoundness of this plan of progression is needed, it is to be found in the following, in which we use higher rates than the law provides simply to make the unsoundness of the plan more apparent: Suppose the law made a rate of 25 per cent if estate did not exceed \$10,000, and 50 per cent if above \$10,000. A party dying possessed of \$25,000, desiring to leave \$7,500 net to each of two friends, could do so by leaving to each \$10,000. He would have left \$5,000. But let us suppose he desired to give one \$7,500 net and the other \$8,000 net: it would be absolutely impossible for him to

give the extra \$500. In fact, if he left his second friend over \$10,000, such party would get net less than the one who got \$10,000, unless he was left the whole balance of \$15,000, when the two would net the same. From the \$15,000 the second party would net the same as though he were left \$10,000. If to the second were left \$11,000, he would net \$5,500 to the other's \$7,500. Certainly such classification cannot be justified. And we must remember that the underlying theory or plan is the same as in our law, and, if such a law as ours is constitutional, laws like the above illustrations must be held constitutional; the only difference being one of degree, as will be seen by taking two bequests to friends under law now before us, one bequest of \$10,000, the other of \$10,100. The first nets \$9,804, the other \$9,500, or \$204 extra tax for transmission of \$100 more property. If one bequest were \$50,000, the other \$50,001, the first would pay \$3,992 tax, the second \$4,990.10. Thus, the recipient of the second bequest would pay \$988.10 tax for privilege of receiving \$1. To say that there is equality in our law would be like saying there was equality in a city ordinance under which the consumer of less than 1,000 cubic feet of gas a month would pay 90 cents per 1,000 feet, while the consumer of over 1,000 feet would pay 60 cents per 1,000, not merely on the excess over the first 1,000 feet, but on the whole amount consumed; resulting in one paying 90 cents for 1,000 feet, the other 66 cents for 1,100 feet. No possible working of a normal mind could evolve any argument, or advance any reasons, to uphold such legislation, as against an attack upon the ground of producing unreasonable inequalities. *Drew v. Tift*, 79 Minn. 175, 47 L.R.A. 525, 79 Am. St. Rep. 446, 81 N. W. 839; *State ex rel. Schwartz v. Ferris*, 53 Ohio St. 314, 30 L.R.A. 218, 41 N. E. 579.

But it is urged that our statute is copied after that of Illinois, and that the supreme court of that state has upheld it (*Kochersperger v. Drake*, 167 Ill. 122, 41 L.R.A. 446, 47 N. E. 321), and that the decision of that court has been affirmed by the Supreme Court of the United States. *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594. It is claimed that the holdings of these courts are of controlling force. Certainly, if it were a mere interpreting of words of the statute, the adoption of the Illinois statute, after it had been interpreted by the court of that state, would be presumed to carry with the adoption the interpretation put upon the words thereof. It must be remembered, however, that the courts of

one state are not bound by any constitutional construction placed upon a law by the courts of the states from which the law came,—and this even if the Constitutions were the same, and in this case the Constitutions vary greatly. An examination of the *Magoun Case* shows that the Federal court simply adopted the construction of the law, so far as the state Constitution was concerned, placed upon such law by the state court, and in no manner passed upon the question now before us. It will be found that nearly or quite every case upholding a law similar to ours quotes the *Magoun* and *Drake Cases* as authority for such decisions, and, further, that they are in states without such constitutional restrictions as contained in our Bill of Rights. The legislature of Colorado had presented to it a request for their views upon the Illinois law, and they expressed the same forcibly in *Re Inheritance Tax*, 23 Colo. 492, 48 Pac. 535; this opinion being after decision of *Drake Case* by *nisi prius* court, and before decision by the Supreme Court. The Colorado court said: "Although an inheritance tax law of some kind is in force in very many states of the Union, the statute of the state of Illinois, from which this bill is mainly taken, is one of the most objectionable acts upon the subject to be found; and a *nisi prius* judge of that state has recently declared it to be invalid, because it conflicts with certain constitutional provisions of that state." It is true that the legislature of Colorado passed this law, and the supreme court of that state upheld it in *Re Magnes*, 32 Colo. 527, 77 Pac. 853; but the court based their decision upon the Illinois cases and the *Magoun Case*, and did not enter into any discussion of their own, merely quoting the reasons given in the *Magoun Case*: "First, an inheritance tax is not one on property, but on the succession; second, the right to take property by devise or descent is a creature of the law, and not a natural right, and therefore the authority which confers it may impose conditions upon it. From these principles it is deduced that the state may tax privileges, discriminate between relatives, and grant exemptions, and is not precluded from this power by the provisions of the respective state Constitutions requiring uniformity of taxation." If we read the case of *Knowlton v. Moore*, 178 U. S. 41, 4 L. ed. 969, 20 Sup. Ct. Rep. 747, aright, the Federal Supreme Court has, in that case, virtually overruled the *Magoun Case* on second reason quoted, and laid down the rule that the fact the state has the right to control the transmission of property by devise or succession has

nothing whatever to do with the power of the state to tax transmission of property, any more than the power to create corporations, and to give them the right to do business, would empower a state to disregard its Constitution in taxing such business; or any more than the power to tax transfers of property, or issuance of check, etc., under Spanish War act, rested upon any right to transfer property or issue check given by state.

The case of *Knowlton v. Moore* construed the Federal inheritance tax law, which law, so far as classification and progression are concerned, is in principle like the law before us, and such law was upheld. But a reading of such decision clearly indicates that, if the Federal Constitution had contained a clause like that quoted from our Bill of Rights, the decision would have been the reverse. The Federal law was attacked as unconstitutional, and we quote the following from the decision of the court: "The contention is that because the statute exempts legacies and distributive shares in personal property below \$10,000, because it classifies the rate of tax according to the relationship or absence of the relationship of the taker to the deceased, and provides for a rate progressing by the amount of the legacy or share, therefore the tax is repugnant to that portion of the first clause of § 8, art. 1, of the Constitution, which provides: 'The duties, imposts, and excises shall be uniform throughout the United States.' The argument to the contrary, whilst conceding that the tax devised by the statute does not fulfil the requirement of equality and uniformity, as those words are construed when found in state Constitutions [the underscoring is ours], asserts that it does not thereby follow that the taxes in question are repugnant to the Constitution of the United States, since the provision in the Constitution that 'duties, imposts, and excises shall be uniform throughout the United States,' it is insisted, has a different meaning from the expression 'equal and uniform,' found in state Constitutions. In order to decide these respective contentions, it becomes at the outset necessary to accurately define the theories upon which they rest. On the one side, the proposition is that the command that duties, imposts, and excises shall be uniform throughout the United States relates to the inherent and intrinsic character of the tax; that it contemplates the operation of the tax upon the property of the individual taxpayer, and exacts that, when an impost, duty, or excise is levied, it shall operate precisely in the same manner upon all individuals; that is to 33 L.R.A. (N.S.)

say, the proposition is that 'uniform throughout the United States' commands that excises, duties, and imposts, when levied, shall be equal and uniform in their operation upon persons and property in the sense of the meaning of the words 'equal and uniform,' as now found in the Constitutions of most of the states of the Union. The contrary construction is this: That the words 'uniform throughout the United States' do not relate to the inherent character of the tax as respects its operation on individuals, but simply requires that whatever plan or method Congress adopts for laying the tax in question, the same plan and the same method must be made operative throughout the United States; that is to say, that wherever a subject is taxed anywhere, the same must be taxed everywhere throughout the United States, and at the same rate. The two contentions then may be summarized by saying that the one asserts that the Constitution prohibits the levy of any duty, impost, or excise which is not intrinsically equal and uniform in its operation upon individuals, and the other that the power of Congress in levying the taxes in question is by the terms of the Constitution restrained only by the requirement that such taxes be geographically uniform." Following the above is a discussion covering over twenty pages to show that the clause in the Federal Constitution required uniformity between places, and not between individuals. Certainly, the Federal court would not have entered into such a comprehensive review of the constitutional clause, both as regards its history and meaning, if it had not believed, as was conceded by those defending the law, that the statute did "not fulfil the requirements of equality and uniformity, as those words are construed when found in state Constitutions." If such court had believed that it was immaterial, so far as that case was concerned, whether the Federal constitutional provision referred to place or person, it would certainly have said so. We therefore repeat that, if the Federal Constitution had contained the clause found in our Bill of Rights, and the same referred to persons (as it does in the state Constitution), the court, in *Knowlton v. Moore*, supra, would not have sustained the Federal law.

We are satisfied that with a classification such as found in our statute, and a rule of progression such as is found in the Wisconsin law, and which is followed in some other states, a statute would be constitutional.

Appellants attack the statute upon the ground that it is defective in its provisions pertaining to property transferred in con-

templation of death, in that it fixes no personal liability on part of grantee for the taxes, it creates no lien on the property for the tax, and provides no proper remedy for recovery of judgment for taxes. The statute is certainly indefinite and ambiguous, if not clearly defective, in these features. Inasmuch as new legislation will be necessary, without dictating as to the nature of such legislation, we would suggest that, if it is to provide for taxation upon transmission of property in contemplation of death, it should clearly and distinctly provide: For personal liability for such taxes on the part of the grantee; for a lien upon the property to secure such tax, such lien to rest on the property when same is held by the grantee or any other party, not an innocent purchaser for value and without notice; and for an action, in a court of competent jurisdiction, to recover judgment and enforce the lien.

The judgment of the Circuit Court is reversed, and said court is directed to enter judgment in favor of the appellants.

Haney, J., dissenting.

A petition for rehearing having been granted, McCoy, J., on February 23, 1911, handed down the following additional opinion:

This is an appeal from the circuit court of Minnehaha county involving the constitutionality of the inheritance tax law of this state as contained in chapter 54, Sess. Laws 1905. The cause is now before this court upon rehearing. Decision and judgment of this court were entered May 10, 1910, reversing the judgment of the lower court, and which decision appears in 24 S. D. —, 126 N. W. 611. A general statement of the facts will be found in the former decision.

Prior to her death, Helen G. McKennan disposed of her property by certain deeds and a will. The trial court, in substance, made the following findings of fact and conclusions of law: On September 6, 1906, the said Helen G. McKennan, in contemplation of death, made and executed to the First Congregational Church of Sioux Falls a warranty deed to certain lands therein described, which deed was fully acknowledged and delivered in escrow, with definite and irrevocable instructions in writing that the same, immediately upon her death, be delivered to the grantee. She died on September 29, 1906. The deed was at once delivered and placed of record. Such church is a religious corporation, and the conveyance so made was made and received with the purpose and intent that such property should be used exclusively for religious and charitable purposes. The church

society has since sold such lands for \$5,000, and has used the proceeds in the construction of a church building for such society, which building was used exclusively for religious purposes. Said land so conveyed was of the value of \$5,000. On the 6th day of September, 1906, in contemplation of death, Helen G. McKennan made and executed to the city of Sioux Falls a deed of a certain tract of land, such deed conditioned that said land was to be used and kept as a public park for the benefit of the public, but with power on the part of the city to sell such part of the tract as should seem to it necessary for the purpose of improving the remainder. This deed was also placed in escrow under the same conditions as the deed above mentioned, and in the same manner was delivered and placed of record. Certain parts of said land have been sold under the power contained in said deed. The value of the land was \$17,000. At the time of the death of Helen G. McKennan, she left property, real and personal, other than above mentioned, to the value of \$32,000, some \$5,000 of which was money on hand. Certain claims have been filed against the estate, which are in litigation and which are not yet adjudicated. The will provided that, after the payment of legacies and debts, the remainder of the property should be devised to one Sherman, who was the executor, to be held by him in trust, to be sold and converted, and the proceeds therefrom paid over to certain trustees for the purpose of constructing and maintaining a public hospital in the city of Sioux Falls, which said trust was one exclusively for charitable purposes.

As conclusions of law, the court found that the property conveyed to the church society was subject to tax on the valuation of \$4,900 at the rate of 4 per cent; that the property conveyed to the city was subject to a tax on a valuation of \$15,900 at the rate of 6 per cent; that the real estate devised in trust was subject to a tax on a valuation of \$31,380, subject to a reduction by allowance on further claims, such tax to be at a rate of 8 per cent; that the church society was liable for the tax on its property, and the executor and trustee in his official capacity liable for the tax on the residue. Decree was entered in conformity with such findings and conclusions; said decree containing a direction and an order to the church society and to the city to pay the tax to the county treasurer, and a direction and order to the trustee to retain the tax on the residue until the claims against the estate should be adjudicated.

Section 1, chap. 54, Laws 1905, provides:

"That all property, real, personal, and mixed, which shall pass by will or by the intestate laws of this state, or according to the provision of any statutes in this state, from any person who may die seised or possessed of the same while a resident of this state, or, if decedent was not a resident of this state at the time of his death, which property, or any part thereof, shall be within this state; or any interest therein or income therefrom which shall be transferred by deed, grant, sale, or gift made in contemplation of the death of the grantor or bargainor or giver, or intended to take effect in possession or enjoyment after such death, to any person or persons, or to any body politic or corporate, in trust or otherwise, or by reason whereof any person or any body politic or corporate shall become beneficially entitled, in possession or expectancy, to any property or income thereof,—shall be and is subject to a tax at the rate hereinafter specified, to be paid to the treasurer of the proper county for the use of the state; and all heirs, legatees, and devisees, administrators, executors, and trustees shall be liable for any and all such taxes until the same shall have been paid as hereinafter directed." This statute also then divides those by whom such taxable estates are received into three general classes, viz.: (1) Near relations; (2) distant relations; (3) strangers; with a different rate of taxation upon the value of the estate transmitted to each class. As will be observed, the basis of this classification is relationship. It will also be observed that under this classification near relations pay a tax of 1 per cent of the net value of the estate transmitted and received, after deducting the provided-for exemption; distant relations pay a tax of 2 per cent of the net value of the estate transmitted and received, after deducting the provided-for exemption; strangers pay taxes varying from 4 to 10 per cent of the net value of the estate transmitted and received, after deducting the exemption. It will also be observed that, as between these different classes, there is not uniformity or equality of the per cent or rate of taxation, but each class pays a different rate and a tax different in amount, even though the estate transmitted to an individual within each class might be of the same value. Again, this statute in question subdivides the third class (strangers) into four subclasses, viz.: (1) Estates of the value of \$10,000 or less, paying a tax of 4 per cent of the net value of the estate transmitted, less the exemption; (2) estates over \$10,000, and not exceeding \$20,000, paying a tax of 6 per cent; (3) estates over \$20,000, and not exceeding \$50,000, paying a tax of

8 per cent; (4) estates over \$50,000 paying a tax of 10 per cent. These four subclasses are not based on relationship, but purely and solely on the progressive amount or graduated value of the estate transmitted to each individual receiver thereof. As between these four different classes, there is the same lack of uniformity and equality in rate or per cent of taxation that exists between the three prior mentioned classes based on relationship.

All courts and all governments conceive that the transmission of property occasioned by death, although differing from tax on property as such, is nevertheless a usual subject of taxation. It is the succession or transmission or receipt of property occasioned by death that is subject to the tax. It is the privilege of succeeding to or inheriting the property of a deceased person, and not the property itself which is thus transmitted, that is taxed. In the consideration of this subject, the distinction between an inheritance tax as such and a property tax as such must at all times be kept in view. Constitutions, statutes, arguments, and reasoning applicable to a property tax are not always germane or applicable to the consideration of an inheritance tax. It seems to be generally held that the provisions of a Constitution, such as § 2, art. 11, of our state Constitution, have no applicability to or effect upon an inheritance tax law such as the one now under consideration, but that such provisions relate solely to property taxation. *Knowlton v. Moore*, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747; *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594; *Re Fox*, 154 Mich. 5, 117 N. W. 558; 12 Current Law, p. 2081; *Nunnenmacher v. State*, 129 Wis. 190, 9 L.R.A. (N.S.) 121, 108 N. W. 627, 9 A. & E. Ann. Cas. 711; *State ex rel. Taylor v. Guilbert*, 70 Ohio St. 229, 71 N. E. 636, 1 A. & E. Ann. Cas. 25; *Re Watson*, 17 S. D. 486, 97 N. W. 463, 2 A. & E. Ann. Cas. 321.

The legislature of this state had the undoubted right to create the inheritance law contained in chapter 54, Laws 1905, unless prohibited by some Federal or state constitutional provision (*Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 292, 42 L. ed. 1042, 18 Sup. Ct. Rep. 594; *Rodman v. Com.* 130 Ky. 88, ante, 592, 113 S. W. 61), and we must look to some other constitutional provision than that relating to property taxation to find the constitutional prohibition, if any such exists. It is contended that § 17, art. 6, contained in the Bill of Rights in our state Constitution, which provides that "no tax or duty shall be imposed without the consent of the people, . . . and

all taxation shall be equal and uniform," prohibits the statute in question; and that this statute is in conflict with this section of our state Constitution. We are of the opinion that this contention is not well founded. While it is no doubt true that § 17, art. 6, is broad enough to comprehend and applies to inheritance laws, still we are constrained to the view that the equality and uniformity comprehended within the meaning of this constitutional provision have been satisfied in the statute in question, and that this view is substantiated and borne out by the weight of authority. To start with, it is not the question whether some better, more advisable, or more equal and uniform law might have been created and passed, but solely the question whether this statute is invalid by reason of its being in conflict with § 17, art. 6, of the Constitution. In the case *Re Fox*, 154 Mich. 5, 117 N. W. 558, the supreme court of Michigan, when construing a very similar inheritance tax law in connection with constitutional provisions of that state, said: "But every Constitution in the Union is founded upon the principle 'that all men are equal before the law, and that life, liberty, and property are secured to all alike.' Such principle, however, is no broader in its scope and effect than the provisions of the 14th Amendment of the United States Constitution, and no law which can be sustained under such provisions of the Federal Constitution can be held . . . to violate either the letter or the spirit of our state Constitution." That clause of the 14th Amendment reading, "nor shall any state . . . deny to any person within its jurisdiction the equal protection of the laws," is as broad and comprehensive in scope and effect as the language of § 17 of our Bill of Rights, reading, "and all taxation shall be equal and uniform," can possibly be. Equality and uniformity when relating to the same subject are similar terms and mean the same thing, whether in a state or Federal Constitution. This clause of the 14th Amendment in a way was expressly aimed at state Constitutions and state legislative enactments with reference to equality and uniformity of state laws generally. *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533. The equality and uniformity of inheritance, succession, and other kindred laws are within the scope and purview of the 14th Amendment. 9 Fed. Stat. Anno. pp. 608, 618. It is said, and evidently truly, that chapter 54, Laws 1905, was modeled after a similar statute in force in the state of Illinois. The Illinois statute first makes three classes liable to the payment of the tax based on

relationship,—(1) near relatives, (2) distant relatives, (3) strangers,—the same as our statute, and then again subdivides the third class (strangers) into subclasses based solely on the progressive value of the inheritance received by each individual by the same method of progression as employed in our statute. The supreme court of Illinois in passing on the constitutionality of the statute in that state in the case of *Kochersperger v. Drake*, 167 Ill. 122, 41 L.R.A. 446, 47 N. E. 321, said: "A tax which affects the property within a specific class is uniform as to that class, and there is no provision of the Constitution which precludes legislative action from assessing a tax on that particular class. By this act of the legislature, six classes of property are created heretofore absolutely unknown. In those classes of property, depending upon the estate owned by one dying possessed thereof, which the state may regulate as to its descent and the right to devise. The tax assessed on classes thus created is absolutely uniform on the classes upon which it operates, and under the provisions of the statute is to be determined by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her, or its property inherited; and is not inconsistent with the principle of taxation fixed by the Constitution, and is clearly within the sections of the Constitution quoted. No want of uniformity with one living who owns property can be urged as a reason why the statute makes an inconsistent rule. No person inherits property or can take by devise, except by the statute; and the state, having power to regulate this question, may create classes, and provide for uniformity with reference to classes which were before unknown. Laws of this character have been sustained in Pennsylvania, New York, Maryland, Virginia, North Carolina, and other states. They have been held invalid in New Hampshire and Ohio, and some other states. We are not disposed to enter into an analysis of these cases, and a consideration of the principles on which they have been decided. The broad principle presented is that the legislature may create new classes of property with reference to estates, under which they may regulate the right to inherit or devise and take under devise, and, such right existing, such classes may be created, and, as created, may be uniform, and the assessment by valuation, when declared to operate equally on the right of succession to such classes, is not a violation of the provisions of the sections of article 9 of the Constitution of the state of Illinois." In *Magoun v. Illinois Trust & Sav. Bank*, *supra*, the constitution-

ality of the same Illinois statute was before the Supreme Court of the United States, wherein it was held that this Illinois statute in no way conflicted with the 14th Amendment. The court said: "But neither case can be said to be contrary to the rule of equality of the 14th Amendment. That rule does not require, as we have seen, exact equality of taxation. It only requires that the law imposing it shall operate on all alike under the same circumstances. . . . It is not unequal in operation because it does not levy the same percentage on every dollar, does not fail to treat 'all alike under like circumstances and conditions, both in the privilege conferred and the liabilities imposed.'"

The state of Michigan has also a very similar inheritance tax law, also divided into classes based on relationship, and again subdivided in subclasses based on the progressive value of the estate received by the individual in any particular class. That statute was also held not to be in conflict with the 14th Amendment in *Re Fox*, 154 Mich. 5, 117 N. W. 558. The court said: "This statute creates two main classes; the first being composed of lineal heirs and near relatives, . . . and the second of distant relatives and strangers. The former is again divided into two subclasses dependent upon the amount of the estate received. Classifications based upon relationship and also upon the amount transferred have been sustained in the Federal courts, and in our own and many other state courts. If the constituents of each class or subclass are affected alike by the statute, the rule of equality prescribed by constitutional provisions, and defined by the courts in construing those provisions, is satisfied. Tested by this rule, it is evident that the statute under consideration meets the constitutional requirements. . . . There is equality within the classes, and that is all that is required." The state of Wisconsin also has a very similar inheritance tax law, which divides the recipients of the inheritance into classes based on relationship, and again subdivides them into subclasses based on the progressive increasing value of the inheritance. Several similar statutes of Wisconsin were first held to be unconstitutional as lacking uniformity and equality, but in *Nunnemacher v. State*, 129 Wis. 190, 9 L.R.A. (N.S.) 121, 108 N. W. 627, 9 A. & E. Ann. Cas. 711, the Wisconsin statute is held not to be in conflict with the constitutional provisions requiring uniformity and equality. In that case the supreme court of Wisconsin said: "That, so far as the taxation of property is concerned, there can be no classification which will interfere with substantial and practical uniform-

ity of rate, . . . and that in the clause [in the Wisconsin Constitution], 'the rule of taxation shall be uniform,' if applicable to excise taxation at all, means no more than the general equality clause of the Constitution, or 'the equality protection of the laws guaranteed by the 14th Amendment. Taxation of privileges and occupations manifestly cannot be uniform in the sense in which property taxation may be uniform. Property may be all reduced to its money value, and a uniform rate levied upon it all; but, when occupations, privileges, or property transfers are to be taxed, there is no common ground upon which they can meet, no standard by which their relative value or worth can be measured or compared, and hence uniformity of taxation, or even equality of taxation, as applied to excise taxes, must necessarily mean taxation which does not discriminate, but which operates alike on all persons similarly situated. In other words, proper classification may be made, and the different rate applied to each class."

The state of Minnesota has a similar inheritance tax law with classes based on relationship, and also subdivided into classes based on the progressive values of the estates inherited. In *State ex rel. Foot v. Bazille*, 97 Minn. 11, 6 L.R.A. (N.S.) 732, 106 N. W. 93, 7 A. & E. Ann. Cas. 1056, the supreme court of Minnesota adopted the reasoning of the Illinois supreme court in the *United States in the Magoun Case*, construing the Illinois statute, and holding that where there is equality between the classes established by an inheritance tax law, that the constitutional requirements of equality and uniformity are satisfied.

The inheritance law of Ohio has had a history somewhat analogous to that of Minnesota and Wisconsin,—first held unconstitutional, afterwards held valid. In *State ex rel. Taylor v. Guilbert*, 70 Ohio St. 229, 71 N. E. 636, 1 A. & E. Ann. Cas. 25, the supreme court held that an excise inheritance tax which operates uniformly throughout the state, and operates equally upon all persons standing in the same category, does not deprive any of the equal protection of the law.

This court in the case of *Re Watson*, 17 S. D. 486, 97 N. W. 463, 2 A. & E. Ann. Cas. 321, has passed upon the precise question. In that case this court said: "The clause, 'and all taxation shall be equal and uniform,' found in the Bill of Rights, cannot be ignored. . . . What is meant by 'equality and uniformity' in this connection? The legislature is not commanded to tax all occupations. To levy the same amount of tax on each trade, occupation, or business in the state would be manifestly

impracticable and unjust. No more effectual method of defeating the real purpose of the rule could be devised. Every person, natural and artificial, whether possessing property or not, enjoys the protection of the government, and should contribute to its support. To determine the extent of contribution in each individual case, with equality and uniformity, is the design of every wise and just system of taxation. But so long as no two persons in the state are surrounded by precisely the same circumstances, and possessed of precisely the same ability to bear the burdens of taxation, no absolutely equal or just system of collecting revenues will be evolved. 'Perfectly equal taxation,' it has been said, 'will remain an unattainable good so long as laws and government and men are imperfect.' . . . Perfect equality is not possible. So, we construe the clause requiring all taxation to be equal and uniform as meaning, with reference to taxes on occupations, that the burden imposed shall fall alike on all persons who are in substantially the same situation,—a rule generally recognized, even in the absence of an express constitutional requirement as to uniformity."

Decisions of similar effect exist in many other states. See 1 Cooley, Taxn. pp. 72, 73; Tiedeman, Pol. Power, p. 282; People ex rel. Farrington v. Mensching, 187 N. Y. 8, 10 L.R.A.(N.S.) 625, 79 N. E. 884; State v. Applegarth, 81 Md. 293, 28 L.R.A. 812, 31 Atl. 961; Knowlton v. Moore, 178 U. S. 41, 4 L. ed. 969, 20 Sup. Ct. Rep. 747; Campbell v. California, 200 U. S. 87, 50 L. ed. 382, 26 Sup. Ct. Rep. 182; Union Trust Co. v. Wayne Probate Judge, 125 Mich. 487, 84 N. W. 1101; Nettleton's Appeal, 76 Conn. 235, 56 Atl. 565; Re Magnes, 32 Colo. 527, 77 Pac. 853; State v. Alston, 94 Tenn. 674, 28 L.R.A. 178, 30 S. W. 750; Crawford v. Linn County, 11 Or. 482, 5 Pac. 738. From all these decisions, although, with the exception of Re Watson and Nunnemacher v. State, construing Constitutions differing from ours, but still construing the question of the meaning of the words "equality and uniformity" in connection with excise taxation, we are compelled and constrained to gather therefrom that the constitutional rule of equality and uniformity is satisfied with reference to inheritance and excise laws, when there is equality and uniformity between each and every individual within or constituting any particular specified class; that there is equality and uniformity within the classes created by the law is all that is required; otherwise, under any other construction, it would be impossible to have any classified inheritance law at all based on the progressive value of the inheritance, under the Constitution of this 33 L.R.A.(N.S.)

state, as it would be an utter impossibility to classify any such law without inequality and lack of uniformity as between the different classes. The very idea of classification comprehends inequality and lack of uniformity. No matter what the form or basis of the classification, it would still logically be subject to the same objection as to inequality and lack of uniformity. There is no constitutional provision in this state expressly prohibiting a progressive or graduated inheritance law, or prohibiting classification with reference thereto. By the use of the word "duty" in § 17 of the Bill of Rights, an excise law is comprehended, if consented to by the people through the legislature, and that the same shall be equal and uniform in its operation, but this equality and uniformity is satisfied by equality and uniformity within each class specified by the legislature. Such is the direct holding in Re Watson and in the Nunnemacher Case. In the latter case the court said that the clause "the rule of taxation shall be uniform," if applicable to excise taxation at all, means no more than the general equality clause in the Constitution, or the equal protection of the law guaranteed by the 14th Amendment, and hence we conclude that § 17, art. 6, of our Bill of Rights, is no broader in scope and effect as to equality and uniformity as applied to excise taxation, than is the 14th Amendment of the Federal Constitution, and that the decisions on that subject applicable to one are applicable to the other. It is clear from all these decisions that the legislature may make any proper classification of recipients of inherited estates, for the purposes of such taxation, that it chooses, so long as there is equality and uniformity between those within and constituting each separate class. It also necessarily follows that, if the legislature has the right to classify on some proper recognized basis, it is not within the judicial province of the courts to say what such classification shall be, so long as the legislature is within the limits of such proper basis. In other words, the courts will not "race opinions" with the legislature as to which might create the better law. It seems to be everywhere conceded that relationship constitutes a proper basis for such classification. It is contended that the subclassification of strangers under the statute in question, whereby those receiving \$10,000 and less pay 4 per cent of the value of the estate received, and those receiving over \$10,000, and not exceeding \$20,000, pay 6 per cent, and those receiving over \$20,000, and not exceeding \$50,000, pay 8 per cent, and those receiving over \$50,000 pay 10 per cent, is an arbitrary and unreasonable classification, without any reasonable justification

therefor. Every individual receiving an estate falling in any one of these four classes would pay precisely the same rate and amount of tax on an estate of like value, so that the burden would fall alike on all similarly situated. This seems to be the test of the rule as to equality and uniformity of classification. It seems also to be generally held that the power to classify the recipients of inherited estates is subject to the rule that the classification must not be so purely arbitrary and unnatural as to have no reason to justify it; that is, it must be devoid of all reasonable grounds on which to rest in order to invalidate such classification. *Re Watson*, supra; *Re Keeney*, 194 N. Y. 281, 87 N. E. 428; *People ex rel. Farrington v. Mensching*, 187 N. Y. 8, 10 L.R.A. (N.S.) 625, 79 N. E. 884, 10 A. & E. Ann. Cas. 101. The basis of the classification of this portion of the statute in question, as will be observed, is purely and solely the progressive rate in amount of the value of the estate inherited. In *Knowlton v. Moore*, the Supreme Court of the United States, in construing the inheritance provision of the Spanish-American War tax of 1898, speaking through Mr. Justice White, said: "Lastly, it is urged that the progressive rate feature of the statute is so repugnant to fundamental principles of equality and justice that the law should be held to be void, even although it transgresses no express limitation in the Constitution. Without intimating any opinion as to the existence of a right in the courts to exercise the power which is thus invoked, it is apparent that the argument as to the enormity of the tax is without merit. It was disposed of in *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 283, 293, 42 L. ed. 1037, 1042, 18 Sup. Ct. Rep. 594. The review which we have made exhibits the fact that taxes imposed with reference to the ability of the person upon whom the burden is placed to bear the same have been levied from the foundation of the government. So, also, some authoritative thinkers and a number of economic writers contend that a progressive tax is more just and equal than a proportional one. In the absence of constitutional limitation, the question whether it is or is not is legislative, and not judicial. The grave consequences which it is asserted must arise in the future, if the right to levy a progressive tax be recognized, involves in its ultimate aspect the mere assertion that free and representative government is a failure, and that the grossest abuses of power are foreshadowed unless the courts usurp a purely legislative function. If a case should ever arise where an arbitrary and confiscatory exaction is imposed, bearing

the guise of a progressive or any other form of tax, it will be time enough to consider whether the judicial power can afford a remedy by applying inherent and fundamental principles for the protection of the individual, even though there be no express authority in the Constitution to do so. That the law which we have construed affords no ground for the contention that the tax imposed is arbitrary and confiscatory is obvious." It will be observed from this quotation that the decision in the *Magoun Case* is approved, which construes the Illinois statute where the progressive rate is classified on the same basis and by the same methods as the law of this state. Again, in this connection, we emphasize the statement that there is no constitutional provision in South Dakota, expressly or otherwise, prohibiting such classification; that § 17 of our Bill of Rights means substantially the same thing, and has no broader scope and effect than the 14th Amendment. In the *Magoun Case* the appellant claimed that "the progression is likewise unnecessarily arbitrary, if we take the view that the tax is levied on the amount received. . . . Under such an assumption, those taking the larger amounts are required to pay a larger rate on the same sums upon which those taking smaller sums pay a smaller rate; that is to say, one who receives a legacy of \$10,000 pays 3 per cent, or \$300, thus receiving \$9,700 net, while one receiving a legacy of \$10,001 pays 4 per cent on the whole amount, or \$400.04, thus receiving \$9,600.96, \$99.04 less than the one whose legacy was actually \$1 less valuable."

This is precisely the claim made on behalf of the appellant in the case at bar. But the unsoundness and fallacy of this claim is fully exposed in this case. Speaking through Mr. Justice McKenna, the court said: "The reasoning of appellant is based on the view that the tax is one on property, instead of one on the succession, as held by the supreme court of the state. Being on the succession, the court further held, as we have seen, that the latter is to be regarded as new property, and the \$20,000 and other property not taxed are not therefore exemptions. In this view the Illinois court is in harmony with the majority of other courts of the country. We concur in the reasoning. It is true that the amount of the exemption is greater in the Illinois law than in any other, but the right to exempt cannot depend on that. Whether it shall be \$20,000 as in Illinois law, or \$10,000 as in that of Massachusetts, or other amounts as in other laws, must depend upon the judgment of the legislature of each state, and cannot be subject to judicial review. If

such review could ascertain the factors of judgment, and could apply them with indisputable wisdom to the different conditions existing, it would be outside of its province to do so. That manifestly is a legislative, not a judicial, function. The first and second classes, therefore, of the statute, depend on substantial distinctions, and their classifications are not arbitrary. Nor do the exemptions of the statute render its operation unequal within the meaning of the 14th Amendment. 'The right to make exemptions is involved in the right to select the subjects of taxation, and apportion the public burdens among them, and must consequently be understood to exist in the lawmaking power, wherever it has not in terms been taken away. To some extent it must exist always; for the selection of subjects of taxation is of itself an exemption of what is not selected.' . . . The provisions of the statute in regard to the tax on legacies to strangers to the blood of an intestate need further comment. . .

. There are four classes created, and manifestly there is equality between the members of each class. Inequality is only found by comparing the members of one class with those of another. It is illustrated by appellant as follows: One who receives a legacy of \$10,000 pays 3 per cent, or \$300, thus receiving \$9,700 net, while one receiving a legacy of \$10,001 pays 4 per cent on the whole amount, or \$400.04, thus receiving \$9,600.96, or \$99.04 less than the one whose legacy was actually \$1 less valuable. . . . These, however, are conceded to be extreme illustrations, and we think, therefore, that they furnish no test of the practical operation of the classification. When the legacies differ in substantial extent, if the rate increases, the benefit increases to greater degree. If there is unsoundness, it must be in the classification. The members of each class are treated alike; that is to say, all who inherit \$10,000 are treated alike; all who inherit any other sum are treated alike. There is equality, therefore, within the classes. If there is inequality, it must be because the members of a class are arbitrarily made such and burdened as such upon no distinctions justifying it. This is claimed. It is said that the tax is not in proportion to the amount, but varies with the amounts arbitrarily fixed, and hence that an inheritance of \$10,000 or less pays 3 per cent, and that one over \$10,000 pays not 3 per cent on \$10,000 and an increased percentage on the excess over \$10,000, but an increased percentage on the \$10,000 as well as on the excess. And it is said, as we have seen, that in consequence one who is given a legacy of \$10,001, by the deduction of the tax, receives \$99.04 less than one who is given a legacy

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of \$10,000. But neither case can be said to be contrary to the rule of equality of the 14th Amendment. That rule does not require, as we have seen, exact equality of taxation. It only requires that the law imposing it shall operate on all alike under the same circumstances. The tax is not on money; it is on the right to inherit, and hence a condition of inheritance, and it may be graded according to the value of that inheritance. The condition is not arbitrary because it is determined by that value. It is not unequal in operation because it does not levy the same percentage on every dollar; does not fail to treat 'all alike under like circumstances and conditions, both in the privilege conferred and the liabilities imposed.' The jurisdiction of courts is fixed by amounts. The right to appeal is. As was said at bar, the Congress of the United States has classified the right of suitors to come into the United States courts by amounts. Regarding these alone, there is the same inequality that is urged against classification of the Illinois law. All license laws and all specific taxes have in them an element of inequality. Nevertheless, they are universally imposed, and their illegality has never been questioned. We think the classification of the Illinois law was in the power of the legislature to make, and the decree of the circuit court is affirmed."

In the *Nunnenmacher Case*, the supreme court of Wisconsin, realizing that the same basic principle of classification was involved in the construction of the Wisconsin statute as in the Illinois, said: "And that the clause, 'the rule of taxation shall be uniform,' if applicable to excise taxation at all, means no more than the general equality clause of the Constitution, or 'the equal protection of the laws' guaranteed by the 14th Amendment. Taxation of privileges and occupations manifestly cannot be uniform in the sense in which property taxation may be uniform. Property may be all reduced to its money value, and a uniform rate levied upon it all; but, when occupations, privileges, or property transfers are to be taxed, there is no common ground upon which they can meet, no standard by which their relative value or worth can be measured or compared, and hence uniformity of taxation, or even equality of taxation, as applied to excise taxes, must necessarily mean taxation which does not discriminate, but which operates alike on all persons similarly situated. In other words, proper classification may be made, and a different rate applied to each class. . . . These considerations bring us to the third point of the argument, and, in fact, partly answer it, namely, the objection that the

tax here in question violates the rule of uniformity, that rule, as applied to excise taxation, meaning simply that there shall be no unjust discrimination. The sole remaining question under this contention is whether the present law violates the true principles of classification. It is said in the Black Case, 113 Wis. 205, 90 Am. St. Rep. 853, 89 N. W. 522, that 'classification between lineals and collateral relatives and strangers does not violate the rule of uniformity, nor the principle of equal protection of the laws, and that reasonable exemption of small estates also may be allowed without violating uniformity.' While the admissions made by counsel in the Black Case tend to deprive this expression of weight as an authority, the arguments in the present case, aided by our own investigations, have convinced us that the conclusions are correct, and sanctioned by the great weight of authority. In order to justify classification, there must, of course, be substantial and real differences of situation, calling for, or reasonably suggesting, the necessity for different treatment. That a wife or daughter deprived by death of the care and support of her natural protector stands in substantially a different position from a collateral relative, and that her situation justifies different treatment, goes almost without saying, and that a collateral relative stands in a substantially different position from a mere stranger seems reasonably clear, although in less degree. The authorities are quite unanimous in justifying substantially the classification which is embodied in the law, and the Supreme Court of the United States has approved of it in numerous decisions, notable among which is *Magoun v. Illinois Trust & Sav. Bank*. . . . The progressive feature of the act involves greater difficulty. By this feature increased rates of taxation are imposed as the amount of the bequest increases. Thus, if one legatee receives \$25,000, and another in the same degree of kinship receives \$50,000, while they will both pay the same rate on \$25,000, the second legatee will pay a higher rate on his second \$25,000. It is said that this is rank discrimination, that there is no difference in situation justifying a difference in classification, but that classification of persons cannot be based on mere differences in ability to pay. If this question were an original one, it would seem serious. It is somewhat persuasive to know that railroad license taxes have been levied upon the progressive plan, increasing as the earnings per mile increase, since 1876 without question, and that street railroads and electric lighting companies are now subject to a like progressive rate of taxation. . . . This fact would not, of 33 L.R.A.(N.S.)

course, be conclusive. The question has, however, been met in other courts, and it has been held with substantial uniformity that the progressive feature does not violate the general guaranties of equality and the equal protection of the laws contained in the various state Constitutions and in the 14th Amendment to the Constitution of the United States. . . . The decision of the Supreme Court of the United States as to the force of the 14th Amendment is necessarily conclusive, and, as the general equality guaranties of our own Constitution are substantially the equivalent of the equal protection of the laws guaranteed by the 14th Amendment, we are content to follow the decisions of the United States Supreme Court, and hold that the progressive feature does not violate the Constitution."

In the case *Re Fox*, the supreme court of Michigan upholds the classification based on the progressive amounts of the value of the inherited estate, under a statute precisely similar in principle to the Illinois and South Dakota enactments, and in this case the court said: "This statute creates two main classes; the first being composed of lineal heirs and near relatives of the testator or intestate, and the second of distant relatives and strangers. The former is again divided into two subclasses dependent upon the amount of the estate received. Classifications based upon relationship and also upon the amount transferred have been sustained in the Federal courts." In this case the decision in the *Magoun Case* is quoted and approved and adopted, after a full review of the decisions apparently holding otherwise.

In the case of *State ex rel. Foot v. Bazille*, 97 Minn. 11, 6 L.R.A.(N.S.) 732, 106 N. W. 93, 7 A. & E. Ann. Cas. 1056, the supreme court of Minnesota, by Brown, J., in construing substantially a like statute, said: "The history of taxation is in harmony with all human affairs, one of evolution. Its progress from the earliest times to the present day is one of constant development, in keeping with the advancing intelligence of man, unrolling step by step, with changing economic and social conditions, tardily, however, new methods and means of subjecting untaxed property to the tax rolls. . . . But in more recent times new species of property, 'new in kind, unsubstantial in character, vast in extent, enormous in value,' have, owing to industrial growth and commercial enterprise, come rapidly into existence, . . . and methods and means of reaching and subjecting the same to its share of the public burdens have developed, and been put into practical operation by the legislatures and courts of this country. Ability

or faculty to pay has come to be the test in determining the justness of taxation. It is 'not only the ideal basis of taxation, but the goal towards which society is steadily working. It lies instinctively and unconsciously at the bottom of all of our endeavors at reform.' . . . The equity and fairness of this theory in its broadest sense, when we reflect upon the vast fortunes accumulated as the result of . . . facilities not possessed by people in general, is apparent and obvious. It works no injustice or harm to those thus fortunately situated, does not injuriously affect productive or industrial agencies, and relieves in a measure those with lesser opportunities, and those to whom taxation is always an extreme burden. This theory does not, however, harmonize well with a strict application of the fundamental mandate of equality, as applied more particularly to the proportional system of taxation in force in this and other states. We mean by 'proportional system, a tax at a fixed and uniform rate, in proportion to the amount of taxable property, based upon a cash valuation; and legislatures and courts have been not a little embarrassed in attempts to apply it. But an examination of the books discloses that the equality mandate has been expanded and made to yield, from time to time, to new and advancing social and economic conditions. The general principle is retained, but is applied with less rigor and strictness. . . . The inheritance tax has been in existence for years, and, although not generally in force in the states of this country until recent times, the general principle has been practised in European countries for ages, and for a number of years in some of the states of the Union. It is variously termed an 'inheritance tax,' 'succession tax,' 'legacy tax,' and 'probate duties;' but, whatever it may be termed, it is not a tax upon property, but upon the right to succession thereto. . . . 'The term "progressive taxation" or "graduated tax" is also used in another way. If a different rate is levied on different kinds (not different amounts) of property or income, we speak not of a graduation, but of a differentiation, of the tax. But if different rates are levied on inheritances or bequests according to the degree of relationship of the heir or successor, the tax is sometimes called a graduated or progressive tax. In ordinary cases "progressive" denotes a changed rate for altered amounts.' Authority to classify persons and property for the purpose of taxation is well settled. When based upon some reasonable and practical rule, founded on such substantial difference of situation or circumstances as to reasonably suggest the pro-

priety of a distinction, or based upon some rule of public policy, the courts sustain various forms of classification. . . . The subject is one resting in the discretion of the legislature, restricted only by the rule of reasonableness and propriety. . . . Graduated or progressive taxation is intimately associated with that of classification, and perhaps amounts, substantially, to the same thing. The progressive rule is applied to the income tax, which in principle is identical with the inheritance tax; the only difference being that the income tax is one upon property, while the inheritance tax is upon the right of succession. It is applied in different forms not materially dissimilar to that fixed by the statute under consideration, in all states and countries where the income or inheritance tax is in force, the amount of the income or inheritance being made the basis for a different rate of taxation. The rule applied in our sister states and by the Federal court sustains the statute under discussion, whether it be termed a classified or a progressive tax. It is in a sense arbitrary, but not so unreasonable or unfair as to justify interference by the courts. The statutes of the state of Illinois provide an inheritance tax substantially like our own, classifying inheritances and devises by amounts, the rate of tax imposed increasing as the amount of inheritance increases. That statute was sustained by the supreme court of that state in the case of *Kochersperger v. Drake*, 167 Ill. 122, 41 L.R.A. 446, 47 N. E. 321, . . . The Illinois statute was under consideration in the Supreme Court of the United States in *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 288, 42 L. ed. 1040, 18 Sup. Ct. Rep. 594, where the subject was carefully gone over and the classification sustained." In this connection we also call attention to the exhaustive and comprehensive note to this decision commencing on page 732, 6 L.R.A.(N.S.), the first paragraph of which is as follows: "Classification of inheritances or gifts for purposes of succession tax on basis of amount.—That a progressive tax upon inheritances is now generally upheld by the courts of this country demonstrates that the judges are no longer wedded to the old theory that the only equality and uniformity possible in taxation must be based upon mathematical proportions, demanding that the same rate of taxation be applied to all persons alike, regardless of the ability to pay, and regardless, too, of the fact that in one case a proportional rate would take from one man the necessary means of subsistence, and from another merely the means to purchase unnecessary luxuries. In the days when the

comparatively insignificant wealth of the county was more evenly distributed, and the richest citizen had but little more than his poorer fellows, such principles were undoubtedly just and fair; but to-day, when fortunes exist whose immensity was not dreamed of by the founders of the Republic, fortunes which owe their existence not solely to the genius or unprincipled greed of their owners, but more especially to the unbounded resources of the country, and in many cases to the partiality of the laws, and which would have no existence whatever without the government and population of America, a new principle of equality, or a new construction of the old principle, becomes absolutely necessary. The truth of this, the legislatures and courts of this country have quite generally recognized, and, early following the teachings of the more advanced economic writers, have come to hold that the fundamental principle of equality, at least in matters of inheritance taxation, is not to be determined by a proportional rate of taxation. It is to be observed in this connection that both legislatures and courts have generally acted upon the theory that inheritance taxes are laid, not upon property, but upon the right to succeed to property; in other words, are mere duties in the nature of excise taxes, and are not subject to the same tests with respect to uniformity and equality as property taxes."

It will serve no useful purpose to further multiply authorities. In all the cases cited are mentioned many other and abundant additional authorities sustaining the principle that a classification based on the increasing and progressing amount of the estate inherited is not an arbitrary, unnatural, or unreasonable basis for such classification. The overwhelming weight of recent authority is in favor of the validity of the classification contained in our statute. The argument that one receiving an inheritance of \$10,000 would pay a tax of \$396, and that one receiving an inheritance of \$10,001 would pay a tax of \$594.06, thereby making the additional \$1 inherited pay an increased tax of \$198.06, is unsound and opposed by the weight of recent authority for two reasons: First. This character of argument is only applicable to a property or proportional tax, and has no application to a classified progressive inheritance tax. The distinction between a property tax as such and an excise tax as such is wholly lost sight of in the use of this illustration. This character of reasoning applies only to the value of a dollar as property, and not as a dividing point between two or more classes of a progressive inheritance or excise tax. As is said in the *Nunnemacher*

Case, there is no common ground on which this distinction between a property and an excise tax can meet. Second. The comparison afforded by this illustration is made between those within different, instead of between those within the same class, thus falling wholly without the established rule that comparison should only be made between those within the same class. This precise illustration and argument has been directly answered and expressly repudiated by the Supreme Court of the United States in the *Magoun Case*; by the supreme court of Wisconsin in the *Nunnemacher Case*; by the supreme court of Michigan in the *Fox Case*; by the supreme court of Minnesota in the *Bazille Case*; and by the supreme court of Illinois in the *Drake Case*. It has been suggested that in the *Magoun Case* the Federal court only followed the decision of the state court in construing a state Constitution, and did not pass on the question as an original proposition before the Federal court, but considered itself bound by the state decision, and is not therefore to be considered as an authority; but this certainly must be a misapprehension, as a reading of the case will justify no such inference. While the Federal "concurs in the reasoning" of the state court, yet it goes far beyond the scope of the state decision in its own originality, and based its decision on the 14th Amendment, and it was recognized as an original authoritative decision of the Federal court in *Knowlton v. Moore*. While our statute may differ from others as to rate or percentage of taxation, may differ as to whether the increased rate is to be computed on an amount within a class between certain fixed limits, which includes all lower classes if any, or on the amount within a class which excludes the amount of prior classes, may differ as to the amount of the exemption,—still the principle involved as to equality and uniformity, the principle involved as to the arbitrariness and unreasonableness of the classification, the principle involved as to discriminations between different classes, is just the same under all these statutes, and under all these decisions cited, whether under a state Constitution or under the 14th Amendment, or whether under a state or Federal enactment. It is also perfectly clear that the question of choice whether an exemption shall be \$10,000 or \$20,000 or some other amount, whether the rate or percentage of taxation shall be two, four, or some other amount, whether the increased rate of percentage from a lower to a higher class shall be computed on the amount of a class which includes or excludes the amount of prior classes, is not subject to judicial review, and is solely a subject within the legislative

function, so long as the rules of "equality and uniformity" and "arbitrary" classification have not been violated. A classification based on the whole of an increasing amount between fixed limits, and which includes the amount of preceding classes, such as contained in the Illinois and South Dakota statutes, is logically, legally, and constitutionally in precisely the same category as the classification in Wisconsin, based on the net increased amount of a higher over a lower class. Both classes result in permissible discriminations and inequalities as between different classes, the only difference being in that the Illinois and South Dakota statutes result in a shade more inequality than does the Wisconsin; but nevertheless the Illinois and South Dakota classification is just as fairly and squarely, as a matter of legal and logical principle, within the "equality and uniformity" rule as to all persons similarly situated within any one of the specified classes, just as fully and fairly within the "progressive amount" rule as to arbitrary classification, as is the Wisconsin classification. This is evidently the reason why in the Nunnemacher Case the Wisconsin court said that the Wisconsin statute was substantially the same as that of Illinois, and why the Minnesota court in the Bazille Case also said that the Minnesota statute was substantially the same as that of Illinois.

Similar discriminations, inequalities, and lack of uniformity exist when comparison is made between different classes based purely on relationship; still these classes are recognized to be fairly within the "equality and uniformity" rule, as applied to excise taxation. The South Dakota statute, being squarely within both the rules as to "equality and uniformity," and as to the classification based on "progressive amount" of the inherited estate, is valid, and should be sustained.

It is contended that the inheritance law of this state is defective, in that no method by which the provisions thereof may be enforced is provided. Section 1 of the act clearly and expressly creates a liability on the part of the recipients of such inherited estates to pay the amount of any such tax to the county treasurer for the use of the state. There is no reason why the county treasurer might not maintain an ordinary action based upon the liability thus created to pay, against the receivers of any such inherited estates, to recover for the use of the state the tax under this statute, whenever there is a refusal to pay the same. The statutory liability to pay is just as strong in binding force and effect as if it were contractual.

We are of the opinion that the former decision of this court should be reversed, and that the judgment of the Circuit Court should be affirmed.

Whiting, J., dissenting:

I am unable to concur in the conclusion reached by my colleague in his most able opinion, as I see no reason to change my views as expressed in the former opinion of this court. By reference to such opinion, it will be seen that there is no difference of views regarding the right of the legislature to enact laws taxing inheritances, nor the right to classify those receiving transmissions of property, both upon basis of kinship with deceased and upon the value of the property transmitted; neither is there any conflict upon the proposition that mere inequalities arising from the workings of the law do not render same void. As noted in such former opinion, there are several states that have enacted laws like the one at bar, and their courts have sustained such laws. There are other states that have enacted laws such as was held in such former opinion would be valid under our Constitution, and their courts have sustained the same. My colleague has quoted from the courts of all these states in support of the classification adopted by our legislature. With such decisions I take no issue so far as they go only to the sustaining of the classification, and giving the grounds upon which such classifications are held constitutional. It is only when it comes to fixing the rates of taxation for the several classes, classified as to value of property transmitted, that in my opinion the reasoning of some of the courts is unsound, and upon this feature of the law I feel justified in expressing my views more fully than before, fearing that one of the grounds for my conclusions heretofore expressed may not have been fully understood.

Regardless of other questions discussed in the former opinion of this court, we would call attention again to the question asked therein: "Must our statute in its application result in inequalities not consistent with any reason or theory upon which progression is allowable?" It would seem to me that the following propositions are too axiomatic to admit of dispute: While inequalities incident to proper classification do not render a tax law unconstitutional on the ground of lack of uniformity, yet all inequalities resulting from features of the law not consistent with the grounds for such classification render the law unconstitutional. When a classification is made for purposes of taxation, the reasons which rendered such classification constitutional cannot be disregarded when it comes to fixing the bases and rates

of taxation among the several classes. It seems to be the universal view of all courts upholding classification based on value of property transmitted, that it finds its justification from one or both of two reasons:

(1) That the person receiving the larger sum is better able to pay the tax; (2) that, inasmuch as large aggregations of wealth are against public policy, the privilege of receiving the larger estates is much greater in proportion to the value thereof than the privilege of receiving the smaller estate, and therefore the transmission of a large estate should be taxed more in proportion than the transmission of a smaller estate. The respondent concedes that these are the bases upon which classification is justified. But the respondent contends (and, if we read aright the views of the majority of the court, my colleagues concur therein) that, when once there has been a classification constitutional in nature, then, in fixing the rate of taxation within a class and the basis for same, no regard need be paid to the rate and basis within any other class. With this contention we cannot agree, and herein lies the reason for our different conclusions. If respondent is correct, although the classification is based upon the theory that the recipient of the larger estate is able to pay a greater tax rate, or else upon the theory that the transmission of the large estate is more against public policy, or upon both, yet it would be perfectly constitutional, after having made a proper classification, to disregard the grounds for such classification, and to have taxed the transmission of the smaller estate at a greater rate than the transmission of the larger, or even to vary the rates making the rate first greater and then smaller, and then greater and smaller again, as between the several classes. To illustrate again, if respondent's contention is right, though it is conceded that a classification based upon difference in kinship is constitutional, for the reason that the instincts of natural justice teach us that to receive from one distantly or not at all related is a greater privilege than to receive from one nearer related, yet, after making a classification founded on degrees of kinship, the legislature could disregard the grounds therefor, and tax transmissions to near relatives at a greater rate than to strangers. It will not do to answer such propositions by saying that the legislature would never attempt it. The question is what we are holding that it would be constitutional for them to do. It is constitutional on grounds of public policy for public carriers to classify as between whites and blacks and provide separate carriages for each, but, though such classification is

lawful, any attempt to provide better accommodations for one than the other would be unlawful, because not founded upon the reason upon which such classification is allowed. To illustrate, further, it might be lawful for a public carrier to provide a separate carriage for persons afflicted with a contagious disease, and refuse admission thereto to all other persons; but, while a public carrier may provide a separate carriage for those who smoke, it could not exclude nonsmokers therefrom. The act of the carrier in each case would have to conform to the reasons upon which the classification was based.

Let us apply similar reasoning to the law before us, and consider the grounds lying at the foundation of the classification found in such law. Let us suppose that this law provided also for the taxation of successive transmissions received by one person at different times and from different sources, so that a person receiving \$10,000 to-day from A's estate and \$10,000 next year from B's estate would be placed in the same class, and such transmissions taxed according to the same rule, as one who received in one lump sum \$20,000 from C's estate. A law that would provide that, upon the receipt of more than one transmission, the rates and bases for taxation should be the same as if all were received at once, certainly would be constitutional so far as that feature was concerned. In the case of the man receiving two \$10,000 transmissions, would it be considered constitutional to impose upon him upon receipt of the second \$10,000, not only the increased tax on the second \$10,000, but also compel him to pay an additional tax on the transmission received a year before? It seems to me not. It is the transmission and receipt of the second \$10,000 that renders the party more able to pay the increased rate. It is the transmission and receipt of the second \$10,000 that is more against public policy, and there exists no reason or grounds upon which classification can be based that is consistent with the requirement of a payment of an additional tax on the first \$10,000, because of the receipt of the second \$10,000; but both of the grounds upon which such classification is based fully justify an increased rate upon the second \$10,000. Yet there are absolutely no grounds for distinction between the supposed case and law, and the receipt by a man under our law of \$20,000. It is the receipt of the second \$10,000 that justifies, under the grounds which lie as the basis of the classification, the imposition of the higher rate, and there is absolutely no reason consistent with the grounds or basis of classification that justifies the increase of the rate upon

the first \$10,000 simply because of the receipt of the additional sums. To me it seems clear that the legislature has made a constitutional classification, and then rendered the law unconstitutional by making an unconstitutional distinction in fixing the bases of taxation as between the different classes, the same as an unconstitutional distinction allowed a public carrier as between different races might render a law unconstitutional which contained a perfectly constitutional classification of such races; the classification being based upon a ground which did not justify the distinction attempted to be made between the classes.

It is complained that the illustrations given in the former opinion of this court are extreme illustrations. This is certainly begging the issue. These illustrations show clearly to what the principle contended for by respondent might lead, not only when applied to inheritance taxes, but when applied to the innumerable other matters concerning which classifications may be legally made. We should not depart from the principle that when classification is made for a certain purpose, the grounds which rendered the classification legal must not be disregarded in effecting the purpose of the law.

WASHINGTON SUPREME COURT.

RE ESTATE OF PEDER G. STIXRUD,
Deceased.

JOHAN E. STIXRUD et al., Appts.,
v.

STATE OF WASHINGTON, by State Board
of Tax Commissioners, Resp't.

(58 Wash. 339, 109 Pac. 343.)

**Inheritance tax — bequest to foreigner
— effect of treaty.**

1. A provision of a treaty that the subjects of the contracting parties in the respective states may freely dispose of their goods and effects by testament, and that the heirs shall receive the succession without having occasion to take out letters of naturalization, will prevent a state from imposing any higher inheritance tax upon property devised or bequeathed by one of its citizens to a citizen of the foreign state than it imposes in case of devises or bequests to its own citizens of the same degree of relationship to the testator under similar circumstances, and it is immaterial that the treaty also provides that the states shall be at liberty to make respecting this matter such laws as they think proper.

Will — treaty provision — effect on real estate.

2. Real property is included in a provision of a treaty giving a naturalized citizen
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a right to give by testament his goods and effects in favor of such parties as he thinks proper.

Treaty — construction — definition of heirs.

3. The word "heirs" in a treaty may be construed to mean not only those who take by operation of law, but also those who are called to the succession by act of the property owner, where the civil law prevails within the territory of one of the parties to the transaction.

(Fullerton and Gose, J.J., dissent.)

(May 14, 1910.)

APPEAL by Johan E. Stixrud et al. from an order of the Superior Court for Thurston County declaring that portion of the estate of Peder G. Stixrud, deceased which passed under his will to Johan E. Stixrud and Petronella Stixrud, subject to an inheritance tax. Reversed.

The facts are stated in the opinion.

Messrs. S. S. Langland and Bausman & Kelleher, for appellants:

The treaty exempts the devisees and the estate from paying any more or other inheritance tax than is paid by a resident of this state.

Bahaud v. Bize, 105 Fed. 485; McConville v. Howell, 5 McCrary, 319, 17 Fed.

Note. — Validity of discrimination against aliens by inheritance tax law as affected by treaty with foreign government.

A state tax levied on the succession by foreign heirs, legatees, or donees to property of a deceased person is inoperative as to an alien who, by treaty between his country and the United States, is entitled to the same right of possessing and disposing of property as the citizens of the United States themselves. Dufour's Succession, 10 La. Ann. 391; Amat's Succession, 18 La. Ann. 403; Crusius's Succession, 19 La. Ann. 369; Rixner's Succession, 48 La. Ann. 552, 32 L.R.A. 177, 19 So. 597.

In Prevost v. Greneaux, 19 How. 1, 15 L. ed. 572, it was held that a vested right to a succession tax under the laws of Louisiana of 1848, imposing a tax upon all property inherited by aliens, was not affected by the subsequent treaty of 1853 between France and the United States, which provided that French citizens should not be subjected to taxes on inheritances different from those imposed on citizens of the United States.

As to constitutionality of succession taxes, see the note to Rodman v. Com. ante, 592.

As to nature of inheritance tax, see the note to Re McKennan, ante, 606.

Generally, as to effect of treaties upon an alien's right to inherit, see note to Rixner's Succession, 32 L.R.A. 177.

J. A. C.

104; *Re Strobel*, 5 App. Div. 621, 39 N. Y. Supp. 169.

A treaty is a contract between two nations, and each looks to the other for the faithful interpretation and performance of its terms.

United States v. Arredondo, 6 Pet. 691, 8 L. ed. 547; *Foster v. Neilson*, 2 Pet. 263, 7 L. ed. 418; *Adams v. Akerland*, 168 Ill. 632, 48 N. E. 454; *Hauenstein v. Lynham*, 100 U. S. 483, 25 L. ed. 628; *Schultze v. Schultze*, 144 Ill. 290, 19 L.R.A. 90, 36 Am. St. Rep. 432, 33 N. E. 201; 2 *Wharton*, *International Law* Dig. 2 ed. § 162.

An inheritance tax statute which conflicts with the provisions of a treaty is inoperative.

Dufour's Succession, 10 La. Ann. 391; *Prevost's Succession*, 12 La. Ann. 577; *Amat's Succession*, 18 La. Ann. 403; *Orsius's Succession*, 19 La. Ann. 369; *Rixner's Succession*, 48 La. Ann. 553, 32 L.R.A. 177, 19 So. 597; *Sala's Succession*, 50 La. Ann. 1009, 24 So. 674; *Rabasse's Succession*, 47 La. Ann. 1452, 49 Am. St. Rep. 433, 17 So. 807, 49 La. Ann. 1405, 22 So. 767; *Pargoud's Succession*, 13 La. Ann. 367; *Hauenstein v. Lynham*, 100 U. S. 483, 25 L. ed. 628; *Geofroy v. Riggs*, 133 U. S. 258, 33 L. ed. 642, 10 Sup. Ct. Rep. 295; *Wunderle v. Wunderle*, 144 Ill. 40, 19 L.R.A. 84, 33 N. E. 195; *Yeaker v. Yeaker*, 4 Met. (Ky.) 33, 81 Am. Dec. 530.

The inheritance tax law imposing a charge of 25 per centum on the distributive shares going to nonresident aliens is unconstitutional and void, as far as this proviso is concerned.

Adams v. Akerlund, 168 Ill. 632, 48 N. E. 454; *Bahaud v. Bize*, 105 Fed. 485; *McConville v. Howell*, 5 *McCrary*, 319, 17 Fed. 104; *Geofroy v. Riggs*, 133 U. S. 258, 33 L. ed. 642, 10 Sup. Ct. Rep. 295; *State ex rel. Garth v. Switzler*, 143 Mo. 287, 40 L.R.A. 280, 65 Am. St. Rep. 653, 45 S. W. 245; *State v. Hamlin*, 86 Me. 495, 25 L.R.A. 632, 41 Am. St. Rep. 569, 30 Atl. 76; *State ex rel. Schwartz v. Ferris*, 53 Ohio St. 314, 30 L.R.A. 218, 41 N. E. 579; *Gelsthorpe v. Furnell*, 20 Mont. 299, 39 L. R. A. 170, 51 Pac. 267.

The courts will not refuse the rights secured by the treaty, because of the adopted citizenship of the decedent in the country of his residence.

Adams v. Akerlund, 168 Ill. 632, 48 N. E. 454; *Chirac v. Chirac*, 2 Wheat. 259-269, 4 L. ed. 234-236; *Schultze v. Schultze*, 144 Ill. 290, 19 L.R.A. 90, 36 Am. St. Rep. 432, 33 N. E. 201; *Jost v. Jost*, 1 Mackey, 487.

Messrs. J. E. Frost and T. D. Rockwell, for respondent:

The treaty provision was not made for 33 L.R.A. (N.S.)

the protection or benefit of alien heirs of a citizen of one of the respective countries residing at home at the time of his death, but for the benefit of the heirs of a subject who died abroad, outside of and away from the protecting arms of the laws of his own country.

Frederickson v. Louisiana, 23 How. 445, 16 L. ed. 577.

The law imposing a greater tax on an alien than a citizen is constitutional.

Mager v. Grima, 8 How. 490, 12 L. ed. 1168; *Frederickson v. Louisiana*, 23 How. 445, 16 L. ed. 577.

Parker, J., delivered the opinion of the court:

Peder G. Stixrud, a naturalized citizen of the United States and a resident of this state, died at Olympia in January, 1908. He left a will by which he devised all of his property, both real and personal, to his brother and sister, Johan E. Stixrud and Petronella Stixrud, who were then residents and citizens of Norway. In February, 1908, letters of administration with the will annexed were granted upon the estate of Peder G. Stixrud, and, upon the settlement of the estate, it was determined by the superior court for Thurston county that the portion of the estate passing to the devisees under the will, after payment of debts and expenses of administration, was subject to an inheritance tax of 25 per cent. An order was entered accordingly, directing payment of such inheritance tax computed at this rate. From this order the devisees Johan E. Stixrud and Petronella Stixrud, have appealed.

The law fixing the amount of the inheritance tax upon property passing by will or inheritance is § 2, Laws 1907, p. 500 (*Rem. & Bal. Code*, § 9183), and, so far as necessary for us to notice, is as follows: "The inheritance tax shall be and is to be levied on all estates subject to the operation of this chapter, on all sums above the first \$10,000, where the same shall pass to or for the use of the father, mother, husband, wife, lineal descendant, adopted child, or the lineal descendant of an adopted child, one (1) per centum. On all sums not exceeding the first \$50,000 of 3 per centum, where such estate passes to collateral heirs, to and including the third degree of relationship; . . . Provided, that on all sums passing to or for the benefit of collateral relatives or strangers of the blood, who are aliens not residing in the United States, a tax of 25 per centum shall be levied and collected." Appellants being collateral heirs of the deceased within the third degree of relationship, it is plain that the inheritance tax upon the property

they take under this will would only be 3 per cent, since the amount thereof is less than \$50,000, unless the rate of the tax is controlled by the proviso fixing the rate at 25 per cent where property passes to collateral relatives, who are aliens not residing in the United States.

Learned counsel for appellants contend that the property left to them by their deceased brother is liable to pay an inheritance tax of only 3 per cent, the same as if they were not aliens residing out of the United States at the time of their brother's death, by virtue of article 6 of the treaty of amity and commerce of 1783 as revived by article 17 of the treaty of commerce of navigation of 1827, still existing between Norway and Sweden and the United States, which provides: "The subjects of the contracting parties in the respective states may freely dispose of their goods and effects, either by testament, donation, or otherwise, in favor of such persons as they think proper, and their heirs, in whatever place they shall reside, shall receive the succession, even *ab intestato*, either in person or by their attorney, without having occasion to take out letters of naturalization. These inheritances, as well as the capitals and effects which the subjects of the two parties in changing their dwelling shall be desirous of removing from the place of their abode, shall be exempt from all duty called *droit de detraction* on the part of the government of the two states respectively. But it is at the same time agreed that nothing contained in this article shall in any manner derogate from the ordinances published in Sweden against emigrations, or which may hereafter be published, which shall remain in full force and vigor. The United States on their part, or any of them, shall be at liberty to make respecting this matter such laws as they think proper." 7 Fed. Stat. Anno. pp. 828, 835 [8 Stat. at L. 60, 79]. By the second clause of article 6 of the Constitution of the United States it is declared: "This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding." It has become the settled law of this country that, when a law of a state comes in conflict with the provisions of a treaty entered into by the United States with a foreign country, relating to a subject-matter within the treaty-making power, such law must give way, and its application to the subject-

matter covered by the treaty held in abeyance during the existence of the treaty. In *Hauenstein v. Lynham*, 100 U. S. 483, 490, 25 L. ed. 628, 630, Justice Swayne, speaking for the court, said: "It must always be borne in mind that the Constitution, laws, and treaties of the United States are as much a part of the law of every state as its own local laws and Constitution. This is a fundamental principle in our system of complex national polity. See also *Shanks v. Dupont*, 3 Pet. 242, 7 L. ed. 666; *Foster v. Neilson*, 2 Pet. 253, 7 L. ed. 415; *The Cherokee Tobacco* (*Boudinot v. United States*), 11 Wall. 616, 20 L. ed. 227; *Mr. Pinkney's Speech*, 3 Elliot, Constitutional Debates, 231; *People ex rel. Atty. Gen. v. Gerke*, 5 Cal. 381." It is equally well settled that the matter of removing the disability of aliens, in order that they may have the same rights as citizens to acquire and hold property in the states of the Union, is a proper subject of treaty regulation. Justice Field, in speaking for the Supreme Court of the United States in *Geofroy v. Riggs*, 133 U. S. 258, 266, 33 L. ed. 642, 644, 10 Sup. Ct. Rep. 295, 296, said: "That the treaty power of the United States extends to all proper subjects of negotiation between our government and the governments of other nations is clear. It is also clear that the protection which should be afforded to the citizens of one country owning property in another, and the manner in which that property may be transferred, devised, or inherited, are fitting subjects for such negotiation, and of regulation by mutual stipulations between the two countries." The state courts at the present day have uniformly given their assent to this doctrine. *Blythe v. Hinckley*, 127 Cal. 431, 59 Pac. 787; *Doe ex dem. Dockstader v. Roe*, 4 Penn. (Del.) 398, 55 Atl. 341; *Wunderle v. Wunderle*, 144 Ill. 40, 19 L.R.A. 84, 33 N. E. 195; *Opel v. Shoup*, 100 Iowa, 407, 37 L.R.A. 583, 69 N. W. 560; *Yeaker v. Yeaker*, 4 Met. (Ky.) 33, 81 Am. Dec. 530; *Baker v. Shy*, 9 Heisk. 85; *Rabasse's Succession*, 47 La. Ann. 1453, 49 Am. St. Rep. 433, 17 So. 867; *Kull v. Kull*, 37 Hun, 476.

These firmly established principles are not denied by learned counsel for the state, but they contend that there is nothing in this treaty to prevent a sovereign state of the Union from collecting an inheritance tax from alien heirs or devisees of a citizen of the United States, upon property in the United States; that this article was adopted for the protection of the citizens of Sweden and Norway residing in the United States, and citizens of the United States residing in Sweden and Norway; that it does not seem possible that our government

would think it necessary to make a treaty with a foreign country for the protection and benefit of a citizen's property at home, he being protected and subject only to the laws of his country. These contentions are apparently based on the theory that the paramount consideration in the interpretation of this treaty is the right of the deceased to dispose of his property by testament, or have it pass by descent to his heirs, rather than the right of his heirs to receive the succession. In other words, the argument seems to be that the treaty is designed to protect the rights of the deceased, rather than those who take from him; and hence, can have no application to the property of a deceased citizen passing to a citizen of the other country. Of course, one country would not be interested in the succession of property merely between citizens of the other; but it would be interested in the succession of property passing from a citizen of one country to citizens of the other, and clearly the power to dispose of property by testament by a citizen of the country where he resides, and where his property is situated, would affect the right of his devisee, a citizen of the other country, to receive such property. Under the same circumstances would each country be interested in the right of its citizens to inherit from citizens of the other. The principal authority relied upon by learned counsel in support of this argument is the case of *Frederickson v. Louisiana*, 23 How. 445, 16 L. ed. 577. That case was brought into the Supreme Court of the United States from the supreme court of Louisiana by writ of error. There was involved a 10 per cent inheritance tax levied by the state upon so much of the property of a deceased naturalized citizen of the United States residing at the time of his death in Louisiana, as passed by his will to residents and subjects of the Kingdom of Wurtemberg. The statute under which the state claimed the tax, the treaty provisions relied upon by the legatees to avoid the tax, and the court's views touching their rights, will be best understood by the following quotation from the decision, commencing on page 446 of 23 How.: "By a statute of Louisiana it is provided that 'each and every person not being domiciliated in this state, and not being a citizen of any other state or territory in the Union, who shall be entitled, whether as heirs, legatee, or donee, to the whole or any part of the succession of a person deceased, whether such person shall have died in this state or elsewhere, shall pay a tax of 10 per cent on all sums, or on the value of all property, which he may have actually received from said succession, or so much thereof as is situated in this

state, after deducting all debts due by the succession.' The claim of the state of Louisiana was resisted in the district court, on the ground that it is contrary to the provisions of the third article of the convention between the United States of America and his majesty, the King of Wurtemberg, of the 10th April, 1844. That article is that 'the citizens or subjects of each of the contracting parties shall have power to dispose of their personal property within the states of the other, by testament, donation, or otherwise; and their heirs, legatees, and donees, being citizens or subjects of the other contracting party, shall succeed to their said personal property, and may take possession thereof, either by themselves or by others acting for them, and dispose of the same at their pleasure, paying such duties only as the inhabitants of the country where the said property lies shall be liable to pay in like cases.' This court in *Mager v. Grima*, 8 How. 490, 12 L. ed. 1168, decided that the act of the legislature of Louisiana was nothing more than the exercise of the power which every state or sovereignty possesses of regulating the manner and terms upon which property, real and personal, within its dominion, may be transmitted by last will and testament, or by inheritance, and of prescribing who shall and who shall not be capable of taking it. The case before the district court in Louisiana concerned the distribution of the succession of a citizen of that state, and of property situated there. The act of the legislature under review does not make any discrimination between citizens of the state and aliens in the same circumstances. A citizen of Louisiana domiciliated abroad is subject to this tax. *State v. Poydras*, 9 La. Ann. 105. Therefore, if this article of the treaty comprised the succession of a citizen of Louisiana, the complaint of the foreign legatees would not be justified. They are subject to 'only such duties as are exacted from citizens of Louisiana under the same circumstances.' But we concur with the supreme court of Louisiana in the opinion that the treaty does not regulate the testamentary dispositions of citizens or subjects of the contracting powers, in reference to property within the country of their origin or citizenship. The cause of the treaty was that the citizens and subjects of each of the contracting powers were or might be subject to onerous taxes upon property possessed by them within the states of the other, by reason of their alienage, and its purpose was to enable such persons to dispose of their property, paying such duties only as the inhabitants of the country where the property lies pay under like conditions. The

case of a citizen or subject of the respective countries residing at home, and disposing of property there in favor of a citizen or subject of the other, was not in the contemplation of the contracting powers, and is not embraced in this article of the treaty." There are two important particulars in which that case differs from the one before us. First. The treaty there involved provided that "the citizens or subjects of each of the contracting parties shall have power to dispose of their personal property within the state of the other by testament," etc., while the treaty here involved provides that "the subjects of the contracting parties in the respective states may freely dispose of their goods and effects. . . . by testament," etc. Second. The statute of Louisiana there involved did not make any discrimination between the citizens of the state and aliens in the same circumstances. A citizen of Louisiana domiciled abroad was subject to the tax. The statute here involved imposes a tax of 25 per cent on property passing to collateral relatives who are aliens not residing in the United States, and at the same time imposes a tax of only 3 per cent on property passing to citizens under the same circumstances; thus clearly discriminating between citizens residing abroad and aliens residing abroad. The persons who may freely dispose of their goods and effects under this treaty are the subjects of the contracting parties "in the respective states." Clearly these words must at least mean that the subject may freely dispose of his property by testament within the country of his citizenship. The word "respective" is defined by the Standard Dictionary as "pertaining or relating severally to each of those under consideration; several; particular; as, they went to their respective homes." The more strictly we construe this language, the more certain does it seem applicable to the facts in this case, in favor of the rights claimed by appellants, as against the contention of the state, based upon the fact that the deceased was a citizen of the United States. Turning, now, to the right of appellants to receive the succession, if indeed, such right can be considered in this case apart from the right of the deceased to give "by testament," we find the express terms of the treaty not only guarantying to them the right to receive, but guarantying to them in so many words the right to receive "in whatever place they shall reside." And then, apparently for the purpose of removing all possible doubt as to the effect of their want of citizenship in the country in which the property may be situated, upon their right to receive, the treaty further ex-

pressly provides that they shall receive "without having any occasion to take out letters of naturalization," thus indicating an intention to give them the same right to receive as if they were citizens. In the case of *Schultze v. Schultze*, 144 Ill. 290, 19 L.R.A. 90, 36 Am. St. Rep. 432, 33 N. E. 201, the court had under consideration article 7 of the treaty of 1827 between the United States and Bremen, providing as follows: "The citizens of each of the contracting parties shall have power to dispose of their personal goods within the jurisdiction of the other, by sale, donation, testament, or otherwise; and their representatives, being citizens of the other party, shall succeed to their said personal goods, whether by testament or *ab intestato*, and they may take possession thereof, either by themselves or others acting for them, and dispose of the same at their will, paying such duties only as the inhabitants of the country wherein said goods are shall be subject to pay in like cases; and if, in the case of real estate, the said heirs would be prevented from entering into the possession of the inheritance on account of their character of aliens, there shall be granted to them the term of three years to dispose of the same as they may think proper, and to withdraw the proceeds without molestation, and exempt from all duties of detraction on the part of the governments of the respective states." Referring to the right of alien heirs and representatives of citizens of the United States under this treaty provision, Justice Magruder, speaking for the court, said: "The second clause can be construed to mean that the representatives or heirs of American citizens, being citizens of Bremen, shall succeed to personal goods. It follows that, by the terms of the third clause, the heirs of American citizens who are citizens of Bremen shall have the prescribed term of three years to dispose of real estate, etc. The appellees are therefore entitled, under said article 7 of the treaty, to the privilege of selling the interest in the land in controversy, which they would have inherited from the deceased, George Ludwig Schultze, under the laws of Illinois, but for their alienage, and of removing such proceeds of sale, providing they do so within three years." It seems to us that the terms of that treaty are not as clear in securing rights to alien heirs of citizens of the United States as the treaty involved in the case before us; yet the liberal rule of construction applicable to treaty rights induced the court in that case to regard the United States citizenship of the deceased as having no effect upon the rights of his alien representatives to succeed to property left

by him in this country. The following authorities involving aliens taking by will or inheritance from citizens of the United States may be cited as lending additional support to this view, though the right to take does not appear to have been challenged upon the ground of the citizenship of the deceased: *Jost v. Jost*, 1 Mackey, 487; *Geofroy v. Riggs*, 133 U. S. 258, 33 L. ed. 642, 10 Sup. Ct. Rep. 295; *Kull v. Kull*, 37 Hun, 476; *Opel v. Shoup*, 100 Iowa, 407, 37 L.R.A. 583, 69 N. W. 560; *Adams v. Akerlund*, 168 Ill. 632, 48 N. E. 454. In the case last cited the court held that subjects and residents of Sweden who were heirs of a citizen of the United States residing in Illinois at the time of his death inherited property of the deceased situated in Illinois, by virtue of the terms of the same treaty which is here involved. We are led to conclude that the rights of appellants here claimed are in no way affected by the mere fact that their deceased brother was, at the time of his death, a citizen of the United States, and that the property claimed is in the state of Washington.

We are next confronted with the question: Does this charge of 25 per cent as an inheritance tax upon the property passing to appellants under this will impair the rights guaranteed to them by the terms of this treaty? A tax of this nature is not a tax upon property; but is a charge upon the right or privilege of receiving it. The nature of this tax and the legal basis for its support is well stated by Justice Brown, speaking for the Supreme Court of the United States, in *United States v. Perkins*, 163 U. S. 625, 628, 41 L. ed. 287, 288, 16 Sup. Ct. Rep. 1073, 1074, as follows: "Though the general consent of the most enlightened nations has, from the earliest historical period, recognized a natural right in children to inherit the property of their parents, we know of no legal principle to prevent the legislature from taking away or limiting the right of testamentary disposition, or imposing such conditions upon its exercise as it may deem conducive to public good. In this view, the so-called inheritance tax of the state of New York is in reality a limitation upon the power of a testator to bequeath his property to whom he pleases,—a declaration that, in the exercise of that power, he shall contribute a certain percentage to the public use; in other words, that the right to dispose of his property by will shall remain, but subject to a condition that the state has a right to impose. Certainly, if it be true that the right of testamentary disposition is purely statutory, the state has a right to require a contribution to the public treas-

ury before the bequest shall take effect. Thus, the tax is not upon the property in the ordinary sense of the term, but upon the right to dispose of it, and it is not until it has yielded its contribution to the state that it becomes the property of the legatee. This was the view taken of a similar tax by the court of appeals of Maryland in *State v. Dalrymple*, 70 Md. 294, 299, 3 L.R.A. 372, 17 Atl. 82, in which the court observed: 'Possessing, then, the plenary power indicated, it necessarily follows that the state, in allowing property . . . to be disposed of by will, and in designating who shall take such property where there is no will, may prescribe such conditions, not in conflict with or forbidden by the organic law, as the legislature may deem expedient. These conditions, subject to the limitation named, are consequently wholly within the discretion of the general assembly. The act we are now considering plainly intended to require that a person taking the benefit of a civil right secured to him under our laws should pay a certain premium for its enjoyment. In other words, one of the conditions upon which strangers and collateral kindred may acquire a decedent's property which is subject to the dominion of our laws is that there shall be paid out of such property a tax of 2½ per cent into the treasury of the state. This, therefore, is not a tax upon the property itself, but is merely the price exacted by the state for the privilege accorded in permitting property so situated to be transferred by will or by descent or distribution.'" This view of the nature of an inheritance tax has been recognized by this court in *State v. Clark*, 30 Wash. 439, where, at page 445, 71 Pac. 20, it was said by Chief Justice Reavis: "It is an impost or excise on the right to pass the estate, and the privilege of the devisee to take." *Plumber v. Coler*, 178 U. S. 115, 125, 44 L. ed. 998, 1004, 20 Sup. Ct. Rep. 829; *State v. Hamlin*, 86 Me. 495, 25 L.R.A. 632, 41 Am. St. Rep. 569, 30 Atl. 76; *Gelsthorpe v. Furnell*, 20 Mont. 299, 39 L.R.A. 170, 51 Pac. 267; *Re Macky*, 46 Colo. 79, 23 L.R.A. (N.S.) 1207, 102 Pac. 1075.

It is upon this theory that such a tax is held not to be in violation of the usual constitutional provisions requiring uniformity of taxation upon property. It is therefore apparent that the levy of a tax of this nature has the direct effect of impairing the right or privilege of receiving property by testament or inheritance; and in that manner this tax impairs the right of these appellants to take, since it withholds from them 25 per cent of the property they would be entitled to were they citizens of the United States and this law did not

exist. It logically follows that they are deprived of a right accorded them by the terms of this treaty, unless it can be said that this tax does not deprive them of their treaty rights, because it is an exercise of the power of taxation by a sovereign state, and that the treaty contemplates the exercise of such power by each of the contracting parties. It may be conceded that there is no limit to the taxing power of the sovereign, and that the right or privilege of succession to property upon the death of its owner may be given or withheld by the state at its pleasure. Indeed, the concluding words of article 6 of this treaty, probably with unnecessary caution, reserve to the United States and each of them the "liberty to make, respecting the matter, such laws as they think proper." But surely this power cannot be rightfully exercised in such manner as to destroy the very rights the treaty was plainly designed to secure. It, of course, cannot be seriously contended that citizens of Sweden and Norway are, by the terms of this treaty, accorded any greater rights in their succession to property than the general laws of the states of the Union may accord to citizens of the United States. The laws of the several states would undoubtedly control those rights, even though no reservation to that effect was in the treaty. To whatever extent the right or privilege of a citizen of the United States to take property by testament or inheritance is impaired by our own laws, whether such laws relate to taxation or succession, to that extent will the rights of the citizens of Norway and Sweden be impaired, without violating the terms or spirit of this treaty. The language of the treaty giving the citizens of the contracting parties the right to dispose of their goods and effects by testament, and the right to receive the succession, must mean the right to so give and receive as such right may be defined by the general laws in force in the country where the property is situated. It could not mean otherwise, because there is no law to which we may turn, or which the contracting parties could have in view, in the making of the treaty, defining testamentary and succession rights, save the laws of the respective countries. There is no universal or international law of succession to property. In order then to give force and effect to the treaty, and avoid the destruction of the very end it was plainly intended to accomplish, we must conclude that the testamentary and inheritance rights secured thereby are such that they cannot be impaired except as such rights and privileges of citizens may be impaired by the laws of their own country. The enforcement of

a law which would have the effect of burdening the succession of property passing to the citizens of Sweden and Norway greater than that imposed upon property passing to our own citizens would, in our opinion, be a plain violation of the rights secured by this treaty. The treaty must be held to mean that, in so far as the rights to succession of property of deceased persons are concerned, the citizens of each country stand on an equal footing. Otherwise its evident intent and purpose touching the matters here involved might be rendered of no effect by the passage and enforcement of laws discriminating against citizens of other countries under the guise of exercising the taxing power or the power to control the succession of property. If these appellants can be discriminated against by withholding from them, in the form of taxation, a larger portion of the property left them than can be withheld from others under the same circumstances, then, by the same method of discrimination, their right of succession to the property may be entirely destroyed by taking all of it, even though others may not have their privilege of succession thus impaired in the least. We think this treaty was intended to secure, and does secure, to the citizens of Sweden and Norway, the right to succeed to property left them by will or inheritance upon the same terms as such rights of our own citizens may be defined by law. These are the rights and the law defining them, which must have been in view in the making of the treaty, rather than possible discriminating laws affecting the rights of aliens different from citizens; for, to concede the right to make and enforce such laws is to concede the right to nullify the provisions of the treaty. This construction of the terms of the treaty finds additional support when we call to our aid the general rule of liberal construction applied by the courts, both state and Federal, in such cases. In *Geofroy v. Riggs*, 133 U. S. 258, 271, 33 L. ed. 642, 646, 10 Sup. Ct. Rep. 295, 298, Justice Field said: "It is a general principle of construction with respect to treaties that they shall be liberally construed, so as to carry out the apparent intention of the parties to secure equality and reciprocity between them. As they are contracts between independent nations, in their construction words are to be taken in their ordinary meaning, as understood in the public law of nations, and not in any artificial or special sense impressed upon them by local law, unless such restricted sense is clearly intended. And it has been held by this court that where a treaty admits of two constructions, one restrictive of rights that may be claimed un-

der it, and the other favorable to them, the latter is to be preferred. *Hauenstein v. Lynham*, 100 U. S. 483, 487, 25 L. ed. 628, 629." See also 28 Am. & Eng. Enc. Law (2d ed.) p. 490; Devlin, *Treaty Power*, §§ 116, 125.

It has been noticed that the deceased left by his will to these appellants both real and personal property. The use of the words "goods and effects" only, to designate the property the treaty is applicable to, might give rise to argument as to whether or not these words include real property. In the case of *Adams v. Akerlund*, 168 Ill. 632, 48 N. E. 464, these words in this same treaty were under consideration, where it was contended that real property was not included by them. The court, however, in a very able and exhaustive opinion, held that real property was included. 1 *Bouvier's Law Dict.* (Rawle's Rev.) 635; *Den ex dem. University v. Miller*, 14 N. C. (3 Dev. L.) 188. No contention is here made upon this point; but, in view of the fact that we are here dealing with real as well as personal property, and our decision necessarily has the effect of applying the treaty provision to real as well as to personal property, we deem it not out of place to notice this possible contention.

We have made particular reference to the language of the treaty relating to the rights of those who may receive. It will be noticed that they are described therein by the word "heirs." This word, of course, has its technical common-law meaning, restricting it to those who take by inheritance only, while in the civil law it applies to all persons who are called to the succession, whether by the act of the party or by operation of law. 1 *Bouvier's Law Dict.* (Rawle's Rev.) 941. There does not appear to be any reason for here attributing to it the technical meaning of either of these systems of law in preference to the other, since it is here used by countries, in one of which the common law prevails, and in the other of which the civil law prevails. 1 *Bouvier's Law Dict.* (Rawle's Rev.) 330, 370. We are of the opinion that the words, "their heirs . . . shall receive the succession," refer to the right of succession of those who receive by testament as well as those who receive by operation of law, in view of the other provision of the article, and that the effect of the word "heirs" should not be measured by any technical rules. *Geofroy v. Riggs*, 133 U. S. 258, 271, 33 L. ed. 642, 646, 10 Sup. Ct. Rep. 295; 21 Cyc. Law & Proc. p. 420; *Re White*, 42 Wash. 360, 362, 84 Pac. 831. We notice this matter of the meaning of the word "heirs" because of the particular provisions 33 L.R.A. (N.S.)

of the treaty defining the rights of those so designated.

The contention of learned counsel for appellants that this inheritance tax law is unconstitutional in so far as it imposes upon aliens not residing in the United States a greater tax than upon citizens, in view of certain provisions of our state Constitution, presents a question which does not require our attention at this time. We are of the opinion that article 6 of the treaty before us secures to appellants the right of succession to the property left them by the will of their deceased brother, upon the same terms as are accorded to our own citizens; and, in so far as the law burdens them with a greater tax than it does our own citizens, it must be held in abeyance, and yield to the provisions of this treaty.

We conclude that the order of the Superior Court should be reversed, with instructions to fix the amount of the inheritance tax at a rate not inconsistent with the views herein expressed. It is so ordered.

Rudkin, Ch. J., and Dunbar, Chadwick, Crow, Morris, and Mount, JJ., concur.

Fullerton and Gose, JJ., dissent.

FLORIDA SUPREME COURT.

ROSS WORLEY, Plff. in Err.,
v.

A. J. JOHNSON.

(— Fla. —, 53 So. 543.)

Bills and notes — presentment — liability of indorser.

1. An indorser without qualification of a note engages that on due presentment it shall be paid according to its tenor, and that if it be dishonored, the necessary proceedings on dishonor being duly taken, he will pay the amount thereof to the holder.

Same — necessity.

2. Presentment for payment, unless dispensed with or excused, is necessary in order to charge an indorser; but presentment may be expressly or impliedly waived.

Same — notice of dishonor.

3. Notice of dishonor, unless dispensed

Headnotes by WHITFIELD. Ch. J.

Note. — Bills and notes: implied waiver of presentment and notice by indorser before maturity.

Cases involving the effect of a statement by an indorser to a holder that the party primarily liable cannot pay, as waiver of presentment and notice, are excluded from this note, and will be found in a note ap-

with or excused, must be given to an indorser, or he is discharged, unless the notice is expressly or impliedly waived.

Same—statute—necessity for presentment.

4. Under the statute, an indorser of a negotiable promissory note is not liable thereon as indorser, if due presentment is not made to the maker for payment, and notice of dishonor is not given, unless presentment and notice are excused, dispensed with, or waived.

Same—waiver of presentment.

5. The rights of an indorser of a negotiable promissory note to have due presentment and notice before liability attaches to him thereon are annexed by law for the benefit of the indorser, and under the terms of the statute such presentment and notice

may be expressly or impliedly waived. Waiver may be implied from the conduct of the indorser.

Same—facts showing waiver.

6. Where, before the maturity of a negotiable promissory note, an indorser thereof by unequivocal words or acts shows that he regards his liability as indorser to be absolute, and not to be dependent upon proper presentment for payment, and notice to him of the dishonor of the note; or where the indorser by unequivocal words or acts fairly warrants the holder of the note to conclude that the indorser intended to assume an absolute liability; or misleads the holder and induces him to dispense with the presentment for payment and notice of dishonor required by law to fix the liability of an indorser,—the indorser may be regarded as having waived his right under the

amount to a waiver. Thus, it has been held that the indorser waived presentment and notice:

Known insolvency of maker at time of indorsement.

While it was held in *M'Clellan v. Clarke*, 2 Brev. 106, that waiver of presentment and notice was implied by the fact that the maker was insolvent and had absconded at the time of indorsement, the general rule is that known insolvency of the maker at the time of indorsement does not imply a waiver of presentment and notice by the indorser. *Phipps v. Harding* (Hudson Furniture Co. v. Harding) 30 L.R.A. 513, 17 C. C. A. 203, 34 U. S. App. 148, 70 Fed. 468; *Kimmel v. Weil*, 95 Ill. App. 15; *Groton v. Dallheim*, 6 Me. 476; *Sandford v. Dillaway*, 10 Mass. 52, 6 Am. Dec. 99; *Farnum v. Fowle*, 12 Mass. 89, 7 Am. Dec. 35; *Barton v. Baker*, 1 Serg. & R. 334, 7 Am. Dec. 620.

And this is true though the indorser indorsed the note of the insolvent for the purpose of giving it credit. *Buck v. Cotton*, 2 Conn. 128, 7 Am. Dec. 251.

Indorsing renewal note.

As a rule, an indorser who indorses a note to be used for the purpose of taking up the former note, which has not yet matured, is held thereby impliedly to have waived presentment and notice of the first note. *Tailer v. Murphy* Furnishing Goods Co. 24 Mo. App. 420; *First Nat. Bank v. Weston*, 25 App. Div. 414, 49 N. Y. Supp. 542; *National Hudson River Bank v. Reynolds*, 57 Hun, 307, 10 N. Y. Supp. 669.

But in *First Nat. Bank v. Gridley*, 112 App. Div. 398, 98 N. Y. Supp. 445, it was held that no such waiver was effected by the indorser indorsing a renewal note before maturity, where the holder had no notice of the renewal until the maturity of the first note.

Agreement by indorser to pay.

A promise by an indorser indicating that he intends to assume responsibility for payment of the note is frequently held to 33 L.R.A. (N.S.)

amount to a waiver. Thus, it has been held that the indorser waived presentment and notice:

—by promising to pay the note at maturity. *Sigerson v. Mathews*, 20 How. 496, 15 L. ed. 989; *Lary v. Young*, 13 Ark. 401, 58 Am. Dec. 332; *Marshall v. Mitchell*, 35 Me. 221, 58 Am. Dec. 697; *Schley v. Merritt*, 37 Md. 352; *State Bank v. Bartle*, 114 Mo. 276, 21 S. W. 816;

—by telling holder that he is collecting money for the maker, and not to be uneasy about the note as he will see that it is paid. *Bryant v. Wilcox*, 49 Cal. 47;

—by promising to pay at maturity, where the note was made to secure funds for a mutual undertaking by maker and indorsers. *First Nat. Bank v. Connoway*, 4 Houst. (Del.) 206;

—by telling holder to do nothing with the note, and they (indorsers) will pay it. *Markland v. McDaniel*, 51 Kan. 350, 20 L.R.A. 96, 32 Pac. 1114;

—by promising to take up the note when due, if maker does not. *Boyd v. Cleveland*, 4 Pick. 525;

—by promising to take care of the note when due, and directing that notice to the maker should be sent in his care (indorser's). *Taunton Bank v. Richardson*, 5 Pick. 436;

—by telling payee at time of indorsement that he should look to him to pay the note, and that he would pay it promptly. *Quaintance v. Goodrow*, 16 Mont. 376, 41 Pac. 76;

—by telling holder, after failure of maker and before maturity of note, that he (indorser) would pay it. *Whitney v. Abbot*, 5 N. H. 378;

—by telling holder to give himself no uneasiness about the note, and he would see him paid. *Leonard v. Gary*, 10 Wend. 504;

—by replying to holder's inquiries in regard to the note, where the maker had become insolvent before maturity, that an auditor would have to be appointed, and that what the maker's property would not reach, he (indorser) would have to pay. *Stahl v. Wolfe*, 6 W. N. C. 143;

law to have due presentment made and notice of dishonor given to him. The words or acts of the indorser must be of such a character as to fairly justify the holder in being misled thereby, or to warrant the holder in concluding that the indorser intended to permit the presentment and notice of dishonor to be dispensed with, or intended to assume an absolute liability.

Same — waiver — implication.

7. A waiver of presentment and notice, being in derogation of a statutory right of the indorser, will not be inferred from doubtful acts or language of the indorser.

Same — promise to pay.

8. Where an indorser of a negotiable promissory note before its maturity is informed by the holder that the makers denied

liability, and had told him they would not pay the note at maturity, or at any other time, and the indorser stated that he did not have the money to pay the note, but that he was liable thereon, and if the holder would sue the makers, and should fail to recover for them, he (the indorser) would pay it, such action by the indorser is not inconsistent with, or a waiver of, his right to have due presentment to the makers for payment made, and notice of dishonor given him, as a prerequisite to his liability on the note as indorser.

Pleading — failure of proof.

9. In an action against an indorser of a negotiable promissory note, where the declaration alleges due presentment of the note for payment, and notice of its dishon-

—by agreeing at the time of discount for their (indorsers') benefit, to pay the note themselves at maturity. *Souther v. McKenna Bros.* 20 R. I. 645, 40 Atl. 736;

—by informing holder that he had taken back the land for which the note was given, and had become paymaster to the indorsee. *Moon v. Haynie*, 1 Hill, L. 411;

—by agreement to pay note if holder would let it run past maturity. *Hale v. Danforth*, 46 Wis. 554, 1 N. W. 284.

On the other hand, it has been held that the indorser did not waive presentment and notice;

—by his assurance that he would stand good for payment. *Freeman v. O'Brien*, 38 Iowa, 406;

—by his promise to pay at maturity. *Isham v. McClure*, 58 Iowa, 515, 12 N. W. 558;

—by his parol representation made before indorsement that he would treat the note as his own paper, and see that it was paid at maturity, as all prior negotiations are merged in the contract of indorsement. *Bird v. Kay*, 40 App. Div. 533, 58 N. Y. Supp. 170;

—by an offer from the indorser to the holder, before maturity of the note, to provide for its payment, which offer had not been accepted at maturity. *M'Mahan v. Grant*, 16 La. 479;

—by a promise to the maker, without knowledge of the holder, to pay the note when due. *Coghlan v. Dinsmore*, 9 Bosw. 453.

Extension or request for extension.

The indorser may waive his right to require presentment and notice:

—by consenting to an extension of time. *Ridgway v. Day*, 13 Pa. 208; *Amoskeag Bank v. Moore*, 37 N. H. 539, 75 Am. Dec. 156; *Sheldon v. Horton*, 43 N. Y. 93, 3 Am. Rep. 669, affirming 53 Barb. 23;

—by asking an extension of time, and promising to pay if it is granted. *Hunter v. Hook*, 64 Barb. 468;

—by requesting a renewal, which was granted by the holder. *First Nat. Bank v. Byerson*, 23 Iowa, 508;

—by informing indorsee at time of trans-

fer that time had been extended by agreement, and requesting delay in presentment. *Glaze v. Ferguson*, 48 Kan. 157, 29 Pac. 396;

—by requesting holder not to sue note till the maker should see him. *Gove v. Vining*, 7 Met. 212, 39 Am. Dec. 770;

—by promising shortly before maturity that if the holder would wait a few days, the note would be fixed up. *Bush v. Gilmore*, 45 App. Div. 89, 61 N. Y. Supp. 682;

—by requesting before maturity that time on note be extended, to which payee consented on condition that the indorser let his name be on it. *Cady v. Bradshaw*, 116 N. Y. 188, 5 L.R.A. 557, 22 N. E. 371;

—by an offer of renewal before maturity with same makers and indorsers. *Jenkins v. White*, 147 Pa. 303, 23 Atl. 556;

—by indorsing the note without informing indorsee that he had previously agreed with the maker to an extension of time. *Williams v. Brobst*, 10 Watts, 111.

And in *Walker v. Graham*, 21 La. Ann. 209, where the indorser consented to an extension of time between maker and holder, it was held that presentment and notice were waived until the new date.

But in *Norton v. Lewis*, 2 Conn. 478, and *Michaud v. Lagarde*, 4 Minn. 43, Gil. 21, it was held that an agreement to permit an extension of time for payment did not amount to a waiver.

And in *Dutton v. Bratt*, —Ark. —, 11 S. W. 821, it was held that a waiver was not implied by the indorser requesting indorsee not to bring suit on the note against him in his absence from home, if the maker failed to pay.

Taking security—in general.

There seems to be considerable conflict as to the effect of the indorser taking security from the maker as a waiver of presentment and notice. Part of this apparent conflict may be explained on the ground that in some cases the security or property is taken for the purpose of enabling the indorser to pay the note when due, while in others it is taken merely as indemnity against his liability as indorser. In the latter case

or to the indorser, and such material allegations are not proven, a judgment for the plaintiff will be reversed.

Same — common counts — indorser.

10. Common counts are not applicable in an action against an indorser as such of negotiable promissory notes.

(November, 1, 1910.)

ERROR to the Circuit Court for Taylor County to review a judgment in favor of plaintiff in an action to hold the indorser on promissory notes. Reversed.

The facts are stated in the opinion.

Mr. W. B. Davis, for plaintiff in error:

Waivers, being in derogation of the admitted rights of the indorser, will not be inferred from doubtful acts or language.

it would seem that there should be no waiver implied, and this is doubtless the general view; while in the former the liability would be based upon the ground that the indorser had taken the place of the maker, and assumed responsibility for payment of the note. But aside from this class of cases there appears to be a real conflict of authority upon the question, the courts which take the position that the taking of security amounts to a waiver placing their decisions upon the ground that the reason for giving an indorser notice of nonpayment is to enable him to take such steps against the maker as may be available for his own protection, and that, when he is amply secured, the reason, and therefore the necessity, for giving him notice, is obviated. Cases taking the other view do so on the ground that the indorser agrees to become liable only in case the maker fails to pay when the note is due and he is notified of such failure, and that, in taking indemnity, he does so only for the purpose of protecting himself against this conditional liability. Of course, if the security taken is insufficient to indemnify the indorser, the reason for implying a waiver is not present, and the cases generally hold that it does not amount to such. There are some cases, however, which hold that though the property taken is not sufficient, nevertheless, if it is all the maker has, a waiver will be implied, for the reason that, the maker having no property left, notice to the indorser would be useless, as there would be nothing to which he could have recourse beyond the security in his hands. The cases do not all agree, however, that the taking by the indorser of insufficient security, even though it is all the maker has, will amount to a waiver of presentment and notice.

—cases denying waiver.

Keeping the above principles and distinctions in mind, it has been held that no waiver was implied:

—by the indorser taking security from the maker. *Dufour v. Morse*, 9 La. 333; 33 L.R.A. (N.S.)

7 Cyc. Law & Proc. p. 1126; *Joyce, Defences to Com. Paper*, § 525; *Rosson v. Carroll*, 90 Tenn. 90, 12 L.R.A. 727, 16 S. W. 66; 2 Dan. Neg. Inst. § 1156; *Tebbetts v. Dowd*, 23 Wend. 379; *United States Bank v. Southard*, 17 N. J. L. 473, 35 Am. Dec. 521; *Creamer v. Perry*, 17 Pick. 332, 28 Am. Dec. 298; *Sigerson v. Mathews*, 20 How. 496, 15 L. ed. 989; 1 *Parsons, Bills & Notes*, 582; *Edwards, Bills & Notes*, p. 633; *Isbell v. Lewis*, 98 Ala. 550, 13 So. 338; *Story, Bills of Exchange*, § 321.

No waiver of presentment has been proved.

2 Dan. Neg. Inst. 5th ed. § 1091; 7 Cyc. Law & Proc. p. 1126; *Glidden v. Chamberlin*, 167 Mass. 486, 57 Am. St. Rep. 479, 46 N. E. 103; *Kent v. Warner*, 12 Allen,

Peets v. Wilson, 19 La. 478; *Haskell v. Boardman*, 8 Allen, 38; *Seacord v. Miller*, 13 N. Y. 55; *Ireland v. Kip*, Anthon, N. P. 145; *Whittier v. Collins*, 15 R. I. 44, 23 Atl. 39; *Selby v. Brinkley*, — Tenn. —, 17 S. W. 479;

—by taking property as security, unless it was sufficient security or was all the maker owned. *Marshall v. Mitchell*, 34 Me. 227; *Kramer v. Sandford*, 4 Watts. & S. 328, 39 Am. Dec. 92;

—by transfer of insufficient property to satisfy the note, though it was all the maker owned. *Woodbury v. Crum*, 1 Biss. 284, Fed. Cas. No. 17,969;

—by taking security which, though not of itself a waiver, is nevertheless evidence thereof. *Hayes v. Werner*, 45 Conn. 246;

—by taking partial indemnity only. *Brunson v. Napier*, 1 Yerk. 199; *Jordan v. Reed*, 77 N. J. L. 584, 71 Atl. 280;

—where a note was given in consideration of an assignment of a judgment against the maker to the indorser, when the indorser was not consulted as to such assignment and was not shown to have any knowledge of it. *Holman v. Whiting*, 19 Ala. 703;

—by a general payment by the maker to the indorser, specific application of payment to the note being necessary to a waiver. *Van Norden v. Buckley*, 5 Cal. 283;

—where a holder of notes and mortgages given to secure their payment indorsed the notes and assigned the mortgages, the mortgages not being intended to secure the ultimate payment of the notes, but to indemnify defendant as indorser. *Olendorf v. Swartz*, 5 Cal. 480, 63 Am. Dec. 141;

—by indorser taking funds to secure him against his indorsement, as they were to secure him only against his liability as indorser, not against absolute liability. *Holland v. Turner*, 10 Conn. 308;

—by transfer by maker to indorser of part of his property, though the transfer includes all the property the maker may hold at maturity of the note. *Brandt v. Mickle*, 28 Md. 436;

—by assignment of maker's property to

561; *Klostermann v. Kage*, 39 Mo. App. 60; *Duffy v. O'Conner*, 7 Baxt. 498; *Isham v. McClure*, 58 Iowa, 515, 12 N. W. 555.

Mr. Thomas B. Adams, for defendant in error:

If the indorser before maturity, by some words or acts, reasonably leads the holder to believe that demand and notice will not be required, it would be a fraud upon the holder to allow the indorser to profit by the laches of the holder caused by such words or acts.

Story, *Promissory Notes*, § 280; *Lary v. Young*, 13 Ark. 401, 58 Am. Dec. 332; *Dan. Neg. Inst.* § 1091; 7 *Cyc. Law & Proc.* p. 1125.

There was a waiver.

Boyd v. Bank of Toledo, 32 Ohio St. 526,

trustee to secure indorser among other creditors. *Creamer v. Perry*, 17 Pick. 332, 28 Am. Dec. 297;

—by indorser taking mortgage of all of maker's property before maturity, to indemnify him. *Moses v. Ela*, 43 N. H. 557, 82 Am. Dec. 175;

—by the mere taking of security, unless it appears that funds have actually come into the hands of the indorser, or that all the maker's property has been transferred to him. *Spencer v. Harvey*, 17 Wend. 480;

—by taking security, though it furnishes abundant indemnity. *Oswego Bank v. Knower, Hill & D. Supp.* 122;

—by acceptance by indorser of an assignment, partial or total, to a third person, as indemnity against existing and future indorsements. *Denny v. Palmer*, 27 N. C. (5 Ired. L.) 610;

—by assignment of all of maker's property to indorser for all his creditors generally, where there is not enough to protect the indorser. *Second Nat. Bank v. McGuire*, 33 Ohio St. 295, 31 Am. Rep. 539;

—by the fact that the vendor's lien is retained in the note, and the indorser is protected thereby. *Cruger v. Lindheim*, 4 Tex. App. Civ. Cas. (Willson) 142, 16 S. W. 420;

—by acceptance of an assignment of all of maker's property, to be applied to only one fourth of the note. *Watkins v. Crouch*, 5 Leigh, 522;

—by indorser taking a mortgage on a stock of goods to secure payment of the note. *Wilson v. Senier*, 14 Wis. 380.

—cases sustaining waiver.

In the following cases it was held that the indorser did waive presentment and notice:

—by taking sufficient security. *Posey v. Decatur Bank*, 12 Ala. 802; *Mead v. Small*, 2 Me. 207, 11 Am. Dec. 62; *Kyle v. Green*, 14 Ohio, 490; *Develing v. Ferris*, 18 Ohio, 170; *Smith v. Lownsdale*, 6 Or. 78; *Durham v. Price*, 5 Yerg. 300, 26 Am. Dec. 267;

—by taking an assignment of all of maker's property. *Stephenson v. Primrose*, 8 Port. (Ala.) 155, 33 Am. Dec. 281; *Bond v. Farnham*, 5 Mass. 170, 4 Am. Dec. 47; *Mechanics' Bank v. Griawold*, 7 Wend. 165; *Barton v. Baker*, 1 Serg. & R. 334, 7 Am. Dec. 620; *Bank of State v. Myers*, 1 Bail. L. 412;

30 Am. Rep. 624; *Lary v. Young*, 13 Ark. 402, 58 Am. Dec. 332; *Lane v. Steward*, 20 Me. 98; *Hibbard v. Russell*, 16 N. H. 410, 41 Am. Dec. 733; *Baker v. Parker*, 6 Pick. 80; *Boyd v. Cleveland*, 4 Pick. 525; *Baumeister v. Kuntz*, 53 Fla. 340, 42 So. 888.

Whitfield, Ch. J., delivered the opinion of the court:

An action was brought by A. J. Johnson, the holder of two notes, against Ross Worley the indorser thereof; the notes having been made by J. H. Edwards and J. C. West, payable to the order of Ross Worley, and indorsed in blank by Ross Worley. Besides the common counts, the declaration contains two counts on the note due De-

er's property. *Stephenson v. Primrose*, 8 Port. (Ala.) 155, 33 Am. Dec. 281; *Bond v. Farnham*, 5 Mass. 170, 4 Am. Dec. 47; *Mechanics' Bank v. Griawold*, 7 Wend. 165; *Barton v. Baker*, 1 Serg. & R. 334, 7 Am. Dec. 620; *Bank of State v. Myers*, 1 Bail. L. 412;

—by taking an assignment of the whole or a sufficient quantity of maker's property as indemnity. *Barrett v. Charleston Bank*, 2 McMull. L. 191;

—by taking effects sufficient to discharge the note, and undertaking to pay the same: *Cockrill v. Hobson*, 16 Ala. 391;

—by second indorser taking indemnity from first indorser. *Walker v. Walker*, 7 Ark. 542;

—by receiving a sufficient sum of money or ample security. *Lewis v. Kramer*, 3 Md. 265;

—by taking a mortgage as indemnity, though the mortgaged property had been released. *Watt v. Mitchell*, 6 How. (Miss.) 131;

—by a statement to the holder that the maker could not pay the note, and had made an assignment and preferred him, so as to make him secure on his indorsement. *Taylor v. French*, 4 E. D. Smith, 458;

—where, at maturity, indorser had in his hands as security sufficient property of the maker to pay the note. *Beard v. Westerman*, 32 Ohio St. 29.

Miscellaneous cases—sustaining waiver.

In the following cases it was held that waiver of presentment and notice was effected:

—by conduct on part of the indorser likely to mislead a reasonable person, and induce him to forbear taking the necessary steps. *Boyd v. Bank v. Toledo*, 32 Ohio St. 526, 30 Am. Rep. 624; *Torbert v. Montague*, 38 Colo. 325, 87 Pac. 1145;

—by the indorser discharging the maker from liability. *Burke v. McKay*, 2 How. 66, 11 L. ed. 181;

—by the indorser delivering the note to the creditor as collateral security for a debt, and subsequently giving the creditor

cember 15, 1908, and two counts on the note due January 10, 1909. The first and second counts allege severally that the note "was duly presented for payment and was dishonored, whereof the defendant had due notice," and the third and fourth counts allege severally that "the plaintiff, a few days before the maturity of said note, informed the makers personally that he was the holder of the same and would expect payment at maturity; and the said makers then and there denied liability on said note, and said they would not pay the same at maturity, or at any other time; that a few days thereafter, and before the maturity of said note, the plaintiff personally informed the defendant of said statements of said makers, and then and there informed defendant that he (plaintiff) did and would look to defendant for payment of said note; that the defendant then and there stated that he did not have the money to pay said note, but that he was liable on the same, and that if plaintiff

would sue the said makers, and should fail to make the money out of them, he would pay it; that, by said conversation and statements of the defendant, plaintiff was induced not to make any further demand at maturity upon said makers, or to give any further notice of dishonor of said note."

Demurrers to each of the special counts were interposed, among the grounds being, in effect, that no sufficient facts are alleged to show a legal waiver of presentment for payment, that no showing is made of any effort to collect from the makers of the note, and that the alleged waiver is not sufficient. The court overruled the demurrers. A plea of "Never was indebted" was filed to the common counts. Among the pleas to the first and second counts are several that aver the notes were not presented for payment, that defendant had no notice of the dishonor of the notes, and that no proper legal notice of dishonor was ever given to defendant. Judgment was ren-

his own note with security for the full amount of the debt. *Johnson v. Downing*, 76 Ark. 128, 88 S. W. 825;

—where a statute made demand notes dishonored after expiration of four months, and defendant indorsed a demand note that provided for payment of interest semi-annually. *Hayes v. Werner*, 45 Conn. 246;

—where the indorser testified that he did not expect presentment at maturity, and, under the circumstances, had no right to expect such presentment to be made. *Baumeister v. Kuntz*, 53 Fla. 340, 42 So. 886;

—by indorser wrongfully obtaining possession of the note, and retaining it till after maturity, and taking steps which tended to show primary liability. *Havens v. Talbot*, 11 Ind. 323;

—by the indorser giving to the holder a mortgage in terms clearly indicating an intention absolutely to secure payment of the debt. *Hoover v. Glasscock*, 16 La. 242;

—by bankruptcy of the maker participated in and consented to by his indorser. *J. W. O'Bannon Co. v. Curran*, 129 App. Div. 90, 113 N. W. Supp. 359;

—by a telegram sent by the indorser to the collecting bank, to pay the note to save protest, and to draw on him. *Seldner v. M. T. Jackson Nat. Bank*, 66 Md. 488, 59 Am. Rep. 190, 8 Atl. 262;

—by indorser calling on holder and stating that he would be unable to pay the note at maturity, and it would be useless to have it protested. *Jones v. Roberts*, 191 Pa. 152, 43 Atl. 123.

—denying waiver.

But in the following cases it was held that presentment and notice were not waived:

—by an answer by the indorser to an objection that the makers were insolvent, 33 L.R.A. (N.S.)

that his name made the notes good. *Andrews v. Simms*, 33 Ark. 771;

—by the indorser inducing and assisting holder to commence actions for overdue instalments of interest. *Isham v. McClure*, 58 Iowa, 515, 12 N. W. 558;

—where, upon the holder making a premature demand on the indorser, the latter refused to pay, and indicated that he intended to resist payment of the note. *Porter v. Moles*, — Iowa, —, 131 N. W. 23;

—by the indorser attending a meeting of creditors of the insolvent drawer, and assuming the quality of a creditor for a large sum, including the note in question. *Miranda v. City Bank*, 6 La. 740, 26 Am. Dec. 493;

—where a holder informed the indorser at the time of indorsement, that he relied altogether upon him for payment. *Davis v. Gowen*, 19 Me. 447;

—by the indorser, on being informed that holder had the note, saying he would see the maker before it was due, and he would probably arrange for a new note. *Kent v. Warner*, 12 Allen, 561;

—by the indorser paying instalments of interest on a demand note. *Porter v. Thom*, 40 App. Div. 34, 57 N. Y. Supp. 479, affirmed without opinion in 167 N. Y. 584, 60 N. E. 1119;

—by the indorser of a demand note, on being informed of the amount still due from maker, saying he would see him, and, if he did not settle, would shut him up, *Congress Brewing Co. v. Habenicht*, 83 App. Div. 141, 82 N. Y. Supp. 481;

—by an indorsement providing that assignment was on condition that the property of maker be exhausted before recourse on indorser. *Duffy v. O'Conner*, 7 Baxt. 498.

R. L. S.

dered for the plaintiff, and writ of error was taken by the defendant.

An indorser without qualification of a note engages that on due presentment it shall be paid according to its tenor, and that if it be dishonored, the necessary proceedings on dishonor being duly taken, he will pay the amount thereof to the holder. Presentment for payment, unless dispensed with or excused, is necessary in order to charge an indorser; but presentment may be expressly or impliedly waived. Notice of dishonor, unless dispensed with or excused, must be given to an indorser, or he is discharged, unless the notice is expressly or impliedly waived. Gen. Stat. 1906, §§ 2999, 3003, 3012-3014, 3020, 3036, 3038, 3039.

Under the statute an indorser of a negotiable promissory note is not liable thereon as indorser, if due presentment is not made to the maker for payment, and notice of dishonor is not given, unless presentment and notice are excused, dispensed with, or waived. The rights of an indorser of a negotiable promissory note to have due presentment and notice before liability attaches to him thereon are annexed by law for the benefit of the indorser, and under the terms of the statute such presentment and notice may be expressly or impliedly waived. Waiver may be implied from the conduct of the indorser. *Baumeister v. Kuntz*, 53 Fla. 340, 42 So. 886. See, also, *Galbraith v. Shepard*, 43 Wash. 698, 86 Pac. 1113.

Where, before the maturity of a negotiable promissory note, an indorser thereof, by unequivocal words or acts, shows that he regards his liability as indorser to be absolute, and not to be dependent upon proper presentment for payment, and notice to him of the dishonor of the note; or where the indorser by unequivocal words or acts fairly warrants the holder of the note to conclude that the indorser intended to assume an absolute liability; or misleads the holder and induces him to dispense with the presentment for payment and notice of dishonor required by law to fix the liability of an indorser,—the indorser may be regarded as having waived his right under the law to have due presentment made and notice of dishonor given to him. The words or acts of the indorser must be of such a character as to fairly justify the holder in being misled thereby, or to warrant the holder in concluding that the indorser intended to permit the presentment and notice of dishonor to be dispensed with, or intended to assume an absolute liability. 2 Dan. Neg. Inst. chap. 1091; 4 Am. & Eng. Enc. Law, 2d ed. p. 460; *Torbert v. Montague*, 38 Colo. 325, 87 Pac. 1145; *Sie-33 L.R.A. (N.S.)*

ger v. Second Nat. Bank, 132 Pa. 307, 19 Atl. 217; *Eaton & G. Com. Paper*, 521; *M'Mahan v. Grant*, 16 La. 479.

A waiver of presentment and notice, being in derogation of a statutory right of the indorser, will not be inferred from doubtful acts or language of the indorser. 7 Cyc. & Proc. p. 1127, and cases cited.

The allegation demurred to in the third and fourth counts is that before maturity the holder notified the makers that he held the note and would expect payment at maturity; that the makers then and there denied liability, and said they would not pay the note at maturity, or at any other time; "that a few days thereafter, and before the maturity of said note, the plaintiff personally informed the defendant of said statements of said makers, and then and there informed defendant that he (plaintiff) did and would look to defendant for payment of said note; that the defendant then and there stated that he did not have the money to pay said note, but that he was liable on the same, and that if plaintiff would sue the said makers, and should fail to make the money out of them, he would pay it; that, by said conversation and statements of the defendant, plaintiff was induced not to make any further demand at maturity upon said makers, or to give any further notice of dishonor of said note." These allegations are not inconsistent with the right of the indorser to presentment and notice.

The acknowledgment of the indorser as alleged is not of an absolute liability, and there is nothing in the acts of the indorser as alleged to justify the holder in being misled, or to fairly warrant the holder in concluding that the indorser, by the language used, intended to waive his right to have due presentment made and notice of dishonor given to him as a condition annexed by law to the indorser's liability on the note. The makers might have changed their minds and paid the notes on due presentment. Therefore the indorser had a right to such presentment in the absence of a clear waiver. *Prideaux v. Collier*, 2 Starkie, 57; *Duffy v. O'Conner*, 7 Baxt. 498; *Isham v. McClure*, 58 Iowa, 515, 12 N. W. 558; *Kent v. Warner*, 12 Allen, 561; *Wright v. Liesenfeld*, 93 Cal. 90, 28 Pac. 849; *Congress Brewing Co. v. Habenicht*, 83 App. Div. 141, 82 N. Y. Supp. 481.

The demurrers to the third and fourth counts of the declaration should have been sustained.

The allegations of the first and second counts, that "the said note was duly presented for payment, and was dishonored, whereof the defendant had due notice," are not sustained by proofs. See *A. B. Far-*

quhar Co. v. Higham, 16 N. D. 106, 112 N. W. 557.

Common counts are not applicable in an action against indorsers as such of a negotiable promissory note; but it appears there was no recovery on the common counts included in the declaration here.

The judgment is reversed.

Shackleford and Cockrell, JJ., concur.

Taylor, Hocker, and Parkhill, JJ., concur in the opinion.

IOWA SUPREME COURT.

ATTILIO POLI

v.

NUMA BLOCK COAL COMPANY, Appt.

(— Iowa —, 127 N. W. 1105.)

Master — mine employee — promise of pit boss.

1. An employee of a mine may rely on the promise of a pit boss who employs and discharges the operatives and has imme-

Note. — Servant's assumption of risk of master's breach of statutory duty.

The earlier cases on this subject are collected in the opinion in *Denver & R. G. R. Co. v. Norgate*, 6 L.R.A. (N.S.) 981, and the note to that case and the cases of *Johnson v. Mammoth Vein Coal Co.* 19 L.R.A. (N.S.) 646, and *Hill v. Saugestad*, 22 L.R.A. (N.S.) 634. The exclusionary statements in the note in 19 L.R.A. (N.S.) 646, also apply to the present note.

As shown in those notes the statutes in question vary all the way from those that merely impose certain duties upon the master without any intimation whatever as to assumption of risk, thus presenting the bald question whether in view of their purpose and the nature of the defense of assumed risk they must be held impliedly to exclude that defense, to those that expressly deal with that defense in terms leaving no room for construction. Between these extremes there are statutes which, without in terms making any declaration as to assumption of risk, provide that contracts releasing the employer from liability for breach of the statute shall be void, or providing that no contract of employment shall constitute any bar or defense. These variations account for part of the apparent conflict observable when only the ultimate results in the cases are considered, but even after allowing for these differences in the statute there is a real and substantial conflict of authority on the question.

In considering the question it is important to bear in mind (as pointed out in the note to *Scheurer v. Banner Rubber Co.* 28 33 L.R.A. (N.S.)

diata charge of the actual underground operations of the mine, to repair the cover of the cage, made in response to his complaint of its insufficiency.

Same — notice of defects.

2. Notice to a mine operator of a defect in the original construction of the cage is not necessary to hold him liable for injury thereby caused to an employee.

Same — assumption of risk — statutory duty.

3. An employee in a mine does not assume the risk of injury from the notorious and persistent disregard, by the proprietor, of his statutory duty to maintain a proper cover over the cage in order to protect employees from injury.

Same — ordinary hazard.

4. A miner is not *per se* negligent in continuing to work in connection with a cage having a defective covering after receiving the employer's promise to repair it as soon as possible, unless the hazard is so great that no reasonably prudent person would expose himself to it.

Same — licensed employees — liability for negligence.

5. Requiring a mine operator to employ only licensed pit bosses does not relieve him from liability for the negligence of his employees so far as it pertains to the perform-

L.R.A. (N.S.) 1215) that while the phrase "assumption of risk" in its proper and distinctive sense imports an affirmative defense not dependent upon any imputation of negligence to the employee, but simply upon his knowledge and appreciation of the danger incident to the master's negligence or breach of duty, the phrase is sometimes employed to cover that passive kind of contributory negligence which consists in remaining in the employment with knowledge or notice of a defect, where, under the circumstances, an ordinarily prudent man would not have done so. For example, as shown in the note in 22 L.R.A. (N.S.) 634, the Texas statute in relation to railroad employees, while saving the latter defense, apparently treats it as a species of assumed risk, since in declaring that the plea of "assumed risk" where the ground of the plea is knowledge or means of knowledge of the defect and danger which caused the injury or death shall not be available, it adds the condition, "where a person of ordinary care would have continued in the service with knowledge of the defect and danger." It should not be assumed that because some statutes or courts declare the abrogation of the defense of assumed risk, without any qualification, that they mean to exclude as defense also the passive kind of contributory negligence already referred to, which, as just stated, is sometimes regarded as coming within the doctrine of assumed risk. In this connection see the note to *Dumphy v. New York, N. H. & H. R. Co.* 13 L.R.A. (N.S.) 1152, on the subject of contributory negligence as a defense where the statute excludes the defense of assumption of risk;

ance of the nondelegable duties of the master.

Appeal — excessive damages — prejudice.

6. A verdict for \$3,200 for the negligent crushing of the hand of an employee, leaving it in a permanently crippled condition, is not indicative of passion or prejudice so as to require interference by the appellate court.

(October 26, 1910.)

A PPEAL by defendant from a judgment of the District Court for Wayne County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Messrs. Miles & Steele, for appellant: As the pit boss held a certificate as a mine pit boss from the state board of mine examiners, the defendant was not responsible for his acts or for any failure to act while he was acting in the capacity of said pit boss.

Durkin v. Kingston Coal Co. 171 Pa. 193, 29 L.R.A. 808, 50 Am. St. Rep. 801, 33 Atl.

and the note to Rase v. Minneapolis, St. P. & S. Ste. M. R. Co. 21 L.R.A. (N.S.) 138, as to the distinction between assumption of risk and contributory negligence.)

Risk not assumed.

The following cases, in addition to those cited in previous notes and those subsequently referred to in this note, hold that the servant does not assume the risk from the breach of a statutory duty:

Arkansas: St. Louis, I. M. & S. R. Co. v. White, 93 Ark. 368, 125 S. W. 120.

Illinois: Waschow v. Kelly Coal Co. 245 Ill. 516, 92 N. E. 303 (affirming 151 Ill. App. 41); Himrod Coal Co. v. Adack, 94 Ill. App. 1; McCray v. Moweaqua Coal Min. & Mfg. Co. 149 Ill. App. 565; Demereski v. Citizens' Coal Min. Co. 149 Ill. App. 513 (semble)—all cases involving wilful failure to carry out the provisions of the mines and mining act.

Iowa: POLI v. NUMA BLOCK COAL CO.; Stephenson v. Sheffield Brick & Tile Co. — Iowa, —, 130 N. W. 586.

Indiana: Boyd v. Brazil Block Coal Co. — Ind. App. —, 50 N. E. 368 (wilful breach of coal mining act); Vandalia Coal Co. v. Yemm, — Ind. —, 92 N. E. 49 (failure to sprinkle roadways of mine under act of 1905); Muren Coal & Ice Co. v. Copeland, — Ind. App. —, 90 N. E. 489, s. c. subsequent appeal 91 N. E. 508 (failing to supply mining timbers); Chamberlain v. Waymire, 32 Ind. App. 442, 68 N. E. 306, 70 N. E. 81 (failure to guard vats); Espenlaub v. Ellis, 34 Ind. App. 163, 72 N. E. 527 (failure to guard vats); Blanchard-Hamilton 33 L.R.A. (N.S.)

237; Williams v. Thacker Coal & Coke Co. 44 W. Va. 599, 40 L.R.A. 812, 30 S. E. 107; Homer Ramsdell Transp. Co. v. La Compagnie Generale Transatlantique, 182 U. S. 406, 45 L. ed. 1155, 21 Sup. Ct. Rep. 831; Harrison v. Hughes, 60 C. C. A. 442, 125 Fed. 860; Colorado Coal & I. Co. v. Lamb, 6 Colo. App. 255, 40 Pac. 251.

The defendant is not liable for anything See said, did, or failed to do outside of his employment as pit boss.

Healy v. Patterson, 123 Iowa, 73, 98 N. W. 576; Sherwood v. Home Sav. Bank, 131 Iowa, 528, 109 N. W. 9; Theleman v. Moeller, 73 Iowa, 108, 5 Am. St. Rep. 663, 34 N. W. 765; Freebourn v. Chamberlain Medicine Co. 136 Iowa, 434, 113 N. W. 918; Cavanaugh v. Centerville Block Coal Co. 131 Iowa, 700, 7 L.R.A. (N.S.) 907, 109 N. W. 303; Beresford v. American Coal Co. 124 Iowa, 34, 70 L.R.A. 256, 98 N. W. 902; McQueeney v. Chicago, M. & St. P. R. Co. 120 Iowa, 522, 94 N. W. 1124; Wilson v. Dunreath Red-Stone Quarry Co. 77 Iowa, 429, 14 Am. St. Rep. 304, 42 N. W. 360.

Notice to an officer or agent of a corporation is not notice to the corporation, unless such officer or agent was charged

Furniture Co. v. Colvin, 32 Ind. App. 398, 69 N. E. 1032 (failure to guard machinery); Cleveland, C. C. & St. L. R. Co. v. Powers, 173 Ind. 105, 88 N. E. 1073, 89 N. E. 485 (failure to obey speed ordinance).

Kansas: Lewis v. Barton Salt Co. 82 Kan. 163, 107 Pac. 783; Bailey v. Prime Western Spelter Co. 83 Kan. 230, 109 Pac. 791—under factory act.

Kentucky: Low v. Cedar Coal Co. post, 656.

Michigan: Rivers v. Bay City Traction & Electric Co. 164 Mich. 696, 128 N. W. 254; Van Doorn v. Heap, 160 Mich. 199, 125 N. W. 11 (failure to guard rip saw).

Missouri: Collins v. Star Paper Mill Co. 143 Mo. App. 333, 127 S. W. 641 (failure to guard shafting).

Washington: Johnson v. Far West Lumber Co. 47 Wash. 492, 92 Pac. 274; Anderson v. Pacific Nat. Lumber Co. 60 Wash. 415, 111 Pac. 337; Dukette v. Northwestern Woodenware Co. — Wash. —, 111 Pac. 1065—all cases of unguarded saws.

Notwithstanding the apparently emphatic holding in POLI v. NUMA BLOCK COAL CO. that the employer cannot plead assumption of risk as a defense to an injury resulting from a violation of an express and specific statutory regulation, the court in the subsequent case of Tyrrell v. Cain, — Iowa, —, 128 N. W. 536, while citing the POLI CASE, apparently treated the question whether an employee may assume the risk from the breach of a statutory duty to guard machinery as still an open one, and the majority opinion disposed of the question by drawing a somewhat strained distinction between the facts in that case and the facts in Sutton

under the law, or by virtue of his office or agency with respect to the matter about which the notice is given.

Russell v. Cedar Rapids Ins. Co. 78 Iowa, 216, 4 L.R.A. 538, 42 N. W. 654; Chicago Lumber & Coal Co. v. Garmer, 132 Iowa, 282, 109 N. W. 780; Second Nat. Bank v. Curren, 36 Iowa, 555; Chesapeake, O. & S. W. R. Co. v. McDowell, 16 Ky. L. Rep. 1, 24 S. W. 607; Union P. R. Co. v. Springsteen, 41 Kan. 724, 21 Pac. 774; Foster v. Boston, 127 Mass. 290; Lineoski v. Susquehanna Coal Co. 167 Pa. 153, 27 Atl. 577; Southern Indiana R. Co. v. Harrell, 161 Ind. 689, 63 L.R.A. 460, 68 N. E. 262; Newbury v. Getchel & M. Lumber & Mfg. Co. 100 Iowa, 441, 62 Am. St. Rep. 582, 69 N. W. 743.

v. Des Moines Bakery Co. 135 Iowa, 390, 112 N. W. 836 (the case which is practically overruled or at least explained away by the opinion in the *POLI* CASE).

In a still later case (*Stephenson v. Sheffield Brick & Tile Co.* — Iowa, —, 130 N. W. 586), however, the court states: "We have already held that an employee does not assume the risk incident to the use of a machine which is not guarded as required by the statute, although he knows of the unguarded condition and appreciates the danger incident to the use thereof." (Citing the *POLI* and *Tyrell* Cases). The fact that the court in the *Stephenson* Case disposed of the defendant's contention that, under the instructions of the trial court as to assumption of risk, there should have been a verdict for defendant, upon the ground that the evidence did not conclusively establish the facts essential to assumed risk, rather than upon the ground that that defense would not be available in any event, is probably accounted for by the doctrine which prevails in some jurisdictions, including Iowa, that a verdict contrary to even erroneous instructions of the trial should be set aside. (See note in 21 L.R.A. (N.S.) 852.)

In *Valjago v. Carnegie Steel Co.* 226 Pa. 514, 75 Atl. 728, an action for negligence in omitting the statutory duty of properly guarding cogwheels or gearing, it was held that the defense of assumption of risk was not open to the defendant, but the court points out that this question was really not in the case, as the jury had passed upon it adversely to the defendant.

A similar opinion was expressed in *Jones v. American Caramel Co.* 225 Pa. 644, 74 Atl. 613, where the court said: "The act of 1905 will become a dead letter if an employer who has failed to properly guard his machinery can relieve himself from that duty by the plea that the danger was so obvious that his injured employee ought to have been aware of it, and was not entitled to any warning against it. Only contributory negligence of an injured employee lawfully employed will relieve the employer from the consequences of his disregard of 33 L.R.A. (N.S.)

The plaintiff assumed whatever risk there was from the falling coal, and he knowingly and voluntarily incurred said risk, and he cannot recover in this action.

Sutton v. Des Moines Bakery Co. 135 Iowa, 390, 112 N. W. 836; *Gorman v. Des Moines Brick Mfg. Co.* 99 Iowa, 257, 68 N. W. 674; *Butler v. Frazee*, 211 U. S. 459, 53 L. ed. 281, 29 Sup. Ct. Rep. 136; *Haines v. Spencer*, 92 C. C. A. 658, 167 Fed. 266; *Martin v. Chicago, R. I. & P. R. Co.* 118 Iowa, 148, 59 L.R.A. 698, 96 Am. St. Rep. 371, 91 N. W. 1034; *Jacobson v. Smith*, 123 Iowa, 263, 98 N. W. 773; *Bertha Zino Co. v. Martin*, 93 Va. 791, 70 L.R.A. 999, 22 S. E. 869.

An employee assumes the risk, even though there is a promise to repair, when he is en-

his statutory duty." As in the preceding case, however, this point does seem to have been essential to a disposition of the case.

The distinction which (as shown in the note in 19 L.R.A. (N.S.) 646) is made in Indiana between specific and general statutory duties was referred to in *American Rolling Mill Co. v. Hullinger*, 161 Ind. 673, 67 N. E. 986, 69 N. E. 460, as follows: "The rule concerning assumed risk is different in cases arising under the employers' liability act, where definitive duties are not prescribed, from what it is where a statute points out definitely what the master must do in certain cases to guard the safety of the employee." See also as referring to this distinction, *Cleveland, C. C. & St. L. R. Co. v. Powers*, 173 Ind. 105, 88 N. E. 1073, 89 N. E. 485.

In *Princeton Coal Min. Co. v. Howell*, — Ind. App.—, 92 N. E. 122, holding that an employee in a mine did not assume the risk from the failure of the mining boss to see that all loose slate, coal, and rock overhead where miners have to travel to and from work shall be "taken down or carefully secured" as required by statute, it was contended by counsel that the act enjoined no specific thing upon the mine boss, but left him free to exercise his judgment as to whether the loose coal should be taken down or secured, and that, therefore, under the distinction adopted in Indiana, the doctrine of assumed risk was available. The court, however, said that the statute was explicit and mandatory,—take down or secure,—and that the alternative expression did not create any uncertainty.

Special statutory provisions.

The decisions in *Luken v. Lake Shore & M. S. R. Co.* 248 Ill. 377, 94 N. E. 175, and *Patten v. Faithorn*, 152 Ill. App. 426, that the risk of master's failure to provide the appliances required by the Illinois safety appliance act was not assumed by the employees, are based upon express provisions to that effect, which admit of no construction on the point.

And the same is true of a similar decision

gaged in ordinary labor, or the tools used are of simple construction and with which he is as familiar as is the master.

Kistner v. American Steel Foundries, 233 Ill. 35, 84 N. E. 44; Crum v. North Vernon Pump & Lumber Co. 34 Ind. App. 253, 72 N. E. 193; Meador v. Lake Shore & M. S. R. Co. 138 Ind. 290, 46 Am. St. Rep. 384, 37 N. E. 721; Shemwell v. Owensboro & N. R. Co. 117 Ky. 556, 78 S. W. 448; Johnson v. Anderson & M. Lumber Co. 31 Wash. 554, 72 Pac. 107.

Where the danger is imminent, the employee cannot rely on a promise to repair.

Consolidated Coal Co. v. Bokamp, 181 Ill. 9, 54 N. E. 567; Indianapolis & St. L. R. Co. v. Watson, 114 Ind. 20, 5 Am. St. Rep. 578, 14 N. E. 721, 15 N. E. 824; McAn-

draws v. Montana Union R. Co. 15 Mont. 290, 39 Pac. 85; Miller v. Bullion-Beck & C. Min. Co. 18 Utah, 358, 55 Pac. 58; Meador v. Lake Shore & M. S. R. Co. 138 Ind. 290, 46 Am. St. Rep. 384, 37 N. E. 721; Erdman v. Illinois Steel Co. 95 Wis. 6, 60 Am. St. Rep. 66, 69 N. W. 993.

An employee is held to have knowledge of those things which the exercise of ordinary care should reveal, and there may be conditions or defects so obviously dangerous that his knowledge of them will be held as a matter of law to impress his mind with the risk arising therefrom.

Stonne v. Hanford Produce Co. 108 Iowa, 137, 78 N. W. 841; Olsen v. Maple Grove Coal & Min. Co. 115 Iowa, 74, 87 N. W.

in Johnson v. Great Northern R. Co. 102 C. C. A. 89, 178 Fed. 643, decided under the Federal safety appliance act; and of McGarvey v. Detroit, T. & I. R. Co. 83 Ohio St. 273, 94 N. E. 424, decided under the Ohio statute similar to the Federal statute.

And the decision to the same effect in Gilliland v. Charleston & W. C. R. Co. 86 S. C. 137, 68 S. E. 186, was under a constitutional provision expressly declaring that "knowledge by any employee injured, of the defective condition of any machinery, ways, or appliances shall be no defense to an action for injury caused thereby, except as to conductors or engineers in charge of dangerous or unsafe cars or engines voluntarily operated by them." That statute was held in Yazoo & M. Valley R. Co. v. Woodruff, — Miss. —, 53 So. 687, to leave the question of assumption of risk by an engineer or conductor where it stood at common law.

The decision in Lowe v. Southern R. Co. 85 S. C. 363, 67 S. E. 460, that defense of assumed risk was excluded, was based upon the terms of the North Carolina statute and the North Carolina cases cited in the note in 6 L.R.A. (N.S.) 985.

As shown in the note in 22 L.R.A. (N.S.) 634, the Texas statute in relation to railroad employees, by its express terms in effect abrogates the doctrine of assumed risk in the sense of an affirmative defense in addition to contributory negligence available to relieve the master of the consequences of his negligence or breach of duty.

The cases of Ft. Worth & D. C. R. Co. v. Lynch, — Tex. Civ. App.—, 136 S. W. 580, and International & G. N. R. Co. v. Schubert, — Tex. Civ. App.—, 130 S. W. 708, are mere applications of the provisions of the statute referred to at the beginning of the note.

In Rice v. Lewis, — Tex. Civ. App.—, 125 S. W. 961, the terms "defect and danger" in the Texas statute conditionally abrogating assumption of risk were held to cover the entire field of those defects and dangers to which persons engaged in the operation of railroad or street railway are exposed, and specifically the danger from

the improper manner in which a train was made up.

The apparent assumption in St. Louis & S. F. R. Co. v. Mathis, 101 Tex. 342, 107 S. W. 530, that the doctrine of assumed risk may still under some conditions be available under this statute is doubtless due to the fact alluded to at the beginning of this note, that the statute as well as the courts treat the continuance in the service with knowledge of the defect or danger, when a person of ordinary prudence under like circumstances would not have done so—a defense which is saved by the clear implication of the statute—as a species of assumption of risk rather than contributory negligence.

In Philadelphia, B. & W. R. Co. v. Tucker, 35 App. D. C. 123, a provision of the statute, that "no contract of employment shall constitute any bar or defense," was held to abrogate the defense of assumed risk, on the theory that the doctrine of assumed risk results from contractual relations. But see Osterholm v. Boston & M. Consol. Copper & S. Min. Co. infra.

Risk may be assumed.

In addition to the cases cited in the earlier notes holding that an employee may assume the risk of the master's breach of a statutory duty, that view is held or recognized by a few subsequent cases.

Thus, in Osterholm v. Boston & M. Consol. Copper & S. Min. Co. 40 Mont. 508, 107 Pac. 499, it was held that the doctrine of assumption of risk does not grow out of a contract, and that therefore it is still available as a defense in Montana, notwithstanding the Constitution and statute declare that a contract releasing an employer from liability for his negligence is void. In that case the statute provided a fine as a penalty to observe it. The court said: "There is not anything in the statute relating to the defense of assumed risk. Indeed, there is no word relating in the remotest degree either directly or indirectly to any action for personal injuries by the servant against

736; *Coles v. Union Terminal R. Co.* 124 Iowa, 48, 99 N. W. 108.

Where an employee has as good an opportunity as the employer to ascertain and avoid the danger for himself, he has no recourse against the employer in case he is injured thereby. *Forbes v. Boone Valley Coal & R. Co.* 113 Iowa, 94, 84 N. W. 970; *Branco v. Illinois C. R. Co.* 119 Iowa, 211, 93 N. W. 97; *Sutton v. Des Moines Bakery Co.* 135 Iowa, 390, 112 N. W. 836; *Foster v. Chicago, R. I. & P. R. Co.* 127 Iowa, 84, 102 N. W. 422, 4 A. & E. Ann. Cas. 150; *Brooks v. W. T. Joyce Co.* 127 Iowa, 266, 103 N. W. 91; *McQueeney v. Chicago, M. & St. P. R. Co.* 120 Iowa, 522, 94 N. W. 1124; *Crane v. Chicago, R. I. & P. R. Co.* 124 Iowa, 81, 99 N. W. 169; *Wahlquist v. Maple Grove Coal & Min. Co.* 116 Iowa, 720, 89 N. W. 98; *Flockhart v. Hocking Coal Co.* 126 Iowa, 576, 102 N. W. 494.

Section 2489 of the Code as to cages was not intended to protect cagers, and adds nothing to the uses and purposes for which cages were used prior to the enactment of the statute.

Indiana & C. Coal Co. v. Neal, 166 Ind. 458, 77 N. E. 850, 9 A. & E. Ann. Cas. 424; *Allen v. Kingston Coal Co.* 212 Pa. 54, 61 Atl. 572; *Jacobson v. Smith*, 123 Iowa, 263, 98 N. W. 773.

Even if the bonnets failed to comply with

the master. There is nothing to indicate that the law-making body had any other thought than that the employer should be compelled, by fear of criminal prosecution, to provide for the employee certain safety appliances, which, experience had taught, should be furnished in any event. The courts are almost unanimously agreed that a failure to comply with the law constitutes negligence *per se*, but the sole effect is to remove the question of primary negligence from the realm of uncertainty. . . . There is to our minds no force in the argument found in some of the decided cases that the legislature intended to abrogate the defense of assumption of risk as an additional punishment for failure to comply with the statute. If it had such intention, it would presumably have employed apt words to express it. The penalty imposed by statute is not to be augmented by implication."

This case was followed in *Monson v. La France Copper Co.* — Mont. —, 114 Pac. 778.

As shown in the note in 19 L.R.A. (N.S.) 646, the New York employers' liability law (now part of the labor law) makes assumption of risk in cases brought under it a question for the jury rather than for the court; but the defense of assumed risk even in case of violation of a statutory duty is not entirely abrogated in that state.

Thus it is held in *Gombert v. McKay*, 201 N. Y. 27, 94 N. E. 186, that the provi-

sions of § 2489 of the Code, the plaintiff waived the failure by continuing to act as cager, with knowledge and notice of the construction of the bonnets.

Martin v. Chicago, R. I. & P. R. Co. 118 Iowa, 148, 59 L.R.A. 698, 96 Am. St. Rep. 371, 91 N. W. 1034.

Messrs. Wilson & Smith and Poston & Murrow, for appellee:

The obligation to make safe the working place and the materials with which the work is done rests on the master and he cannot escape it by delegating his authority to an agent.

Taylor v. Evansville & T. H. R. Co. 121 Ind. 124, 6 L.R.A. 584, 16 Am. St. Rep. 372, 22 N. E. 876; *Fink v. Des Moines Ice Co.* 84 Iowa, 321, 51 N. W. 155; *Haworth v. Steevers Mfg. Co.* 87 Iowa, 765, 51 N. W. 68, 62 N. W. 325; *Blezenic v. Iowa & W. Coal Co.* 102 Iowa, 706, 72 N. W. 292; *Collingwood v. Illinois & I. Fuel Co.* 125 Iowa, 537, 101 N. W. 283; *Hendrickson v. United States Gypsum Co.* 133 Iowa, 89, 9 L.R.A. (N.S.) 555, 110 N. W. 322, 12 A. & E. Ann. Cas. 246; *Wilder v. Great Western Cereal Co.* 134 Iowa, 451, 109 N. W. 789; *Branstrator v. Keokuk & W. R. Co.* 108 Iowa, 377, 79 N. W. 130; *Sommer v. Carbon Hill Coal Co.* 32 C. C. A. 156, 59 U. S. 519, 89 Fed. 54; *Gowen v. Bush*, 22 C. C. A. 196, 40 U. S. App. 349, 76 Fed. 349, 18 Mor. Min. Rep.

sions of §§ 18, 19, of the labor law with reference to the construction of scaffolds, while imposing upon the employers personal responsibility and a positive prohibition do not preclude the defenses of assumed risk or contributory negligence.

So, it is held in that state that while there is a presumption that the employee does not assume the risk from the master's breach of a duty to guard machinery as required by the labor law that presumption is not conclusive. *Graves v. Stickley Co.* 125 App. Div. 132, 109 N. Y. Supp. 256 (affirmed without opinion in 195 N. Y. 584, 89 N. E. 1101); *Osterman v. Ware*, 135 App. Div. 119, 119 N. Y. Supp. 981.

In *Carstens Packing Co. v. Swinney*, 186 Fed. 50, it was held that the statute of the state of Washington requiring the master to provide guards for machinery where practicable impliedly excludes the defense of assumed risk when the injury occurs as a result of a violation of the provision. It will be observed that this result is in accord with the decisions of the state court of Washington construing this statute. The Federal court, however, did not rely on the decisions of the state court, but upon *Welsh v. Barber Asphalt Paving Co.* 93 C. C. A. 101, 167 Fed. 465.

The court in the latter case, while evidently inclined even as an independent proposition to the view that the statute precludes the defense of assumed risk, was of the opinion that in any event the Oregon

433; Union P. R. Co. v. Jarvi, 3 C. C. A. 433, 10 U. S. App. 439, 53 Fed. 65.

Notice to one whose duty it is to report to another who is charged with the duty of making repair is notice to the company defendant.

Brabbitts v. Chicago & N. W. R. Co. 38 Wis. 289; Hannibal v. St. J. R. Co. v. Fox, 31 Kan. 586, 3 Pac. 320; Pieart v. Chicago, R. I. & P. R. Co. 82 Iowa, 148, 47 N. W. 1017; Huggard v. Glucose Sugar Ref. Co. 132 Iowa, 724, 109 N. W. 475; Weber Wagon Co. v. Kehl, 139 Ill. 644, 29 N. E. 714; Patterson v. Pittsburg & C. R. Co. 76 Pa. 389, 18 Am. Rep. 412; Homestake Min. Co. v. Fullerton, 16 C. C. A. 545, 36 U. S. App. 32, 69 Fed. 923; Louisville & N. R. Co. v. Kenley, 92 Tenn. 207, 21 S. W. 326; Dells Lumber Co. v. Erickson, 25 C. C. A. 397, 46 U. S. App. 697, 80 Fed. 257; Berglund v. Illinois C. R. Co. 109 Minn. 317, 123 N. W. 928.

A person who has the supervision of the underground workings of a mine, with the power to hire and discharge men who work under ground and give them directions as to their work, is a vice principal, for whose negligence the master is responsible.

Foley v. Cudahy Packing Co. 119 Iowa, 246, 93 N. W. 284; Newbury v. Getchel & M. Lumber & Mfg. Co. 100 Iowa, 441, 62 Am. St. Rep. 582, 69 N. W. 743; Cushman

v. Carbondale Fuel Co. 116 Iowa, 618, 88 N. W. 817; Blazenic v. Iowa & W. Coal Co. 102 Iowa, 706, 72 N. W. 292; Meier v. Way, J. L. & Co. 136 Iowa, 302, 125 Am. St. Rep. 254, 111 N. W. 420.

An employee who was intrusted with the performance of a duty which the law enjoins upon the master is, as to such servant, a vice principal, and his negligence is the master's negligence.

Beresford v. American Coal Co. 124 Iowa, 34, 70 L.R.A. 256, 98 N. W. 902; Collingwood v. Illinois & I. Fuel Co. 125 Iowa, 537, 101 N. W. 283.

An employee vested with the sole charge of a branch or department of the employer's business, and whose duties are not those of a mere workman, but those of one whose duty it is to manage a distinct department, and to give orders to other employees as to the duties they should perform, is not a fellow servant of such other employee, but a vice principal while he is engaged in giving orders or directing their execution.

Taylor v. Evansville & T. H. R. Co. 121 Ind. 124, 6 L.R.A. 584, 16 Am. St. Rep. 372, 22 N. E. 870; Wabash, St. L. & P. R. Co. v. Hawk, 121 Ill. 259, 2 Am. St. Rep. 82, 12 N. E. 253.

Declarations of an officer within the scope of his authority are binding on the corporation.

statute having been adopted from the Washington statute after the supreme court of the latter state had so construed the statute, that view was binding upon the Federal court.

Federal cases.

In Erdman v. Deer River Lumber Co. 104 C. C. A. 482, 182 Fed. 42, it was held that the statute of Minnesota requiring the protection of saws does not exempt the employee from the assumption of risk. The court cites a decision to the same effect by the Minnesota supreme court, but also cites earlier Federal cases; and it is not clear whether the question was regarded as one for the independent judgment of the Federal court, or one as to which the decisions of the state court would in any event be controlling.

The statement in Johnson v. Great Northern R. Co. 102 C. C. A. 89, 178 Fed. 643, that no question of assumption of risk is material in the determination of a case arising under the Federal safety appliance act is based upon the express provision of § 8, that the employee shall not be deemed to have assumed the risk occasioned by the use of any locomotive, car, or train contrary to the provisions of the act, although continuing in the employment after.

Summary.

It will be observed that since the sum-
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mary added to the note in 19 L.R.A. (N.S.) 649, the Iowa supreme court, if it has not changed its position, has at least adopted the view that a statute imposing specific duties upon the master impliedly excludes the defense of assumed risk, whereas at the time of that note it was apparently committed to the contrary doctrine.

The Pennsylvania supreme court has also expressed a decided opinion to the same effect, although the question may not perhaps be regarded as authoritatively settled in that state.

The change of position of the Wisconsin supreme court is due to the addition of a statutory provision which expressly precludes assumption of risk; and the Texas decisions on this side of the question are also due to express statutory provisions which scarcely admit of construction on the point.

The Rhode Island decision noted in the note in 22 L.R.A. (N.S.) 634, holding that the defense of assumed risk was precluded is based upon an express statutory provision to that effect in relation to elevators, and does not indicate a change of position of that court upon the general question whether the defense is abolished by implication by a statute imposing specific duties upon the master.

Montana appears to be the only new state to be added to the list of those holding that the defense of assumed risk is not excluded.
G. H. P.

Farrell v. Dubuque, 129 Iowa, 447, 105 N. W. 896.

Every person while violating an express statute is a wrongdoer and is *ex necessitate* negligent in the eyes of the law, and an innocent person within its protection injured thereby is entitled to civil remedy by way of damages.

Mosgrove v. Zimbleman Coal Co. 110 Iowa, 169, 81 N. W. 227; Woolf v. Nauman Co. 128 Iowa, 261, 103 N. W. 785; Bromberg v. Evans Laundry Co. 134 Iowa, 38, 111 N. W. 417, 13 A. & E. Ann. Cas. 33.

Where the master, or someone acting in his place, promises to remedy a defect complained of, the servant, by continuing in the employment for a reasonable time after such promise does not assume the risk of injury by reason of the defect, unless the danger was so imminent that no person of ordinary prudence would have continued to work.

Buehner v. Creamery Package Mfg. Co. 124 Iowa, 446, 104 Am. St. Rep. 354, 100 N. W. 345; Taylor v. Star Coal Co. 110 Iowa, 40, 81 N. W. 249; Foster v. Chicago, R. I. & P. R. Co. 127 Iowa, 84, 102 N. W. 422, 4 A. & E. Ann. Cas. 150; Stoutenburgh v. Dow, G. H. Co. 82 Iowa, 179, 47 N. W. 1039; Huggard v. Glucose Sugar Ref. Co. 132 Iowa, 724, 109 N. W. 475; Hough v. Texas & P. R. Co. 100 U. S. 213, 25 L. ed. 612.

A pit boss having charge of the mine is an agent within the meaning of the statutory provision requiring owner, agent, or operator of any coal mine to provide safe means of lowering and hoisting persons in a cage.

Beaucoup Coal Co. v. Cooper, 12 Ill. App. 373.

The fact that J. W. See held a certificate as pit boss from the state board of mine examiners does not absolve the defendant from liability on account of his negligence, and does not make him a fellow servant of the plaintiff.

Henrietta Coal Co. v. Martin, 221 Ill. 460, 77 N. E. 902; Linton Coal & Min. Co. v. Persons, 11 Ind. App. 264, 39 N. E. 214; Antioch Coal Co. v. Rockey, 169 Ind. 247, 82 N. E. 76; Schmalstieg v. Leavenworth Coal Co. 65 Kan. 753, 59 L.R.A. 707, 70 Pac. 888; Smith v. Dayton Coal & I. Co. 115 Tenn. 543, 4 L.R.A.(N.S.) 1180, 92 S. W. 62; Wilmington Star Min. Co. v. Fulton, 205 U. S. 60, 51 L. ed. 708, 27 Sup. Ct. Rep. 412.

A mine examiner is the vice principal of the mine owner, who is not released from liability by the fact that he employs the examiner as required by law, and that the examiner reports conditions in the mine as satisfactory.

Davis v. Illinois Collieries Co. 232 Ill. 284, 83 N. E. 836.
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Actual notice to a mine examiner of dangerous condition is notice to the mine owner, as the mine examiner is a vice principal of the mine owner.

Olson v. Kelly Coal Co. 236 Ill. 502, 86 N. E. 88.

Weaver, J., delivered the opinion of the court:

The defendant operates a coal mine in which at the time of the accident in question the plaintiff was employed. He had considerable experience in the ordinary work of mining or digging coal, and was engaged in this class of work until a short time prior to his injury, when he took the position of cager. The shaft in which the cage or hoist was operated was 240 feet in depth. Plaintiff's place of work was in the entry at the foot of the shaft. The cage was constructed with an open floor or platform at the bottom, on which were two parallel rails corresponding in gauge with the rails on which the coal cars in the mine were operated. In hoisting coal the cage was first lowered to the bottom, where the platform to which we have referred rests on a level with the car tracks in the entry. The duty of the cager is then to push the loaded cars from the tracks in the entry to the platform of the cage, which is then hoisted with its load to the surface. The business of coal mining in this state has been made the subject of statutory regulation, and among the safety appliances which the operator must provide are "proper covers overhead on all cages." Code, § 2489. The precise purpose of such covers is not definitely expressed in the statute, but quite obviously they are intended to protect the employees and others who may be upon a cage or in the shaft beneath from injury by the falling of coal or other heavy substances from the top. See Bodell v. Brazil Block Coal Co. 25 Ind. App. 654, 58 N. E. 856; Durant v. Lexington Coal Min. Co. 97 Mo. 62, 10 S. W. 484. The cage in defendant's mine was provided with a cover, but plaintiff alleges, and there was evidence tending to show, that it was considerably smaller than the shaft through which the cage was hoisted and lowered. The platform or floor of the cage was of a size to nearly fill the shaft, but the cover, or bonnet as it appears to be called in miner's parlance, was narrower, leaving an opening variously estimated at from 10 to 14 inches in width through which a lump of coal falling from the top could pass to the floor. On the day in question, the plaintiff, in the discharge of his duty as cager undertook to push a loaded coal car from the entry to its place upon the platform of the cage, and in so doing his hand, resting up-

on the car, was extended out from the shelter of the entry into the shaft and under the opening between the bonnet and the wall. In doing this a lump of coal falling from the top struck his hand, perforating it, breaking some of the bones, and leaving that member to a material extent in a permanently crippled condition. It is the claim of plaintiff that his injury is chargeable to the negligence of the defendant in failing to provide a large and more effective covering for the cage. The defendant takes issue upon the charge of negligence, denies that plaintiff exercised due care for his own safety, and alleges that he knew the condition under which the work was being done, and assumed the risk therefrom. It is also alleged that the negligence, if any, from which the plaintiff suffered injury, was that of a fellow servant. There was trial to a jury, and verdict and judgment for plaintiff in the sum of \$3,200, and defendant appeals.

1. There was evidence tending to show that, having observed the insufficient covering of the cage, plaintiff called the attention of the pit boss to its condition, and the latter assured him he would fix it "as soon as possible," or "as soon as he could," or "had a lay-off," and the plaintiff, relying on the assurance thus given, continued the work. Appellant argues that a notice to the pit boss was not notice to the company, and the plaintiff was not authorized to rely upon his promise to repair. For reasons stated in a subsequent paragraph of this opinion, the question thus raised is not controlling importance, but we think the notice was sufficient, and the plaintiff was entitled to rely upon the promise of the pit boss as the promise of the employer. He was the person who employed the plaintiff and other operatives in the mine, and he had authority to discharge them. He had immediate charge of the actual underground operations, and, if any defect or dangerous condition therein was called to his attention, it was his duty either to remedy it or to report it to the proper office or department within whose scope such work properly belonged. The duty of the company to provide a safe place to work could not be delegated or left to the discretion of a servant, nor could it leave the operation of its mine or shaft without the responsible care and foresight of some person, and escape all responsibility until some miner or cager should hunt up the directors or managers, and serve formal notice upon them. The boss in immediate charge and control of the men and of the work as well as of the place is the one to whom they naturally and properly look as the representative of the corporation, and there is nothing in the record of this case to take it out from under 33 L.R.A. (N.S.)

the operation of this rule. *Wahlquist v. Maple Grove Coal & Min. Co.* 116 Iowa, 720, 89 N. W. 98; *Beresford v. American Coal Co.* 124 Iowa, 44, 70 L.R.A. 256, 98 N. W. 902; *Island Coal Co. v. Swaggerty*, 159 Ind. 664, 62 N. E. 1103, 65 N. E. 1028; *Wellston Coal Co. v. Smith*, 65 Ohio St. 70, 55 L.R.A. 99, 87 Am. St. Rep. 547, 61 N. E. 143; *Consolidated Coal Co. v. Wombacher*, 134 Ill. 57, 24 N. E. 627; *Meier v. Way, J. L. & Co.* 136 Iowa, 302, 125 Am. St. Rep. 254, 111 N. W. 420; *Blazenic v. Iowa & W. Coal Co.* 102 Iowa, 706, 72 N. W. 292. We cannot say, therefore, as a matter of law that the pit boss was not in this instance a vice principal, or that plaintiff was not justified in relying upon his promise to make the repair. It is to be noticed also that, as far as the merits of this case turn upon the question of notice to the company of the alleged defect, the fault, if one there was, pertained to the matter of the original construction of the cage covering, and notice of its condition is therefore conclusively presumed.

2. Appellant argues also that, even if it be found that defendant was negligent in the matter of its statutory duty to furnish a proper cover for the cage, plaintiff should be held as a matter of law to have assumed the risk because the danger therefrom was obvious, and he knew the conditions of which he now complains. In support of this contention, we are cited to *Sutton v. Des Moines Bakery Co.* 135 Iowa, 390, 112 N. W. 836. It is to be conceded that in the opinion referred to an expression is used to the effect that, if there was a breach of statutory duty by the employer with reference to a safety device, plaintiff was nevertheless not absolved from the consequence of his voluntary assumption of the risk. The case was one in which the plaintiff's contributory negligence was so obvious that the court was united in the opinion that the order of the district court in directing a verdict for defendant should be affirmed. In disposing of the appeal, the opinion went somewhat beyond the last ground here mentioned, and made use of the language upon which appellant now relies, without any general discussion of the question as to the effect of statutory regulation upon the application of the rule of assumption of risk. In the case before us, we are for the first time confronted with a record which seems to render necessary a definite pronouncement upon this phase of the law of negligence, and we are disposed to treat it as *res integra* in this jurisdiction. Statutory regulation of the manner in which any particular line of business shall be carried on is an exercise of the police power of the state, and is intended in some instances as an in-

strument of protection to the public generally, and in others as a protection to certain classes of employees exposed to special hazards. For example, a statute regulating the speed of railway trains or of street cars in cities and towns is meant primarily for the benefit of the general public in the use of the public ways and crossings, while a regulation which compels the operator of a mill or factory to place hoods over his circular saws, or to box or cover exposed gearings, is meant primarily for the protection of his employees whose duties expose them to contact with these dangerous instrumentalities. In cases of the first class we have held that an employee may assume the risk of the known and habitual disregard of his employer of a statute or ordinance regulating in the interest of the public safety the operation of a railroad (*Martin v. Chicago, R. I. & P. R. Co.* 118 Iowa, 148, 59 L.R.A. 698, 96 Am. St. Rep. 371, 91 N. W. 1034. The same thought is reflected in *Sweeney v. Central P. R. Co.* 57 Cal. 15, and *Fleming v. St. Paul & D. R. Co.* 27 Minn. 111, 6 N. W. 448); but the reasons which have been thought controlling in these cases have much less persuasive force when considered in connection with a case of the other class. Notwithstanding the absolute liberty with which every individual is legally endowed to enter into contract for his personal labor or service, and his equal legal right to abandon such service at any time subject only to liability for damages in case such act be not justified, it is nevertheless true in practical life that poverty, scarcity of employment, dependent family, and other circumstances often impose moral compulsion upon the laborer to accept employment upon such terms and under such conditions as are offered him; and it is in recognition of this fact, as well as the further facts, that society has a direct interest in preserving the lives and promoting the well-being of all persons engaged in productive industry, that laws have been enacted to protect them against unnecessary hazard of injury by failure of employers to exercise proper care for their safety. *Freeman's note to Wellston Coal Co. v. Smith*, 87 Am. St. Rep. 584; *Kilpatrick v. Grand Trunk R. Co.* 74 Vt. 288, 93 Am. St. Rep. 887, 52 Atl. 531; *Knoxville Iron Co. v. Harbison*, 183 U. S. 13, 46 L. ed. 55, 22 Sup. Ct. Rep. 1; *Harbison v. Knoxville Iron Co.* 103 Tenn. 421, 56 L.R.A. 310, 76 Am. St. Rep. 682, 53 S. W. 955; *State v. Brown & S. Mfg. Co.* 18 R. I. 16, 17 L.R.A. 856, 25 Atl. 246; *Holden v. Hardy*, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; *McGuire v. Chicago, B. & Q. R. Co.* 131 Iowa, 340, — L.R.A.(N.S.) —, 108 N. W. 902, 33 L.R.A.(N.S.)

To say that the legislature, in enacting these measures of protection, which in some degree equalize the advantages of employer and employee and afford a needed protection to the persons and lives of the latter, intended that a master might violate the statute to the injury or death of his servant, and then escape liability by pleading and proving that his offense against the law was habitual, obstinate, and notorious, is inconsistent with justice, and, it is hardly extravagant to say, repugnant to good morals. Such a rule offers a premium to contemptuous disregard of the statute, and robs it substantially of all value to the class in whose interest it was enacted. These statutes being to a great extent the product of comparatively recent legislation, it is only natural that the expressed views of the courts of different jurisdictions have not been entirely harmonious with respect to their operation and effect, but the decided weight of the precedents supports the view we have above indicated that, where the negligence charged constitutes the violation of a statute enacted for the servant's benefit, the master cannot avail himself of the plea of assumption of risk against the consequences of his own wrong. The holdings to this effect are so numerous that to attempt an exhaustive citation would unduly extend this opinion. The leading cases of this class are collected in 26 Cyc. Law & Proc. p. 1181, notes 61, 62; Cyc's Annotations for 1910, p. 2533; 20 Am. & Eng. Enc. Law, 2d ed. p. 121; *Hall v. West & S. Mill Co.* 4 A. & E. Ann. Cas. 599, note; *Bromberg v. Evans Laundry Co.* 13 A. & E. Ann. Cas. 36, note.

A few eminent courts—notably those of Massachusetts and New York—have reached the opposite conclusion, but the reasoning on which it is based does not appeal to us as controlling, and serves to unduly narrow the effect, if it does not substantially defeat the evident purpose, of the legislation. Among the courts upholding the view we here adopt are those of Indiana, Michigan, Washington, Oregon, Kansas, North Carolina, Louisiana, and Missouri. Such also seems to be the trend of judicial opinion in England (*Webbin v. Ballard*, L. R. 17 Q. B. Div. 122, 55 L. J. Q. B. N. S. 395, 54 L. T. N. S. 532, 34 Week. Rep. 455, 50 J. P. 597), and in Canada (*McCloyerty v. Gale Mfg. Co.* 19 Ont. App. Rep. 117; *Rodgers v. Hamilton Cotton Co.* 23 Ont. Rep. 425). A like conclusion has been reached in Illinois, where the negligence alleged was the failure of a coal-mine operator to furnish a proper light at the bottom of a shaft, and defendant sought to avoid liability because of the injured servant's knowledge that this regulation was not obeyed. The court there

says: "The statute expressly requires the mine owner to furnish a sufficient light at the top and bottom of the shaft to insure as far as possible the safety of persons getting on and off the cage. To excuse the mine owner from a compliance with said statute upon proof . . . that the miner knew the mine owner was violating the statute would be to repeal the statute." *Spring Valley Coal Co. v. Patting*, 210 Ill. 342, 71 N. E. 371. We shall not extend this opinion for further quotation from the cited cases. They afford much interesting reading upon one of the most important features of the law of negligence as affected by modern legislation, and the logical soundness of the conclusion reached appears to us to be unassailable.

It follows that, in so far as the negligence charged in the case at bar was a violation of an express and specific statutory regulation, the appellant cannot avail itself of the plea of the assumption of risk in an action for resulting injury to a servant for whose protection the law was enacted. It should perhaps be noted before leaving this branch of the case that some leading precedents emphasize a distinction between statutory regulations which are stated in general terms and are but little more than re-enactments of the common law, and those which prescribe specific means or methods for the protection of the servant, and hold that, while there can be no assumption of risk attending a violation of the latter, the defense may still avail in the former. The case before us does not call for a determination of the question thus suggested, and we make no pronouncement upon it.

3. We are further asked to hold as a matter of law that the plaintiff was guilty of contributory negligence. The record will not justify the holding. He was performing the duty placed upon him in the usual way, and counsel do not suggest what he did or omitted to do for his own protection against the hazard from falling coal. True, he might have refused to work, but, having called the attention of his employer to the condition of things and having received its promise to repair, the law did not require him to at once cease work and lose his job, or to continue work at his own risk. He could wait at least a reasonable time for the work of repair to be done without being charged with contributory negligence, unless the hazard was so great that no reasonably prudent person would expose himself to it. Whether such conditions existed was a jury question.

4. Counsel argue that, as the company was by law required to employ only duly li-

censed engineers and pit bosses, these persons were to be treated as quasi officers of the state, and that for their negligence the employer is not liable. The proposition does not appeal to us as being reasonable or sound. The statute is not intended to relieve the mine operator from any of his common-law liabilities, but rather to add thereto by imposing upon him certain specific duties intended to safeguard the persons and lives of his servants who are engaged in a work which exposes them to many dangers. The licensed engineer and licensed pit boss, so far as their work or duty pertain to the nondelegable obligations of the master, are none the less his representatives, because the law requires them to possess certain prescribed qualifications. As we have already said, the negligence here complained of, being one which pertains to or inheres in the construction of the shaft or cage, is necessarily the negligence of the owner, and responsibility therefor cannot be shifted to the engineer or to any other officer or servant. The law cited by counsel, which compels the master of a ship to employ a licensed pilot, and under which there have been decisions which relieve the shipowner from the consequences of the pilot's negligence or incompetence, is not in point. If the shipowner sends to sea a vessel of such defective construction that it sinks while it is being taken out of the harbor, no one would contend that he is relieved from responsibility for his negligence because a licensed pilot was in charge when the disaster occurred.

5. Much complaint is made of alleged misconduct of counsel in argument. Without undertaking to set out the various remarks and statements objected to, we have to say that we find nothing calling for the interference of the court. The debate was doubtless spirited, and the record is not without indication that counsel for appellant was inclined to indulge in nagging interruptions and objections to the course of the closing argument, and this had its usual result in spurring the orator to more fiery and exaggerated declamation than would otherwise have been indulged in. Nothing is disclosed in the argument which was so far outside of the record that we can say any prejudice therefrom to the appellant was possible.

It is also objected that the recovery was excessive. The damages awarded were liberal, but we do not regard them so excessive as to indicate that the verdict was influenced by passion or prejudice.

There is no reversible error in the record, and the judgment of the District Court is affirmed.

KENTUCKY COURT OF APPEALS.

JOHN LOW, Appt.,

v.

CLEAR CREEK COAL COMPANY.

(140 Ky. 754, 131 S. W. 1007.)

Servant — miner — unpropped room — assumption of risk.

A miner is not guilty of contributory negligence by going to work in a room for which the owner has not furnished props in accordance with a statutory duty, which will prevent his holding the latter liable for injuries caused by fall of the roof, unless he could have seen or known by the exercise of ordinary care, that the situation was dangerous and imminently so.

(November 25, 1910.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Bell County in favor of defendant in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Mr. O. V. Riley for appellant.

Messrs. Sampson & Sampson for appellee.

O'Rear, J., delivered the opinion of the court:

Appellant is a coal miner of some three years' experience. He was employed as a miner in appellee's coal mine to mine coal in a room. He took out the coal and propped the roof of his room. The mine owner was to furnish the timber, properly cut and taken into the mine, for his use as he requested. On December 24, 1908, he notified the mine foreman that he needed certain props for his room, and selected and marked the lot he required. But the props were not furnished to him. He continued his work until quitting time that day, leaving some 6 feet of space cleared of coal beyond his last prop. He did not return to work until the 28th of that month, when he again notified the mine foreman of his requirement, and selected and marked the props he needed. They were not sent in to him. He went into his room to begin work. He examined the roof, and discovered nothing indicating immediate danger from it, and began preparations for the day's work, when a large piece of slate forming the roof fell upon him and severely injured him. The fault in the roof was

what is known as a "horseback," which, he alleges, was not discoverable by ordinary care, and, until it fell, its existence was unknown to him. Such faults were likely to exist in coal mines, and he probably knew that fact.

In the petition in this suit by the miner against the mine owner for its negligence in failing to furnish him props as required, by reason of which he alleges he sustained the injury named, he charges the foregoing facts, coupled with the allegation that it was safe to work the mine when the roof was propped with suitable props placed 5 feet apart in rows, and the rows 4 to 5 feet apart in the space from which the coal had been removed, and the props so placed as soon as the coal had been taken out, or in a reasonable time thereafter. A general demurrer was sustained to the petition as amended, and, the plaintiff declining to plead further, his petition was dismissed.

The circuit court's ruling is said to have been based upon the notion that as the petition disclosed the unsafety of the situation in the room in the absence of props, a fact alleged to have been in the knowledge of the plaintiff, he was guilty of contributory negligence in going into the room and commencing to work without them. It must be remembered that the plaintiff alleged that before going into the room and before beginning work he examined the roof, and found nothing to indicate that it was not safe, or was about to fall, and that he believed that it was safe, and would not fall before the props could be brought in and set up; also that the conditions were such that the immediate danger could not be discovered by the exercise of ordinary care. The situation thus disclosed is that coal mining, such as was here being done, was safe when the roof was propped by suitable props 4 or 5 feet apart, set seasonably—that is, in a reasonable time—after the coal was removed; that there was an unpropped space of 6 feet, which had been in that condition about three days; that the miner examined the roof with care upon going to work upon the fourth day, and found nothing indicating a disintegration, or the presence of any defect making its danger imminent. That it was a dangerous situation is admitted. He went to work under the promise of the foreman to send in his props presently. The roof immediately fell, owing to a latent fault, and injured him. Is this on his part negligence *per se*, and such as will preclude his recovering damages from his master for his injury? In other words, was his own conduct the immediate and proximate cause of the injury?

The legislature has from time to time found it necessary to deal with the mining

Note. — As to servant's assumption of risk of master's breach of statutory duty, see note to *Poli v. Numa Block Coal Co.* ante, 646, and earlier notes therein referred to.

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situation in Kentucky. It was found that casualties in coal mines were increasing in number, resulting in destruction of life and maiming laborers, so as to reduce them to dependence on the public or on others. It was found that, in spite of the common-law duty of the mine owner to furnish his laborers a reasonably safe place in which to work, it was not always done. Besides, there was a question as to the extent of this duty. By an act approved March 20, 1908 (Laws 1908, chap. 59), now incorporated as § 2739b, Carroll's Ky. Stat. (Russell's Stat. § 2489a), the relative duties of the mine owners and miners were defined respecting a number of things. Among them was that of furnishing and using props. Subsection 7 of that section provides: "Each owner, lessee, or operator of every mine to which the mining laws of the state apply, shall provide and furnish to the miners employed in said mine a sufficient number of caps and props, said props to be sawed square at each end, to be used by said miners in securing the roof in their rooms, and at such other working places where by law or custom of those usually engaged in such employment it is the duty of said miners to keep the roof propped, after the miner has selected and worked the same." By subsection 8 of the act a penalty by fine is imposed on those who neglect the duty imposed by the act, applying both to mine owners or operators and miners. This mine was one subject to the act. It was the custom of this mine for the miners to prop the roof in their rooms. Section 466, Ky. Stat. (Russell's Stat. § 3) provides: "A person injured by the violation of any statute may recover from the offender such damage as he may sustain by reason of the violation, although a penalty or forfeiture for such violation be thereby imposed." Facts are alleged in this petition showing that it was the duty of the mine owner to provide the props, that it failed, and that the roof fell because of lack of props. It is therefore sufficiently shown that the violation of defendant's statutory duty was the cause of the injury.

But the legislature, by the statute regulating the operation of mines, did not intend to relieve miners of the duty to be careful of their own safety. Just the contrary is evinced. But it did separate the express duties of the owner and miners. The miner cannot now, nor could he before the statute, shut his eyes to obvious dangers created by his master's negligence, and then charge the whole consequence upon the master. He is still bound to use his eyes and other senses, in connection with his experience and other knowledge, to keep out of such dangers when they are apparent.

But it is a well-known fact, true no more of mining than other hazardous employments, that laborers when forced to do so will take chances and subject themselves to dangers which in calm reflection is a matter of surprise that they were not avoided by the laborer. He gets in a hurry. He is so accustomed to the ordinary dangers of his employment that they do not alarm him,—do not sharply arrest his attention. Daily familiarity with them, and coming through unharmed, begets a mental attitude respecting them which is natural enough, but to others not so employed may seem reckless. These are well-known conditions. The legislature saw that the result was an increase in the loss of life and destruction of earning capacity in that class of persons. It set about to remedy the evil. So the duty of furnishing means to make the rooms of the miners safe was imposed on the master, and the duty of using them when so furnished was put on the laborer. It was true then, and is no less true now, that, if the owner or operator neglects to furnish props or caps, the miners will go ahead with their work and take chances. They know that the conditions are inherently unsafe. Yet, as it is not apparent to them that they are immediately so, they take the chance, so to speak, of coming out without injury. Now, if the statute be so construed as to impose on the miners the consequence of the situation if they should be injured, then the wholesome benefit of the legislation is lost. On the other hand, if it be so construed as to let the miner shut his eyes to obvious and imminent dangers, it would carry the statute to an unreasonable length, and place a premium on sheer recklessness.

We think the safe rule is to hold that, unless the danger from the lack of props is not only imminent, but so obvious that an ordinarily careful man would not have worked under the conditions, the owner has the responsibility. He having failed in his statutory duty, the liability for all consequences is upon him, unless the miner could see, or know, by ordinary care, that the situation was dangerous and imminently so. In other words, there is no assumption of risk by the laborer where the master neglects a statutory duty; but such laborer is still liable for his contributory negligence. The two propositions are not identical. To constitute contributory negligence, there must be some act or failure on the part of the laborer, in addition to the ordinary risks imposed by the character of his work under the conditions created by the master's conduct, which would amount to culpable negligence on the laborer's part; such, for example, as a failure to look, to ob-

serve, to test in some way, the safety of the roof in this instance, or, if it had been unsafe, and obviously so, and the danger thereby imminent, his continuing to work under those conditions. *Johnson v. Mammoth Vein Coal Co.* 88 Ark. 243, 19 L.R.A. (N.S.) 646, 114 S. W. 722, 123 S. W. 1180; *Mammoth Vein Coal Co. v. Johnson*, — Ark. —, 127 S. W. 971.

The demurrer to the petition as amended should have been overruled. Reversed, and remanded for proceedings not inconsistent herewith.

KANSAS SUPREME COURT.

VERNON PARNELL, Exr., etc., of Herbert Marriage, Deceased,
v.
C. A. THOMPSON et al., Impleaded, etc.,
Appts.

(81 Kan. 119, 105 Pac. 502.)

Will — foreign — power to admit to probate.

1. The statutes conferring jurisdiction on probate courts to allow and admit to record authenticated copies of foreign wills executed and proved according to the laws of any state or territory of the United States, or of any country other than the United States and territories thereof, and giving to such copies, when so allowed and recorded, the same effect as if the original

Headnotes by PORTER, J.

Note. — Jurisdiction to admit to probate will not probated at testator's domicile.

With the exception of two cases, both of which are based upon a construction of local statutes, it is uniformly held that where assets are found within a state, the courts of probate of that state have jurisdiction to grant original probate of a foreign will. In some states such jurisdiction is expressly given by statutes, which are, however, characterized by the courts as merely declaratory of the common law.

But the exercise of original jurisdiction over the estates of nonresidents affects, and can affect, only the property within the state. The judgment admitting the will to probate is valid in all other states only as to property within the jurisdiction of the court pronouncing the judgment. It has no extraterritorial force, establishes nothing beyond that, and does not dispense with nor abrogate the formalities and proofs which may be exacted by other jurisdictions in which the deceased also left property subject to their laws of administration. *Re Clark*, 148 Cal. 108, 1 L.R.A. (N.S.) 996, 113 Am. St. Rep. 197, 82 Pac. 760, 7 A. & E. Ann. Cas. 306, 33 L.R.A. (N.S.)

will had been proved here, were not intended to deny such courts jurisdiction to probate an original will executed in a foreign state or country, which disposes of property situated here.

Same — original probate.

2. A resident of England executed two wills, one known as the "English will," relating solely to property in England, and the other, known as the "American will," relating solely to property situated in Kansas. The testator died in England. The English court admitted the English will to probate. The American will was never probated there; but the original thereof was brought to Kansas and probated in the probate court of the county where real estate and personal property belonging to the deceased were situated. The will was executed and attested in accordance with the laws of Kansas, and disposed of property situated here in a form not repugnant to the laws or policy of the state. Held, that the probate court had jurisdiction to probate the original will.

Same — will in two parts — validity.

3. Where a testator executes two separate and distinct wills one relating solely to property at his domicile, and the other relating solely to property situated in a foreign state or country, both are valid if executed, attested, and proved in accordance with the laws of the place where the property disposed of is situated.

Administrator — appointment — collateral attack.

4. When an application is presented to the probate court for the appointment of an administrator of a surviving partnership, and the court finds the existence of

The right to exercise such jurisdiction is discretionary, and may be declined from considerations of comity, as is instanced in some of the ensuing cases.

As to whether provisions for the ancillary probate of a will probated in another jurisdiction will permit such probate in the state of testator's domicile, see note to *Re Clark*, 1 L.R.A. (N.S.) 996.

The conclusiveness of foreign probate as affecting real property is discussed in a note to *State ex rel. Ruef v. District Ct.* 6 L.R.A. (N.S.) 617.

In *Jacques v. Horton*, 76 Ala. 238, it is held that, by the express terms of a statute, which are not stated, a court of probate has jurisdiction to take proof and to admit to probate the will of a testator who is shown to have died within its jurisdiction, leaving assets therein, though his domicile may have been in another state.

In California, § 1204 of the Code of Civil Procedure expressly provides for the grant of original probate upon wills of deceased nonresidents who leave property within that state. *Re Clark*, 148 Cal. 108, 1 L.R.A. (N.S.) 996, 113 Am. St. Rep. 197, 82 Pac. 760, 7 A. & E. Ann. Cas. 306; *Re Edelman*, 148 Cal. 233, 113 Am. St. Rep. 231, 82 Pac. 962.

the facts authorizing it to exercise jurisdiction, the action of the court in making the appointment is not subject to collateral attack.

Evidence — sufficiency — dissolution of partnership.

5. The evidence in this case examined, and held sufficient to warrant a decree dissolving a partnership and ordering the partnership estate settled in the probate court.

(November 6, 1909.)

A PPEAL by defendants Thompson et al., from a decree of the District Court for Kiowa County in plaintiff's favor in an action to dissolve a partnership between the estate of Herbert Marriage, deceased, and John Marriage, for a full and final accounting of the partnership business, and for a decree settling and determining the rights of the defendants to the partnership property. Affirmed.

Statement by Porter, J.:

Herbert Marriage, a resident of Moulsham Lodge, Chelmsford, in the county of Essex, England, departed this life at his residence on the 12th day of September, 1904, leaving two separate and distinct wills, one of which is known as the "English will," and the other the "American will." The American will contained a declaration that it related solely and exclusively to the testator's property in the United States of America, and not elsewhere. It named as executors a son of the testator,

Herbert J. Marriage, of Alberta, Canada, Walter Hilliard, of Chelmsford, England, and Vernon J. Parnell, of Mullinville, Kansas, and bequeathed to them all his real and personal property in the United States upon trust to convert the same into money, to be held upon further trust for certain purposes mentioned in the will. The English will disposed of all of his property in that country, and was probated there. The American will was never probated in England. The original American will was afterwards brought to Kansas, and probated here under the circumstances hereinafter mentioned.

Herbert Marriage in his lifetime was the owner of a large amount of real and personal property situated in Kiowa county, Kansas. The defendant John Marriage, of Mullinville, Kansas, is a nephew of the deceased, and owned a large tract of land adjoining the land owned by the deceased. On the 12th day of October, 1903, Herbert Marriage and John Marriage entered into a partnership contract to carry on the business of stock raising and farming on what was known as the Eagle Canon ranch in Kiowa county. By the terms of the contract each contributed to the business as capital, either in cash or land or other property, the sum of \$30,000, and each was to share equally in the profits or losses of the enterprise. The property owned by the partnership consisted of about 10,000 acres of land, which was held by the partners under deeds conveying to each of them an un-

In Hall's Succession, 28 La. Ann. 57, it was held that art. 1689, of the La. Civ. Code, which declares: "This order of execution shall be granted without any other form than that of registering the testament, if it be established that the testament has been duly proved before a competent judge of the place where it was received. In the contrary case, the testament cannot be carried into effect without its being first proved before the judge of whom the execution is demanded," clearly authorizes the original probate of a foreign will in Louisiana.

In Rackemann v. Taylor, 204 Mass. 394, 90 N. E. 552, it is held that jurisdiction to allow the probate of a foreign will for ancillary administration should be exercised only when the will has been proved in the state of domicile of the testator, unless special reasons are set forth for the application for the ancillary probate of it without waiting longer for administration in the courts of that state; but that, having regard to practical considerations affecting the rights and interests of the parties, and also to the comity which should be maintained between the courts of the different states, jurisdiction should be declined where proceedings for the probate of the will are being contested in the courts of the state of domicile.

33 L.R.A. (N.S.)

In Putnam v. Whitney (Re Washburn) 45 Minn. 242, 11 L.R.A. 41, 47 N. W. 790, it is said that a will executed according to the laws of Minnesota, whether previously probated in another state or not, and without reference to the domicile of the testator, may be admitted to probate under the provisions of § 4, chap. 1, of the Probate Code, provided the testator left any property in the state which is the subject of administration; and that this power over the estates of deceased persons situate within its jurisdiction is inherent in any state or country on common-law principles, of which the provisions of the Probate Code in that regard are declaratory.

In Bailey v. Osborn, 33 Miss. 128, it was held that the probate court was without jurisdiction to grant probate of a will of a testator domiciled in another state. It does not appear whether or not testator left property within the state, but that there was no such property may be inferred from the fact that, in the subsequent case of Still v. Woodville, 38 Miss. 646, it was held that the court had jurisdiction to grant probate of a will and issue letters testamentary where testator left property within the state, even though he was domiciled elsewhere. In this latter case it does not appear whether or not the

divided interest, and a large amount of cattle, hogs, and farming implements. The articles of agreement provided that the partnership was to continue for a term of seven years, terminating March 1, 1911. By the terms of the contract John Marriage was to manage and superintend the business of the partnership and to furnish Herbert Marriage, on the 1st day of March in each year, a statement showing the accounts of the concern, the stock on hand, and the value thereof. From the time the partnership was formed, John Marriage continued in possession of the property, and conducted the affairs of the partnership as manager until after the death of Herbert Marriage. John Marriage was given a year's option from March 1, 1904, to purchase the inter-

est of Herbert Marriage in the partnership. The contract contained the following provision: "In case of the death of Herbert Marriage before the expiration of this contract, then this contract shall be carried out by his executors to the same extent as if the said Herbert Marriage were living."

A few months after the death of Herbert Marriage, and on the 2d day of November, 1904, more than a year prior to the probate of the American will, John Marriage entered into a written contract with the defendant C. A. Thompson, by which he leased to Thompson all the property of the ranch of every kind or description for a period of six years, terminating March 1, 1911. Under this contract Thompson was

will had been previously probated in the state of alleged domicil.

In New Hampshire it has been held that neither the common law, nor the statute providing that the judge of probate, who shall have jurisdiction of the probate of a will of a nonresident, shall be the judge for any county in which such person had estate, requires that a will shall be probated first in the state of testator's domicil. *Knight v. Hollings*, 73 N. H. 495, 63 Atl. 38.

In *Re Gordon*, 50 N. J. Eq. 397, 26 Atl. 268, it is held that where it appears that there is personal property belonging to the testator's estate within the jurisdiction of the court, which must be administered under the will, the will may be proved in the state, even though the testator at his death were domiciled elsewhere, and the will has not yet been proved at the place of domicil.

In New York it has been held that § 2611 of the Code of Civil Procedure, which declares that a will executed without the state of New York, and within the United States, in accordance with the laws of the place of its execution, may be proved in the state of New York, and § 2476, conferring upon the surrogate's court of each county jurisdiction to take proof of the will of a nonresident testator who has died without the state leaving personal property within such county, confer authority upon the surrogate of a county in which personal property is found, to grant probate of a foreign will in the first instance, and before it has been submitted to the proper judicial tribunal of decedent's domicil. *Booth v. Timoney*, 3 Dem. 416. This seems also to have been assumed in *Re Barandon*, 41 Misc. 380, 84 N. Y. Supp. 937, in which, however, it does not appear whether or not the will had been admitted to probate at the place of domicil; and in *Re Rubens*, 128 App. Div. 626, 112 N. Y. Supp. 941, affirmed without opinion in 195 N. Y. 527, 88 N. E. 1130, in which it was held that the jurisdiction of the court, under § 2611 of the Code of Civil Procedure, is not so governed

and restricted by the provision of § 2694, that "the validity and effect of a testamentary disposition . . . are regulated by the laws of the state or country of which the testator was a resident at the time of his death," as to preclude the probate of a will disposing of personal property within the state, although not so executed in accordance with the laws of testator's domicil as to permit its probate in the country of domicil.

In *Hyman v. Gaskins*, 27 N. C. (5 Ired. L.) 267, it is held that while there is a manifest propriety in submitting a will in the first instance to the forum of the domicil at the time of the death, such course is not absolutely necessary; and therefore that letters testamentary upon the original probate of a foreign will were not void, although the court characterized the grant as an unnecessary departure from the comity which should exist.

And in *Shields v. Union Cent. L. Ins. Co.* 119 N. C. 380, 25 S. E. 951, a grant of letters testamentary upon proof that testator owned property then in the state, no matter when or how such chattels are brought within the jurisdiction, was held valid, although it appeared that the testator at the time of his death was a resident of another state, and left assets there also.

In *Flannery's Will*, 24 Pa. 502, it seems to have been assumed that letters testamentary might be granted upon the production for probate of the original of a will of a testator whose domicil was out of the state.

A statute (§ 6 of the act of March 15, 1832) providing that letters testamentary shall be grantable by the register of the county within which was the family or principal residence of the decedent at the time of his decease, "and if the decedent had no such residence in this commonwealth, then by the register of the county where the principal part of the goods and estate of such decedent shall be," confers jurisdiction to admit a foreign will to probate in the first instance, although the better way is to have it first admitted to pro-

to manage the business, and John Marriage turned over the possession of the ranch and all the property of the partnership to him. In the spring of 1905, and about the time of the expiration of the option which John Marriage held for the purchase of his deceased partner's interest, the defendants, John Marriage, C. A. Thompson, and W. A. Cottrell, undertook to purchase the entire interest belonging to the heirs of Herbert Marriage, deceased, in the partnership business and in the ranch, and for that purpose sent John Marriage to England. He obtained from Walter Hilliard, the resident executor of the English estate, an option in writing for the purchase of the interest of the deceased in the partnership property, which provided that if the conditions of the

option were carried out, the partnership agreement should be dissolved. The conditions were never complied with, and the option expired. In the month of November 1905, Vernon J. Parnell, a resident of Kansas, and the only one of the executors named in the American will who was a resident of the United States, presented the original American will to the probate court of Kiowa county for probate; and thereafter, on the 4th day of January, 1906, the same was probated, and Vernon J. Parnell qualified as sole executor. Letters testamentary were issued to him by the probate court, and he gave bond and qualified as executor. Parnell, as executor, requested John Marriage to qualify and act as surviving partner, and give bond as required

bate in the place of domicile, and then to file a certified record of the will and probate in the state of the forum. *Brown's Estate*, 2 Pa. Dist. R. 730.

In *Walton v. Hall*, 66 Vt. 455, 29 Atl. 803, in which it appears that the will was never probated in the state of domicile, it was held that, inasmuch as there was property in another state on which the will was to be operative, the proper probate court of that state had jurisdiction to probate it.

Under § 6087, *Ballinger's Anno. Codes & Statutes*, which provides that "wills shall be proved, and letters testamentary or of administration shall be granted, . . . in the county in which any part of his [the decedent's] estate may be, he having died out of the state, and not having been a resident thereof at the time of his death," a will executed in a foreign county by a person domiciled there may be probated, notwithstanding it has not been probated in the courts of the state of the domicile, according to the laws thereof. *Re Clayson*, 26 Wash. 263, 66 Pac. 410; *Rader v. Stubblefield*, 43 Wash. 334, 86 Pac. 560, 10 A. & E. Ann. Cas. 20.

Such jurisdiction also exists independent of statute. *Re Clayson*, *supra*.

The question was incidentally presented in *Chicago Terminal Transfer R. Co. v. Winslow*, 216 Ill. 166, 74 N. W. 815, in which an objection to the introduction of a will in evidence, based on the argument that, as it had been probated in a state other than that of testatrix's residence, the probate would not be the best evidence of the foreign will, was overruled, the court saying that while the rule, generally speaking, is that a will shall be probated in the first instance at the testator's domicile, it is subject to the exception, which is almost as broad as the rule itself, that it may be probated in any county in any state where the testator had and left assets, particularly real estate.

But in *Davis v. Upson*, 230 Ill. 327, 82 N. E. 824, in which the question was as to the jurisdiction of a probate court of Illinois

to admit to probate an instrument purporting to be the will of a nonresident, which had been refused probate in the state of domicile, it was held to be clear from the language of the statute providing: "All wills, testaments, and codicils which heretofore have been, or shall hereafter be, made, executed, and published out of this state, may be admitted to probate in any county in this state in which the testator may have been seized of lands or other real estate at the time of his death, in the same manner and upon like proof as if the same had been made, executed, and published in this state, whether such will, testament, or codicil has first been probated in the state, territory, or country in which it was made and declared or not," that a foreign will can be admitted to probate in Illinois only in case the testator died seized of "lands or other real estate" situate in the state; and that no such jurisdiction can be inferred to exist from the provision of the ensuing section of the statute, that "if he or she have no such known place of residence, and there be no lands devised in such will, the same may be proved either in the county where the testator or testatrix shall have died, or that wherein his or her estate, or the greater part thereof, shall lie," such section being construed as applicable only to domestic wills. In support of this conclusion, the court further states that, as foreign executors and administrators are given by statute the right to sue in any court in the state upon filing an authenticated copy of their letters testamentary or of administration, there is no reason why the probate courts should be given power to admit to probate the wills of nonresidents who die without leaving real estate situated in the state.

The conclusion reached in *PARNELL v. THOMPSON*, that the courts are not deprived of such jurisdiction by statutes providing for the grant of letters testamentary upon the filing of an authenticated copy of the will, with due proof of its probate at testator's domicile, is supported by other decisions. A contrary conclusion

by law. John Marriage refused, for the reason that the property was in control of defendant Thompson. Thereafter, John Marriage was cited to appear in the probate court of Kiowa county, and requested to give bond and qualify as surviving partner. On his refusal, an order was made by the probate court appointing Vernon J. Parnell as administrator of the partnership property. He gave the bond as required by law, and undertook to administer upon the partnership property. He requested John Marriage to make a statement of the condition of the property, in compliance with the terms of the partnership articles. John Marriage failed to comply with this request, stating as a reason that it was impossible to do so because Thompson was in possession of the partnership property.

Thereupon, and during the year 1906, Vernon J. Parnell, as executor of the estate of Herbert Marriage, deceased, and as administrator of the partnership estate of John Marriage, surviving partner of Herbert Marriage, deceased, brought three suits in the district court of Kiowa county, two against defendant C. A. Thompson, and the third against defendants, John Marriage, C. A. Thompson, and W. A. Cottrell. In the first it was alleged that C. A. Thompson held the legal title to certain land in Kiowa county in trust for the partnership estate, and a decree was asked ordering a conveyance for the use and benefit of the

partnership. The second suit against Thompson was for an injunction to restrain him from interfering with the possession of the plaintiff as executor of Herbert Marriage, deceased, and as administrator of the partnership estate, and from disposing of or converting any of the property of the partnership to his own use. The third suit was against the three defendants, and asked for a decree dissolving the partnership theretofore existing between the estate of Herbert Marriage, deceased, and John Marriage, and for a full and final accounting of the partnership business, and a further decree settling and determining the rights of the defendants to the partnership property and the possession thereof. A receiver was appointed to take charge of the property during the pendency of the suits. The several answers of the defendants denied the right of the plaintiff to maintain the actions, either as executor of the estate of Herbert Marriage, deceased, or as administrator of the surviving partnership, alleging that the probate court of Kiowa county was without jurisdiction to probate the American will, and that all proceedings in relation thereto were void, and that, under the terms of the partnership agreement, the probate court had no jurisdiction to appoint an administrator of the partnership estate, for the reason that the partnership by the terms of the contract continued after the death of Herbert Mar-

seems, however, to have been reached in a Michigan case, which constitutes one of the exceptions above mentioned.

The question as to whether a statute authorizing an authenticated copy of a foreign will proved according to the laws of any of the United States, to be proved and recorded, operated as a limitation upon the jurisdiction of the court to admit the original will to probate, was also decided in the negative in *Varnier v. Bevil*, 17 Ala. 286, which is so fully set forth in the opinion in the case reported as to render any further statement thereof in this place superfluous.

So, also, in *Re Coursen*, 4 N. J. Eq. 408, it is held that jurisdiction to grant original probate of a foreign will is not taken away or impaired by a statute authorizing any surrogate to grant letters testamentary upon an exemplified copy of a foreign will proved in another state.

On the other hand, in *Re Corning*, 159 Mich. 474, 134 Am. St. Rep. 739, 124 N. W. 514, it was held that while there could be no doubt concerning the power of the probate court to administer assets found within the state, the statutes of the state evinced an intention to deny to the probate court power to admit to probate the will of a person domiciled in another state, before its validity is established in a proceeding in the courts of the domicile. The real-33 L.R.A. (N.S.)

soning of the court in support of this conclusion is contained in the following excerpt: "Power to admit wills to probate, and to grant administration of estates, is conferred upon probate courts, generally, by 1 Comp. Laws, § 650, which reads: 'The judge of probate for each county shall have power to take the probate of wills, and to grant administration of the estate of all persons deceased who were at the time of their decease inhabitants of, or residents in, the same county, and of all who shall die without the state leaving any estate within such county to be administered; and to appoint guardians to minors and others in the cases prescribed by law, and shall have and exercise all such other powers and jurisdiction as are or may be conferred by law.' It is further provided in 3 Comp. Laws, §§ 9282-9284, for admitting in this state wills of those who were domiciled abroad, and for the manner of disposing of estates of testators domiciled abroad whose wills are so admitted to probate here. These and other provisions of the statutes must be read together. It is plain that the legislature has recognized the right of the courts of the domicile of a testator to conclusively determine the validity of the will, and quite as plain that the courts of the domicile of this testator have made no such determination. It has been repeatedly held that the issue here

riage, and was not to terminate until March 1, 1911. Defendant C. A. Thompson denied that he held the title to any of the real estate in trust for the partnership, and alleged that he had purchased it with his own funds and had taken the title in fee simple. The three suits were afterward consolidated and tried to the court, and separate findings of fact and conclusions of law were made.

Among the facts found are that Thompson was in possession and control of the ranch and partnership business from the time he moved there with his family in November, 1904; and that the representatives of the estate of Herbert Marriage had no knowledge of the various contracts made by the defendants until a short time prior to the institution of the suits, and never consented to or ratified the action of John Marriage in making the contract with Thompson; that Thompson brought cattle of his own to the ranch and mingled them with the partnership property, and the cattle were sold together and the proceeds deposited to the credit of Marriage and Thompson, without any separate accounts being kept; that Thompson sold other property of the partnership, and placed the proceeds to his individual credit at the bank; that the indebtedness of the ranch increased during his management from \$3,000 to \$6,800, to secure which John Marriage and C. A. Thompson, in November, 1905, executed a

chattel mortgage on the partnership property.

As conclusions of law the court found: That the probate court had jurisdiction to admit the original will to probate; and that the plaintiff, as the representative of the estate, had the right to institute the suits; that the contract entered into between the defendants for the purchase of the Herbert Marriage interest in the ranch was void for want of power on the part of John Marriage to make it, and of no effect against the plaintiff, because the contract was inimical to the Herbert Marriage estate and made through fraud and collusion of the defendants; that the contract entered into between John Marriage and C. A. Thompson was void because made without authority on the part of John Marriage, and because of the fraudulent representations on the part of Thompson; that the title to the two quarter sections of land was held by Thompson in trust for the use and benefit of the partnership; and that the acts and conduct of John Marriage in making the several contracts in fraud of the interest of the deceased partner's estate, and the mingling of the property of other persons with the ranch property, and placing the partnership property and business out of his own control, were sufficient to authorize a decree dissolving the partnership.

Judgment was accordingly entered grant-

upon the offering of a domestic will for probate is 'will or no will.' We have then these two methods provided by the legislature for admitting wills of deceased persons to probate: One, to try out every issue upon which validity of the instrument depends; the other, to accept the determination of all of these issues by the courts of the domicile of the testator. There is no method pointed out for admitting a will here as valid to the extent of appointment of an administrator of the estate, leaving the question of its validity to be determined at the domicile of the testator. It is not conceivable that the courts of this state will inquire about and finally decide that a certain instrument is, or is not, a valid will, subject to having the determination reversed by the courts of any other state. Assuming the right of each state to assert complete jurisdiction *in rem* over all property of decedents found within the state, including the right to determine, through its tribunals, the validity or nonvalidity of a foreign will, it is equally the right of each state, acting through its legislature, to accept as conclusive the judgment of the courts of the domicile of the testator as to the validity of his will, and to permit his property found in the state to be disposed of according to the provisions of the will. I find in the statutes sufficient evi-

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dence of a state policy which denies to the probate court of Saginaw county the jurisdiction which it assumed when it admitted the particular will to probate. Holding these views, it is not important to refer to and review decisions of courts of other states in which a different view is expressed."

In connection with the present discussion, it may also be noted that it has been held that the appointment of an administrator in the place of decedent's domicile is not a necessary prerequisite to the appointment of an administrator in a state where assets are found, as otherwise, if it should happen that administration should never be granted in the foreign state, the debts due in the state of the forum under such circumstances, to a deceased person, could never be collected, and the debts due from him to citizens of the state might remain unpaid. *Stevens v. Gaylord*, 11 Mass. 256; *Wood v. Matthews*, 73 Mo. 477.

Nor is it an essential prerequisite to the granting of letters of administration upon the estate of a decedent residing in another state, leaving a will, that the will should be first proved and allowed in the courts of the state in which the deceased was domiciled. *Bowdoin v. Holland*, 10 Cush. 17.

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ing the relief prayed for, and the partnership property was ordered turned over to the plaintiff as executor of the last will and testament of Herbert Marriage, deceased, and as administrator of the partnership estate, to be dealt with as provided by law under the orders of the probate court. The defendants filed exceptions to the conclusions of fact and of law, which were overruled. Their motion for a new trial was denied and defendants Thompson and Cottrell bring the case here for review.

Messrs. B. F. Milton and Carr W. Taylor for appellants.

Messrs. John D. Beck, A. O. Mitchell, and S. D. Bishop, for appellee:

The probate court had power and authority to admit the foreign will to probate.

Gen. Stat. 1901, § 1976; *McCormick v. Sullivan*, 10 Wheat. 192, 6 L. ed. 300; *Darby v. Mayer*, 10 Wheat. 468, 6 L. ed. 368.

At common law the original will could be probated wherever there was real property devised thereby.

Robertson v. Pickrell, 109 U. S. 608, 27 L. ed. 1049, 3 Sup. Ct. Rep. 407.

The statute was intended to enlarge, not to restrain, the jurisdiction of our courts.

Varner v. Bevil, 17 Ala. 286; *Walton v. Hall*, 66 Vt. 455, 29 Atl. 803; *Knight v. Hollings*, 73 N. H. 495, 63 Atl. 38; *Re Clayson*, 26 Wash. 253, 66 Pac. 410; *Re Clark*, 148 Cal. 108, 1 L.R.A.(N.S.) 996, 113 Am. St. Rep. 197, 82 Pac. 760, 7 A. & E. Ann. Cas. 306; *Re Gordon*, 50 N. J. Eq. 397, 26 Atl. 268; 23 Am. & Eng. Enc. Law, p. 114.

Assets will give jurisdiction of a nonresident's will.

Fletcher v. Sanders, 7 Dana, 347, 32 Am. Dec. 96; *Re Southard*, 48 Minn. 37, 50 N. W. 932; *Wilson v. Cox*, 49 Miss. 538; *Varner v. Bevil*, 17 Ala. 286; *Jaques v. Horton*, 76 Ala. 238; *Still v. Woodville*, 38 Miss. 646; *Re Coursen*, 4 N. J. Eq. 408; *Re Lawrence*, 7 N. J. Eq. 215; *Re Gordon*, 50 N. J. Eq. 397, 26 Atl. 268; 52 N. J. Eq. 317, 30 Atl. 19; *Re Clayson*, 26 Wash. 253, 66 Pac. 410; *Pepper's Estate*, 148 Pa. 5, 23 Atl. 1039, reversing 9 Pa. Co. Ct. 507; *Brown's Estate*, 13 Pa. Co. Ct. 289, 2 Pa. Dist. R. 730.

Mr. L. M. Day for John Marriage, appellee.

Porter, J., delivered the opinion of the court:

The making of two wills by a testator, one disposing of his property at his domicile, and the other of his property situated in a foreign country, although unusual, has undoubtedly the sanction of law, and there would seem to be no inherent objection to the validity of either, where each

is separate and distinct and otherwise in conformity with law. 1 *Underhill, Wills*, § 284. The validity of such wills has been recognized in England. In *Astor's Goods* (1876) L. R. 1 Prob. Div. 150, 45 L. J. Prob. N. S. 78, 34 L. T. N. S. 856, 24 Week. Rep. 539; *Murray's Goods* [1896] P. 65, 65 L. J. Prob. N. S. 49, 44 Week. Rep. 414. The important question to be determined is whether the probate court had jurisdiction to admit to probate the original will of Herbert Marriage, the will not having been first probated in the courts of his domicile. The granting of letters testamentary or of administration by the probate court is the exercise of judicial authority. If regular in form, the letters are prima facie evidence of the regularity of prior proceedings, but are absolutely void if the court making the appointment had no jurisdiction. *Perry v. St. Joseph & W. R. Co.* 29 Kan. 420; *Mallory v. Burlington & M. River R. Co.* 53 Kan. 557, 36 Pac. 1059; *Missouri P. R. Co. v. Bennett*, 58 Kan. 499, 49 Pac. 606; *Ewing v. Mallison*, 65 Kan. 484, 93 Am. St. Rep. 299, 70 Pac. 369.

After the case was tried, and before judgment, the plaintiff by leave amended his reply, and averred that, under the laws and practice in England, a subject or resident citizen thereof is authorized to dispose of his property in any other jurisdiction or country by a will separate and distinct from his will disposing of his property in England; that under the laws of England, when separate wills of this character are made, each reciting that it is to be executed and administered independent of the other, the courts of England hold that the only courts having jurisdiction to probate such wills are the courts of the country in which the property disposed of is located; and that in such cases the courts of England have refused probate of the will disposing of property in a foreign jurisdiction; and, further, that where a citizen of the United States has made two wills, separate and distinct from each other, one disposing of his property in the United States, and the other disposing of his property in England, the courts of England, in recognition of the comity existing between nations, have permitted the independent will covering property in England to be probated there. It is said in the brief that all these allegations were established to the satisfaction of the court, and that the court made findings of fact thereon, but the court merely found that the American will was never proved or admitted in the courts of England, and no finding was made in reference to what the laws of England are in respect to the matters referred to in the reply. Our attention has not been called to any evidence

offered for the purpose of proving the averments. We are referred to numerous decisions of the English courts which we are at liberty to consider as precedents, but not in proof of the fact as to what the laws of England are. We take judicial notice of the laws of another state or of a foreign country for the purpose of aiding us in ascertaining and determining the laws of this state on a particular subject, but cannot do so for any other purpose. *Missouri, K. & R. Co. v. Hutchings*, 78 Kan. 758, 99 Pac. 230. Looking to the provision of our own laws, we find that § 8 of art. 3 of the Constitution provides: "There shall be a probate court in each county, which shall be a court of record, and have such probate jurisdiction and care of estates of deceased persons, minors, and persons of unsound minds as may be prescribed by law." Section 1974 of the General Statute of 1901, so far as applicable to the present case, reads: "The probate courts shall be courts of record, and, within their respective counties, shall have original jurisdiction: First, to take the proof of last wills and testaments, and admit them to probate, and to admit to record authenticated copies of last wills and testaments executed, proved, and admitted to probate in the courts of any other state, territory, or country; . . . seventh, to have and exercise the jurisdiction and authority provided by law respecting executors and administrators and the settlement of the estates of deceased persons." Section 2806 of the General Statute of 1901, respecting executors and administrators, reads: "That upon the decease of any inhabitant of this state, letters testamentary or letters of administration on his estate shall be granted by the probate court of the county in which the deceased was an inhabitant or resident at the time of his death; and when any person shall die intestate in any other state or country, leaving any estate to be administered within this state, administration thereof shall be granted by the probate court of any county in which there is any estate to be administered; and the administration which shall be first lawfully granted in the last-mentioned case shall extend to all the estate of the deceased within this state, and shall exclude the jurisdiction of the probate court in every other county."

Construing the first part of the section just quoted, it has been held that, where the deceased is a resident of this state, the probate court of a county has no jurisdiction over the estate unless the deceased, at the time of his death, was an inhabitant or resident of that county, and that the true place of residence of the deceased at the time of his death may be shown for the 33 L.R.A. (N.S.)

purpose of disproving jurisdiction, where the probate court has assumed jurisdiction to administer the estate. *Ewing v. Mallison*, 65 Kan. 484, 93 Am. St. Rep. 299, 70 Pac. 369. In §§ 7937 *et seq.* of the General Statute of 1901, relating to wills, are found the provisions concerning foreign wills. Section 7961 provides that authenticated copies of wills executed and proved according to the laws of any state or territory of the United States, relating to property in this state, may be admitted to record in the probate court of any county in this state where such property may be situated, and the authenticated copies so recorded shall have the same validity as wills made in this state. Section 7962 reads: "A will executed, proved, and allowed in any state or country other than the United States and territories thereof, according to the laws of such foreign state or country, may be allowed and admitted to record in this state in the manner and for the purpose mentioned in the following sections." Section 7963 provides that "a copy of the will and probate thereof, duly authenticated, shall be produced by the executor or by any person interested therein, to the probate court of the county in which there is any estate upon which the will may operate. . . ." Section "7964 provides that, after the instrument is allowed and recorded, the will, the probate, and the record thereof shall then have the same force and effect as if the will had been originally proved and allowed in the same court in the usual manner. Section 7965 provides for granting letters testamentary or of administration after allowing and admitting to record a will pursuant to the four preceding sections.

Appellants insist that it was the intention of the legislature, in the adoption of the sections we have cited, to make it mandatory on the heirs and devisees of a testator under a foreign will, to probate the will first at the domicile of the testator, and it is urged, as reasons which probably actuated the legislature in so providing, that it is easier to secure witnesses acquainted with the deceased and his handwriting at the place of his domicile; that, if original foreign wills were permitted by law to be probated in any county in this state where the testator left property, persons interested in the estate would be put to great expense in taking foreign depositions for the purpose of proving the will, and many opportunities would be afforded for fraud. The principal argument is that the method specifically provided by statute for admitting to record authenticated copies of a foreign will proved in the foreign jurisdiction is exclusive, and amounts

to a limitation on the jurisdiction of probate courts. Some slight support for the appellant's contention is found in language used in the opinion in *Meyers v. Smith*, 50 Kan. 1, 31 Pac. 670. In that case the instrument, called a will, which it was claimed was executed by Isaac Johnnycake, was presented to the probate court of Wyandotte county, and that court ordered the will approved. The original instrument, however, was not produced, and the alleged probate was founded merely upon a certified transcript of a will executed in the Indian territory, and recorded in the office of the clerk of the United States district court of the territory, probably for safe-keeping. At all events, there was no proof that it had ever been probated at the domicile of the testator, and it was said in the opinion that the probate court evidently never intended nor believed that the order it made was an original probate of the will. In the opinion Mr. Justice Valentine used this language: "We might say here that there is no statute in Kansas which in terms would authorize a will not executed in Kansas, nor by a person residing therein nor dying therein, to be probated originally in Kansas, and all the implications of the statutes are against any such probating of any such will." The language quoted, however, was not necessary to the decision. As observed, the original will was never in Kansas, and it did not appear that there was any evidence before the probate court except the certified transcript, and the case turned on the fact that the will was not sufficiently probated or proved. The same question has often been decided, which is that an exemplified copy of a foreign will, although authenticated according to the act of Congress by the official custodian of wills in a foreign jurisdiction, is not sufficient to prove a testamentary title to lands without an exemplification of the judgment of some court of competent jurisdiction admitting the will to probate. *Fenderson v. Missouri Tie & Timber Co.* 104 Mo. App. 290, 78 S. W. 819.

The question under consideration here has never been determined by this court. That a plain distinction is made in the statutes between a domestic will, which must be probated, and a foreign will, which may be admitted to record, must be conceded, and also that there is no provision in our statutes anywhere providing in express terms for the original probate of a foreign will in this state. The usual practice has always been for the original probate to be made in the foreign state or country at the domicile of the testator, and, upon an authenticated copy showing probate there,

for ancillary probate to be made here. The sections from 7961 to 7965 of the General Statute of 1901 all relate expressly to wills "executed, proved, and allowed" in any state or country other than the United States. We have to determine therefore whether the fact that the statutes expressly provide for the allowance and admission to record in this state of an authenticated copy of a will duly probated in any state or country other than the United States was intended as a limitation on the jurisdiction of the probate court, and excludes the power of that court to grant original probate of a foreign will. The reasons urged in support of that construction are far from satisfactory. It is frequently found necessary in the original probate of a domestic will, for the probate court to send a commission to a foreign country or to another state to procure the testimony of a subscribing witness who is beyond the jurisdiction of the court. So far as the likelihood of fraud on the court being perpetrated, the advantage would seem to be all in favor of the domestic court, which judicially determines for itself whether the will has been duly executed and is entitled to probate, instead of relying upon certified copies of proceedings in the courts of a foreign state.

The contention of the appellants requires us to assume that the legislature attached more importance to an authenticated copy of a will than to the original instrument itself. The original is always the better evidence. Does the fact that the legislature provided an elaborate scheme for the allowance and recording here of the copy of a foreign will which had been originally probated in the foreign state or country, and failed to make any express provision for the original probate here of such a will, compel the conclusion that it intended thereby to limit the general jurisdiction of probate courts to take the proof of last wills, and admit them to probate? We think not. The conclusion that we have reached is that the statute was not so intended; that its purpose was to enlarge, not to restrain, the jurisdiction of the probate court. While probate courts are sometimes spoken of as courts of limited jurisdiction, they have jurisdiction over certain, peculiar, exclusive subjects, and their jurisdiction is limited only in the sense that it is confined to the particular subject-matter; but within their province they are courts of general jurisdiction. *Howbert v. Heyle*, 47 Kan. 58, 27 Pac. 116; *Higgins v. Reed*, 48 Kan. 272, 29 Pac. 389; 23 Am. & Eng. Enc. Law, p. 116. The existence of property within the state belonging to the estate of a deceased person is the fact which

gives jurisdiction to the probate court; and the principle is of universal application that "every state has plenary power with respect to the administration and disposition of the estates of deceased persons, as to all property of such persons found within its jurisdiction." *Re Clark*, 148 Cal. 108, 1 L.R.A.(N.S.) 996, 113 Am. St. Rep. 197, 82 Pac. 760, 7 A. & E. Ann. Cas. 306; *Shields v. Union Cent. L. Ins. Co.* 119 N. C. 380, 25 S. E. 951; *Putnam v. Pitney* (Re Washburn) 45 Minn. 242, 11 L.R.A. 41, 47 N. W. 790. A statute of Minnesota authorized the probate of a will executed according to the laws of that state, whether previously probated in another state or not, and without reference to the domicile of the testator. In *Putnam v. Pitney*, supra, referring to the power of the probate courts of the state over the estate of a deceased person within the state, who was domiciled out of it, Mr. Justice Mitchell used this language: "This power over the estates of deceased persons situate within its jurisdiction is inherent in any state or country on common-law principles, of which the provisions of the probate Code in that regard are but declaratory." In 23 Am. & Eng. Enc. Law, 2d ed. p. 116, it is said: "The jurisdictional fact is the existence of assets within the state. Under such circumstances, the probate court of the county in which the property is situated has jurisdiction in the premises, and even the original probate may be had in that county, though, as a general rule, a will should be proved in this first instance at the testator's domicile."

In the statute conferring jurisdiction (Gen. Stat. 1901, § 1974), the word "probate," as it is used, applies solely to original wills, and the copies of wills properly authenticated are not admitted to probate, but are admitted to record. It must therefore have been the intention of the section to give the probate courts the same authority which all courts of probate had at the common law. Nor could it subserve any useful purpose first to require the will to be proved in the foreign jurisdiction before it can be admitted here. At the common law, the probate of a will in one state was of no validity whatever as affecting the title to lands in another. *Robertson v. Pickrell*, 109 U. S. 608, 27 L. ed. 1049, 3 Sup. Ct. Rep. 407. The law of the place where real estate is situated governs the formality of the transfer of such property, and at common law the original will could be probated wherever there was real property devised thereby. *McCormick v. Sullivan*, 10 Wheat. 192, 6 L. ed. 300; *Robertson v. Pickrell*, supra. But it was often difficult to procure the original will after

it had been probated in the courts of the domicile of the testator, and the evident purpose of the statutes in the various states authorizing copies of wills and their probate in a foreign country or sister state to be recorded, and to have the same effect as the original, was to overcome the hardships which often occurred by reason of the fact that the original will, having been probated at the place of the testator's domicile, could not be had for original probate. The statutes therefore must have been designed to enlarge, not limit, the original jurisdiction, which probate courts always exercised at the common law, to probate the original will regardless of where it was executed. The authorities, while not numerous, support this view.

In *Varner v. Bevil*, 17 Ala. 286, the question determined was in all respects the same as that presented here. The will of Samuel Varner was made in the state of Mississippi, where he was domiciled at the time of his death. He owned real estate and personal property in Alabama, and the sole question was whether there could be an original probate of the will in the courts of Alabama before the will had been proved in Mississippi. So far as appears in the opinion, the jurisdiction of the orphans' court there was the same as our probate court. It was contended there, as here, that the court was of limited jurisdiction, and that the statutes authorizing the admission and allowance of authenticated copies of foreign wills that had been proved in a foreign jurisdiction were a limitation on the power of the court, and that the probate court was without jurisdiction to admit the original will to probate. In the opinion it was said: "The statutes of this state make no express provision for cases of this kind. They authorize authenticated copies of wills proved according to the laws of any of the United States, and which embrace or concern property within this state, to be proved and recorded, subject to be contested and controverted, as the original will might be if offered. . . . We must then recur to the general law as recognized by the Code of International Comity, for the rules which must guide us in arriving at a correct conclusion. . . . Our statute, which provides for the probate in our courts of authenticated copies of foreign wills which have been proved according to the laws of any of the United States, or of any country out of the limits of the United States, was not designed to deny to our courts jurisdiction over the probate of the original will made in a foreign country, but disposing of property situated here. It but enlarges the jurisdiction of the court, enabling the par-

ties to make the contest upon an authenticated copy of a foreign will proved according to the law of the domicile, in the same manner they might have done upon the original. It could not have been intended by the legislature, in authorizing copies to be proved, to affirm that the originals, which furnished the better evidence, should not be allowed to be proved or contested. This would be to reverse the rule of law which gives the preference to the primary over secondary evidence." Other authorities in point are: *Stevens v. Gaylord*, 11 Mass. 263; *Spraddling v. Pipkin*, 15 Mo. 118; *Wood v. Matthews*, 73 Mo. 477; *Hyman v. Gaskins*, 27 N. C. (5 Ired. L.) 267; *Jaques v. Horton*, 76 Ala. 238; *Re Gordon*, 50 N. J. Eq. 397, 26 Atl. 268; *Pepper's Estate*, 148 Pa. 5, 23 Atl. 1039; 23 Am. & Eng. Enc. Law, p. 114 (2). 1 Woerner, Am. Law of Administration, § 226. We have not found, nor have we been cited to, any decisions holding the contrary. The American will shows on its face that it was executed in contemplation of, and attested in accordance with, the laws of Kansas. It disposes of property here in a form not repugnant to the laws or policy of the state, and was entitled to be probated here without being first probated at the testator's domicile.

The principal contention remaining is that the probate court of Kiowa county was without jurisdiction to appoint an administrator of the surviving partnership, inasmuch as the contract itself provided that the partnership should continue until 1911, notwithstanding the death of Herbert Marriage. The appellant's contention that the partnership was not dissolved by the death of Herbert Marriage must be granted. Notwithstanding the general rule that the death of one partner dissolves the partnership, it is otherwise when by will, or in the contract of partnership, the deceased has provided that the partnership shall continue after his death. *Insley v. Shire*, 54 Kan. 793, 45 Am. St. Rep. 308, 39 Pac. 713; *Blaker v. Morse*, 60 Kan. 24, 55 Pac. 274; *Exchange Bank v. Tracy*, 77 Mo. 594; 30 Cyc. Law & Proc. pp. 620, 653.

The real contention is that the probate court is only authorized to appoint an administrator of a surviving partnership estate where the death of one of the partners has caused a dissolution of the partnership, and the surviving partner, having been cited to appear and qualify as administrator, has declined to do so; that where it is provided in the contract of partnership, or by will of the deceased, that the partnership shall continue notwithstanding his death, the probate court has no jurisdiction over the partnership; and, further,

that even though misconduct of the surviving partner might be sufficient to warrant a decree of dissolution by a court of equity, the probate court could not exercise jurisdiction until such decree was rendered. The fact that a partnership existed, and the death of a partner, gave the court jurisdiction to cite the survivor, and, upon his refusal to qualify, to appoint an administrator. Conceding that, since it is not a court of general equity jurisdiction, it has no authority to determine whether facts exist which would authorize a decree dissolving a partnership, still it had authority to determine whether the facts existed authorizing it to exercise jurisdiction and appoint an administrator, and its action cannot be the subject of collateral attack. *Brenholts v. Miller*, 80 Kan. 185, 101 Pac. 998. *Wyandotte County v. Equitable Invest. Trust Co.* 80 Kan. 492, 103 Pac. 996.

The contention is of slight importance, however, for reasons that will be stated. The continuing clause of the partnership agreement provided that, in the event of the death of Herbert Marriage, the contract should be carried out by his executors to the same extent as if he were living; but his executor was not bound by the continuing clause to stand by and permit the partnership property to be dissipated through the fraud and collusion of the surviving partner. There can be no question but that the abuse of trust, the misappropriation of the funds, the disagreement between the executor and the surviving partner, and the other facts shown by the findings, were sufficient to authorize the decree of dissolution. The utmost good faith is required of parties to a partnership. The court found that the surviving partner had placed the partnership property and business beyond his control, and that he had acted collusively and fraudulently in dissipating the partnership property and mingling it with property belonging to others. If these things had occurred in the lifetime of Herbert Marriage, a court of equity would not have hesitated to grant him relief by appointing a receiver and winding up the business. As the suits were brought by the plaintiff not only as administrator of the partnership estate, but also as executor under the will, it would seem to make very little difference whether the probate court had authority to appoint him as administrator of the partnership estate or not. The petition in either event stated a cause of action, and the findings of fact are abundantly sufficient to warrant the judgment and decree dissolving and winding up the partnership. The partnership having been dissolved, the probate court had

jurisdiction over the settlement of the partnership estate. Although the evidence with respect to the Crebbin land and the Herbert J. Marriage land was conflicting, we think it was sufficient to support the findings, and that the conclusions reached by the trial court ordering a conveyance of this real estate were proper.

The judgment is affirmed.

All the Justices concur.

Petition for rehearing denied December 17, 1909.

KENTUCKY COURT OF APPEALS.

J. W. PRESCOTT, Exr., etc., of Mary E. Prescott, Deceased, Appt.,
v.

ELIZABETH E. GRIMES et al.

(143 Ky. 191, 136 S. W. 206.)

Life tenant — duty to preserve property.

1. A life tenant is bound to make all ordinary, reasonable, and necessary repairs to preserve the property and prevent its going to decay or waste.

Same — liability of estate.

2. The estate of a life tenant is answerable for the cost of repairs which he should have placed upon the property during his lifetime.

Equity — jurisdiction — obligation to life tenant — enforcement.

3. Equity has jurisdiction of a proceeding

Note. — Duty of life tenant to keep property in repair.

As to whether life tenant or remainderman must bear the cost of a public improvement, see note to *Meanor v. Goldsmith*, 10 L.R.A.(N.S.) 342.

As to right of life tenant or one claiming under him to recover for improvements, see note to *Frederick v. Frederick*, 13 L.R.A.(N.S.) 514.

Duty of life tenant to repair.

The following cases hold that life tenants are bound to keep the property in repair: *Stansbury v. Inglehart*, 9 Mackey, 134; *Beerman v. DeGive*, 112 Ga. 614, 37 S. E. 883; *Miller v. Shields*, 55 Ind. 71; *Hackworth v. Louisville Artificial Stone Co.* 106 Ky. 235, 50 S. W. 34; *Delker v. Owensboro*, 30 Ky. L. Rep. 440, 98 S. W. 1031; *Creutz v. Heil*, 89 Ky. 432, 12 S. W. 926; *Brodie v. Parsons*, 23 Ky. L. Rep. 831, 64 S. W. 426; *Smith v. Blindbury*, 66 Mich. 319, 33 N. W. 391; *Fuller v. Devolld*, 144 Mo. App. 93, 128 S. W. 1011; *Wilson v. Edmonds*, 24 N. H. 517; *Kearney v. Kearney*, 17 N. J. Eq. 504, affirming 17 N. J. Eq. 59; *Re Steele*, 19 N. J. Eq. 120; *Re Heaton*, 21 N. 33 L.R.A.(N.S.)

to hold the estate of a life tenant answerable for the sum necessary to make the repairs which he should have made upon the property.

Parties — joinder — heirs — obligation of life tenant.

4. Heirs whose interests in a remainder are identical may join in an action to hold the estate of the life tenant answerable for the cost of repairs which the life tenant should have made upon the property.

Estoppel — failure to compel life tenant to make repairs.

5. Failure of remaindermen to insist that the life tenant make the necessary repairs upon the property does not estop them from holding his estate answerable for the cost of those he should have made.

Limitation of actions — life tenant — duty to repair.

6. The amount which remaindermen may recover for failure of a life tenant to make necessary repairs to the property is not limited to the amount of deterioration of the property within the period of the statute of limitations, since the duty to place the property in repair exists at all times up to the expiration of the tenancy, and the statute begins to run against the liability only at such expiration.

(April 18, 1911.)

APPEAL by defendant from a judgment of the Circuit Court for Bourbon County in plaintiffs' favor in an action brought to hold the estate of the life tenant answerable for the cost of necessary repairs. Affirmed.

The facts are stated in the opinion.

J. Eq. 221; *Schulting v. Schulting*, 41 N. J. Eq. 130, 3 Atl. 526; *Murch v. J. O. Smith Mfg. Co.* 47 N. J. Eq. 193, 20 Atl. 213; *Perrine v. Newell*, 62 N. J. Eq. 14, 49 Atl. 724; *Carter v. Youngs*, 10 Jones & S. 418; *Hancox v. Meeker*, 95 N. Y. 528; *Re Laytin*, 2 Connolly, 106, 20 N. Y. Supp. 72; *Re Burr*, 48 Misc. 50, 96 N. Y. Supp. 225, affirmed on other grounds in 118 App. Div. 482, 104 N. Y. Supp. 29, 118 App. Div. 488, 103 N. Y. Supp. 518; *Re Very*, 24 Misc. 139, 28 N. Y. Civ. Proc. Rep. 163, 53 N. Y. Supp. 389; *Hitner v. Ege*, 23 Pa. 305; *Piper's Estate*, 2 W. N. C. 711; *Ballentine v. Spear*, 2 Baxt. 269; *Clemence v. Steere*, 1 R. I. 272, 53 Am. Dec. 621; *Thurston v. Thurston*, 6 R. I. 296; *Greene v. Greene*, 19 R. I. 619, 35 L.R.A. 793, 35 Atl. 1042; *Brooks v. Brooks*, 12 S. C. 422; *Harvey v. Harvey*, 41 Vt. 373; *Brough v. Higgins*, 2 Gratt. 409; *Smith v. Poyas*, 2 Desaus. Eq. 65; *Wise v. Metcalfe*, 10 Barn. & C. 209, 5 Moody & R. 235, 8 L. J. K. B. 126, 9 Eng. Rul. Cas. 419; *Crowe v. Crisford*, 17 Beav. 507, 2 Week. Rep. 45; *Bostock v. Blakeney*, 2 Bro. Ch. 653; *Re Redding* [1897] 1 Ch. 876, 66 L. J. Ch. N. S. 460, 76 L. T. N. S. 339, 45 Week. Rep. 457; *Re Leigh*, L. R. 6 Ch. 892, 40 L. J. Ch. N. S.

Messrs. Emmett M. Dickson and Dennis Dundon for appellant.

Messrs. Talbott & Whitley, for appellees:

It is the duty of the life tenant to keep down taxes and interest and to make repairs.

Creutz v. Heil, 89 Ky. 432, 12 S. W. 926; Delker v. Owensboro, 30 Ky. L. Rep. 440, 98 S. W. 1031; Hackworth v. Louisville Artificial Stone Co. 106 Ky. 234, 50 S. W. 33; Greene v. Greene, 10 R. L. 619, 35 L.R.A. 793, 35 Atl. 1042.

It is the duty of the life tenant to leave the property in repair.

Boardman v. Howard, 64 L.R.A. 648, and note.

After notice to the executor of the life

tenant of the amount of repair needed, and refusal by the executor to pay therefor, an action should lie against the estate of the life tenant, because a remainderman, after notice to the life tenant and refusal to repair, may take the repairs and recover from the life tenant.

Baker v. Eabin, 1 Chester Co. Rep. 293; Smith v. Mattingly, 96 Ky. 228, 28 S. W. 503; Robinson v. Miller, 2 B. Mon. 284; 3 Sedgw. Damages, 950; Taylor, Land. & T. § 686; 4 Kent, Com. § 76.

Lassing, J., delivered the opinion of the court:

In the settlement of her husband's estate in 1865, Mary Grimes was allotted as dower the dwelling and about 200 acres of

687, 25 L. T. N. S. 644, 19 Week. Rep. 1105; Baker v. Eabin, 1 Chester Co. Rep. 293; Langley v. Furlong, 1 Dick. 315; Hamer v. Tilsley (1859) Johns. V. C. (Eng.) 486; Hibbert v. Cooke, 1 Sim. & Stu. 552, 24 Revised Rep. 225, 1 Eng. Ch. 552; Marsh v. Wells, 2 Sim. & Stu. 87, 2 L. J. Ch. 191, 25 Revised Rep. 160.

In Brodie v. Parsons, 23 Ky. L. Rep. 831, 64 S. W. 426, it is held the duty of a life tenant to pay the cost of paving the sidewalk in front of the property, where the old pavement had been worn out by long use, the improvement being in the nature of a repair essential to the proper enjoyment of the property.

So, in Ballentine v. Spear, 2 Baxt. 269, permanent improvements, such as a roof and fencing, being necessary repairs, are chargeable to the tenant for life.

And in Miller v. Shields, 55 Ind. 71, a life tenant is bound to keep in repair the buildings, fences, etc., on the estate after coming into her possession, except where they are destroyed by the act of God.

So, in Hancox v. Meeker, 95 N. Y. 528, ordinary repairs, such as plate glass, etc., are held properly chargeable against the life tenant's estate.

It is held in Murch v. J. O. Smith Mfg. Co. 47 N. J. Eq. 193, 20 Atl. 213, that a life tenant is bound to keep the premises in as good repair as they were when the life tenancy began; he is bound to make those repairs rendered necessary by actual wear and tear, and to renew the roof and repaint when required to prevent decay.

So, in Brooks v. Brooks, 12 S. C. 422, a life tenant is held bound to maintain the estate in as good condition as when it came into his hands, and if the estate is one of a productive character, such as a plantation, that productive character must be maintained.

In Brough v. Higgins, 2 Gratt. 409, it is held that both life tenant and reversioner are entitled to apply the insurance to the repair of a building on the estate partially injured by fire. "By the strict common-law rule," says the court, "supposing there had been no insurance, the tenant is bound

to repair, and, as the statute of Anne has not been incorporated in our Code, the tenant may be bound to repair the partial injuries from fire, at least so far as to prevent future dilapidations, to which such injury may expose the building. Under this aspect of the case, which devolves on the tenant the duty to make such repairs, the injuries to be repaired are exclusively his risks; and it seems to be a plain consequence of reason and justice that the indemnity stipulated for such injuries should inure to him who is bound to repair them."

In Greene v. Greene, 19 R. L. 619, 35 L.R.A. 793, 35 Atl. 1042, it is held that life tenants cannot be reimbursed for expenditures of the income of residuary real estate in making up a deficiency of the income of personal estate, from which a testator has directed trustees to pay the expense of repairs, insurance, taxes, and assessments on the real estate, no provision having been made for such deficiency.

It was held in Stansbury v. Inglehart, 9 Mackey, 134, that by the common law it was the duty of the life tenant to pay for repairs.

In Hackworth v. Louisville Artificial Stone Co. 106 Ky. 235, 50 S. W. 34, it is held that a life tenant must pay the cost of reconstructing a worn-out sidewalk in front of the premises. "The improvement," said the court, "was more in the nature of a repair, like putting on a roof, or doing any act which is necessary to preserve the property and prevent its decay."

Following the above cases, it is held in Delker v. Owensboro, 30 Ky. L. Rep. 440, 98 S. W. 1031, that a life tenant is liable for the cost of reconstructing a sidewalk in front of the property, it being in the nature of a repair.

In Re Heaton, 21 N. J. Eq. 221, on motion for order to sell infants' reversionary interest in lands, it is said by the court that "a life tenant is bound not to commit or permit waste; he is bound to make the repairs needed by the natural and usual wear and tear; to keep the premises in their original condition; to rebuild fences; to repaint the house, and to renew the roof

land around it. The dwelling, outbuildings, and fencing upon the place were all in good repair. It was a handsome home, well kept. She lived there for several years, when she married one J. W. Prescott, who moved to her place, and together they occupied it until her death in 1908. Following her marriage but slight attention was paid to the care of the dwelling, outbuildings, and fencing, so that at the time of her death all were in a very much decayed and dilapidated condition. Her husband John Grimes had two children by a former wife, and, after her death, the heirs at law of these two children brought suit against her husband as executor of his wife's estate, in which they sought to recover of him damages for her failure to keep and maintain

the dwelling and other improvements upon the place in repair. The claim was resisted by the executor, primarily upon the ground that a life tenant is not liable for permissive waste. The procedure by bill in equity was objected to as improper, the aid of the five and ten years statutes of limitation was invoked, and the plea of laches interposed. The case was prepared for trial, much proof taken, and upon final submission a judgment for \$3,000 was entered in favor of the plaintiffs. From that judgment this appeal is prosecuted.

The evidence shows beyond dispute that in 1865, when the property in question was set apart to the widow of John S. Grimes as her dower interest in the estate, it was in good repair, and at her death in 1908 it

and other parts of a house when they decay, so that he may hand it over to the remainderman as good as at the commencement of the life estate."

In *Bostock v. Blakeney*, 2 Bro. Ch. 653, it is held that a tenant for life with remainder to his first and other sons, remainder to his sisters, cannot lay out a sum of money on the estate, and charge it on the reversion, although the estate would be benefited.

In *Re Leigh*, L. R. 6 Ch. 892, 40 L. J. Ch. N. S. 687, 25 L. T. N. S. 644, 19 Week. Rep. 1105, it is held the duty of the tenant for life to keep up the buildings, although he may be punishable for waste.

In *Stansbury v. Inglehart*, supra, an action for the sale of an infant's real estate, it is held that by the common law repairs were charges which the life tenant was to meet.

In *Hibbert v. Cooke*, 1 Sim. & Stu. 552, 24 Revised Rep. 225, 1 Eng. Ch. 552, it was held that an expenditure in repairing a mansion damaged by dry rot was an expense to which a tenant for life choosing to occupy the property must submit.

In *Crowe v. Crisford*, 17 Beav. 507, 2 Week. Rep. 45, it was held that all ordinary repairs were to be paid out of the income payable to the life tenant out of that arising from the residuary real and personal estate, but not such extraordinary repairs as would amount to rebuilding the houses.

It was held in *Marsh v. Wells*, 2 Sim. & Stu. 87, 2 L. J. Ch. 191, 25 Revised Rep. 160, that a reversioner who, with privity of a life tenant, had renewed a lease in his own name, and covenanted to repair the premises, was to be considered to have entered into the covenant on behalf of the life tenant, and the latter's estate was liable for damages resulting from his neglect to repair.

So, in *Wise v. Metcalfe*, 10 Barn. & C. 299, 5 Moody & R. 235, L. J. K. B. 126, 9 Eng. Rul. Cas. 419, an action for dilapidations by the successor against the executor of a deceased rector, the incumbent was held bound to maintain the parsonage in 33 L.R.A. (N.S.)

good and substantial repair, restoring and rebuilding when necessary, according to the original form without addition or modern improvements; but that he was not bound to supply or maintain anything in the nature of ornament, to which painting (unless necessary to preserve exposed timbers from decay) and whitewashing and papering belong.

According to *Hamer v. Tilsley* (1859) Johns. V. C. (Eng.) 486, a tenant for life cannot recoup an expenditure by him for repairs.

In *Smith v. Poyas*, 2 Desauss. Eq. 65, a devisee for life was held liable for a one-fourth part of the expense of repairing buildings on an estate.

In *Re Laytin*, 2 Connolly, 106, 20 N. Y. Supp. 72, a life tenant is held bound to make an ordinary repair, like that of a burst pipe, but that replumbing a house is a permanent improvement of benefit to both life tenant and remainderman, the cost of which should be apportioned between them.

In *Kearney v. Kearney*, 17 N. J. Eq. 59, it is held that a tenant for life is obliged to make no other repairs than such as are necessary to prevent waste.

In *Wilson v. Edmonds*, 24 N. H. 517, a life tenant is held bound to keep the buildings of the estate from going to decay by using ordinary care; but he is not required to expend any extraordinary sums.

In *Perrine v. Newell*, 62 N. J. Eq. 14, 49 Atl. 724, a life tenant was held liable for expense incurred by trustees in repairing banks which retained the tides and preserved the meadows in which the lands in question were included.

It is held in *Baker v. Esbin*, 1 Chester Co. Rep. 203, that a remainderman who makes necessary repairs after notice to the life tenant, who refuses and neglects to make them, can recover the amount so expended; and it was also held that where repairs were of a permanent nature, such as would enhance the remainderman's estate as compared with its condition when it came into the life tenant's possession,

was in a very dilapidated condition. If the life tenant is liable at all for the permissive waste charged, the amount allowed by the court in his judgment is reasonable. As a general rule a tenant for life must make all ordinary, reasonable, and necessary repairs required to preserve the property and prevent its going to decay or waste, and, if he fails to do so, the remainderman may, by appropriate proceeding, either require him to make such repairs, or have them made and the interest of the life tenant in the property subjected in satisfaction of the cost thereof. The law casts upon the life tenant this burden because he receives all of the rents, income, and profits growing out of the use of the property during the life of his tenancy. He may not suffer

it to go to decay or waste for want of necessary repairs any more than he may injure its value by acts of voluntary waste. In *Creutz v. Heil*, 89 Ky. 432, 12 S. W. 926, it was held that the life tenant must pay the taxes and keep the property improved. No distinction was made or drawn between the duties of paying the annual taxes assessed against the property and keeping up the repairs. For a failure to discharge either of these duties, the tenant would be guilty of permissive waste. Again in *Delker v. Owensboro*, 30 Ky. L. Rep. 440, 98 S. W. 1031, it is held to be the duty of the life tenant to pay the cost of reconstructing a pavement in front of his property, on the theory that this is a repair. To the same effect is *Hackworth v.*

the cost of such repairs should be apportioned between the life tenant and the remainderman.

In *Harvey v. Harvey*, 41 Vt. 373, it is held that although it is the duty of a tenant in dower to keep the estate in good repair, she cannot be held liable for waste where in relation to the buildings, fences, and lands, she has proceeded as a prudent man would with respect to the same if they had been his own absolutely. It was also held in this case that such a tenant, where the want of repair was causing no immediate injury to the estate, could delay a reasonable time in making repairs, in view of the very high price of labor and materials.

It is held in *Clemence v. Steere*, 1 R. I. 272, 53 Am. Dec. 621, that if a life tenant receives a house in such a state as not to be repairable, or so dilapidated that the expense of repair would be beyond the value of the house, he may leave it to its natural destruction; but if the house is such that repairs would make it tenantable, he is bound to make them.

—nonobligation of tenant to repair.

The following cases hold that life tenants are not obliged to repair the property: *Sampson v. Grogan* (*Sampson v. Bagley*), 21 R. I. 174, 44 L.R.A.711, 42 Atl. 712; *Wood v. Gaynon*, 1 Ambl. 395; *Re Freman* [1898] 1 Ch. 32, 67 L. J. Ch. N. S. 14, 77 L. T. N. S. 460; *Re Baring* [1893] 1 Ch. 61, 62 L. J. Ch. N. S. 50, 3 Reports, 37, 67 L. T. N. S. 702, 41 Week. Rep. 87; *Re de Teissier's Settled Estates* [1893] 1 Ch. 153, 62 L. J. Ch. N. S. 552, 3 Reports, 111, 68 L. T. N. S. 275, 41 Week. Rep. 186; *Re Betty* [1899] 1 Ch. 821, 68 L. J. Ch. N. S. 435, 80 L. T. N. S. 675; *Re Courtier*, L. R. 34 Ch. Div. 136, 56 L. J. Ch. N. S. 350, 55 L. T. N. S. 574, 35 Week. Rep. 85, 51 J. P. 117; *Powys v. Blagrove*, 4 DeG. M. & G. 448, 2 Eq. Rep. 1204, 24 L. J. Ch. N. S. 142, 2 Week. Rep. 700.

In *Wood v. Gaynon*, 1 Ambl. 395, on the filing of a bill by a reversioner to compel the life tenant to put and keep the premises 33 L.R.A.(N.S.)

in repair, the court refused on the ground that no precedent could be produced where the court had made such a decree, and also said that it would tend to harass tenants for life, and that suits of this kind would be attended with great expense in depositions about repairs.

In *Nairn v. Marjoribanks*, 3 Russ. Ch. 582, 3 Eng. Ch. 582, the tenant for life presented a petition stating that he had expended considerable sums in repairs of the mansion house; that the roof was constructed on a bad principle, and unless it were removed and replaced the mansion would sustain considerable injury; that the removal and construction of the roof did not fall within the description of those ordinary repairs to which a tenant for life is liable, and would greatly benefit all parties interested in the estate. The prayer was for a reference to inquire whether it would be for the benefit of the parties interested in the property that the roof of the mansion house should be removed, and a new one constructed at the expense of the testator's estate. The court refused to make any order on the petition, stating that, even if the master should report that it would be for the benefit of all parties interested that improvement should be made in the mansion house, he would not confirm the report.

In *Re de Teissier's Settled Estates* [1893] 1 Ch. 153, 62 L. J. Ch. N. S. 552, 3 Reports, 111, 68 L. T. N. S. 275, 41 Week. Rep. 186, where the testator left the house in a dilapidated condition, the court refused to charge the interest of the infant tenant for life with the expenditure for repairs proposed by the trustees.

In *Sampson v. Grogan* (*Sampson v. Bagley*) 21 R. I. 174, 44 L.R.A. 711, 42 Atl. 712, it is held that a life tenant required by terms of the will to keep the estate in repair is not bound to rebuild in case of destruction by accidental fire.

Liability for permissive waste.

In *Re Parry* [1900] 1 Ch. 160, the estate of a life tenant of leaseholds was held not

Louisville Artificial Stone Co. 106 Ky. 234, 50 S. W. 33. The views of textwriters and most courts of last resort are in accord with the principles announced in the decisions which we have cited.

The burden of keeping the property in reasonable repair being cast upon the life tenant, the question arises whether the remainderman may enforce this right against the estate of the life tenant after the death of the latter. There can be no question but what the remainderman at any time during the existence of the life estate might have, by appropriate action, compelled the life tenant to discharge all duties as to repairs, etc., which the law imposed upon him. As this right existed during the continuance of the life estate, it might have

been enforced just prior to the death of the life tenant, and we see no good reason why his estate should not be answerable after his death for the cost of repairs that he should have made during his life. With the exception of certain excepted cases, under our statutes, all actions for money or breach of contract or duty survive, and may be prosecuted against the personal representative of the deceased. The action for waste is not one excepted out of the general provisions of the statute, and hence survives.

It is urged that, even though the action survives, it cannot be brought in equity, but must be brought at law. It is so held in certain jurisdictions, and such contention is supported by some of the text

liable to the remainderman for damages as a consequence of life tenant's failure to keep the premises in repair as covenanted.

According to *Moore v. Townshend*, 33 N. J. L. 284, by the statutes of Gloucester (6 Edw. I, chap. 5), and *Marlbridge*, tenants for life are made liable for permissive waste; by the former the offender shall lose the thing wasted, and pay treble damages; and by the latter he "shall yield full damage and shall be punished by amercement grievously." The court said: "The instances in the earlier reports in which lessees for life or years were held liable for permissive waste, which consisted in injuries resulting from acts of negligence or omission, are quite frequent; and their liability is grounded, not on the covenants or agreements in the instruments of demise, but on the statute which subjected them to the action of waste."

So, in *Roby v. Newton*, 121 Ga. 679, 68 L.R.A. 601, 49 S. E. 694, a tenant for life is held liable to the reversioner or remainderman for actual damages resulting from permissive waste.

But in *Sampson v. Grogan*, *supra*, it is held that a life tenant's liability for permissive waste does not include damages by accidental fire; according to this case it is the consensus of opinion that a tenant for life is liable for permissive waste where the property is destroyed by fire through his negligence, but not where the property is destroyed by accidental fire.

It is held in *Stevens v. Rose*, 69 Mich. 259, 37 N. W. 205, that tenants for life not made unimpeachable for waste by the person granting the estate are liable for permissive waste.

In *Re Williames* (1884) 52 L. T. N. S. 40, affirmed on appeal in (1885) 54 L. T. N. S. 105, the executor of a deceased life tenant was made liable for permissive waste by a life tenant; but this ruling was based on the fact that the omission to repair was a breach of condition or implied contract contained in the will.

In *Sherrill v. Connor*, 107 N. C. 630, 12 S. E. 588, a tenant in dower was held not liable for permissive waste in suffering to 33 L.R.A. (N.S.)

fall into decay a barn not used because of the changed condition of the country and use of the farm, the court saying: "A tenant in dower, or other life tenant, who by neglect or wantonness occasions permanent waste or injury to the inheritance, whether voluntary or permissive, thereby subjects himself to liability to pay the actual damages or treble damages, at the discretion of the judge, and also to forfeit the place wasted on a day to be fixed by the judge, if she should meantime fail to pay damages recovered of her."

It is held in *Patterson v. Central Canada Loan & Sav. Co.* 29 Ont. Rep. 134, that an action for permissive waste will not lie against a life tenant, the court saying: "The buildings were very old and have suffered from decay and exposure; but the tenant is not legally bound to repair, in the absence of a direction to that effect in the instrument creating the present and the reversionary estate. If premises are suffered to become dilapidated by omission to repair, and so run down through mere neglect, that is no more than permissive waste, for which an action does not lie. . . . Though it may be the duty of the tenant for life, and in his own interest, to keep up the buildings in habitable shape, he cannot charge the expense on the inheritance, nor can he be dispunishable for waste if he abstains."

It is held in *Cannon v. Barry*, 59 Miss. 289, that courts of equity will take no jurisdiction of permissive waste by a life tenant, such as suffering a mansion to go to decay or failure to keep up an orchard.

But in *Cole v. Bickelhaupt*, 64 App. Div. 6, 71 N. Y. Supp. 636, an assignee of a tenant for life was held liable for treble damages for waste, where timber was cut, and an orchard and the farm in general were allowed to become ruinous by inattention.

In *Re Cartwright*, L. R. 41 Ch. Div. 532, 58 L. J. Ch. N. S. 590, 60 L. T. N. S. 891, 37 Week. Rep. 612, a life tenant was held not liable for permissive waste.

In *Dozier v. Gregory*, 46 N. C. (1 Jones, L.) 100, where the husband of a life tenant in dower was held not liable for permissive

writers; but such is not the practice in this state, for in *Smith v. Mattingly*, 96 Ky. 228, 28 S. W. 503, after reviewing fully the law of procedure down to that time, it is stated that "the remedy by equitable proceeding is more easy, expeditious, and complete than by an action ordinary," intended to restrict the right to sue at law to the action for voluntary waste, provided for in § 1, quoted, whereby, in case the jury finds the waste was wantonly committed, treble damages may be assessed, leaving exclusive jurisdiction of cases of permissive waste to courts of equity." This opinion is conclusive of the question, and settles it adversely to the claim of appellant.

It is next urged that there was a misjoinder of parties, and that the motion to elect which should prosecute should have been sustained. As stated, John S. Grimes left surviving him two children. William, a son, and Sallie, a daughter, who married one Logan. William died intestate, and left surviving him two children, the plain-

tiffs to this suit. Sallie Logan died testate, and by her will devised to the children of her brother, William, her undivided interest in the land in question. They then became by inheritance from their father and devise from their aunt the owners in fee of the entire tract. They are joint tenants, claim from and through the same source, and their interests are identical. In *Smith v. Mattingly*, supra, the right of all the remaindermen to be joined as plaintiffs to this suit. Sallie Logan died testate, effect are *Newman v. Kendall*, 2 A. K. Marsh, 234, and *King v. Bullock*, 9 Dana, 41. These decisions upon this question of practice are supported by § 22 of the Code, which provides that "all persons having an interest in the subject of an action and in obtaining the relief demanded may be joined as plaintiffs, unless it is otherwise provided in this Code." The interests of the plaintiffs in the subject of this action are identical. They each seek to recover such damages as will compensate the estate for

waste after his wife's death, the court freely discusses the question whether a tenant in dower or a tenant for life is liable for mere permissive waste, and says that it seems questionable whether the statute of Gloucester, which prescribes a penalty for waste by a life tenant and authorizes a writ of waste, extends to any case of mere permissive waste, and, indeed, whether a tenant for life is liable to any penalty, forfeiture, or action for merely neglecting to repair, unless he be under express directions or agreement to do so.

In *Griffin v. Fleming*, 72 Ga. 697, it is held that a testator by will may relieve the life tenant of the duty to make repairs, and place the title of the property in the executor.

Remedy.

The ordinary remedy to compel a life tenant to make repairs to prevent property from deteriorating is by mandatory injunction. *Sawyer v. Adams*, 140 App. Div. 756, 126 N. Y. Supp. 128.

According to *Clement v. Wheeler*, 25 N. H. 361, the remedy by injunction is applicable to every species of waste, it being to prevent a known and certain injury.

So, in *Caldwell v. Baylis*, 2 Meriv. 408, where buildings were allowed to decay and become ruinous, an injunction against permissive waste was granted.

It is said in *Moore v. Townshend*, 33 N. J. L. 284, that the action on the case in the nature of waste has almost entirely superseded the common-law action of waste, as well for permissive as for voluntary waste, as furnishing a more easy and expeditious remedy than a writ of waste, and that it is also an action encouraged by the courts, the recovery being confined to single damages, and not being accompanied by a forfeiture of the place wasted. 33 L.R.A.(N.S.)

In *Smith v. Mattingly*, 96 Ky. 228, 28 S. W. 503, it is held that the sections of the Kentucky statute providing that if a tenant for life shall commit waste, "he shall be subject to an action of waste, shall lose the thing wasted, and pay treble the amount at which the waste shall be assessed," and if waste is wantonly committed, "judgment shall be entered for three times the amount of the damages assessed,"—apply to active, and not permissive, waste. The court, in discussing the question whether an action ordinary in the nature of trespass on the case can be maintained by a reversioner or remainderman against a tenant for permissive waste, "states that an examination of the history of legislation on the subject of waste, has satisfied us that action on the case for permissive waste, if it ever was a proper action therefor, was intended to and has been abolished by statute," and concludes that the jurisdiction of cases of permissive waste is left to courts of equity.

In *Powys v. Blgrave*, 4 DeG. M. & G. 448, 2 Eq. Rep. 1204, 24 L. J. Ch. N. S. 142, 2 Week. Rep. 700, it is held that equity will not interfere by injunction in cases of permissive waste, at the instance of a remainderman, against an equitable tenant for life in possession.

In *Barnes v. Dowling* (1881) 44 L. T. N. S. 809, 45 J. P. 635, 767, it is held that an action at law for permissive waste will not lie against a life tenant. The court said that the weight of authority in equity is therefore clearly against an action for permissive waste, and if there is any variance between the rules of equity and the rules of common law with reference to permissive waste, we are bound to give effect to the former.

It is held in *Bullock v. Burdett*, 3 Dyer,

the damage done by the failure of the life tenant to keep the property in reasonable repair. The court did not err in refusing to require them to elect.

The only remaining questions are, Did the court err in refusing to uphold the pleas of the statutes of limitation and laches? It being the duty of the life tenant to keep the place in reasonable repair, it is urged that, when the remaindermen discovered that this was not being done, they should have demanded of the life tenant that the necessary repairs be made, and upon her refusal to comply with their request, they should have taken steps to compel her to do so; that, inasmuch as they made no such request, and took no steps to compel her to make repairs, they, by their silence and inaction, acquiesced in the conduct of the life tenant, and are by reason of their acts estopped from now seeking to recover damages of her estate on that account. Or, if this is not so, they should at least be restricted in their re-

covery to such damages as the estate suffered by reason of the permissive waste during the five years, or, at most, ten years, next before the institution of their suit. There would be much force in this argument if there was any definite time fixed within which the repairs must be made. But the law imposes upon the life tenant only the duty to so manage the estate that, at the expiration of the tenancy or term, he may deliver up the property in a reasonable condition of repair. He might suffer the property to become out of repair for years, and later fix it up, in which event the remaindermen would have no cause for complaint; and even though years had run before any effort was made to compel the life tenant to repair, when such effort was made, the court would undoubtedly require the tenant to place the property in reasonable repair, taking into consideration its condition when the life tenancy began. Such a rule is but equitable and just, for the life tenant, having had the

281a, that permissive waste was punishable by the statute of Gloucester.

In *St. Paul Trust Co. v. Mintzer*, 65 Minn. 124, 32 L.R.A. 756, 60 Am. St. Rep. 444, 67 N. W. 657, where a life tenant neglected and refused to make necessary repairs on the homestead, it was held that the administrator could have a receiver appointed, and apply the proceeds of the income or rentals of the property collected to reimburse the administrator for the expense of repairs made by him, and, if need be, sell the property for that purpose.

Effect of statute of limitations.

There is unquestionably a dearth of authority on the question whether the statute of limitations can be pleaded in an action for permissive waste.

In *Powell v. Dayton*, S. & G. R. Co. 16 Or. 33, 8 Am. St. Rep. 251, 16 Pac. 863, an action against a tenant in possession under a lease, for damages for waste in failing to make tenantable repairs and in suffering a warehouse to be washed away, it was held that the statute of limitations did not commence to run against an action for waste until the time given by the lease for exercising the privilege of purchase had expired.

In *Sherrill v. Connor*, 107 N. C. 630, 12 S. E. 588, where a tenant in dower had suffered a barn to fall into decay, the court said: "We think that his Honor erred when he told the jury that, on account of the continuous character of the injury, no statute of limitations applied to the permissive waste. While we find no direct authority upon the question, the general principles governing the assessment of damages, and the application of them, in other analogous cases, lead us to a conclusion very different. . . . The jury 33 L.R.A. (N.S.)

cannot allow prospective damages, where the roof of a building has become decayed, for the value of the whole building, on the supposition that the tenant will suffer the decay to continue till the structure shall have rotted and fallen down. The tenant is at liberty to replace the roof, and restore the building to its original condition, and if he does so, the decay is arrested, and the accruing liability ceases. . . . It being apparent that, from the nature of the case, the liability for permissive waste to the same building may be the subject of separate actions, where it is continued after one recovery, we can see no reason why his Honor should not have limited the extent of the recovery by the plaintiffs, laboring under no disability such as prevented the statute from running, to three years before the action was brought."

In *Dashwood v. Magniac* [1891] 3 Ch. 306, 60 L. J. Ch. N. S. 809, 65 L. T. N. S. 811, an action for permissive waste, the defendants relied on the various statutes of limitations, particularly the statute 21 Jac. I. chap. 16, and the real property limitation act 1874, as a bar to the action; but the parties came to an arrangement as to the sum payable for dilapidations, and, in the course of the argument, the point as to the plaintiff's right of action being barred by the statute of limitations was given up by the defendants' counsel.

In *Simpson v. Simpson* (1879) Ir. L. R. 3 Eq. 308, the six years statute of limitations was held a bar to legal waste, citing *Seagram v. Knight*, L. R. 2 Ch. 628, 36 L. J. Ch. N. S. 918, 17 L. T. N. S. 47, 15 Week. Rep. 1152; *Higginbotham v. Hawkins*, L. R. 7 Ch. 670, 41 L. J. Ch. N. S. 828, 27 L. T. N. S. 328, 20 Week. Rep. 955. This was a case, however, of active waste for cutting timber, which is without the scope of this note.

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use and benefit of the property during his entire term, if, instead of spending a small sum of money annually to keep it in repair, he has preferred to let it run for several years before he voluntarily makes the repair, or is called upon to do so, he is in no condition to complain that the expense or cost thereof is considerable.

As it is the duty of the life tenant to so manage the property as to leave it in a reasonable condition of repair at the expiration of his tenancy, the plea of the statute of limitations cannot avail. The duty of the tenant is to leave the property in reasonable condition and repair at the end of the term, and this duty keeps pace with the life of the tenancy. It is an ever-present, existing duty, and, when the court comes to enforce this duty the inquiry is not when the waste occurred, or how long it has been permitted to run, but what is the extent thereof, and what sum will be required to make the necessary repairs. During the life of the tenancy, there is no limitation to the time within which the action to compel reparation for permissive waste must be commenced.

On consideration of the whole case, we are constrained to hold that the conclusion reached by the chancellor was both equitable and just, for the life tenant was intrusted with the use of a valuable estate, upon which the improvements were in splendid repair when she took possession thereof. It was incumbent upon her to give it such care and attention as a reasonably prudent man would give his own property so as to keep it in repair. This she failed to do, and the judgment against her estate is but a fair estimate of the damage occasioned by this neglect on her part.

Judgment affirmed on original and cross appeal.

ARKANSAS SUPREME COURT.

TITLE GUARANTY & SURETY COMPANY, Appt.,
v.
BANK OF FULTON.

(89 Ark. 471, 117 S. W. 537.)

Insurer — indemnity bond — delivery.

1. Delivery of an indemnity bond is shown by evidence that it was executed by the insurer and sent by him to the agent of the assured, and that shortly afterwards the premium was paid to and accepted by the insurer.

Same — signature by principal — necessity.

2. A fidelity insurance bond issued by a corporation in consideration of a premium 33 L.R.A. (N.S.)

paid need not be signed by the principal to render it valid, in the absence of any stipulation in the instrument or elsewhere which requires such signature.

Same — employer's statement — warranty.

3. A clause in a fidelity insurance bond which requires a statement from the employer as to habits and accounts of the employee whose fidelity is to be insured, and provides that said statement shall constitute part of the basis and consideration of the contract, does not make the statement a warranty so as to avoid the policy in case it is incorrect through mere mistake.

Evidence — embezzlement — letters announcing shipment of money.

4. Letters announcing shipments of money to a bank are not competent evidence to establish the fact of actual shipment, for the purpose of establishing its embezzlement by an officer of the bank who has since absconded.

(Battle, J., dissents.)

(February 15, 1909.)

APPEAL by defendant from a judgment of the Circuit Court for Hempstead County in plaintiff's favor in an action brought to recover the amount alleged to be due on a fidelity insurance bond. Affirmed on condition.

The facts are stated in the opinion.

Messrs. J. W. Blackwood and Bradshaw, Rhoton, & Helm for appellant.

Messrs. James H. McCullum, Etter & Monroe, and John A. Hope, for appellee:

A guaranty company is liable on its bond insuring the fidelity of an employee, without his signature, when issued upon his application, except in cases where it is positively and specifically provided that no liability attaches without it.

State Mut. F. Ins. Asso. v. Brinkley

Note. — *What reference in policy to application will make it part of policy.*

This question is discussed in a note to Spence v. Central Acci. Ins. Co. 19 L.R.A. (N.S.) 88, where the earlier cases will be found collected. Since the preparation of that note, it was held in Eminent Household, C. W. v. Prater, 24 Okla. 214, 23 L.R.A. (N.S.) 917, 103 Pac. 558, that where a policy of insurance declared that it was executed in consideration of the warranties in insured's application, and that the same were a part of the contract of insurance, and the application warranted that the insured's answers to the medical examiner were "true and accurate," such answers were warranties, and a false statement made therein by the assured avoided the policy.

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Stave & Heading Co. 61 Ark. 1, 29 L.R.A. 712, 54 Am. St. Rep. 191, 31 S. W. 157; Travelers' F. Ins. Co. v. Globe Soap Co. 85 Ark. 169, 122 Am. St. Rep. 22, 107 S. W. 386; State v. Buchanan, 1 Mart. Ch. Dec. (Ark.) 227; New York L. Ins. Co. v. Babcock, 104 Ga. 67, 42 L.R.A. 88, 69 Am. St. Rep. 134, 30 S. E. 273; Deering v. Moore, 86 Me. 181, 41 Am. St. Rep. 534, 29 Atl. 988; Fidelity Mut. Life Asso. v. Harris, 94 Tex. 25, 86 Am. St. Rep. 813, 57 S. W. 635; Clark v. Bank of Hennessey, 14 Okla. 572, 79 Pac. 217, 2 A. & E. Ann. Cas. 219.

The signing of the declaration was not in the line of the president's duty, and unless specially authorized cannot operate against the bank.

City Electric Street R. Co. v. First Nat. Exch. Bank, 62 Ark. 33, 31 L.R.A. 535, 54 Am. St. Rep. 282, 34 S. W. 89; American Surety Co. v. Pauly, 170 U. S. 133, 42 L. ed. 977, 18 Sup. Ct. Rep. 552; Independent School Dist. v. Hubbard, 110 Iowa, 58, 80 Am. St. Rep. 271, 81 N. W. 241; Mt. Sterling & J. Turnp. Road Co. v. Looney, 1 Met. (Ky.) 550, 71 Am. Dec. 491; Blen v. Bear River & A. Water & Min. Co. 20 Cal. 602, 81 Am. Dec. 132, 3 W. R. Min. Rep. 435; Schaeffer v. Farmers' Mut. F. Ins. Co. 80 Md. 563, 45 Am. St. Rep. 361, 31 Atl. 317; Supreme Council, R. A. v. Brashears, 89 Md. 624, 73 Am. St. Rep. 244, 43 Atl. 866; Clinton v. Norfolk Mut. F. Ins. Co. 176 Mass. 486, 50 L.R.A. 833, 79 Am. St. Rep. 325, 57 N. E. 998; Piedmont & A. L. Ins. Co. v. Ewing, 92 U. S. 377, 23 L. ed. 610; 4 Joyce, Ins. § 3790; Mutual L. Ins. Co. v. Wiswell, 56 Kan. 765, 35 L.R.A. 258, 44 Pac. 996.

The employer's declaration is not a warranty, but only a representation.

American Bonding Co. v. Morrow, 80 Ark. 49, 117 Am. St. Rep. 72, 96 S. W. 613; Supreme Council, R. A. v. Brashears, 89 Md. 624, 73 Am. St. Rep. 244, 43 Atl. 866; American Surety Co. v. Pauly, 170 U. S. 133, 42 L. ed. 977, 18 Sup. Ct. Rep. 552; Manufacturers' Acci. Indemnity Co. v. Dorgan, 22 L.R.A. 620, 7 C. C. A. 581, 16 U. S. App. 290, 58 Fed. 945; Arkansas F. Ins. Co. v. Wilson, 67 Ark. 553, 48 L.R.A. 510, 77 Am. St. Rep. 129, 55 S. W. 933; Murray v. Home Ben. Life Asso. 90 Cal. 402, 25 Am. St. Rep. 133, 27 Pac. 309; Owen v. Metropolitan L. Ins. Co. 74 N. J. L. 770, 122 Am. St. Rep. 413, 67 Atl. 25; American Popular L. Ins. Co. v. Day, 39 N. J. L. 89, 23 Am. Rep. 198; Supreme Council, C. K. A. v. Fidelity & C. Co. 11 C. C. A. 96, 22 U. S. App. 439, 63 Fed. 48; 2 Joyce, Ins. §§ 1185, 1891, 1934; Stearns, Suretyship, § 255.

"A surety on the bond of the cashier of a bank is not discharged by the fact that 33 L.R.A. (N.S.)

the cashier had, before the bond was given, committed frauds upon the bank, if such frauds were unknown to the officers of the bank, although they were guilty of gross negligence in not discovering them.

Tapley v. Martin, 116 Mass. 275; Bennett v. S. A. R. E. Bldg. & L. Asso. 57 Tex. 72; Farmington v. Stanley, 60 Me. 472; Wayne v. Commercial Nat. Bank, 52 Pa. 343; Anaheim Union Water Co. v. Parker, 101 Cal. 483, 35 Pac. 1048; Bowne v. Mt. Holly Nat. Bank, 45 N. J. L. 360; Bostwick v. Van Voorhis, 91 N. Y. 353; Lieberman v. First Nat. Bank, 8 Del. Ch. 229, 40 Atl. 384; American Bonding Co. v. Morrow, 80 Ark. 49, 117 Am. St. Rep. 72, 96 S. W. 613.

Frauenthal, J., delivered the opinion of the court:

On June 22, 1906, T. C. Hockersmith was the cashier of the Bank of Fulton, and he had been such cashier for some time prior to that date. On that day he made application for a surety bond guarantying his fidelity as such cashier to Duncan, Horton, & Robinson, located at Poplar Bluff, Missouri, who were the local agents of the Title Guaranty & Surety Company. On the same day Duncan, Horton, & Robinson transmitted by mail the application to the Title Guaranty & Surety Company at Scranton, Pennsylvania, the domicile of that company, and in their letter stated that the application was for bond in the sum of \$10,000 in behalf of T. C. Hockersmith as cashier of the Bank of Fulton. Thereafter the Title Guaranty & Surety Company transmitted by mail the bond from Scranton, Pennsylvania, to Duncan, Horton, & Robinson, at Poplar Bluff, Missouri, and in their letter transmitting same stated: "We inclose herewith bond No. 44,478 in behalf of T. C. Hockersmith; the premium upon which of \$25 we have charged to your account." On June 28, 1906, Duncan, Horton, & Robinson transmitted the bond by mail to T. C. Hockersmith at Fulton, Arkansas, who at the time was cashier of the bank, and in their accompanying letter state: "We are pleased to inclose you Title Guaranty & Surety bond in the sum of \$10,000 issued to the Bank of Fulton in your behalf as cashier." Prior to transmitting the bond to Fulton, Arkansas, a record of the bond was made in their registry by Duncan, Horton, & Robinson, which shows: "Bond No. 44,478 dated May 16th, 1906, term one year, expiration May 16th, 1907; name of employer, Bank of Fulton, address, town of Fulton, Arkansas; position, cashier, amount of bond \$10,000, premium \$25." The original bond could not be found, but E. M. Robinson, the agent of appellant, tes-

tified that it was on one of the regular forms of surety bonds issued by appellant, a copy of which was produced, and is as follows:

The Title Guaranty & Surety Company.
Amount, \$10,000. Annual Premium, \$25.
Bond No. 44478.

Whereas, Bank of Fulton, hereinafter called the employer, is employing or intends to employ T. C. Hockersmith in the capacity as cashier; and,

Whereas, the employee has filed with the Title Guaranty & Surety Company, hereinafter called the company, an application specifying the amount of security required from said employee, and they jointly having applied to the company for the grant of this bond; and,

Whereas, the company in consideration of the sum of twenty-five and no/100 dollars, now paid as a premium from May 16th, 1906, to May 16th, 1907, 12 o'clock noon, has agreed, upon the terms, provisions, and conditions herein contained, to issue this bond to the employer; and,

Whereas, the employer has heretofore delivered to the company certain representations and promises relative to the duties and accounts of the employee, and other matters, it is hereby understood and agreed that those representations and such promises, and any subsequent representations or promises of the employer, hereafter required by or lodged with the company, shall constitute part of the basis and consideration of the contract hereinafter expressed.

Now, therefore, this bond witnesseth: That for the consideration of the premises the company shall, during the term above mentioned, or any subsequent renewal of such term, and subject to the provisions and conditions herein contained, at the expiration of three months next after proof satisfactory to the company, as hereinafter mentioned, make good and reimburse to the said employer, such pecuniary loss as may be sustained by the said employer, by reason of the fraud or dishonesty of the said employee in connection with the duties of his office or position, amounting to embezzlement or larceny, and which shall have been committed during the continuance of said term, or of any renewal thereof, or within six months thereafter, or within six months from the death or dismissal or retirement of said employee from the service of the employer within the period of this bond, whichever of these events shall first happen; the company's total liability on account of said employee under this bond or any renewal thereof, not to exceed the sum of ten thousand and no/100 dollars. . . . That, no one of the above condi-

tions or of the provisions contained in this bond shall be deemed to have been waived by or on behalf of the company, unless the waiver be clearly expressed in writing, over the signature of its president and its secretary, and its seal thereto affixed.

And the employee doth hereby for himself, his heirs, executors, and administrators, covenant and agree to and with the company, that he will save, defend, and keep harmless the company from and against all loss and damage of whatsoever nature or kind, and from all legal and other costs and expense, direct or incidental, which the company shall or may at any time sustain or to be put to (whether before or after any legal proceedings by or against it to recover under this bond, and without notice to him thereof), or for or by reason or in consequence of the company having entered into the present bond.

In witness whereof, the said _____ (employee) has hereunto set his hand and seal and the company has caused this bond to be sealed with its corporate seal, duly attested by the signature of its _____ president, and of its _____ secretary, that _____ day of _____ one thousand nine hundred and _____.

Signed, sealed, and delivered by the employee at _____.

_____, Employee.

In the presence of:

_____,
_____.

The Title Guaranty & Surety Company.

"Attest:

_____, Secretary."

On August 6, 1906, a draft of the Bank of Fulton on the Exchange National Bank of Little Rock for \$25 was received by Duncan, Horton, & Robinson in payment of the premium of the bond, which they had transmitted to appellant on July 25, 1906.

At the time the application was made for the bond there was transmitted therewith the following statement:

Employer's Declaration.

The foregoing applicant has been in the service of the undersigned employer two years and _____ months, and the duties required have always been performed in a faithful and satisfactory manner. The accounts were last audited on the 11th day of June, and were correct in every particular. There has never come to the notice or knowledge of the employer any act, fact, or information tending to indicate that the applicant is negligent, unreliable, deceitful, dishonest, or unworthy of confidence. As far as the employer knows, applicant's

habits are good, and the employer knows no reason why you cannot safely assume the suretyship applied for.

The above and foregoing statements and representations are made for the purpose of inducing the Title Guaranty & Surety Company to execute said bond.

Dated at Fulton, Arkansas, the 21st day of June, 1906.

Bank of Fulton (Employer),
By H. L. B'Shers.

This statement was signed by H. L. B'Shers, who at the time was president of the Bank of Fulton. On June 11, 1906, there was a stockholders' meeting of the bank. At that meeting Hockersmith made a statement of everything relating to the books and accounts of the bank, and B'Shers, and some one else, went through the books. Hockersmith on that day made a report of the condition of the affairs of the bank to the board of directors, who examined the report. The officers of the bank had great confidence in Hockersmith, and did not know, and had no reason to know, of any dereliction or dishonesty on the part of Hockersmith; and, when Mr. B'Shers signed the above statement, he did so in good faith, believing same to be true. It appears from the teller's cashbook that there was an item of debit on the account of Hockersmith of \$1,492.25, which occurred on every date from February 21, 1906, until Hockersmith left the bank, in May, 1907. Hockersmith continued as cashier of the Bank of Fulton until May, 1907, when he absconded. Thereafter an examination of the books of the Bank of Fulton was made by an expert accountant, from whose testimony it appears that Hockersmith had embezzled from the Bank of Fulton the sum of \$11,773.90 from May 16, 1906, to May 16, 1907. Thereafter the appellee instituted suit against appellant on said bond, and recovered judgment for \$10,000 against appellant, from which this appeal is taken.

1. The appellant contends that the evidence in this case fails to show that the bond was actually delivered, or that it was signed by Hockersmith, and that on that account the judgment should be reversed. The testimony in this case shows that a written application was made and sent by mail by the cashier, Hockersmith, to the appellant, through its duly authorized agents, for the execution of the bond sued on herein; that the appellant accepted and approved the application, and thereupon signed the bond, and through its authorized agents sent the bond by mail to the appellee. The letter inclosing the bond was addressed to T. C. Hockersmith at Fulton, 33 L.R.A. (N.S.)

Ark., who at the time was the agent and cashier of the appellee at its place of business at Fulton, Arkansas. Within a short time thereafter the premium and consideration for the execution of the bond was paid to the appellant and accepted by it. This operated as a full delivery of the bond. In this case the bond was first sent by the appellant to its agents unconditionally, and with instructions to deliver the same to the appellee. This itself would bind the appellant, and was tantamount to a delivery to the appellee, even though the agent had never parted with the possession of the bond. *New York L. Ins. Co. v. Babcock*, 104 Ga. 67, 42 L.R.A. 88, 69 Am. St. Rep. 134, 30 S. E. 273. In fact, the acceptance of an application for indemnity or insurance, and mailing of the bond or policy, are all of the acts that are necessary or essential to put the contract into force. *Fidelity Mut. Life Assn. v. Harris*, 94 Tex. 25, 86 Am. St. Rep. 813, 57 S. W. 635. In the case of *Bostwick v. Van Voorhis*, 91 N. Y. 353, it was shown that one Bartow was chosen cashier of the bank, and his bond fixed at \$30,000, upon which suit was brought. The bond was actually executed by the sureties, and Bartow thereafter entered upon the discharge of his duties as cashier. No direct evidence was given that the bond was ever delivered to or that it was ever in the possession of the bank, or that the sureties were ever formally approved. And in that case it was held that it was a fair and legal inference from these facts that the bond was delivered to and accepted by the bank. In the case of the *State Mut. F. Ins. Assn. v. Brinkley Stave & Heading Co.* 61 Ark. 1, 29 L.R.A. 712, 54 Am. St. Rep. 191, 31 S. W. 157, this court held that when an application made to the local agent of a foreign insurance company is by him forwarded to the company at its domicile, at which place the application is accepted, and the policy of insurance signed and mailed to the applicant, the contract is then and there complete. So in this case, when the appellant accepted the application for the bond and approved the same, and thereupon actually signed the bond and deposited it in the mail addressed to its agents, with instructions for unconditional delivery, and thereupon the agents mailed same to appellee, these acts constituted a delivery of the bond to appellee. *Travelers' F. Ins. Co. v. Globe Soap Co.* 85 Ark. 169, 122 Am. St. Rep. 22, 107 S. W. 386. The letters that passed between the various parties showed clearly the execution of the bond, the amount thereof, the length of time for which it ran, and that it was executed to the appellee as obligee to guarantee the fidelity of Hockersmith, its cashier. The

evidence shows that the premium for the bond was actually paid and received by the appellant, and the appellant therefore understood that the bond was in full force and effect. It is claimed by the appellant that the evidence does not show that the cashier, Hockersmith, had signed the bond. This bond does not stipulate that it is essential to the validity of the contract that the employee, Hockersmith, should sign the same, and that it should be of no effect until he did sign it. The bond was executed for the benefit of the appellee, and it was the one who under the terms of the bond was to be protected by its provisions. The appellee was the party indemnified and the sole obligee in the bond; and, unless the bond had expressly stated that it should not take effect until it was signed by Hockersmith, the employee, it was binding upon its execution by the appellant and delivery to the appellee. Nowhere in the correspondence, which was introduced in evidence, does the appellant even suggest that the employee, Hockersmith, should sign the bond, and under the testimony in this case there is nothing to show that the signature of Hockersmith was essential to the validity of the bond. *First Nat. Bank v. Fidelity & G. Co.* 100 Am. St. Rep. 765, 774, note.

2. It is urged by the appellant that the statement designated above as the "employer's declaration" became a part of the bond, and is a warranty, and that, if any of the statements therein contained is incorrect, the bond became thereby avoided. In order to determine whether these statements are warranties or mere representations, it is necessary to consider the nature of the bond sued on, and what construction the law makes relative to the provisions of such bonds. This is not an ordinary obligation given by a surety, but it is an indemnity bond, and is in the nature of a contract of insurance, insuring the fidelity of the employee. It is said by this court in *American Bonding Co. v. Morrow*, 80 Ark. 49, 117 Am. St. Rep. 72, 96 S. W. 613: "It is now well settled that the bond of a surety company, like any other insurance policy, is to be most strongly construed against the insurer. The language of the bond is that selected and employed by the insurer, and, when doubtful or ambiguous, must be given the strongest interpretation against the insurer which it will reasonably bear." And so, in determining the nature of the provisions of this bond, we first look to see whether the provisions are susceptible of two constructions. If they are, then we must adopt that construction which is most favorable to the bank. This is the well-settled doctrine as to the con-

struction of such instruments as the bond sued on in this case. *American Surety Co. v. Pauly*, 170 U. S. 133, 42 L. ed. 977, 18 Sup. Ct. Rep. 552. Now, if it had been the intention of the parties to make these statements in the "employer's declaration" warranties, it should have been so stated. But the bond does not say that any of these statements is a warranty. It does not employ any language which says, or can be construed to say, that any of these statements is a warranty. If it had been so desired, the bond could have well stated that, if any of the statements made in the "employer's declaration" was incorrect, then the bond should be void. But there is no language of that kind in the bond, or in the employer's declaration, and the court cannot construe any such language into it. In the case of *Supreme Council, R. A. v. Brashears*, 89 Md. 624, 73 Am. St. Rep. 244, 43 Atl. 866, it is held that statements by an applicant for life insurance which by the terms of the policy are made part of the contract with the insurance company are not to be regarded as warranties, unless the policy upon its face plainly declares that they shall be treated as such. *Supreme Council, C. K. A. v. Fidelity & C. Co.* 11 C. C. A. 96, 22 U. S. App. 439, 63 Fed. 48. The general rule is that a statement in an application is a representation rather than a warranty, unless it is made a warranty by express terms, or by such language that it cannot be construed otherwise. 2 Joyce, Ins. § 1891.

It is contended that because the bond states that the representations in the declaration shall constitute a part of the basis of the contract these representations should be considered warranties. But in the case of *American Popular L. Ins. Co. v. Day*, 39 N. J. L. 89, 23 Am. Rep. 198, the application for the policy involved contained an agreement that the answers and statements should be the basis and form part of the contract of the policy, and the policy further declared that the insurance was in consideration of the representations; and in that case the court held that the agreement and statements in the application were not warranties, and that the policy could be only avoided for fraud or intentional misrepresentation. It is well settled that forfeitures are never favored, and, if the contract does not specifically and definitely provide for such forfeiture, the courts will not by a species of construction read a forfeiture into it. So, in the construction of the provisions of this bond, if by any reasonable interpretation thereof a forfeiture of it can be avoided, such interpretation should be given to it, and the contract sustained. Taking into considera-

tion all of the terms contained in the "employer's declaration," it is shown that it was intended by the statements therein to represent the condition of the bank, and the accounts of the bank, as it was then understood, and the character and habits of the employee, Hockersmith, as then known to the employer. These were mere representations, and, if they were made honestly and in good faith, the fact that they were incorrect would not vitiate the bond. The testimony shows clearly that these representations were made in good faith, and that there was an honest basis for the making of the same. There had been a meeting of the board of directors, and a report of the condition of the bank was presented to them, and the books of the bank were before them. It is true that no expert accountant examined these books and accounts, but the terms of this declaration did not call for such an examination. The examination made was such as the board of directors were accustomed to make of the accounts of the bank in the ordinary discharge of their duties, and the statement set forth in the declaration was honestly made. We are therefore of the opinion that even though the above "employer's declaration" was duly authorized by the bank, and the statements therein were afterwards found to be incorrect, they were not warranties, nor were they of such a material and essential nature as that their incorrectness would work a forfeiture of the contract, if they were made in good faith.

3. It is urged by the appellant that the evidence does not show that the shortage amounted to \$10,000. The evidence shows that soon after the cashier, Hockersmith, absconded, the appellant sent to the Bank of Fulton an expert accountant for the purpose of going thoroughly through the books and accounts of the bank and finding out the amount of the shortage during the life of the bond,—between May 16, 1906, and May 16, 1907. This accountant testified that the amount of the shortage that occurred during that period was \$11,773.90. This shortage was made up of items to which the accountant testified, and the only items that were not established by competent testimony were the item of \$2,000 for currency shipped May 11, 1907, by the National Bank of Commerce of St. Louis, and the item of \$1,000 for currency shipped on May 8, 1907, by Exchange National Bank of Little Rock. The accountant testifies that he did not get the information as to these two items from the books of the Bank of Fulton, and that he only obtained the information from letters or statements contained in letters sent by the banks claiming to have shipped the

currency. Such letters were *ex parte* statements, and did not prove by themselves the statements therein contained. Such testimony was not competent to show that said items of currency had been actually shipped to and received by the Bank of Fulton or its cashier. The witness testified that he obtained this information outside of the books of the bank, and there was no competent evidence introduced relative to these two items. And the court is therefore of the opinion that these two items of the shortage have not been proved by competent evidence, and that the amount of the shortage that occurred during the life of the bond, as shown by competent evidence, is \$8,773.90.

If, therefore, the appellee will within fifteen days file a remittitur, so as to make the amount of judgment \$8,773.90, the judgment of the lower court will be affirmed; otherwise the judgment will be reversed, and the cause remanded for a new trial.

Battle, J., dissenting.

Petition for rehearing denied.

COLORADO SUPREME COURT.

S. JENSEN, Plff. in Err.,

v.

EAGLE ORE COMPANY.

(47 Colo. 306, 107 Pac. 259.)

Bailment — stolen property — right of bailee.

A bailee cannot relieve himself from the duty of redelivering the property to the bailor, by showing that at some unknown time it had been stolen by an unknown thief from an undisclosed owner, and that the bailor by reasonable inquiry could have ascertained that fact, and that the bailee had purchased the property from one claiming to be the agent of such owner.

(February 7, 1910.)

Note. — Right of bailee to assert against his bailor the hostile, adverse, paramount title of a third person.

- I. Nature of relation created by bailment, 682.
- II. Estoppel arising from relation.
 - a. In general, 683.
 - b. Where bailee retains possession of bailed articles, 684.
 - c. Where property is surrendered to the true owner, 686.
 - d. Where property surrendered to one neither the bailor nor the owner, 687.

ERROR to the District Court for Teller County to review a judgment dismissing the complaint in an action brought to recover the value of certain ore alleged to have been converted by defendant. Reversed.

The facts are stated in the opinion.

Messrs. Huff & Ferguson, for plaintiff in error:

A bailee cannot set up his bailor's want of title as a justification of his refusal to deliver.

Story, Bailm. 9th ed. § 266; Schouler, Bailments & Carriers, 3d ed. § 494; 3 Am. & Eng. Enc. Law, p. 756; 5 Cyc. Law & Proc. p. 172; Dougherty v. Chapman, 29 Mo. App. 241; Cole v. Wabash, St. L. & P. R. Co. 21 Mo. App. 443; The Idaho (Hentz

v. The Idaho) 93 U. S. 575, 23 L. ed. 978; Pulliam v. Burlingame, 81 Mo. 111, 51 Am. Rep. 229; Western Transp. Co. v. Barber, 56 N. Y. 552; Bates v. Stanton, 1 Duer, 79; King v. Richards, 6 Whart. 418, 37 Am. Dec. 420; Biddle v. Bond, 6 Best & S. 225, 11 Jur. N. S. 425, 34 L. J. Q. B. N. S. 137, 12 L. T. N. S. 178, 13 Week. Rep. 561, 3 Eng. Rul. Cas. 573; McKay v. Draper, 27 N. Y. 256; Parsons, Contr. 677; Sedgwick v. Macy, 24 App. Div. 1, 49 N. Y. Supp. 154.

Messrs. W. J. Chinn and Edward J. Boughton for defendant in error.

White, J., delivered the opinion of the court:

Jensen, the plaintiff in error, instituted this suit against the Eagle Ore Company,

II.—continued.

e. Where property taken from bailee *vi et armis*, 688.

f. As affected by nature of bailor's title, 688.

III. Where property taken in legal proceedings.

a. In general, 689.

b. Necessity that bailor be party to suit, 690.

c. Where proceeding is defective, 692.

d. Duty of bailee to give notice of proceeding to bailor, 693.

IV. Subsequent sale of bailed property by bailor, 694.

V. Effect of bad faith of bailee.

a. Where bailee accepts bailment with knowledge of adverse claim, 694.

b. Where bailee induces holder of paramount title to assert claim, 695.

c. Where bailee instigates commencement of action by adverse claimant, 695.

VI. Effect of special contract, 695.

VII. Waiver by bailee of right to make defense, 696.

VIII. Remedies of bailee.

a. Interpleader.

1. General rule, 696.

2. Where interpleader authorized by statute, 697.

3. Effect of bad faith of bailee, 697.

b. Miscellaneous remedies, 698.

I. Nature of relation created by bailment.

In considering the rule of estoppel as applied to a bailee, it is of importance to bear in mind the nature of the relation created by a bailment. The derivation of the word itself is of significance. According to Justice Story it is derived from the French word "bailler," which signifies to "deliver." Hence it is that the essential feature of a bailment is the express or implied agreement to return the subject-mat-

ter of the bailment, either on demand, or at an agreed time. It implies a trust that as soon as the purpose of the bailment is answered the bailed property shall be restored to the bailor. In the absence of an express agreement by the bailee to return the bailed property to the bailor, the law implies such an agreement. The relation has frequently been compared to the relation of landlord and tenant, principal and agent, and trustee and *cestui que trust*.

Thus in Pulliam v. Burlingame, 81 Mo. 111, 51 Am. Rep. 229, the court in considering the relation of bailor and bailee said: "The contract of bailment necessarily admits the right of property in the bailor, and the obligation to return it to him at the termination of the term of bailment. In other words a bailee when he receives the property by virtue of the bailment legally admits the right of the bailor to make the contract of bailment. After this subservient relation of the defendant to the plaintiff in respect to the property was established, the law forbids him to dispute the title of plaintiff. The relation is analogous to that which exists between landlord and tenant,—a relation which prevents the tenant from setting up against his landlord either an outstanding or self-acquired adverse title; and from attorning to a stranger without the consent of his landlord or in pursuance of a judgment or sale under execution or deed of trust, or forfeiture under mortgage."

The doctrine of estoppel as applied to the relation of bailor and bailee has frequently been said to be similar to that of landlord and tenant. Thus in H. K. Porter Co. v. Boyd, 96 C. C. A. 197, 171 Fed. 305, speaking on this subject the court said: "If one gains possession only by means of, and claims title solely under, an instrument of lease or bailment, he will, as a general rule, be stopped or precluded from disputing title with the other party to the contract during its continuance, and until he shall have surrendered or redelivered the property; but where he has otherwise gained possession, asserts ownership in himself, and neither claims nor defends, un-

to recover the value of certain ore and the sacks in which it was contained, alleged to have been delivered by the plaintiff to the defendant, and by the latter wrongfully converted to its own use.

The defendant is a corporation conducting and carrying on a general ore sampling business, and buying and selling ore. The pleadings admit, or the undisputed evidence shows, that plaintiff delivered to the defendant certain sacks of the value of \$40.75, containing ore of the value of several hundred dollars, under an agreement that defendant would crush and sample the ore and deliver said property to plaintiff upon upon demand, unless a sale thereof to the defendant should be agreed upon between said parties; that no sale was consum-

mated, and that plaintiff, prior to the bringing of the suit, made demand on defendant for the possession of said property, with which demand defendant refused to comply. The defense interposed is that plaintiff was never at any time the owner of the ore, or any part thereof, and never was entitled to its possession; that his possession was at all times unlawful and fraudulent; that the Cripple Creek District Mine Owners' & Operators' Association was the agent of the owners of all the ore, and entitled to the possession thereof; that said association asserted its right of ownership in said ore, and that defendant afterwards purchased it from said association and thus acquired title thereto. The affirmative allegations of the answer were denied by the

der, or by virtue of the instrument, there is no such estoppel. The court quotes with approval from Chief Justice Marshall in *Blight v. Rochester*, 7 Wheat. 535, 5 L. ed. 516, as follows: "The title of the lessee, is in fact the title of the lessor; he comes in by virtue of it, holds by virtue of it, and rests upon it to maintain and justify his possession. He professes to have no independent right in himself, and it is a part of the very essence of the contract under which he claims that the paramount ownership of the lessor shall be acknowledged during the continuance of the lease, and that possession shall be surrendered at its expiration. He cannot be allowed to controvert the title of the lessor without disparaging his own, and he cannot set up the title of another without violating that contract by which he obtained and holds possession, and breaking that faith which he has pledged, and the obligation of which is still continuing and in full operation." These principles, the court said, apply with equal force to leases of real estate, and to leases or bailments for hire of personal chattels, and warrant an estoppel or preclusion as to title only where those relying on such estoppel or preclusion obtain possession of the subject-matter of the lease or bailment under and by virtue of it.

And in *Thompson v. Williams*, 30 Kan. 114, 1 Pac. 47, the court said a bailee was estopped to deny his bailor's title even as is a tenant his landlord's.

This comparison is also made in *Bechtel v. Sheaffer*, 117 Pa. 555, 11 Atl. 889, where in the court, after adverting to the rule that an interpleader will not be awarded to relieve a party under an express promise to pay or perform against an antagonist an independent claim, remarked: "The same rule prevails also where an independent liability must of necessity arise out of the very nature of the relation subsisting between the parties, with respect to the subject-matter of dispute, as between landlord, and tenant, attorney and client, etc.; for, as a general rule, a tenant cannot deny his landlord's title, nor an attorney his client's right to money received for him as 33 L.R.A. (N.S.)

such; nor can a bailee ordinarily raise an interpleader between his bailor and one who asserts an independent, antagonistic and paramount title. But even a tenant who is under an express promise to pay rent may interplead his landlord and an opposing claimant, when the title of the latter is derived from the lessor after the lease, or generally when there is privity between the claimant and the lessor; as, for example, when the relation of mortgagor and mortgagee, trustee and *cestui que trust*, assignor and assignee, etc., has been created between them; in such case the tenant does not dispute the landlord's title. So in the case of an attorney, agent, or bailee, whenever the third person claims the debt or thing under a title derived from the bailor or principal, by assignment, sale, or mortgage, subsequent to the bailment or agency, he may compel the parties to interplead, for there is no denial of the original title or right; the only dispute is as to the effect of the subsequent act."

On this point in *Biddle v. Bond*, 6 Best & S. 225, 11 Jur. N. S. 425, 34 L. J. Q. B. N. S. 137, 12 L. T. N. S. 178, 13 Week. Rep. 561, 3 Eng. Rul. Cas. 573, the court said that the position of an ordinary bailee, where there has been no special contract or representation on his part, is very analogous to that of a tenant who, having accepted the possession of land from another, is estopped from denying his landlord's title unless he is evicted by title paramount.

II. Estoppel arising from relation.

a. In general.

Subject to many exceptions the general rule is that a bailment creates a relation between the bailor and the bailee of such a nature as to preclude the bailee from denying the title of his bailor to the property bailed, and from asserting a title thereto in himself or a third person as an excuse for refusing to redeliver the property to the bailor. *McCullough v. Root*, 8,

replication. The lawful existence of said Mine Owners' Association, and its power to act in the premises, was also put in issue. The answer in no wise disclosed the particular owner or owners of the ore for whom the said association was the alleged agent, nor did the evidence adduced give light thereon. The Cripple Creek District Mine Owners' & Operators' Association was brought into existence by a voluntary agreement, said to have been entered into among certain mine owners and operators of mines, for the purpose, as stated in said agreement, of forming "a co-operative alliance and association for the protection of the mining interests of said district, and the promotion of the welfare and prosperity of the mining industry." The

articles of agreement of the Mine Owners' Association were offered in evidence, and, over objections interposed, received. No proof was adduced as to the authenticity of the signatures appearing thereto, except solely as to that of this defendant. By agreement the cause was tried to the court without the intervention of a jury. The contract of bailment, and the possession of the property thereunder, having been admitted, the plaintiff presented his evidence of value of the property in question, and rested the case. Thereupon the defendant undertook to establish its affirmative defense, that the Cripple Creek District Mine Owners' & Operators' Association was the agent of the owner of said property, and entitled to its possession, and had asserted its

19 How. 349, 15 L. ed. 681; H. K. Porter Co. v. Boyd, 96 C. C. A. 197, 171 Fed. 305; Rosenfield v. Express Co. 1 Woods, 131, Fed. Cas. No. 12,060; Knight v. Bell, 22 Ala. 198; Powell v. Robinson, 76 Ala. 423; Young v. East Alabama R. Co. 80 Ala. 100; Jackson v. Jackson, 97 Ala. 372, 12 So. 437; Riddle v. Blair, 148 Ala. 461, 42 So. 560; Estes v. Boothe, 20 Ark. 583; Palmtag v. Doutrick, 59 Cal. 154, 43 Am. Rep. 245; Davis v. Donohoe-Kelly Bkg. Co. 158 Cal. 282, 92 Pac. 639; Barker v. S. A. Lewis Storage & Transfer Co. 79 Conn. 342, 118 Am. St. Rep. 141, 65 Atl. 143; Moses v. Taylor, 6 Mackey, 255; Atlantic & B. R. Co. v. Spires, 1 Ga. App. 22, 57 S. E. 973; Pepper v. James, 7 Ga. App. 518, 67 S. E. 218; Davis v. Williams, 8 Ga. App. 86, 68 S. E. 558; Great Western R. Co. v. McComas, 33 Ill. 185; Simpson v. Wrenn, 50 Ill. 222, 99 Am. Dec. 511; Foltz v. Stevens, 54 Ill. 180; Ohio & M. R. Co. v. Yohe, 51 Ind. 181, 19 Am. Rep. 727; Thompson v. Williams, 30 Kan. 114, 1 Pac. 47; Borron v. Landes, 1 Duv. 299; Britton v. Aymar 23 La. Ann. 63; Sherwood v. Neal, 41 Mo. App. 416; Hampton v. Swisher, 4 N. J. L. 66; Hendricks v. Mount, 5 N. J. L. 738, 8 Am. Dec. 623; Wheeler & W. Mfg. Co. v. Brookfield, 70 N. J. L. 703, 58 Atl. 352; Western Transp. Co. v. Barber, 56 N. Y. 544; Leoncini v. Post, 37 N. Y. S. R. 255, 13 N. Y. Supp. 825; Sedgwick v. Macy, 24 App. Div. 1, 49 N. Y. Supp. 154; Van Winkle v. United States Mail S. S. Co. 37 Barb. 122; Welles v. Thornton, 45 Barb. 390; Gerber v. Monie, 56 Barb. 652; Dunwoodie v. Carrington, 4 N. C. (2 Car. Law Repos. 469); Burnett v. Fulton, 48 N. C. (3 Jones, L.) 486; Maxwell v. Houston, 67 N. C. 305; Lain v. Gaither, 72 N. C. 234; Peebles v. Farrar, 73 N. C. 342; Colbath v. Hoerber, 43 Or. 366, 73 Pac. 10; Klein v. Patterson, 30 Pa. Super. Ct. 495; Tindall v. McCarthy, 44 S. C. 487, 22 S. E. 734; Freeman v. Perry, 25 Tex. 611; Texas Standard Cotton-Oil Co. v. National Cotton Oil Co. — Tex. Civ. App. —, 40 S. W. 159; Kelly v. Patchell, 5 W. Va. 585; Nudd v. Montayne, 38 Wis. 511, 20 Am. Rep. 25; Oehmen v. Portmann, 153 Mo. App. 240, 133 S. W. 104; 33 L.R.A. (N.S.)

Biddle v. Bond, 6 Best & S. 225, 11 Jur. N. S. 425, 34 L. J. Q. B. N. S. 137, 12 L. T. N. S. 178, 13 Week. Rep. 561, 3 Eng. Rul. Cas. 573; Cheeseman v. Exall, 6 Exch. 341, 20 L. J. Exch. N. S. 209; Hardman v. Willcock, 9 Bing. 382, note; Sheridan v. New Quay Co. 4 C. B. N. S. 618, 28 L. J. C. P. N. S. 58, 5 Jur. N. S. 248.

b. Where bailee retains possession of bailed articles.

The general rule that the bailee is estopped to deny his bailor's title to the bailed property applies where the bailee seeks to retain the possession of the property, and defend an action therefor by the bailor by showing an adverse paramount title in a third person, where he does not also show that, without his instigation, such title has been asserted, and that he defends upon such title by authority of the person in whom it is vested. Rosenfield v. Express Co. 1 Woods, 131, Fed. Cas. No. 12,060; Riddle v. Blair, 163 Ala. 314; 51 So. 14 former hearing, 148 Ala. 461, 42 So. 560; Croswell v. Lehman, 54 Ala. 363, 25 Am. Rep. 684; Estes v. Boothe, 20 Ark. 583; Palmtag v. Doutrick, 59 Cal. 154, 43 Am. Rep. 245; Dodge v. Meyer, 61 Cal. 405; Wetherly v. Straus, 93 Cal. 283, 28 Pac. 1045; Bondy v. American Transfer Co. — Cal. App. —, 115 Pac. 965; Great Western R. Co. v. McComas, 33 Ill. 185; Tolts v. Stevens, 54 Ill. 180; Borron v. Landes, 1 Duv. 299; Fisher v. Bartlett, 8 Me. 122, 22 Am. Dec. 225; Cole v. Wabash, St. L. & P. R. Co. 21 Mo. App. 443; Dougherty v. Chapman, 29 Mo. App. 233; Sherwood v. Neal, 41 Mo. App. 416; Oehman v. Portmann, 153 Mo. App. 240, 133 S. W. 104; Western Transp. Co. v. Barber, 56 N. Y. 544; Sedgwick v. Macy, 24 App. Div. 1, 49 N. Y. Supp. 154; Lain v. Gaither, 72 N. C. 234; Colbath v. Hoerber, 43 Or. 366, 73 Pac. 10; McCafferty v. Brady, 5 Sadler (Pa.) 565, 19 W. N. C. 553, 9 Atl. 37; Kelly v. Patchell, 5 W. Va. 585; Nudd v. Montayne, 38 Wis. 511, 20 Am. Rep. 25; Betteley v. Reed, 4 Q. B. 511, 7 Jur. 507, 3 Gale & D. 561, 12 L. J. Q. B. N. S. 172;

right of ownership thereto. The trial court, however, over plaintiff's objections and exceptions, declared and held, that it was only necessary for the defendant to establish that the possession of the ore by plaintiff was wrongful and unlawful; that it was wholly immaterial to whom the ore belonged, or as to the agency of said association; that if the evidence convinced the court that the ore was stolen, though it failed to disclose from whom, by whom, or when, and that plaintiff by any reasonable inquiry could have ascertained before he purchased it that it was stolen, the plaintiff could not recover. Upon this theory the court proceeded, and so limited the inquiry; and at the close of the evidence dismissed the complaint. A motion for a new

trial was filed, argued, and overruled, and judgment entered in favor of defendant for

This court is without jurisdiction to entertain the appeal. The judgment is not for such sum, nor does it relate to a mat-costs, to review which plaintiff appeals. ter, that may be reviewed on appeal. Section, 388, Mill's Anno. Code. While the defendant has filed no brief, it has nevertheless, through its attorneys of record, entered its appearance by stipulation within the time a writ of error might have been sued out, and scire facias served. Therefore, under § 388a of the Code, and the decisions of this court, the cause will be entered as pending on error, and we will proceed to dispose of the case. Brady v.

Biddle v. Bond, 6 Best. & S. 225, 11 Jur. N. S. 425, 34 L. J. Q. B. N. S. 137, 12 L. T. N. S. 178, 13 Week. Rep. 561, 3 Eng. Rul. Cas. 573; Cheeseman v. Exall, 6 Exch. 341, 20 L. J. Exch. N. S. 209.

Compare with Lavelle v. Belliu, 121 Mo. App. 442, 97 S. W. 200, wherein it was held that a bailee of lost money was entitled to deny the bailor's title thereto, the bailor being the finder, and it appearing that he asserted his right to the money for the purpose of converting it to his own use. This conclusion was reached on the theory that the bailee could not have returned the money to the bailor without being a *particeps criminis*, an accessory to the commission of a felony,—and hence it became his duty to retain it until the owner could be found.

Under no circumstances can a bailee set up a title another does not assert, and keep for himself the bailed goods as his own. Riddle v. Blair, 148 Ala. 461, 42 So. 560; Crowell v. Lehman, 54 Ala. 363, 25 Am. Rep. 684.

A bailee can only assert the title of a third person against his bailor when he defends on such a title and by authority of the holder thereof. Palmtag v. Doutrick, 59 Cal. 154, 43 Am. Rep. 245; Dodge v. Meyer, 61 Cal. 405; Wetherly v. Straus, 93 Cal. 283, 28 Pac. 1045; Bondy v. American Transfer Co. — Cal. App. —, 115 Pac. 965.

The bailee incontestably concedes the title to the bailed property to be in the bailor, unless he can show that the true owner is making an adverse claim. Oehmen v. Portmann, 153 Mo. App. 240, 133 S. W. 104. He cannot set up the title of a third person unless the owner has claimed the property, and the bailee has yielded to the claim. Sedgwick v. Macy, 24 App. Div. 1, 49 N. Y. Supp. 154.

In Dunwoodie v. Carrington, 4 N. C. (2 Car. Law Repos. 469) the court said that, by the bailment, the bailee had admitted the right of the bailor to the property, and had taken possession under it, and added: "That possession he is bound to restore to the person from whom he ob-

tained it, and cannot with any shadow of justice consider himself a trustee for anyone who, in his conception, may have a better right to the property."

It is no defense to bailees that the title to the bailed property is in a third person, where such third person has not authorized the bailees to vindicate his title, and as to that defense they are officious intermeddlers with business that does not concern them, they not pretending to have any title themselves, or pretending to connect themselves with any third person who has a better title, or any title at all. Lain v. Gaither, 72 N. C. 234.

In Great Western R. Co. v. McComas, 33 Ill. 185, the court said that it was very questionable if a carrier would be permitted of his own motion to set up as a defense against his bailor the right of the true owner of the property.

That a horse was taken up by the bailor as an estray is no defense for the failure of the bailee to return it as agreed. Borron v. Landes, 1 Duv. 299.

While a bailee may yield to the claim of a third person who is the true owner of the property, yet the mere fact that title is in a third person is not a defense in his favor in an action against him by the bailor. Cole v. Wabash, St. L. & P. R. Co. 21 Mo. App. 443; Dougherty v. Chapman, 29 Mo. App. 233; Sherwood v. Neal, 41 Mo. App. 416.

A receiptor of money, by merely showing that the legal title thereto was in the estate of a deceased person, does not relieve himself from the obligation to return the money according to his agreement. McCafferty v. Brady, 5 Sadler (Pa.) 565, 19 W. N. C. 553, 9 Atl. 37.

The bailee must either have yielded to an adverse paramount title asserted by a third person, or he must rely upon such title under authority of such person (Bet-teley v. Reed, 4 Q. B. 511, 7 Jur. 507, 3 Gale & D. 561, 12 L. J. Q. B. N. S. 172); or such third person must have asserted and maintained or prosecuted his adverse paramount title to such an extent as to be equivalent to an eviction of the bailee

People, 45 Colo. 364, 101 Pac. 340; McVicker v. Rouse, 44 Colo. 255, 98 Pac. 807.

We are clearly of the opinion that the trial court adopted an erroneous view of the law, and thereby committed reversible error. The general rule is that the bailee can discharge his liability to the bailor only by returning the identical thing which he has received, or its proceeds, under the terms of the bailment; but to this rule there are certain exceptions. The bailee may show that the property has been taken from him by process of law, or by a person having a paramount title, or perhaps excuse his default in some other way. But he cannot set up *jus tertii* against his bailor, however tortious the possession of the latter, unless the true owner has

claimed the property and the bailee has yielded to the claim. Story, Bailm. §§ 450, 582; Schouler, Bailments & Carriers, § 494. The correct rule, stated in 9 Current Law, pp. 325, 326, is that "a bailee cannot set up title in himself, but may, if goods are claimed by third person, refuse at his peril to deliver to bailor, and may protect himself from liability by showing delivery on demand to true owner, but cannot by mere assertion of right in another avoid liability for conversion by himself." The following authorities are analogous in principle and are cited in support of the rule. Atlantic & B. R. Co. v. Spire, 1 Ga. App. 22, 57 S. E. 973; Barker v. S. A. Lewis Storage & Transfer Co. 79 Conn. 342, 118 Am. St. Rep. 141, 65 Atl. 143; Klein v. Pat-

(Biddle v. Bond, 6 Best & S. 225, 11 Jur. N. S. 425, 34 L. J. Q. B. N. S. 137, 12 L. T. N. S. 178, 13 Week. Rep. 561, 3 Eng. Rul. Cas. 573; Cheeseman v. Exall, 6 Exch. 341, 20 L. J. Exch. N. S. 209; Hardman v. Willcock, 9 Bing. 382, note; Sheridan v. New Quay Co. 4 C. B. N. S. 618, 28 L. J. C. P. N. S. 58, 5 Jur. N. S. 248).

c. Where property is surrendered to the true owner.

Where he acts in good faith and without fraud or connivance, the relation created by a bailment does not preclude the bailee from defending an action against him by his bailor to recover for his failure to redeliver the bailed goods, by showing that the property was taken from him by, or that he surrendered the same to an adverse paramount title asserted by a third person. The Idaho (Hentz v. The Idaho) 93 U. S. 575, 23 L. ed. 978; Rosenfield v. Express Co. 1 Woods, 131, Fed. Cas. No. 12,060; Young v. East Alabama R. Co. 80 Ala. 100; Jackson v. Jackson, 97 Ala. 372, 12 So. 437; Riddle v. Blair, 148 Ala. 461, 42 So. 560; Estes v. Boothe, 20 Ark. 583; Hayden v. Davis, 9 Cal. 573; Palmtag v. Doutrick, 59 Cal. 154, 43 Am. Rep. 245; Dodge v. Meyer, 61 Cal. 405; Wetherly v. Straus, 93 Cal. 283, 28 Pac. 1045; Bondy v. American Transp. Co. — Cal. App. —, 115 Pac. 965; Atlantic & E. R. Co. v. Spire, 1 Ga. App. 22, 57 S. E. 973; Pepper v. James, 7 Ga. App. 518, 67 S. E. 218; American Exp. Co. v. Greenhalgh, 80 Ill. 68; Ohio & M. R. Co. v. Yohe, 51 Ind. 181, 19 Am. Rep. 727; Britton v. Aymar, 23 La. Ann. 63; Thomas v. Northern P. Exp. Co. 73 Minn. 185, 75 N. W. 1120; Cole v. Wabash, St. L. & P. R. Co. 21 Mo. App. 443; Dougherty v. Chapman, 29 Mo. App. 233; Sherwood v. Neal, 41 Mo. App. 416; Wolfe v. Missouri P. R. Co. 97 Mo. 473, 3 L.R.A. 539, 10 Am. St. Rep. 331, 11 S. W. 49; Walter A. Wood Harvester Co. v. Dobry, 59 Neb. 590, 81 N. W. 611; Shellenberg Tremont, E. & M. Valley R. Co. 45 Neb. 487, 50 Am. St. Rep. 561, 63 N. W. 859; Barron v. Cobleigh, 11 N. H. 557, 35 Am. 33 L.R.A. (N.S.)

Dec. 507; Healey v. Hutchinson, 66 N. H. 316, 20 Atl. 332; Western Transp. Co. v. Barber, 58 N. Y. 544; Mullins v. Chickering, 110 N. Y. 513, 1 L.R.A. 467, 18 N. E. 377; Sedgwick v. Macy, 24 App. Div. 1, 49 N. Y. Supp. 154; Van Winkle v. United Stated Mail S. Co. 37 Barb. 122; Welles v. Thornton, 45 Barb. 390; Colbath v. Hoefer, 43 Or. 366, 73 Pac. 10; Floyd v. Bovard, 6 Watts & S. 75; King v. Richards, 6 Whart. 418, 37 Am. Dec. 420; Klein v. Patterson, 30 Pa. Super. Ct. 495; Roberts v. Yarboro, 41 Tex. 449; Kelly v. Patchell, 5 W. Va. 585; Wells v. American Exp. Co. 55 Wis. 23, 42 Am. Rep. 695, 11 N. W. 537, 12 N. W. 441; Oehmen v. Portmann, 153 Mo. App. 240, 133 S. W. 104; Sheridan v. New Quay Co. 4 C. B. N. S. 618, 28 L. J. C. P. N. S. 58, 5 Jur. N. S. 248.

In Ross v. Edwards, 73 L. T. N. S. 100, 11 Reports, 574, Lord Macnaghten asserted the rule to be that in an ordinary bailment the bailor represents to the bailee that he may safely accept the bailment. On that representation the bailee promises to redeliver; hence it is clear that the bailee, after acknowledging that he holds the goods on account of the bailor, cannot say to the bailor: "The goods are not yours." But it is equally clear that, if there is that which amounts to eviction by title paramount, the bailee is discharged from his promise. In that event he is under no liability to the bailor, unless he has made a special contract with him or is in some way to blame for his loss.

In Young v. East Alabama R. Co. 80 Ala. 100, the court said the reason of the rule is that the bailee of the goods can be in no better situation than the bailor from whom he received them, and the true owner or other person entitled to their custody, having a special property in them, can sue either the bailor or bailee and recover from them, and no man shall be rebuked by the law for doing what the law would compel him to do.

Nudd v. Montayne, 38 Wis. 511, 20 Am. Rep. 25, approves the English doctrine that the title of a third person must be assert-

terson, 30 Pa. Super. Ct. 495, 500; Riddle v. Blair, 148 Ala. 461, 42 So. 560. In *The Idaho* (Hentz v. The Idaho), 93 U.S. 575, 581, 23 L. ed. 978, 980, the rule stated and approved is "that a bailee cannot avail himself of the title of a third person (though that person be the true owner) for the purpose of keeping the property for himself, nor in any case where he has not yielded to the paramount title. If he could, he might keep for himself goods deposited with him without any pretense of ownership. But if he has performed his legal duty by delivering the property to its true proprietor at his demand, he is not answerable to the bailor." "The relation between bailor and bailee, and that of depositor and depositary of money, is analogous to that of landlord

and tenant. Until something equivalent to title paramount has been asserted against the bailee or depositary, he will be estopped to deny the title of his bailor to the goods intrusted to him." Bigelow, *Estoppel*, 4th ed. 490. Public policy and reason both combine to require that a bailee shall never be permitted to controvert the bailor's title, or set up against him a title acquired by himself during the bailment, which is hostile to, or inconsistent in character with, that which he acknowledged in accepting the bailment. This rule, however, does not preclude the bailee pleading and showing that he has been dispossessed by superior right, or that he holds the thing bailed, subject to such known right then asserted, and not by him

ed to such extent as to be equivalent to an eviction in order to entitle the bailee to take advantage of the same as against the bailor.

Where, upon depositing articles with a bailee, the bailor instructs him that such articles are to be returned to the bailor personally, or to a designated third person at their demand, the bailee is not liable to the bailor if he thereafter delivers the articles to such third person, upon demand being made to him, such third person being the true owner of the property, the bailor merely acting as her agent in making the bailment. *Davis v. Donohoe-Kelly Bkg. Co.* 152 Cal. 282, 92 Pac. 639.

The rule that a bailee is estopped to deny the title of his bailor is, in general, limited to cases where he seeks to himself hold the property by setting up title in a third person, and does not apply to cases where he yields to such title and delivers possession of the property upon demand of the holder thereof. *Western Transp. Co. v. Barber*, 56 N. Y. 544.

The receiptor of attached property is not liable therefor where it is taken from him upon a paramount title asserted by a third person. *Barron v. Cobleigh*, 11 N. H. 557, 35 Am. Dec. 505; *Healey v. Hutchinson*, 66 N. H. 316, 20 Atl. 332.

That a common carrier delivered property in its hands for shipment, on demand to a stranger to the shipment, who was the rightful owner and entitled to the possession thereof, is a good defense against the claim of the bailor for failure to redeliver. *Thomas v. Northern P. Exp. Co.* 73 Minn. 185, 75 N. W. 1120.

And while a common carrier cannot of his own motion set up against his bailor an adverse title in a third person, he may do so, however, when he has delivered the consigned goods to such third person upon his demand. *Rosenfield v. Express Co.* 1 Woods, 131, Fed. Cas. No. 12,060.

Under a statute making it a misdemeanor for a warehouseman to part with the possession of stored property unless same is removed from his custody by operation of law, he cannot defend his failure to de-

liver the property upon the demand of the bailor, on the ground that he has delivered to another, and justify under that other's title, and he will not be permitted to dispute his bailor's title. Such a statute is valid, since it is consistent with public policy to require one out of possession, in asserting a claim of property by process of law, to establish his right while it is still in the hands of the warehouseman, or otherwise to relieve the warehouseman from liability, if he in the meantime delivers it to the bailor. *Wheeler & W. Mfg. Co. Brookfield*, 70 N. J. L. 703, 58 Atl. 352.

d. Where property surrendered to one neither the bailor nor true owner.

It constitutes a wrongful conversion of the bailed property for the bailee to surrender it to, or permit a third person to obtain possession of it, where such person is not the true owner. And it is no defense to the bailee in an action against him by the bailor for such wrongful conversion, that the title to the bailed property at the time of the bailment was in fact in another. *Estes v. Boothe*, 20 Ark. 583; *Riddle v. Blair*, 163 Ala. 314, 51 So. 14; *Roberts v. Stuyvesant Safe Deposit Co.* 123 N. Y. 57, 9 L.R.A. 438, 20 Am. St. Rep. 718, 25 N. E. 294.

Thus the fact that the bailor acted in the bailment as agent for the true owner is no defense to the bailee, who has turned the property over to a third person. *Estes v. Boothe*, 20 Ark. 583.

Neither is it a defense that the bailee doubts the bailor's title to the property, or that a third person claims the same, where the bailee retains his possession or has permitted another to convert it to his own use. *Riddle v. Blair*, 163 Ala. 314, 51 So. 14.

And while a bailee who permits the property of the bailor to be taken by a stranger may excuse himself by showing that he yielded to the power of legal process, it does not follow that a seizure under such process, after the bailee has negligently allowed the property to pass into the hands

known prior to the bailment. 2 Am. & Eng. Enc. Law, p. 62.

Between the plaintiff and the defendant, the property was the plaintiffs. By accepting it under the contract of bailment the defendant not only admitted the plaintiff's title thereto, but also assumed with respect to that property, a position of trust and confidence which continues until the property is returned or lawfully accounted for. It was incumbent upon defendant, in order to relieve itself of the redelivery of the property or its proceeds to the plaintiff, to establish by a preponderance of the evidence that it actually delivered the property to the true owner on his demand. The defendant could not lawfully account for the property, and relieve itself of its

contractual obligation to the plaintiff, by showing that the property had been, before plaintiff secured possession thereof, stolen at some unknown time, by an unknown thief, from an unknown and unascertained owner, and that the bailee by reasonable inquiry could have ascertained such facts. It would be a serious reproach to the administration of justice if our courts should adopt a rule that permitted one to acquire possession of property from another under a specific contract to return it, and then subsequently repudiate that contract, and retain possession of the property, under a claim of ownership, acquired from one not specifically shown to have had title thereto. Such a procedure would have close resemblance to theft by sanction of

of trespassers, or persons who have no right to it, is any protection to him, in an action by the bailor. And where the bailee permits the property to be taken from his custody without using proper diligence and care to retain or reclaim it, the bailors cause of action immediately accrues and cannot be defeated by the action of another party, seeking to establish claims against the bailor. *Roberts v. Stuyvesant Safe Deposit Co.* 123 N. Y. 57, 9 L.R.A. 438, 20 Am. St. Rep. 718, 25 N. E. 294.

e. Where property taken from bailee vi et armis.

In the early case of *Shelbury v. Scottsford*, Yelv. 23, it was held to be a good defense in an action by the bailor against the bailee, to show that the bailed property was taken from the bailee with force and arms, under a paramount title. It is, however, said that this would not be a good defense had the bailee suffered the holder of the paramount title to take possession of the property by fraud or covin.

Seizure of the bailed property in the hands of the bailee, under and by authority of the Treasury agents of the United States, is a good excuse on the part of the bailee for not retaining possession of the bailed property and delivering same to the bailor upon demand. *Britton v. Aymar*, 23 La. Ann. 63.

That the bailed property was taken from the bailee by the military department of the government is a good defense to an action by the bailor for the property. *Watkins v. Roberts*, 28 Ind. 167. To same effect, where property was taken by Confederate soldiers, is *Nashville & C. R. Co. v. Estes*, 10 Lea, 755.

f. As affected by nature of bailor's title.

The doctrine has been frequently asserted that where the bailor has acquired his title tortiously his bailee may surrender to the true owner, and rely upon this fact as a defense to any action by the bailor for his failure to restore the bailed property. *Hayden v. Davis*, 9 Cal. 573; *Wether-* 33 L.R.A. (N.S.)

ly v. Straus, 93 Cal. 283, 28 Pac. 1045; *Bates v. Stanton*, 1 Duer, 79; *Decan v. Shipper*, 35 Pa. 239, 78 Am. Dec. 334; *Floyd v. Bovard*, 6 Watts & S. 75; *King v. Richards*, 6 Whart. 418, 37 Am. Dec. 420; *Hardman v. Willcock*, 9 Bing. 382, note; *Cheeseman v. Exall*, 6 Exch. 41, 20 L. J. Exch. N. S. 209.

Thus the rule has been asserted that where the bailor has obtained possession of the bailed property by felony, force, or fraud, it is a bar to his action against the bailee for the property, that the latter has surrendered to the true owner. *Bates v. Stanton*, 1 Duer, 79.

And that it is a defense to the bailee in an action against him by the bailor, that the bailor's possession of the bailed property was obtained by fraud, and that the true owner has made a demand upon the bailee, for the articles, and has forbidden their delivery to the bailor. *Hayden v. Davis*, 9 Cal. 573.

In *Wetherly v. Straus*, 93 Cal. 283, 28 Pac. 1045, the court remarked that when the bailor has obtained the property by some fraud practised upon the true owner, the bailee can, upon the authority of the true owner or when he has been forbidden to make delivery of the property, defend upon such true owner's title; but he always assumes such defense at his peril, and he takes upon himself the burden of showing the right to retain the property.

While the language of the foregoing cases might indicate that this general rule applied only where the bailor acquired the bailed property tortiously, yet where the question has been squarely presented to the court in cases where the bailor's title to the bailed property was not obtained tortiously, and his claim thereto, is in good faith, even though mistakenly made, it has been held that it is immaterial how the bailor obtained the property, that, in any event, if the bailor is not the true owner the bailee has a right to deliver the property to the true owner upon demand by him, or surrender the same through legal proceedings and the loss of the property in such a manner will constitute a

law, and cannot be approved. If the bailor has no title, the bailee can have none; for the bailor can give no better than he has. Still without absolute title the bailor may have the right of possession, and the bailee certainly cannot dispute that right, unless by virtue of a specific title asserted, paramount to that of the bailor. *Bartels v. Arms*, 3 Colo. 72, 75; *Barker v. S. A. Lewis Storage & Transfer Co.* 79 Conn. 342, 118 Am. St. Rep. 141, 65 Atl. 143. In *Armory v. Delamirie*, 1 Strange, 504, 10 Mor. Min. Rep. 66, it is held that the finder of a jewel, though he does not by such finding acquire an absolute property or ownership, yet he has such a property as will enable him to keep it against all but the rightful owner, and may recover damages

from a bailee for its conversion. And in *Anderson v. Gouldberg*, 51 Minn. 294, 296, 53 N. W. 636, 637, it is said: "One who has acquired the possession of property, whether by finding, bailment, or by mere tort, has a right to retain that possession as against a mere wrongdoer who is a stranger to the property. Any other rule would lead to an endless series of unlawful seizures and reprisals in every case where property had once passed out of the possession of the rightful owner."

From what has been said, it necessarily follows that the judgment must be, and accordingly is, reversed, and the cause remanded.

Steele, Ch. J., and Bailey, J., concur.

good defense against any action by the bailor for failure to redeliver. The Idaho (*Hentz v. The Idaho*) 93 U. S. 575, 23 L. ed. 978.

Thus it has been held that, as against the bailor having no title, the bailee has a right to deliver the property to the true owner upon demand by him, without reference to the mode in which the bailor obtained possession. When the owner comes and demands his property, he is entitled to its immediate delivery, and it is the duty of the possessor to make it. The law will not adjudge the performance of this duty tortious as against the bailor having no title. *Western Transp. Co. v. Barber*, 56 N. Y. 544.

The doctrine is also asserted in *Biddle v. Bond*, 6 Best & S. 225, 3 Eng. Rul. Cas. 573, that it is immaterial how the bailor obtained the property in so far as affecting the right of the bailee to set up the *ius tertii*. In this case the court, after pointing out that while in *Hardman v. Willcock*, 9 Bing. 382, note. And *Cheeseman v. Exall*, 6 Exch. 341, 20 L. J. Exch. N. S. 209, the plaintiff had obtained the goods by fraud upon the person whose title was set up, added: "We do not think that this circumstance alters the law on the subject. The position of the bailee is precisely the same whether his bailor was honestly mistaken as to the rights of the third person, or fraudulently acting in derogation of them."

III. Where property taken in legal proceedings.

a. In general.

Subject generally to the performance by the bailee of certain duties hereinafter considered, in an action against him by the bailor of property to recover same or the value thereof, it is a good defense that the property was taken from him upon legal process fair on its face. *Stiles v. Davis*, 1 Black, 101, 17 L. ed. 33; *Robinson v. Memphis & C. R. Co.* 9 Fed. 129; *a. c.* on 33 L.R.A. (N.S.)

subsequent appeal 16 Fed. 57; *Lemont v. New York, L. E. & W. Co.* 28 Fed. 920; *The M. M. Chase*, 37 Fed. 708; *Wetherly v. Straus*, 93 Cal. 283, 28 Pac. 1045; *Savannah, G. & N. A. R. Co. v. Wilcox*, 48 Ga. 432; *Ohio & M. R. Co. v. Yohe*, 51 Ind. 181, 19 Am. Rep. 727; *Indiana, I. & I. R. Co. v. Doremeyer*, 20 Ind. App. 611, 67 Am. St. Rep. 264, 50 N. E. 497; *Stephens v. Vaughan*, 4 J. J. Marsh, 206, 20 Am. Dec. 216; *Fisher v. Bartlett*, 8 Me. 122, 22 Am. Dec. 225; *French v. Star Union Transp. Co.* 134 Mass. 288; *Pingree v. Detroit, L. & N. R. Co.* 66 Mich. 144, 11 Am. St. Rep. 479, 33 N. W. 298; *Cooley v. Minnesota Transfer R. Co.* 53 Minn. 332, 39 Am. St. Rep. 609, 55 N. W. 141; *Nanson v. Jacob*, 93 Mo. 331, 3 Am. St. Rep. 531, 6 S. W. 246; *Walter A. Wood Harvester Co. v. Dorby*, 59 Neb. 590, 81 N. W. 611; *McVeagh v. Atchison, T. & S. F. R. Co.* 3 N. M. 327, 5 Pac. 457; *Roberts v. Stuyvesant Safe Deposit Co.* 123 N. Y. 57, 9 L.R.A. 438, 20 Am. St. Rep. 718, 25 N. E. 294; *Bliven v. Hudson River R. Co.* 35 Barb. 188, affirmed in 36 N. Y. 403; *Van Winkle v. United States Mail S. S. Co.* 37 Barb. 122; *Livingston v. Miller*, 48 Hun, 232, 16 N. Y. S. R. 71; *Glass v. Hauser*, 40 Misc. 661, 83 N. Y. Supp. 177; *Stanford S. B. Co. v. Gibbons*, 9 Wend. 327; *Edson v. Weston*, 7 Cow. 278; *Jewett v. Olsen*, 18 Or. 421, 17 Am. St. Rep. 745, 23 Pac. 262; *Burton v. Wilkinson*, 18 Vt. 186, 46 Am. Dec. 145; *Verrall v. Robinson*, 2 Cromp. M. & R. 495, 4 Dowl. P. C. 242, 1 Gale, 244, 5 Tyrw. 1069; *Ross v. Edwards*, 73 L. T. N. S. 100, 11 Reports, 574.

The rule that a bailee cannot deny the title of his bailor has no application where the bailee has been compelled, by action of which the bailor had notice, to pay for the property to one having the true title. *Cook v. Holt*, 48 N. Y. 275.

A carrier, like other bailees, may set up the *ius tertii*, and the valid process from a court to which the carrier is subject, demanding the possession of the goods, is an excuse for nondelivery. It is the *vis major*

of the law, and public policy, which demands obedience to the process of the court, overrides that other policy which requires the carrier to perform his contract of carriage. This protection is afforded, whatever the form of action for nondelivery against the carrier may be, if by its process the goods are taken from him. *Robinson v. Memphis & C. R. Co.* 9 Fed. 129, s. c. on subsequent appeal 16 Fed. 57.

In *Burton v. Wilkinson*, 18 Vt. 186, 46 Am. Dec. 145, a leading case on this subject, the doctrine is asserted that if bailed goods are taken from a wharfinger, or warehouseman by legal process, the wharfinger or warehouseman, on this ground, may protect himself in a suit brought against him by the owner. So, if the person from whom the wharfinger or warehouseman received the goods, claims the same by a title illegal, so that he cannot lawfully hold them, and they are taken by authority of the law, out of the custody and care of the wharfinger, the latter may show this as an excuse for not delivering them.

Seizure by legal process is an implied exception to a carrier's contract limiting *pro tanto* the general rule of the common law that a carrier is liable for nondelivery under a bill of lading for any causes not excepted therein. *The M. M. Chase*, 37 Fed. 708.

But a bailee cannot lightly shake off his obligation to defend his possession against an action at law with reference thereto, to which he alone is a party and hence recognized as having a right to defend upon any loose theory that there is something in legal process alone which protects him; he must do in and about that process all that can be done to defend against it, or else call in his bailor to defend for himself. *Robinson v. Memphis & C. R. Co.* 16 Fed. 57.

b. Necessity that bailor be party to suit.

By the weight of authority, in order that legal proceedings operate in favor of a bailee to bar the claim of the bailor for a redelivery of the property without also establishing the adverse title upon which it was taken, it is not sufficient that the bailee show merely that the bailed property was taken from him upon process fair upon its face. He must also show that the bailor was a party to the proceedings, or that he was heard therein or had an opportunity to be heard.

On this point, see *Schrauth v. Dry Dock Sav. Bank*, 86 N. Y. 390, wherein, in holding it not to be a defense to a bailee that he had paid or delivered money deposited with him to a third person, in reliance upon an order and judgment of the court in a proceeding to which the bailor was not a party, and of which he had no notice, and as to which he was not heard, the court said that if the payment by the bailee un-

der such circumstances is held to be valid, then the bailor has been deprived of her property without due process of law, and her constitutional rights thus violated, and added: "It can never be a defense that one who owes me money has, by an order or judgment of a court in a proceeding to which I was not a party, been compelled to pay or deliver the money to another. If such were the rule, a bill of interpleader would rarely have been necessary, as the judgment of a court would always protect a defendant. The very object of interpleading conflicting claimants to money in the hands of a party willing to pay is to procure an adjudication which will protect him against double payment. In the case of conflicting claimants, an adjudication and payment, in an action by one claimant, would not bar the right of the other claimant, and no statute constituting such a bar could be upheld. Here, if plaintiff's husband had sued the bank and recovered a judgment for this money, payment of such judgment would not have furnished a defense to an action by her to recover the same money. And certainly this order had no greater or more binding force than a judgment would have had. The general rule which holds that one shall not be affected by an adjudication to which he is not a party may sometimes work hardship, but the cases must be very rare in which a party holding property upon which there are conflicting claims cannot protect himself against double liability. Here the defendant knew that the plaintiff deposited this money as her own and that she claimed it, and yet, without any effort to protect her rights, it paid the money in pursuance of an order made in a proceeding to which she was not a party. The bank should have resisted payment, or in some way made her a party to the proceeding."

As to the application to such a state of facts, of the general rule that a common carrier or other bailee can show in defense of an action against him for the property intrusted to him by the bailor, that it has been taken from him by legal process, the court in the foregoing case said, that the rule therein asserted and applied was not in conflict with the latter rule, and added: "The bailee is bound to exercise such care as the law requires over the property committed to him, and he is held not to have violated his duty in that respect if he surrenders the property upon legal process without fault or collusion, and gives notice of the surrender to the bailor. But these decisions give no countenance to the claim that a debtor can discharge his debt by either voluntary or compulsory payment to some one besides the creditor."

Considering this point in *Barnard v. Kobbe*, 3 Daly, 35, the court said that the due process of law which would exonerate a bailee from redelivery of the bailed property is that which is set in motion directly against the bailor; that as between the

two the bailor was prima facie the true owner, and a levy upon the bailed property under an attachment against a third person does not, as between the parties to the bailment, place the bailed goods or their proceeds in the custody of the law. Hence if the goods are removed by force under an attachment, the bailee is bound to treat such acts as a naked trespass, and to protect his bailor. Otherwise he adopts the situation of the attaching creditors, with all its attendant peril.

To the same effect, also, is *Edwards v. White Line Transit Co.* 104 Mass. 159, 6 Am. Rep. 213, which holds that the seizure of goods upon an attachment against a third person does not exonerate a carrier from his duty to deliver the goods on his contract or his obligation as carrier, although it does relieve him from an action of trover for the conversion of the property.

It is no answer by the bailee of a certificate of deposit left with him for safe-keeping, that the certificate belonged to the husband of the bailor, and that it had been garnished in his hands by the creditors of such husband, and that he was holding same for their benefit, where the husband does not authorize such defense, and as a matter of fact gave the deposit to the wife, although his creditors claim that he did so fraudulently; the latter claim not being a proper ground of defense. *Wetherly v. Straus*, 93 Cal. 283, 28 Pac. 1045.

Stephens v. Vaughan, 4 J. J. Marsh. 206, 20 Am. Dec. 216, holds that a bailee who covenants to redeliver the bailed property to the bailor is not excused therefrom by the fact that the property was taken from him by the sheriff in proceedings against another than the bailor, and to which neither the bailor nor bailee is a party.

A bailee of property to be returned to a sheriff from whom he had received it, and who had attached same, cannot defend an action for the possession of the property by the sheriff by showing that, in a trial between the plaintiff in the attachment and a third person, the property had been proved to belong to such third person, and such fact does not authorize the bailee to surrender the property to claimant without the authority of the plaintiff in the attachment. *Foltz v. Stevens*, 54 Ill. 180.

In *Stiles v. Davis*, 1 Black, 101, 17 L. ed. 33, the doctrine is asserted that the seizure of goods under transportation by a carrier will relieve the carrier from liability to the consignor or consignee in an action of trover for wrongful conversion although such seizure is by writ of attachment running against a third person. The court said that, after the seizure of the goods by the sheriff under the attachment, they are in the custody of the law, and the defendant can not comply with the demand of the plaintiff without a breach of it even admitting the goods to have been at the time in his actual possession, and added: "It is true that these goods have been delivered 33 L.R.A. (N.S.)

to the defendant as carriers by the plaintiffs to be conveyed for them to the place of destination, and were seized under an attachment against third persons, but this circumstance did not impair the legal effect of the seizure or custody of the goods under it, so as to justify the defendant in taking them out of the hands of the sheriff. The right of the sheriff to hold them was a question of law, to be determined by the proper legal proceedings and not at the will of the defendant nor that of the plaintiffs." The court concluded that the plaintiffs had mistaken their remedy, and said that they should have brought their action against the officer who seized the goods, or against the plaintiffs in the attachment suit if the seizure was made under their direction. As to these parties the court said the process being against third persons, it would have furnished no justification if the plaintiffs could have maintained a title and right to possession in themselves.

While the foregoing case is apparently in conflict with the general doctrine heretofore asserted, yet this conflict is more apparent than real. It is to be noted that the action was trover for the conversion of the bailed goods; and while in holding it to be a good defense to the action of trover, that the goods were taken from the possession of the carrier under process against a third person, the court used language which might indicate the intention to assert the broad doctrine that the seizure of bailed goods under process against a third person will exonerate a carrier from redelivery, the court, however, did not have that point before it, and the case relied upon and quoted from as authority was also a trover action in which the distinction seems clearly made between an action in trover and action for failure to redeliver, as it is said in that case (*Verrall v. Robinson*, 2 Crompt. M. & R. 495, 4 Dowl. P. C. 242, 1 Gale, 244, 5 Tyrw. 1009) that where a bailee's refusal to deliver the bailed property is grounded on its being on his premises, but in the custody of the law because seized in attachment proceedings, his refusal is no evidence of a wrongful conversion to his own use so that trover may be maintained against him.

This distinction is also made in *Edwards v. White Line Transit Co.* 104 Mass. 159, wherein *Stiles v. Davis* is distinguished on that ground. To the same effect also, is *Henderson v. 300 Tons of Iron Ore*, 38 Fed. 41.

But where there is no collusion it is a defense that goods intrusted to a carrier for transportation were taken on legal process against a third person, where the carrier gives to the consignor, who is also the consignee, timely notice of this fact. *McVeagh v. Atchison, T. & S. F. R. Co.* 3 N. M. 327, 5 Pac. 457. (See also *infra* 3).

Of course the bailee may show as a bar to the right of a bailor to a redelivery of the bailed property, that the same was

taken from him upon process fair upon its face, if he also shows that the proceedings in which the property was taken were valid and were instituted by the holder of a paramount title. Upon such a showing it is not necessary also to show that the bailor was a party to the proceeding or had notice thereof or had an opportunity to be heard therein. As supporting this proposition, see *Edson v. Weston*, 7 Cow. 278, which holds the fact that the bailed property was taken from the bailee under legal proceedings instituted by the holder of the paramount title constitutes a good defense against a claim of the bailor to a redelivery of the property.

And see also *Rogers v. Weir*, 34 N. Y. 463, which holds a bailee cannot rely upon an attachment levied upon the bailed goods to exonerate him from redelivering them to the bailor, where the attachment was directed against a third person on the theory that such third person was the true owner of the goods and had conveyed them to the bailor in fraud of his creditors. The court, after pointing out that the sheriff levying the attachment could not justify the seizure as against the bailor except by bringing forward the creditors and establishing the alleged fraud, said: "Upon what principle, then, can the defendant rely upon the sheriff's levy to withhold the goods from the plaintiff? Is he in a better position than the sheriff himself? Suppose the sheriff had taken the goods into his own custody; he could not detain them from the plaintiff on the ground which is the foundation of the defense in this action."

See also *Barnard v. Kobbe*, 3 Daly, 35, which recognized and applied this doctrine to a very similar state of facts.

And see also *Van Winkle v. United States Mail S. S. Co.* 37 Barb. 122, wherein the rule is asserted that a person having a paramount title may claim his property from the bailee or carrier where it has been taken from him by felony, force, or fraud, or where the bailor or shipper is a mere agent of the owner; and where the bailor is the mere agent for the owner it is a defense to the bailee or carrier that the property was taken from him upon valid process directed against the true owner.

c. Where proceeding is defective.

The rule that a bailee is excused from delivering property to the bailor when called for, by showing that the property was taken out of his custody under the authority of valid legal proceedings, and that in a reasonable time he gave notice of that fact to the owner, does not apply where the officer who took the property had no process which authorized him to do so, and where no attempt was made by the bailee to notify the bailor of what had transpired, although they had her name and address and she resided only a short distance from their place of business. *Roberts v.* 33 L.R.A. (N.S.)

Stuyvesant Safe Deposit Co. 123 N. Y. 57, 9 L.R.A. 438, 20 Am. St. Rep. 718, 25 N. E. 294.

That property while in the hands of a common carrier *in transitu* is seized by an officer without any warrant or other legal process constitutes no defense in behalf of the carrier for a failure to redeliver the property according to its contract, since the officer under such circumstances is a mere trespasser, and the carrier is liable under the rule of common law, in the same manner as if it had allowed any other trespasser to take property out of its custody. *Bennett v. American Exp. Co.* 83 Me. 236, 13 L.R.A. 33, 23 Am. St. Rep. 774, 22 Atl. 159.

A bailee assuming to give up the bailed property on the request of a receiver, without any order or judgment binding upon him, undertakes to affirm the legality of the proceedings in which the receiver was appointed. *Welles v. Thornton*, 45 Barb. 390.

In *Walter A. Wood Harvester Co. v. Dobry*, 59 Neb. 590, 81 N. W. 611, it is said that the bailee must surrender the bailed property to the bailor on demand and payment of his just charges unless there has been a prior lawful seizure of the property under judicial process issued against the owner, and the fact that the property was taken from the bailee upon defective attachment proceedings constitutes no defense to the claim of the bailor for the redelivery thereof.

A factor receiving and selling the principal's property, and rendering him an account of the sales, cannot defend an action against him on the ground that he has paid the proceeds of the sale of the property to a stranger upon an order of the court made in a supplementary proceeding, invalid because based upon an invalid attachment judgment. *Barnard v. Kobbe*, 54 N. Y. 516.

That goods in the hands of a carrier were seized on an attachment running against the owner is no defense to an action by the owner against the carrier for failure to redeliver the goods, where the goods were exempt from attachment. *Kiff v. Old Colony & N. R. Co.* 117 Mass. 591, 19 Am. Rep. 429.

But a carrier surrendering property to an officer under a writ valid on its face is protected, even though the writ was issued under a statute afterwards judicially determined unconstitutional. *McAlister v. Chicago, R. I. & P. R. Co.* 74 Mo. 351.

A seizure of whisky in a warehouse of a common carrier under process *prima facie* legal, on the claim that the same was shipped into the state in violation of the state liquor law, excuses the carrier from liability for the loss of the goods; and it is not necessary that the carrier should question the validity of the statute under which the same was seized. *Southern R.*

Co. v. Heymann, 118 Ga. 616, 45 S. E. 491.

d. Duty of bailee to give notice of proceeding to bailor.

In order that the bailee be entitled to take advantage of the rule that the loss of the bailed property through legal proceedings will exonerate him from redelivering the property to the bailor, he must, within a reasonable time after seizure of the property, give notice of this fact to the bailor, in order that the latter may have an opportunity to defend his title.

Considering the question as to the necessity of giving notice to the bailor under such circumstances in *Thomas v. Northern P. Exp. Co.* 73 Minn. 185, 75 N. W. 1120, the court said: "The bailee must promptly notify his bailor of the seizure, so as to give him the opportunity to defend his title. The law does not require a common carrier to defend a title of which he presumably knows nothing, but in case of seizure on legal process it does require him to notify his bailor, so that the latter may defend. Where the carrier delivers the property, on demand, to one claiming to be a rightful owner, he of course assumes the burden of proving, as against the claim of his bailor, that such person was the rightful owner; but we know of no rule of law requiring him to give notice to his bailor of such delivery."

Roberts v. Stuyvesant Safe Deposit Co. 123 N. Y. 57, 9 L.R.A. 438, 20 Am. St. Rep. 718, 25 N. E. 294, while holding that a bailee is not bound to resist the seizure on a search warrant of goods described therein which he holds as bailee, further holds that such a warrant affords no excuse or justification for the removal from the bailee's custody of property not described therein, and that as to such property the bailee must use such means to prevent its removal as is proper and justifiable in case the same party attempted to remove it without having any warrant or legal authority whatever. The bailee cannot rely upon such seizure as an excuse for not delivering the bailed property to the bailor, where he makes no resistance to the seizure and no attempt to inform the bailor as to what had transpired, although he had her name and address. In reaching this conclusion the court asserted the doctrine that, when property in the custody of the bailee for hire is demanded by a third person under color of process, it becomes the bailee's duty to ascertain whether the process is such as requires him to surrender the property, and if it does not, then it is his right and duty to refuse and to offer such resistance to the taking, and adopt such measures for reclaiming it, if taken, as a prudent and intelligent man would if

it had been demanded and taken under claim of right to the property by another without legal process.

A common carrier is exonerated from liability for the loss of goods seized on attachment against the owner, where they give verbal notice of the seizure to the husband of the owner, who at the time had in his possession a bill of lading for the goods. *Furman v. Chicago, R. I. & P. R. Co.* 81 Iowa, 540, 46 N. W. 1049.

It is the duty of a carrier by sea, upon any interference with his possession, whether by legal proceedings or otherwise, to interpose for the owner's protection, and to make immediate assertion of his rights and interests, by whatsoever measures are appropriate at the time and place. To that extent the carrier is bound to take part in legal proceedings, and to continue them until, after informing his absent consignee thereof, the latter has a reasonable opportunity to take upon himself the burden of the litigation. *The M. M. Chase*, 37 Fed. 708.

A carrier does not discharge his obligation to the consignee with whom he is making the contract of shipment, by simple delivery to an officer, or by standing idly by until the process has impounded the goods and through it the adverse claimant has appropriated them by the judgment of the court. The strict rule of law applying generally to bailees, which requires them to defend their possession and justifies the surrender of the bailed articles only to a paramount owner, applies with equal force to a carrier, and imposes upon it the liability of either assuming all the dangers of loss from wrongful seizure by undertaking the defense of the suit in which the seizure was made, or giving immediate notice to the consignee to appear and defend it for himself. *Robinson v. Memphis & C. R. Co.* 16 Fed. 57.

It is a complete defense to a common carrier that the property during transportation was taken from it under legal process by one claiming a paramount title thereto, and that notice of this fact was given to both the consignor and the consignee, both of whom failed to furnish the company any evidence to enable it to resist the sworn statement of the complainant, and also failed to pay any attention to the notice. *Savannah, G. & N. A. R. Co. v. Wilcox*, 48 Ga. 432.

In *Ranson v. Platt* [1911] 1 K. B. 499, it is held that a bailee is exonerated from his duty to redeliver the bailed property to the bailor, where the property was taken under an order issued by a magistrate in a proceeding in which the bailor was not a party and in which she was not heard, and although the bailee gave her no notice thereof, the court said that the bailee complied with his obligations to the bailor by making known to the magistrate the bailor's claim to the property; and this was true although the

bailor lived but a short distance away and her residence was known to the bailee.

IV. Subsequent sale of bailed property by bailor.

The bailor may sell the subject-matter of the bailment and thereby confer on the purchaser an immediate and valid title thereto, the possession of the bailee becoming that of the purchaser, without any formal delivery of the subject of the bailment to him, a mere notice to the bailee of the sale being sufficient; and where the fact of the sale is established or not disputed, the relation of bailor and bailee exists between such subsequent purchaser and the bailee, and their acts or conduct with reference to the subject-matter of the bailment are governed by the same rules of law that obtained between the original parties to the bailment, and the liability of the bailee with respect to a conversion of the property by him is determined by the same principle which would obtain were the action brought by the first bailor. The bailee can no more deny the title of the first bailor in the action by the purchaser, than he could in an action brought by the first bailor. *Riddle v. Blair*, 148 Ala. 461, 42 So. 560. And see to same effect *Bechtel v. Shearer* supra, I.

The bailee, after recognizing the title of a subsequent purchaser from the bailor and agreeing to turn the property over to him, is liable to him for the conversion of the property, if he thereafter turns it over to the bailor or his appointee. *Smith v. Bell*, 9 Mo. 873.

Where a bailee promises the purchaser of the bailed goods that he will deliver the same to him, he is not entitled to set up any other than such person as the proprietor of the goods. *Holl v. Griffin*, 10 Bing. 246, 3 L. J. C. P. N. S. 17, 3 Moore & S. 732.

As an excuse for a failure to redeliver the bailed's property, the bailee may rely upon a deed in trust, executed by the bailor subsequently to the bailment and covering the property in question, the bailee having attorned to the trustee in the deed. *Burnett v. Fulton*, 48 N. C. (3 Jones, L.) 486. It is a defense to the bailee that he has delivered the bailed property to a subsequent assignee of his bailor. *Roberts v. Noyes*, 76 Me. 590. He may surrender the bailed property to a subsequent mortgagee who, under the mortgage, is entitled to possession thereof. *European & A. Royal Mail Co. v. Royal Mail Steam Packet Co.* 30 L. J. C. P. N. S. 247, 8 Jur. N. S. 136. And he is not estopped to assert a subsequent paramount title under a mortgage covering the bailed property, executed by the bailor. *Collins v. Bellefonte C. R. Co.* 171 Pa. 243, 33 Atl. 331.

V. Effect of bad faith of bailee.

a. Where bailee accepts bailment with knowledge of adverse claim.

Even though a bailee of property is en-
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titled, under some circumstances, to surrender possession thereof upon demand of a holder of the paramount title, it is clear that in order to entitle himself to make such surrender a defense to the claim of his bailor, he must not connive with the holder of the paramount title, and his contract of bailment must have been entered into by him without knowledge of such title, for if the bailee has knowledge of the hostile adverse claim, and with such knowledge he accepts the property, he cannot thereafter assert such title as an excuse for his failure to deliver the bailed property to his bailor upon demand. Considering this point *Jessel, M. R. in Ex parte Davies*, L. R. 19 Ch. Div. 86 said: "In order that the bailee may be able to avail himself of such a defense, he must himself have been in no default. If the bailee, knowing of the adverse claim, had said to his bailor, I will sell the horse for you if you will let me have a commission, and I will hand over the proceeds to you, he could not afterwards set up against his bailor the title of the adverse claimant, because he would have acted with his eyes open." This doctrine is applied in that case to an auctioneer, who put up goods for sale, by the order of a trustee in liquidation, and to whom he afterwards sent an account charging him possession money for the time the goods were in his care. The court said that by this account he had precluded himself from setting up the adverse claim of a person holding under a bill of sale from the same person represented by the trustee in liquidation, he having notice of such adverse claim at the time of the sale. In the same case, and on the same point, *Lush, L. J.*, remarked: "When a person in such a position, knowing of two adverse claims to goods, elects to take the part of one of the claimants and to sell the goods as his, he is estopped from afterwards denying that claimant's title. If he had not taken this course he would have been entitled to show that there was a better title in the bill of sale holder; there might have been what is called an eviction of the trustee by title paramount."

And see also *Osgood v. Nichols*, 5 Gray, 420, which held that an auctioneer who received goods intrusted to him for sale, and who sold them in that capacity, and made no claim on them as his property until he was called upon for the proceeds of the sale, was estopped to deny the title of the bailor. The court said that as it neither appeared, nor was suggested, that he acted in the sale under any ignorance or misapprehension of his own right, if the goods were his, he misled the plaintiff and is estopped from making the defense offered.

This doctrine is also recognized in *Sinclair v. Murphy*, 14 Mich. 392, wherein a bailee of money attempted to defend his possession as against the bailor, on the ground that a third person had an interest in the money, and that in holding the same against the bailor he was acting for and in behalf of such third person. Upon

this point the court said: If the bailee "intended to set up any such claim when he obtained the money, we think he is as much estopped by his representations and promises from doing so, as the receptor of property levied upon is estopped from setting up a claim to it in opposition to his receipt."

So, a person accepting property from someone other than the true owner, and with knowledge of that fact, recognizing his right thereto and agreeing to hold same for him, cannot set up the title of the true owner as against the person whose title he so recognized. *Murphy v. Yeomans*, 29 U. C. C. P. 421.

After recognizing a person's title to the bailed goods, with knowledge of the claim of a third person, the bailee is estopped to thereafter assert title in such third person as a defense to the claim of the title he recognized. *Gosling v. Birnie*, 7 Bing. 339, 9 L. J. C. P. 105, 5 Moore & P. 160.

A common carrier accepting goods for transportation from a person other than the true owner, with knowledge of that fact, cannot set up the title of the true owner against the person from whom the goods were accepted for transportation. *Brill v. Grand Trunk R. Co.* 20 U. C. Q. P. 440.

And a person assuming an agency and duty in regard to a draft which the payees might recognize, and to which they might bind him by a ratification, is not at liberty to defend an action therefor, by such payees, by showing an absence of title in them to the draft. *Hayes v. Kedzie*, 11 Hun, 577.

Title in a third person cannot be asserted by a bailee where he received the bailed articles under a bailment which he intended to violate before he received the articles. *Dodge v. Meyer*, 61 Cal. 405.

A bailee of goods for safe-keeping, knowing at the time of the bailment the nature of the transfer of the goods to the bailor, cannot assert the invalidity of the transfer, or its fraudulent character, and claim that the goods are in reality the property of a third person. *Hendricks v. Mount*, 5 N. J. L. 738, 8 Am. Dec. 623.

A bailee receiving goods for safe-keeping only, and under a promise to deliver them when called for, will not be permitted to set up property in himself derived from a third person. *Hampton v. Swisher*, 4 N. J. L. 66.

By force of the contract of bailment, the bailee incontestably concedes that title and right of possession exists in the bailor, and he is estopped to assert title in himself by virtue of a mortgage upon the bailed property, although by the terms of the mortgage, it being in default, he had the right to take possession of the property, where such default also existed at the time of the contract of bailment, so that the title to the property mortgaged and the right of possession was the same as when the bailee refused to surrender the mortgage. *Bricker v. Stoud Bros.* 56 Mo. App. 153.
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A bailee who at the time of the bailment had a mortgage upon the bailed goods executed by a third person is estopped from setting up said mortgage as a defense to an action by the bailor against him for the conversion of the property. *Peebles v. Farrar*, 73 N. C. 342.

But a person getting possession of a boat as a bailee for a mere trespasser is not estopped to show that he turned the boat over to the true owners, although that was his purpose at the time of obtaining possession of the boat. *Hastings v. Allen*, 14 Ohio, 58, 45 Am. Dec. 523.

b. Where bailee induces holder of paramount title to assert claim.

A bailee cannot hunt up a paramount claimant, and then, when called upon by the bailor for the property, answer that he is a bailee of such claimant. Thus, a husband who becomes the bailee of property cannot defend an action by the bailor, on the ground that his wife is the true owner of the property and has asserted a claim thereto, and that he is holding the same for her, and he having knowledge of the wife's interest in the property at the time of the contract of bailment. *Pulliam v. Burlingame*, 81 Mo. 111, 51 Am. Rep. 229.

And see also *Shelbury v. Scotsford*, Yelv. 23, which holds that while it would be a good defense that the property was taken from the bailee with force and arms, by the holder of a paramount title, yet it would not be a good defense, if the property was so taken by the fraud or covin of the bailee.

This doctrine is also recognized in *Marvin v. Ellwood*, 11 Paige, 365, and applied to an attorney who had collected a judgment for his client, and who connived with a third person claiming a paramount title thereto, to assert such title.

c. Where bailee instigates commencement of action by adverse claimant.

In order that the bailee of property be entitled to show the seizure thereof upon legal process as a defense to an action by the bailor, the seizure must not have been brought about by any fraud or connivance of the bailee. *The M. M. Chase*, 37 Fed. 708.

So, if at the instigation of the bailee attachment proceedings are instituted against the bailor, and the bailed property is seized in such proceedings, the loss of the property thus occasioned is no bar to the claim of the bailor for the redelivery thereof. *Walter A. Wood Harvester Co. v. Dobry*, 59 Neb. 590, 81 N. W. 611.

VI. Effect of special contract.

A bailee by executing a receipt to the bailor for the bailed property admits the right of possession in the bailor, and is thereafter estopped from denying what has

been thus admitted. The bailee cannot thereafter avoid the force of his own agreement by showing title in a third party. *Reed v. Reed*, 13 Iowa, 5.

A distinction is also made in *Crawshaw v. Thornton*, 2 Myl. & C. 1, 6 L. J. Ch. N. S. 179, between an ordinary bailee and a receptor of property, and it is held that, irrespective of the question of a paramount title in a third person, a bailee is liable for the value of bailed goods which he received for bailment, to be delivered to a third person, and to whom he furnished a written statement showing the amount of goods left with him at the disposal of such third person. The court said that this was a personal undertaking on the part of the bailee, and created a liability or right of action beyond that arising from the legal consequences of a mere bailment, and the liability of the bailee did not depend merely on the question of title.

So a wharfinger who accepts from his bailor an order to a third person for goods stored with him is thereafter estopped from asserting an adverse title to the one he has just recognized. *Woodley v. Coventry*, 9 Jur. N. S. 548, 2 Hurlst. & C. 164, 32 L. J. Exch. N. S. 185, 8 L. T. N. S. 249, 11 Week. Rep. 599. Under such circumstances the court said that it was not a question of title, but the question was whether the wharfinger had so conducted himself as to entitle the plaintiff to say: "I call upon you to deliver to me that which you have acknowledged you hold on my behalf."

A bailee having money which, by agreement, he is to deposit to the credit of the bailor, will not be permitted to retain it and compel the bailor to litigate with him the right of some third person to an interest therein, even though the bailee claims to be holding the money as the agent for, and in behalf of, such third person. *Sinclair v. Murphy*, 14 Mich. 392.

A bailee of money to abide the order of a court under and by virtue of specified attachments and garnishments is a mere depositary or stakeholder of the money to be held for a specified purpose, and as such he is bound by the terms of his acceptance. He cannot raise any objections to the surrender of the funds inconsistent with the conditions on which he accepted the custody. *Swallow v. Duncan*, 18 Mo. App. 622.

In *Colbath v. Hofer*, 43 Or. 366, 73 Pac. 10, the court said that a receptor's liability is to be determined by the terms of the contract. Whether he is estopped to show that the property belonged not to the debtor, but to some third party, depends upon whether it is a contract of indemnity, an express assurance for a certain amount or value whereby he assumes an absolute liability, or a mere contract of bailment for the safe-keeping and return of the specific chattels. If the former, he will not be allowed to prove title in a third person, but if on the other hand, the contract is one of bailment only, the bailee may always excuse himself for nondelivery by showing

that the property was that of a third person, and not that of the bailor, if he further show that it has been delivered to the true owner in obedience to a paramount title.

If at the time of the attachment of property, it did not belong to the defendant in attachment, but to a third person, that circumstance alone will not constitute a defense in an action by the officer against the receptor for the property, but if such third person has obtained possession of the property the receptor may defend himself for failure to deliver the property to the officer by proof of that fact. *Fisher v. Bartlett*, 8 Me. 122, 22 Am. Dec. 225.

VII. Waiver by bailee of right to make defense.

Where the bailee refuses to deliver the property to the bailor, upon demand, and does not intimate that anything has happened to discharge his obligation as bailee, he is answerable in a proper action by the bailor. *Dunlap v. Hunting*, 2 Denio, 643, 43 Am. Dec. 763.

The refusal of a bailee to deliver the bailed property upon the confessedly false pretense that it had already been delivered to a third person precludes his thereafter claiming that the plaintiff failed to exhibit to him his bill of sale from the original bailor, or pleading a paramount adverse title. *Tuttle v. Gladding*, 2 E. D. Smith, 157.

In *Rogers v. Lambert* [1891] 1 Q. B. 318, 60 L. J. Q. B. N. S. 187, 64 L. T. N. S. 406, 39 Week. Rep. 114, 55 J. P. 452, while the doctrine was recognized that a bailee may set up the *jus tertii* where there has been what is equivalent to an eviction by title paramount, it was, however, held the fact that third persons owned the bailed property was no defense to the bailee, where his denial of the demand of the bailor for the possession of the property was not based upon that ground, but upon a general denial of the right of the bailor thereto.

VIII. Remedies of bailee.

a. Interpleader.

1. General rule.

In many cases the right is denied a bailee to maintain a pure bill of interpleader to protect himself against the claim of his bailor and that of a third person who asserts an adverse title to the bailor. *Bartlett v. The Sultan*, 23 Fed. 257; *Crawshaw v. Thornton*, 2 Myl. & C. 24, 6 L. J. Ch. N. S. 179; *Marvin v. Ellwood*, 11 Paige, 365; *First Nat. Bank v. Bininger*, 26 N. J. Eq. 345.

In *Vosburgh v. Huntington*, 15 Abb. Pr. 254, the rule is asserted that neither in equity nor at law can a bailee or agent dispute the original title of the person from whom he received the property, and hence such bailee or agent cannot file a bill in

equity to settle the conflicting claims of the bailor or principal and a stranger who claims the property by a distinct and independent title.

In reaching the same conclusion in *First Nat. Bank v. Bininger*, 26 N. J. Eq. 345, the court said that if this was a case of first impression, no difficulty would be found in declaring jurisdiction to entertain an interpleader in such a case to be clearly within the purposes designed to be accomplished in the establishment of courts of equity, and added: "But the rule denying the right of the complainants to require the bailor to interplead with the other defendant is too firmly established to be changed by anything short of legislative power."

And in *Crawshaw v. Thornton*, 2 Myl. & C. 1, Lord Cottenham said that, unless the plaintiff has come under some personal obligation, independently of the question of property, so that either of the defendants may recover against him at law, without establishing a right to the property, it is obvious there is no case for interpleader, and added: "It is familiarly said that there is no interpleader between landlord and tenant or principal and agent, but it will be found that the reason for this lies deeper than might be inferred from the statement of this rule, and that it is to be considered not so much as an independent rule, as a necessary consequence to the principle of all interpleading. In both these cases rights and liabilities exist between the parties independent of the title to property, or to the debt or duty in question, and which may not depend upon the decision to the question of title."

In *Pearson v. Cardon*, 2 Russ. & M. 606, Lord Brougham, in denying the right of an agent or bailee to compel his principal to litigate with a stranger, the title to property held by him for the principal, said: "Upon such a state of facts, can I hold this to be a common case of a claim by an agent against his principal, and of another party, claiming by another title, foreign to the title of the principal." That an agent should have the power of filing a bill of interpleader when his principal demands a redelivery of goods bailed with him appears to me so monstrous a proposition and to involve such frightful consequences in mercantile transaction, that I could not suppose it was meant to contend for any such doctrine. For in fact it amounts to this, that an agent may at any moment treat his principal to a chancery suit, and I was therefore relieved to find that the plaintiffs' counsel went entirely on the peculiarity of this case."

And in the absence of statute a bailee cannot compel his bailor to interplead with a stranger where he claims the property in the hands of the bailee under adverse rights not founded in any privity of title or common contract. *New Jersey Title, Guarantee & T. Co. v. Rector*, 75 N. J. Eq. 423, 72 Atl. 968.

In *DeZouche v. Garrison*, 140 Pa. 430, 21 Atl. 450, it is said that a bailee cannot

ordinarily raise an interpleader between his bailor and one who asserts an independent, antagonistic, and paramount title, and that in any event he must occupy the place of a mere stakeholder, without any rights of his own to be litigated or any personal interest in subject-matter of the controversy.

An interpleader is not the proper remedy where the bailee has been deprived of the possession of the property by a writ of replevin in behalf of a third person claiming title thereto, and the further reason that the bailee has an inadequate remedy at law in his defense to the replevin suit does not make it the proper remedy. *Grant Bros. Auto. Co. v. Cotter*, 161 Mich. 521, 126 N. W. 839.

But the bailee of lost money left with him by the finder is entitled to maintain a bill of interpleader against the bailor and third persons claiming the ownership of same, in order that the title to the money be settled. *Lavelle v. Belliu*, 121 Mo. App. 442, 97 S. W. 200.

2. Where interpleader authorized by statute.

In England by a special act the right is given a bailee to maintain a bill of interpleader against his bailor and adverse claimants to the bailed property. *Attentborough v. St. Katharine's Dock Co.* L. R. 3 C. P. Div. 450, 47 L. J. C. P. N. S. 763, 38 L. T. N. S. 404, 26 Week Rep. 583.

In Alabama by statutory provision, a bailee has the right to require claimants of the bailed property to counterplead with the bailor and litigate the question of title. *Behr v. Gerson*, 95 Ala. 438, 11 So. 115; *Powell v. Robinson*, 76 Ala. 423.

Under the practice in Nebraska a bailee may defend an action against him for the bailed property either by a stranger or the bailor, by an answer in the nature of a bill in interpleader, making the adverse claimant a party to the controversy and requiring such claimant and the bailor to litigate their claims of title between themselves. *Shellenberg v. Fremont, E. & M. Valley R. Co.* 45 Neb. 487, 50 Am. St. Rep. 561, 63 N. W. 859.

In Iowa under the Code, a third person claiming to own personal property may be made a defendant in an action by the bailor against the bailee for the conversion of the property. *Reed v. Reed*, 13 Iowa, 5.

3. Effect of bad faith of bailee.

If a bailee accepts property for bailment from one who to his knowledge is not the true owner and whom he has assisted in getting possession of the property wrongfully, a court of equity will not assist him to compel the parties to interplead to determine to whom the property should be surrendered. *Hatfield v. McWhorter*, 40 Ga. 269.

On this point in *Bechtel v. Sheaffer*, 117 Pa. 555, 11 Atl. 889, the court said that as a general rule the party seeking relief by an interpleader must not have incurred any in-

dependent liability to either of the rival claimants. If he has expressly acknowledged the title or rights of one of them and agreed to hold the property for him, or, disregarding the adverse claim of one, he has by contract made himself liable in any event to the other, he cannot be said to stand indifferent between them. It was, however, held in this case that the mere fact of a contract relation existing between the bailor and the bailee by the terms of which the bailee was bound to pay the money received to the bailor will not necessarily deprive the bailee or depository of the right to an interpleader.

In *Marvin v. Ellwood*, 11 Paige, 365, an attorney at law was denied the right to interplead, his client and a third person claiming certain money in the hands of the attorney belonging to his client. The court said that in general a stranger cannot know that the attorney has funds in his hands not paid over to his client, to which he can interpose a claim, unless the attorney himself, in violation of his professional duty, discloses the same. Hence, it would be contrary to sound morals to permit him to sustain a suit of discord against his own client and at the expense of the latter, in order to transfer the fruit of his suit to another party; such a course would seem to be putting a premium on professional infidelity. The foregoing is taken from the opinion of the vice chancellor, which, however, on appeal, was affirmed by the chancellor.

b. Miscellaneous remedies.

The cases heretofore considered which sustain the right of a bailee, under any circumstances, to surrender the bailed property to a third person, and assert this fact as a defense to an action against him by the bailor for his failure to redeliver the bailed property, are, of course, authority for the rule that this is a remedy which the bailor may at his option resort to. In taking this course, however, the bailee assumes the burden of establishing the existence of a paramount title in the person to whom he surrendered the property. While, as stated, this right of the bailee is assumed in all the cases included herein which sustain the right of the bailee to assert an independent paramount title against the bailor, for a discussion of the question as a remedy, attention is particularly called to the following cases: *The Idaho* (*Hentz v. The Idaho*) 93 U. S. 580, 23 L. ed. 978; *Jackson v. Jackson*, 97 Ala. 372, 12 So. 437; *Young v. East Alabama R. Co.* 80 Ala. 100; *Powell v. Robinson*, 76 Ala. 423; *Dodge v. Meyer*, 61 Cal. 405; *Atlantic & B. R. Co. v. Howard Supply Co.* 125 Ga. 478, 54 S. E. 530; *Atlantic & B. R. Co. v. Spires*, 1 Ga. App. 22, 57 S. E. 973; *Graham v. Northern P. Exp. Co.* 89 Minn. 193, 94 N. W. 548; *Rogers v. Weir*, 34 N. Y. 463; *Lester v. Delaware, L. & W. R. Co.* 73 Hun, 398, 26 N. Y. Supp. 206; *Lain v. Gaither*, 72 N. C. 234; *Biddle v. Bond*, 11 Jur. N. S. 425, 6 Best & 33 L.R.A. (N.S.)

S. 225, 34 L. J. Q. B. N. S. 137, 12 L. T. N. S. 178, 13 Week. Rep. 561, 3 Eng. Rul. Cas. 573; *Betteley v. Reed*, 4 Q. B. 511, 7 Jur. 507, 3 Gale & D. 561, 12 L. J. Q. B. N. S. 172; *Palmtag v. Doutrick*, 59 Cal. 154, 43 Am. Rep. 245.

If the bailee is embarrassed by the conflicting claims of the bailor and a third person, who claims to be the principal of the bailor, each claiming to own the goods, and to be his bailor, so that he cannot even, with the bond of indemnity, safely or properly deliver the property to the claimant, he can relieve himself from all responsibility by promptly commencing a suit in equity, in the nature of a bill of interpleader, against both parties, and thus have the controversy and the conflicting rights to the property judicially determined. *Ball v. Liney*, 48 N. Y. 6, 8 Am. Rep. 511.

When there are adverse claims, and the bailee cannot compel the bailor and the adverse claimant to interplead, he must, at common law, defend himself as well as he may. If he is unwilling to undertake the burden of proving the superior title to his principal, he may retain possession and defend in an action by the adverse claimant. On such action being brought, he may give his bailor notice of its tendency and require him to defend his title. A judgment against the bailee where the bailor appears or refuses to defend after notice will be a sufficient defense in any subsequent action by the bailor, the rule that the bailee cannot dispute the title of the bailor not applying under such circumstances. *Powell v. Robinson*, 76 Ala. 423. A. G. S.

DISTRICT OF COLUMBIA COURT OF APPEALS.

WILLIAM W. DANENHOWER, Appt.,

v.

NARCISSA HAYES.

(35 App. D. C. 65.)

Contract — hotel accommodations — negotiations for others — personal liability.

One who engages accommodations at a hotel for a party, promising that they will occupy and utilize them, is personally liable for the contract price in case the party upon arriving refuses to accept the accommodations and goes elsewhere.

(April 5, 1910.)

Note. — Effect upon contract obligation of failure of third person to take action essential to performance.

It has long since been established that "where the law creates a duty or charge, and the party is disabled to perform it without any default in him, and hath no remedy over, there the law will excuse him . . . but when the party by his own con-

APPEAL by defendant from a judgment of the Supreme Court affirming a judgment of a Justice of the Peace in plaintiff's favor in an action brought to recover damages for breach of an alleged contract to furnish plaintiff's hotel with certain prospective guests. Affirmed.

The facts are stated in the opinion.

Messrs. Hayden Johnson and O. A. Keigwin for appellant.

Mr. Levi H. David, for appellee:

Where a party by his own contract creates a duty or obligation possible of fulfilment, he must make good his undertaking, unless prevented from doing so by the act of God, the law, or the other party.

Macfarland v. Barber Asphalt Paving Co. 29 App. D. C. 506.

tract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract." This distinction, which has its basis in the classic decision of *Paradine v. Jane*, Ayleyn, 26, from which the preceding quotation is taken, has been followed in a multitude of subsequent cases which establish the general doctrine that impossibility of performing an absolute promise will not relieve from the obligation.

The rigor of this rule is somewhat tempered in its application by the doctrine that the provision against liability for nonperformance occasioned by intervening impossibility need not be in express terms, but may be implied from the nature of subject-matter of the contract and the situation of the parties. Whether a contract is to be operative in the event of performance becoming impossible is therefore dependent upon the real intention of the parties. See, among the multitude of decisions to this effect: *School Dist. No. 1 v. Dauchy*, 25 Conn. 530, 68 Am. Dec. 371; *Hillyard v. Mutual Ben. L. Ins. Co.* 35 N. J. L. 415; and *Wolfe v. Howes*, 20 N. Y. 197, 75 Am. Dec. 388.

Such being the situation, the question arises as to when an intention that the contract shall not continue operative may be inferred. Some courts have stated as a general rule that further performance is excused where rendered impossible by the act of God or of the law; but the decisions themselves show that no such categorical assertion can be universally correct. The true view appears to be that the character of the circumstance which occasioned the impossibility does not conclusively establish an intention that in such an event the promise shall not be operative, but that the solution of the question must ever depend upon the facts of the particular case.

Owing to the manifold aspects in which the question is likely to be presented, the following cases which, like the decision reported, deal with the effect upon a contract obligation of impossibility of performance 33 L.R.A. (N.S.)

Difficulties, even if unforeseen and however great, will not excuse performance.

United States v. Gleason, 175 U. S. 538, 44 L. ed. 284, 20 Sup. Ct. Rep. 228; *Malcomson v. Wappoo Mills*, 88 Fed. 680; *Wheeler v. Connecticut Mut. L. Ins. Co.* 82 N. Y. 543, 37 Am. Rep. 594; *Vandegrift v. Cowles Engineering Co.* 161 N. Y. 435, 48 L.R.A. 685, 55 N. E. 941; *Wells v. Callan*, 107 Mass. 514, 9 Am. Rep. 65; *Butterfield v. Byron*, 153 Mass. 517, 12 L.R.A. 571, 25 Am. St. Rep. 654, 27 N. E. 667; 2 *Parsons*, Contr. 673; *Dermott v. Jones* (*Ingle v. Jones*) 2 Wall. 1, 17 L. ed. 762; *Watson v. Blossom*, 18 N. Y. S. R. 726, 4 N. Y. Supp. 491; *Jennings v. Lyon*, 39 Wis. 554, 20 Am. Rep. 57; *Cobb v. Harmon*, 23 N. Y. 148; *Gilpins v. Consequa*, 3 Wash. C.

occasioned by the failure of a third party to take some action essential to the performance, probably do not comprehend all the decisions of that type. They will, nevertheless, serve to show that the fact that the act of a third party is a prerequisite to a promisor's ability to perform does not necessarily and of itself give rise to the implication that the promise was conditional upon such act. This does not mean, of course, that such is always the case. An instance of this may be found in the suggestion made in the decision reported, that the contract therein under construction was conditioned upon the coming of the party of guests to the city.

In *M'Neill v. Reid*, 9 Bing. 68, it was held that a promisor was liable for nonperformance of an agreement to introduce a stranger into a firm of which he was a member, although such nonperformance was due to his inability to obtain the consent of his copartners, *Bosanquet, J.*, saying: "It is objected that the contract is of such a nature that the defendant could not perform it without the consent of his partners; but that does not discharge the defendant from his contract, for he ought not to have engaged in it unless he had secured that consent or was willing to incur the consequences; as where a party undertakes to sell a lease which he cannot assign without the consent of the lessor, it is his business to procure such consent."

A covenant including the construction of a canal upon certain lands is not excused by inability to get from the landowners the right to construct it. *Stone v. Dennis*, 3 Port. (Ala.) 231.

The performance of an agreement by a carrier to procure the renewal of notes or to return them is not excused by the refusal of an indorser to whom they have been delivered to give them up or renew them, because he has been summoned as trustee of a subsequent indorser. *Wareham Bank v. Burt*, 5 Allen, 113.

In *Cobb v. Harmon*, 23 N. Y. 148, it was held that sureties in a bond conditioned for the diligent prosecution by a debtor of his application for a discharge were not re-

C. 184, Fed. Cas. No. 5452; *Youqua v. Nixon*, Pet. C. C. 221, Fed. Cas. No. 18,189.

If parties have made no provision for a dispensation, the law gives none; nor in such circumstances can equity interpose.

Dermott v. Jones (*Ingle v. Jones*) 2 Wall. 1, 17 L. ed. 762; *United States v. Gleason*, 175 U. S. 602, 44 L. ed. 289, 20 Sup. Ct. Rep. 228; *The Harriman*, 9 Wall. 172, 19 L. ed. 633; *Bryan v. Spurgin*, 5 Sneed, 681; *Beebe v. Johnson*, 19 Wend. 500, 32 Am. Dec. 518.

Damage to the promisee constitutes as good a consideration as benefit to the promisor.

Pillans v. Van Mierop, 3 Burr. 1663;

lied from liability by the fact that the prosecution within the time stipulated was rendered impossible by the circumstance that the only available judge was absent from the county and in such a state of intoxication as to be unfit to discharge the duties of his office. The court said: "The nonperformance was not caused by the act of God, nor of the law, nor of the obligee. It was attributable solely to the default of the judge, resulting from acts within his own control. His absence was voluntary, and his inability of unfitness to discharge the duties of his office was in consequence of the free indulgence of a depraved appetite. All was the result of his own agency, and although the defendants themselves had done nothing to contribute to that result, and may not have been able in fact to prevent it, they nevertheless, by obligating themselves absolutely that the application should be made, became bound not only that the petition and notices necessary to that end should be served, but also that the requisite means to make those steps effectual should be secured through the officer of the law appointed for that purpose. As a part of those means they undertook to secure the attendance of the judge, and so far to rule and govern him as that he should not, by his own acts and conduct, disqualify himself from the discharge of his official duty. Their obligation was in this respect the same in principle as that assumed by a party for the faithful discharge of an official or other duty by a third party, and the performance thereof was no more impossible. It is said by *Brian, Ch. J.*, that 'there is a diversity where a condition becomes impossible by the act of God, as death, and where by a third person (or stranger), and where by the obligor, and where by the obligees; the first and last are sufficient excuses of forfeiture, but the second is not, for in such case the obligor has undertaken that he can rule and govern the stranger, and in the third case it is his own act.' (*Viner, Abr. title. Conditions* (G) pl. 19, citing *Br. Conditions*, pl. 127)."

A promisor is not absolved from respon-
33 L.R.A. (N.S.)

Hendrick v. Lindsay, 93 U. S. 148, 23 L. ed. 855.

Van Orsdel, J., delivered the opinion of the court:

This is an appeal from a judgment rendered in the supreme court of the District of Columbia against the appellant *William W. Danenhowe*, and in favor of appellee *Narcissa Hayes* for the sum of \$250 for the breach of an alleged contract. This action was originally brought in the justice of the peace court, and a judgment there rendered in favor of appellee for the sum of \$125, from which judgment appellant appealed to the supreme court of the District.

It appears that on March 26, 1908, appel-

sibility for failure to perform, because prevented from performance by the neglect or omission of some other person upon whom he had depended for such performance. *Van Etten v. Newton*, 15 Daly, 542, 29 N. Y. S. R. 411, 8 N. Y. Supp. 478.

Employees quitting the employment of one who has contracted to saw lumber and ties, on account of the prevalence of small-pox, and thereby greatly diminishing the capacity of the employer's mill, is no defense for the nonperformance of his contract. *Vale v. Suiter*, 58 W. Va. 353, 52 S. E. 313.

Where a railway company agreed that the total amount of grain received at an elevator should be at least 5,000,000 bushels a year during the term of a lease, and, if it should fall short of that amount, agreed to pay the lessee 1 cent per bushel on the amount of such deficiency, such company by offering at the elevator the stipulated quantity of grain performed its agreement, and the inability of the lessee to accept the grain so tendered on account of the storage capacity of the elevator being fully occupied by third parties, whose action in respect to allowing the grain to remain, or to be removed, was beyond the control of either the company or the lessee, cannot operate to defeat such performance or constitute any ground for holding the company liable on its agreement. *Chicago, M. & St. P. R. Co. v. Hoyt*, 149 U. S. 1, 37 L. ed. 625, 13 Sup. St. Rep. 779, reversing 39 Fed. 416.

Another case which, although not precisely in point, may profitably be stated in the present connection, is *Tone v. Doelger*, 6 Robt. 251, in which it was held that the promisor was absolved from the performance of his undertaking to fill in with certain earth removed by him in process of excavating, where by the direction of the other party to the contract he had placed it upon adjoining lands, the owner of which would not allow him to remove it. The decision in this case, however, proceeded upon the theory that performance was prevented rather by the act of the promisee in directing the disposition of the earth, than

lant was the proprietor of the Fredonia Hotel and the appellee was the proprietress of the George Washington Hotel, both situated in this city. Shortly prior thereto, appellant had engaged to accommodate at his hotel a party of about forty-five persons from Boston. Some days before their arrival, appellant, finding that he could not accommodate them, requested appellee to arrange for their accommodation at her hotel. The agreement between the parties was partly verbal and partly in writing. The written portions consisted of two separate papers, one signed by appellee and the other signed by appellant. The writing signed by appellee is as follows: "3-26-'08. Miss N. Hayes agrees to take 45 people from Sunday afternoon, March 29, to Fri-

day after breakfast at \$7.50 per person. April 3." The record does not contain a copy of the paper signed by appellant, but it is recited in the bill of exceptions: "Then Mr. Danenhower signed a paper writing (which he drew up himself) whereby he bound himself personally to pay to the plaintiff 35 cents for each of the 45 persons in order that the plaintiff would be assured of receiving \$7.50 for each of said persons." This agreement on the part of appellant to pay appellee 35 cents for each of the forty-five persons was due to the fact that the rate at which appellant had agreed to take the party was thirty-five cents less per person for the five days that that demanded by appellee.

The evidence on the part of the appellee,

by that of the third person in forbidding its removal.

The general question of the effect of intervening impossibility to relieve from the obligation of a contract is discussed in a note to *Stewart v. Stone*, 14 L.R.A. 215.

Further reference may be had to other notes in the *Lawyers' Reports Annotated*, a list of which is appended, which discuss the effect of intervening impossibility of performance, with reference to certain special kinds of contracts, or arising from certain causes, upon the contract obligation.

Decisions as to the effect of insanity or illness to discharge a promisor from further performance of his contract may be found in a note to *Central R. Co. v. Hall*, 4 L.R.A. (N.S.) 898, on "Insanity or illness as act of God."

Ill health as defense to an action for breach of promise to marry is considered in the note to *Grover v. Zook*, 7 L.R.A. (N.S.) 582.

Disease as a defense for breach of promise to marry is the subject of a note appended to *Shackleford v. Hamilton*, 15 L.R.A. 531.

The question of the termination of a contract of employment by the master's death is considered in the cases contained in the note to *Campbell v. Faxon*, 5 L.R.A. (N.S.) 1002. Cases considering the effect on contracts generally of the death of a party thereto are to be found in the note to *Drummond v. Crane*, 23 L.R.A. 707. On the right to recover on a contract for services interrupted by sickness or death, see note to *Parker v. Macomber*, 16 L.R.A. 858.

Decisions as to the effect of strikes to relieve a carrier from failure to perform its contract may be found in a note to *Empire Transp. Co. v. Philadelphia & R. Coal & I. Co.* 35 L.R.A. 623, on the general question of "Effect of strikes upon the rights and liabilities of a carrier."

As to liability of a carrier for injury or loss caused by the enforcement of quarantine regulations, see note to *Baldwin v. Seaboard Air Line R. Co.* 13 L.R.A. (N.S.) 360.

The action of public authorities under the police power as a defense to a carrier for delay or nondelivery of freight is considered in 33 L.R.A. (N.S.)

considered in the note to *Alabama & V. R. Co. v. Tirelli Bros.* 21 L.R.A. (N.S.) 731, and the supplemental note thereto in 28 L.R.A. (N.S.) 139.

As to the burden of proof when the defense in an action to recover for loss or injury to goods during carriage is an act of God or *vis major*, see the note to *Chicago, R. I. & P. R. Co. v. Logan, S. & Co.* 29 L.R.A. (N.S.) 663.

As to the effect of appointment of receiver or assignee for creditors of a corporation on compensation of officers, agents, or employees for unexpired term of employment, see the note to *Lenoir v. Linville Improv. Co.* 51 L.R.A. 146.

As to effect of passage, before expiration of the time of performance of contract, of statute rendering performance impossible, see note to *American Mercantile Exch. v. Blunt*, 10 L.R.A. (N.S.) 415.

As to the effect upon lease of property for saloon of passage of prohibitory laws during term, see note to *Heart v. East Tennessee Brewing Co.* 19 L.R.A. (N.S.) 964.

As to who must bear the loss caused by destruction of building or other structure in process of erection, see notes to *Milske v. Steiner Mantel Co.* 5 L.R.A. (N.S.) 1105, and *Loneragan v. San Antonio Loan & T. Co.* 22 L.R.A. (N.S.) 364.

For cases on the liability of contractor to replace bridge destroyed by unprecedented flood against which he does not contract, see note to *Mitchell v. Weston*, 15 L.R.A. (N.S.) 833.

As to when strict compliance with requirement as to time of notice in accident or health policy is excused, see note to *Jennings v. Brotherhood Acci. Co.* 18 L.R.A. (N.S.) 109, and the supplemental note thereto in 27 L.R.A. (N.S.) 319.

For a note on nondevelopment of injury as affecting time for giving the notice required by an accident-insurance policy, see *Hatch v. United States Casualty Co.* 14 L.R.A. (N.S.) 503.

The effect of incapacitating illness or insanity on failure to pay insurance premium when due is considered in the note to *Hipp v. Fidelity Mut. L. Ins. Co.* 12 L.R.A. (N.S.) 319.

E. S. O.

in effect, discloses, and for the purposes of this appeal must be accepted as true, that the appellant assured appellee that the forty-five persons would come to Washington and that they would remain at the George Washington Hotel for the four and three-quarter days from March 29, 1908. Pursuant to the agreement, appellee made preparations for the accommodation of the prospective guests, incurred considerable expense, and, in order to reserve room for them, refused to contract for another party with whom she had been negotiating. It appears that, when the party arrived in Washington, appellant sent automobiles to the depot to meet them, and they were taken to appellee's hotel. After inspecting the rooms, they all left the hotel, refusing to accept the accommodations afforded. For the damage sustained, appellee brought this suit.

The case comes here on a single assignment of error: "That the court below erred in refusing to grant his motion, made at the conclusion of the evidence, to instruct the jury to return a verdict in his favor."

The evidence of appellee discloses that appellant made representations to her which amounted to a guaranty on his part that the party of guests would not only come to her hotel, but that they would stop there during the time agreed upon. This was disputed by the testimony of the appellant. An issue of fact was, therefore, presented to the jury, the further consideration of which, under the limitations of the single assignment of error, is foreclosed by the verdict. This is a contract based upon the happening of a contingency, namely, the coming of a party of guests to be turned over to appellee by appellant to be entertained. The party came, and appellee fulfilled her part of the contract by furnishing the accommodations agreed upon. Her proof is that appellant failed in his part of the agreement in that the party refused to accept the accommodations afforded and which appellant had contracted that they would accept.

This is simply a case of the appellant's undertaking to do a perfectly lawful thing which he was unable to perform. Such contracts, in the absence of fraud, are enforceable. In 2 Parsons on Contracts, p. 673, it is said: "If one, for a valid consideration, promises another to do that which is, in fact, impossible, but the promise is not obtained by actual or constructive fraud and is not on its face obviously impossible, there seems no reason why the promisor should not be held to pay damages for the breach of the contract; not, in fact, for not doing what cannot be done, but for undertaking and promising to do it. *Ashmore v. Cox* 33 L.R.A.(N.S.)

[1899] 1 Q. B. 436, 68 L. J. Q. B. N. S. 72, 15 Times L. R. 55, 4 Com. Cas. 48. So, if it becomes impossible by contingencies which should have been foreseen and provided against in the contract, and still more, if they might have been prevented, the promisor should be held answerable. So, if the impossibility applies to the promisor personally, there being no natural impossibility in the thing, this will not be a sufficient excuse."

Such contracts, when fairly and honestly made, are enforceable. There is no claim of fraud or deception in this case. The agreement was a fair one with ample consideration. Touching the question of consideration, in *Hendrick v. Lindsay*, 93 U. S. 143, 23 L. ed. 855, the court said: "It is argued that Hendrick had no personal interest in the matter, and that, therefore, there was no consideration for his promise. But damage to the promisee constitutes as good a consideration as benefit to the promisor. In *Pillans v. Van Mierop*, 3 Burr. 1663, the court say: 'Any damage or suspension of a right or possibility of a loss occasioned to the plaintiff by the promise of another is sufficient consideration for such promise, and will make it binding, although no actual benefit accrues to the party promising.' This rule is sustained by a long series of adjudged cases."

The questions of fact in this case have been disposed of by the jury, and there are no questions of law that demand further consideration. The judgment is affirmed, with costs, and it is so ordered.

FLORIDA SUPREME COURT. (Division B.)

WILLIAM A. HENDRY, Plff. in Err.,
v.

WILLIE E. ELLIS.

(— Fla. —, 54 So. 797.)

Evidence — breach of promise — seduction — pleading.

In a suit for breach of promise of marriage, it is erroneous to permit the plaintiff to introduce evidence of her seduction and

Headnote by HOCKEE, J.

Note. — Necessity of averring seduction in order to recover therefor in an action for breach of promise.

As indicated by its title, this note includes only a question of pleading. As to the right to prove seduction in aggravation of damages in breach of promise cases, generally, see note to *Wrynn v. Downey*, 4 L.R.A.(N.S.) 616, from which there ap-

of her subsequent delivery of a bastard child, unless there is special averment of these facts, and that the seduction and sexual intercourse were brought about and accomplished by the defendant under and by virtue of the contract of marriage.

(March 14, 1911.)

ERROR to the Circuit Court for De Soto County to review a judgment in plaintiff's favor in a suit for breach of promise of marriage. Reversed.

The facts are stated in the opinion.

Messrs. Treadwell & Treadwell for plaintiff in error.

Mr. Thomas Palmer for defendant in error.

pears to have been some conflict of authority on that question. Where it is held that proof of seduction is wholly inadmissible upon the question of damages in a breach of promise suit, the question as to the necessity of averring it, of course, does not arise. But where the apparently better established rule prevails, that seduction may be considered in aggravation of damages in breach of promise suits, the other question, as involved in *HENDRY v. ELLIS*, arises, upon which, as further indicated in the note in 4 L.R.A.(N.S.) 616, and as stated in *HENDRY v. ELLIS* there is an irreconcilable conflict of authority. In numerous cases holding evidence of seduction generally competent, it appears that it has been duly averred, and in such cases, again the question of pleading here involved does not arise. But where the seduction has not been averred, some courts have still held evidence thereof to be admissible in aggravation of damages, while others, like *HENDRY v. ELLIS* have held it inadmissible, in the absence of special averment.

The latter view, as stated in *HENDRY v. ELLIS*, seems to be more in line with the rule of pleading "that special damages, not the natural and usual result of the acts complained of, should be alleged,"—seduction not being a "direct, natural, and usual result of the contract of marriage or the breach of it."

As stated in *Tyler v. Salley*, 82 Me. 128, 19 Atl. 107: "The distinction between general and special damages, and the necessity of a special averment to permit the recovery of special damages, is now well settled." And the increase of shame and distress of mind following the breach of a promise of marriage, where there has been a seduction under and by virtue of such promise, though the proximate result of the breach, "is not a natural or necessary one,—not one implied by the law from a simple statement of the cause of action,—but arises from another and distinct statement of facts, which are traversable and which must be proved, and to be proved must be alleged. These are facts upon which the defendant is entitled to be heard, and of which he has a 33 L.R.A.(N.S.)

Hocker, J., delivered the opinion of the court:

The defendant in error sued plaintiff in error in the circuit court of De Soto county for breach of promise of marriage.

The declaration is as follows: "For that the plaintiff, the said Willie E. Ellis, and the defendant, the said William A. Hendry, on the 15th day of October, A. D. 1906, agreed to marry one another, and a reasonable time for such marriage has elapsed, and the plaintiff has always been willing and ready to marry the defendant, yet the defendant has neglected and refused to marry the plaintiff, to the damage of plaintiff in the sum of \$10,000. Whereupon she brings this suit."

Pleas of not guilty, and two special

right to the legal notice before he can be required to answer." And, especially in view of the possibility of a false charge of seduction in an action of this kind, and the consequences in case the defendant had no notice of such charge prior to the time of trial, this would seem to be the only just rule.

So, in *Herriman v. Layman*, 118 Iowa, 590, 92 N. W. 710, holding that seduction, before it can be considered in aggravation of damages, must be alleged in the petition, the court said: "Though the proximate result, it is by no means the natural or necessary one to be implied from a general statement of the breach of promise. Allowance because of it is in the nature of special damages, to be specifically alleged, especially so in view of our statute authorizing an unmarried female to maintain an action for her own seduction. Ordinarily, a distinct state of facts is involved, which are traversable by the defendant; and when not alleged, seduction should not be considered an element of damages."

Likewise, in Indiana, where, by statute, a woman can maintain in her own name an action for her own seduction, it has been held that evidence of seduction cannot be admitted to enhance the damages in a suit for breach of a marriage contract, under a complaint which contains no allegation of seduction. *Cates v. McKinney*, 48 Ind. 562, 17 Am. Rep. 768.

Referring to the earlier cases of *Whalen v. Layman*, 2 Blackf. 194, 18 Am. Dec. 157, and *King v. Kersey*, 2 Ind. 402, holding evidence of seduction admissible to enhance the damages in breach of promise suits, the court said: "In the cases in 2 Blackf. and in 2 Ind., it does not appear whether the declaration alleged seduction or not." And further: "When the cases in this court were decided, a woman could not prosecute an action for her own seduction." *Cates v. McKinney*, supra.

And in *Felger v. Etzell*, 75 Ind. 417, although the only point directly involved was whether evidence upon the subject of illicit intercourse between the parties was admissible as bearing upon the question as to

pleas to the effect that the plaintiff had been guilty of illicit intercourse with other men, which was unknown to the defendant at the time the promise to marry was made, were filed. And on the trial a verdict and judgment were given for the plaintiff. Among the errors assigned here are that the court admitted evidence on the part of the plaintiff, over the objection of

defendant, of the seduction by the defendant and the birth of a bastard child, there being nothing alleged in the declaration to that effect.

The defendant in error has not favored us with a brief in support of the rulings of the trial court, but we have given the matter some investigation, and we find that the courts are in irreconcilable conflict

whether or not a contract of marriage was in fact made, the court said: "It is very clear that the evidence complained of was not competent for the purpose of enhancing or aggravating the appellee's damages, where, as in this case, the complaint contains no allegation of her seduction by the appellant. . . . We are clearly of the opinion therefore that the evidence of the illicit intercourse between the parties was wholly inadmissible in this case for any purpose."

In *Leavitt v. Cutler*, 37 Wis. 46, where the trial judge had instructed the jury that if the defendant seduced the plaintiff under promise of marriage, and if the defendant's charges of unchastity against the plaintiff were not proved, the seduction might properly be considered as enhancing the damages, the court said: "The authorities seem to sustain the instruction as correct in the law, but we think the better practice is to require that seduction should be alleged in the complaint before any evidence thereof (if duly objected to) is received. . . . But it is quite unnecessary to enlarge upon these questions [judgment having been reversed and the case remanded on another ground], inasmuch as the circuit court has full power to allow the pleadings to be amended to meet the exigencies of the case."

In *Daggett v. Wallace*, 75 Tex. 352, 16 Am. St. Rep. 908, 13 S. W. 49, although seduction was duly alleged, it appears inferentially that this is necessary in order to recover therefor, the court saying: "It is settled by the great majority of cases that, in an action for the breach of a promise of marriage, such seduction, if alleged and proved, is proper to be considered in estimating the damages."

And in *Burks v. Shain*, 2 Bibb, 341, 5 Am. Dec. 616, holding that the plaintiff in an action for a breach of promise, being *particeps criminis*, cannot recover damages therein for seduction, especially where her father has brought suit for the seduction, it seems that the want of a special averment of seduction may also have been one reason for such holding, the court saying: "Nor is there any allegation, either general or special, under which testimony of the seduction is admissible." But the further conclusive consideration also appears, "that the promise attempted to be proven on the trial was made at a period subsequent to the seduction, and of which the seduction might have been the cause, but could not have been the consequence. Had it therefore been alleged with a *per quod*, evidence of it could not have been admitted to increase the plaintiff's damages."

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Opposed to these cases are others from an equal or even a greater number of jurisdictions, holding that seduction brought about and accomplished by the defendant under and by virtue of a promise of marriage may be shown in aggravation of the damages in a suit for breach of the promise, although not specially alleged. *Poehlmann v. Kertz*, 204 Ill. 418, 68 N. E. 467, affirming 105 Ill. App. 249; *Lowden v. Morrison*, 36 Ill. App. 495; *Jennette v. Sullivan*, 63 Hun, 361, 18 N. Y. Supp. 266; *Dent v. Pickens*, 34 W. Va. 240, 26 Am. St. Rep. 921, 12 S. E. 698.

So, also, in *Fidler v. McKinley*, 21 Ill. 308, holding evidence of seduction admissible in an action of this kind, it appears from the opinion of Breese, J., expressing a strong dissent on this point, that seduction was not averred, though he argued that evidence of seduction was not admissible in a breach of promise action, whether averred or not.

The reason for this holding seems to be that, while seduction is not the natural result of a promise of marriage, and while the law may not imply that damages for seduction are a natural result of a breach of promise of marriage, yet, "when seduction follows in consequence of the promise, degradation, loss of character and happiness, are the direct result of a breach of that promise." *Poehlmann v. Kertz*, supra.

So, proof of seduction is said to be merely evidence of such direct damages, necessarily following a breach of a contract, and "it is not necessary to plead that which is merely evidence." *Lowden v. Morrison*, supra.

But, as noted above, while this reasoning may be satisfactory in cases of actual seduction, it would be highly unjust to a defendant in a breach of promise suit, falsely charged for the first time, upon trial, with seduction.

A somewhat different line of reasoning appears in *Dent v. Pickens*, supra, where the court said: "Upon this question [whether proof of seduction can be admitted where there has been no direct averment thereof in the declaration] there is a conflict of authorities. Those who hold such averment a necessary prerequisite go upon the well-settled doctrine that two causes of action cannot be combined and prosecuted in one suit, and that any special circumstance in aggravation of damages should be alleged in the declaration. The other and weightier class of authorities proceeds upon the idea that, when a contract for future marriage has been entered into, the relation between the parties is in the nature of a trust, and that the seduction of the female,

upon the question whether it is necessary that the declaration should allege seduction and the birth of a bastard child, as a predicate for the introduction of evidence of these facts.

In West Virginia and New Jersey, it is held that such evidence may be given in aggravation of damages, though nothing to that effect is alleged in the declaration.

while thus engaged, is in itself a breach of the promise of marriage, which is held to embrace an obligation and undertaking to protect and respect until the marriage is lawfully consummated; hence the evidence of seduction is admitted (whether directly averred or not in the declaration) as proof of the violation of his promise by the defendant."

If a defendant in a breach of promise action resorted to the marriage contract as a means of seduction, evidence of the seduction is admissible in aggravation of damages, although the declaration contains no direct averment thereof. *Williams v. Hollingsworth*, 6 Baxt. 12.

And in *Ferguson v. Moore*, 98 Tenn. 342, 39 S. W. 341, a breach of promise action in which seduction was specifically pleaded, and the question was as to the admissibility of evidence of an abortion, not specially pleaded, the court said, *obiter*: "It is true that in an action for breach of promise, seduction may be shown, though not alleged, but abortion is a separate, distinct grievance and injury," etc.

So, although evidence tending to show a seduction consequent upon a promise of marriage is competent to aggravate damages in an action for a breach of the promise, even without a special allegation thereof in the declaration, evidence of a venereal disease contracted from the defendant is incompetent, and cannot be considered in fixing the damages. *Churan v. Sebesta*, 131 Ill. App. 330.

In *Coil v. Wallace*, 24 N. J. L. 291, where presumably seduction was not alleged, though this is not entirely clear from the report, it was held that seduction effected under the influence and on the sanctity of a promise to marry may be considered as an aggravation of the damages in a suit for breach of the promise.

And in *Mainz v. Lederer*, 21 R. I. 370, 43 Atl. 876, holding that seduction may be shown in evidence in aggravation of damages in a breach of promise suit, it appears inferentially that the seduction was not alleged, and that this court considered such special allegation unnecessary, and it refers to the fact that "some states require an averment of special damages on this account."

So, in *Sauer v. Schulenberg*, 33 Md. 288, 3 Am. Rep. 174, holding that evidence of a seduction of the plaintiff, accomplished by the defendant after and by means of the promise of marriage, is admissible on the question of damages, it appears inferentially, at least, that the seduction was not al-

Dent v. Pickens, 26 Am. St. Rep. 921, and note (34 W. Va. 240, 12 S. E. 698); *Coil v. Wallace*, 24 N. J. L. 291. On the other hand, several courts of high authority hold that evidence of seduction of the plaintiff by the defendant under the alleged promise of marriage, and of her subsequent delivery of a bastard child, cannot be introduced, unless there is a special averment of these

leged, though the question of admissibility of evidence thereof was discussed rather generally than as a question of necessity of averment.

And the same is true in *Sherman v. Rawson*, 102 Mass. 395, holding that the jury may consider seduction in awarding damages for the mortification and distress suffered as a result of the breach of promise.

This case was followed in *Kelley v. Riley*, 106 Mass. 339, 8 Am. Rep. 336, holding that, although the declaration did not allege special damage, seduction under and by virtue of the marriage promise, resulting in the birth of a child alive and still living, may be considered by the jury in computing damages, so far as it tends to aggravate and increase the disappointment, mortification, pain, or distress of mind which the plaintiff has suffered by reason of the defendant's breach of contract.

Other breach of promise cases holding evidence of seduction admissible upon the question of increased damages, in which it is not apparent whether or not the seduction was alleged, but in which it seems more probable that it was not, although the question as to the admissibility of the evidence of the seduction is discussed on general principles, and without reference to necessity of averment, are: *Berry v. Da Costa*, L. R. 1 C. P. 331, 12 Jur. N. S. 588, 1 Harrison & K. 291, 35 L. J. C. P. N. S. 191, 14 Week. Rep. 279; *Tubbs v. Van Kleeck*, 12 Ill. 446; *Kurtz v. Frank*, 76 Ind. 594, 40 Am. Rep. 275; *Bennett v. Beam*, 42 Mich. 346, 36 Am. Rep. 442, 4 N. W. 8; *Bird v. Thompson*, 96 Mo. 428, 9 S. W. 788; *Kniffen v. McConnell*, 30 N. Y. 285; *Conn v. Wilson*, 2 Overt, 233, 5 Am. Dec. 663; *Goodall v. Thurman*, 1 Head, 209.

And the report leaves the same uncertainty as to the question of pleading, in *Wells v. Padgett*, 8 Barb. 323, holding that where defendant's promise to marry plaintiff was made with a view to seduce her and then to abandon her, and by mean of such promise he has seduced her, the seduction will be regarded as an aggravation of a broken promise, and will authorize increased damages.

Where the defendant has pleaded as a defense to a breach of promise action that the plaintiff was an unchaste woman, it is competent for the plaintiff to prove that the defendant seduced her, and was the father of the child to whom she has given birth, although she has not alleged any special damages. *Clark v. Phillips*, 4 Ky. L. Rep. 826 (abstract). A. C. W.

facts in the declaration. *Tyler v. Salley*, 82 Me. 128, 19 Atl. 107; *Leavitt v. Cutler*, 37 Wis. 46; *Geiger v. Payne*, 102 Iowa, 581, 69 N. W. 554, 71 N. W. 571.

Of course, it must be alleged and proven that the seduction and sexual intercourse were brought about and accomplished by the defendant under and by virtue of the contract of marriage. These facts must be shown, even in those states where it is not necessary to allege them in the declaration. 3 *Sutherland, Damages*, pp. 316 et seq.; 5 *Enc. Pl. & Pr.* p. 744.

It seems to us that these decisions which require that seduction, sexual intercourse, and the birth of a bastard were brought about by and as a result of the contract of marriage, should be set up in the declaration, are more in line with the principles of pleading followed in this state than those which do not require such allegations. When such facts are alleged in the declaration, the defendant is advised before trial of what he has to meet.

The rule in this state is that special damages, not the natural and usual result of the acts complained of, should be alleged and proven. *Ocala Foundry & Mach. Works v. Lester*, 49 Fla. 199, 38 So. 51; *Jacksonville Electric Co. v. Batchis*, 54 Fla. 192, 44 So. 933; *Moses v. Autuono*, 56 Fla. 499, 20 L.R.A.(N.S.) 350, 47 So. 925.

It cannot be contended that seduction and the birth of a bastard child are the direct, natural, and usual result of the contract of marriage or the breach of it.

We think the trial judge erred in admitting the evidence of seduction of the plaintiff and the birth of a bastard child, in the absence of any allegation of those facts in the declaration.

A charge to the jury was given by the judge, based on the evidence of seduction and the birth of a bastard child. This was excepted to, and, of course, erroneous from our view of the law.

Charge No. 6 given by the judge was also excepted to and assigned as error. It seems to us this charge is objectionable as argumentative and somewhat too rhetorical as a statement of law. Of course, the facts of the case present a deplorable social tragedy calculated to arouse the sensibilities of every right-feeling man; but the trial judge should refrain from any statement which would have the effect of arousing the feelings of the jury. It is his duty to give the jury the law applicable to the evidence of the case, and leave it to counsel to make proper and legitimate 33 L.R.A.(N.S.)

comments upon the evidence and the nature of the unfortunate affair.

The judgment is reversed.

Taylor and Parkhill, JJ., concur.

Whitfield, C. J., and Shackelford and Cockrell, JJ., concur in the opinion.

IOWA SUPREME COURT.

CHARLES L. MCGUIRE, Appt.,
v.

CHICAGO, BURLINGTON, & QUINCY
RAILROAD COMPANY.

(131 Iowa, 340, 108 N. W. 902.)

Statute — public policy — effect on court.

1. Courts are bound by the expressions of public policy found in constitutional statutes.

Same — employer's liability — construction avoiding restrictive contracts.

2. An amendment of a statute making a railroad company liable for injuries to employees through the negligence of fellow servants, and prohibiting any contract which restricts such liability, which provides that

Note. — Constitutionality of statute forbidding the avoidance of liability to employee or reduction of his damages by relief or indemnity contract.

For a note on the validity of statutes abrogating the fellow-servant rule, see *Bradford Constr. Co. v. Heflin*, 12 L.R.A.(N.S.) 1040.

For a note on contracts requiring servant to elect between acceptance of benefits out of relief fund and a prosecution of his claims in an action for damages, see *Frank v. Newport Min. Co.* 11 L.R.A.(N.S.) 182.

And for a note on validity of provision in contract of railroad relief department for forfeiture of benefits in case of suit against company for damages, see *Chicago, B. & Q. R. Co. v. Healy*, 10 L.R.A.(N.S.) 198.

The holding made in *McGUIRE v. CHICAGO, B. & Q. R. Co.* was adhered to in a subsequent appeal of that case (138 Iowa, 664, 116 N. W. 801).

In affirming the decision in *McGUIRE v. CHICAGO, B. & Q. R. Co.* in the Supreme Court of the United States, 219 U. S. 549, 55 L. ed. 328, 31 Sup. Ct. Rep. 259, and holding the provision in question not to be a violation of the 14th Amendment of the Federal Constitution by reason of the restraint it lays upon liberty to contract, Justice Hughes said: "The right, to make contracts is subject to the exercise of the powers granted to Congress for the suitable conduct of matters of national concern; as, for example, the regulation of commerce with foreign nations and among the several states. . . . It is subject, also, in the

no contract for relief or indemnity between the company and its employee shall bar a recovery, does not apply alone to such contracts as restrict the liability of the company.

Same — title — sufficiency.

3. A title, "An Act to Amend" a section of the Code which made a railroad company liable for injuries to employees caused by negligence of fellow servants, is sufficient to recover provisions that this liability shall not be avoided by relief or indemnity contracts between the parties.

Master — abolishing fellow-servant rule — prohibiting nullifying contracts — constitutionality.

4. Making railroad companies liable for injury to employees through the negligence of fellow servants, and forbidding the avoidance of such liability by a relief or indemnity contract with the employee, does not deprive such companies of the equal protection of the laws.

Same — liberty of contract — interference.

5. Forbidding railroad companies which have been rendered liable for injuries to employees by the negligence of fellow servants, to avoid such liability by relief or

indemnity contracts with their employees, is not an unconstitutional interference with their liberty of contract.

Same — police power — sufficiency.

6. The police power of the state extends to forbidding railroad companies which have been made liable for injury to employees through the negligence of fellow servants, from contracting with them for a relief or indemnity plan which will relieve the railroad company from a portion of the burden cast upon it by the statute.

Foreign corporation — applicability of local law.

7. That a railroad company is the creature of another state, and is engaged in interstate commerce, does not make inapplicable to it a statute of a state in which it is doing business forbidding such companies to make contracts with their employees of the establishment of a relief or indemnity plan which shall relieve them from a portion of the liability imposed upon them by law for injuries to employees.

(Ladd and Bishop, JJ., dissent.)

(July 14, 1906.)

field of state action, to the essential authority of government to maintain peace and security, and to enact laws for the promotion of the health, safety, morals, and welfare of those subject to its jurisdiction. . . . The principle involved in these decisions [cases upholding statutes requiring reasonable maximum charges for public service etc.] is that where the legislative action is arbitrary and has no reasonable relation to a purpose which it is competent for government to effect, the legislature transcends the limits of its power in interfering with liberty of contract; but where there is reasonable relation to an object within the governmental authority, the exercise of the legislative discretion is not subject to judicial review. The scope of judicial inquiry in deciding the question of power is not to be confused with the scope of legislative considerations in dealing with the matter of policy. Whether the enactment is wise or unwise, whether it is based on sound economic theory, whether it is the best means to achieve the desired result, whether, in short, the legislative discretion within its prescribed limits should be exercised in a particular manner, are matters for the judgment of the legislature, and the earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance.

"In dealing with the relation of employer and employed, the legislature has necessarily a wide field of discretion in order that there may be suitable protection of health and safety, and that peace and good order may be promoted through regulations designed to insure wholesome conditions of work and freedom from oppression. What differences, as to the extent of this power, 33 L.R.A. (N.S.)

may exist with respect to particular employments, and how far that which may be authorized as to one department of activity may appear to be arbitrary in another, must be determined as cases are presented for decision. . . . Here there is no question as to the validity of the regulation, or as to the power of the state to impose the liability which the statute prescribes. The statute relates to that phase of the relation of master and servant which is presented by the case of railroad corporations. It defined the liability of such corporations for injuries resulting from negligence and mismanagement in the use and operation of their railways. In the cases within its purview it extended the liability of the common law by abolishing the fellow-servant rule. Having authority to establish this regulation, it is manifest that the legislature was also entitled to insure its efficacy by prohibiting contracts in derogation of its provisions. In the exercise of this power, the legislature was not limited with respect either to the form of the contract, or the nature of the consideration, or the absolute or conditional character of the engagement. It was as competent to prohibit contracts which, on a specified event, or in a given contingency, should operate to relieve the corporation from the statutory liability which would otherwise exist, as it was to deny validity to agreements of absolute waiver. The policy of the amendatory act was the same as that of the original statute. Its provision that contracts of insurance relief, benefit, or indemnity, and the acceptance of such benefits, should not defeat recovery under the statute, was incidental to the regulation it was intended to enforce. Assuming the right of enforcement, the au-

APPEAL by plaintiff from a judgment of the District Court for Appanoose County in defendant's favor in an action brought to recover damages for personal injuries which were alleged to have been caused by defendant's negligence and for which plaintiff had received some compensation through defendant's relief department. Reversed.

The facts are stated in the opinion.

Messrs. C. F. Howell and W. R. O. Kendrick, for appellant:

The amendment of the statute was within the title.

Morgan v. Des Moines, 54 Fed. 456; *State ex rel. Weir v. County Judge*, 2 Iowa, 280; *Davis v. Woolnough*, 9 Iowa, 104; *Christie v. Life Indemnity & Invest. Co.* 82 Iowa, 360, 48 N. W. 94; *State ex rel. Witter v. Forkner*, 94 Iowa, 1, 28 L.R.A. 206, 62 N. W. 772; *McAunich v. Mississippi & M. River R. Co.* 20 Iowa, 341; *Montclair Twp. v. Ramsdell*, 107 U. S. 147, 27 L. ed. 431, 2 Sup. Ct. Rep. 391; *State ex rel. Walter v. Union*, 33 N. J. L. 351.

The amendment is within the reserved power of the state.

Sioux City Street R. Co. v. Sioux City, 78 Iowa, 371, 43 N. W. 224; *Sioux City Street R. Co. v. Sioux City*, 78 Iowa, 746, 39 N. W. 498, affirmed in 138 U. S. 98, 34 L. ed. 898, 11 Sup. Ct. Rep. 226; *Des Moines v. Des Moines Waterworks Co.* 95 Iowa, 348, 64 N. W. 269; *Holyoke Water-Power Co.*

thority to enact this inhibition cannot be denied. If the legislature had the power to prohibit contracts limiting the liability imposed, it certainly could include in the prohibition stipulations of that sort in contracts of insurance relief, benefit, or indemnity, as well as in other agreements. But if the legislature could specifically provide that no contract for insurance relief should limit the liability for damages, upon what ground can it be said that it was beyond the legislative authority to deny that effect to the payment of benefits, or the acceptance of such payment, under the contract? The asserted distinction is sought to be based upon the fact that under the contract of membership, the employee has an election after the injury. But this circumstance, however appropriate it may be for legislative consideration, cannot be regarded as defining a limitation of legislative power. The power to prohibit contracts, in any case where it exists, necessarily implies legislative control over the transaction, despite the action of the parties. Whether this control may be exercised in a particular case depends upon the relation of the transaction to the execution of a policy which the state is competent to establish. It does not aid the argument to describe the defense as one of accord and satisfaction. The payment of benefits is the performance of the promise to pay, contained in the contract of member-

v. Lyman, 15 Wall. 500, 21 L. ed. 133; *Central P. R. Co. v. Gallatin*, 99 U. S. 727, 25 L. ed. 504; *St. Louis, I. M. & S. R. Co. v. Paul*, 173 U. S. 404, 43 L. ed. 747, 19 Sup. Ct. Rep. 1; *Avent Beattyville Coal Co. v. Ellis*, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77; *Burlington, C. R. & N. R. Co. v. Dey*, 82 Iowa, 344, 12 L.R.A. 436, 3 Inters. Com. Rep. 584, 31 Am. St. Rep. 477, 48 N. W. 98; *Ex parte Davis*, 21 Fed. 396; *Shelley v. St. Charles County*, 5 McCrary, 474, 17 Fed. 910; *Farmers Loan & T. Co. v. Stone*, 20 Fed. 273, 116 U. S. 319, 29 L. ed. 642, 6 Sup. Ct. Rep. 334, 388, 1191; *Sarony v. Burrow-Giles Lithographic Co.* 17 Fed. 591; *Knoxville Iron Co. v. Harbison*, 183 U. S. 13, 46 L. ed. 55, 22 Sup. Ct. Rep. 1; *Avent Beattyville Coal Co. v. Com.* 96 Ky. 218, 28 L.R.A. 273, 28 S. W. 502; *Orient Ins. Co. v. Daggs*, 172 U. S. 557, 43 L. ed. 552, 19 Sup. Ct. Rep. 281; *Atchison, T. & S. F. R. Co. v. Matthews*, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609.

What legislation is required for the public good and welfare is "for the legislative determination."

Lawton v. Steele, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499; *Hollden v. Hardy*, 169 U. S. 393, 42 L. ed. 791, 18 Sup. Ct. Rep. 383; *Com. v. Alger*, 7 Cush. 53; *Litchfield Coal Co. v. Taylor*, 81 Ill. 590, 10 Mor. Min. Rep. 684;

ship. If the legislature may prohibit the acceptance of the promise as a substitution for the statutory liability, it should also be able to prevent the like substitution of its performance."

And a section of the employers' liability act of Congress, providing that "no contract of employment, insurance, relief benefit, or indemnity for injury or death, entered into by or on behalf of any employee, nor the acceptance of any such insurance, relief benefit, or indemnity by the person entitled thereto, shall constitute any bar or defense to any action brought to recover damages for personal injuries to or death of such employee; Provided, however, that upon the trial of such action against any common carrier, the defendant may set off therein any sum it has contributed toward any such insurance, relief benefit, or indemnity that may have been paid to the injured employee, or, in case of his death, to his personal representative" (34 Stat. at L. 232, chap. 3073, U. S. Comp. Stat. Supp. 1909, p. 1149), as applied in the District of Columbia, is not unconstitutional as an encroachment by Congress upon the right of free contract guaranteed by the 5th Amendment of the Constitution, but is valid as a reasonable and necessary means of carrying out the purposes of the employer's liability act. *McNamara v. Washington Terminal Co.* 35 App. D. C. 230. J. T. W.

Com. v. Hamilton Mfg. Co. 120 Mass. 383; Holden v. Hardy, 169 U. S. 393, 42 L. ed. 791, 18 Sup. Ct. Rep. 383; Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; Barron v. Burnside, 121 U. S. 186, 30 L. ed. 915, 1 Inters. Com. Rep. 295, 7 Sup. Ct. Rep. 931; Dayton Coal & I. Co. v. Barton, 183 U. S. 23, 46 L. ed. 61, 22 Sup. Ct. Rep. 5; Orient Ins. Co. v. Daggs, 172 U. S. 567, 43 L. ed. 556, 19 Sup. Ct. Rep. 281.

The amendment was properly enacted in the exercise of the police power.

Peirce v. New Hampshire, 5 How. 583, 12 L. ed. 201; McAunich v. Mississippi & M. R. Co. 20 Iowa, 343; Iowa R. Land Co. v. Soper, 39 Iowa, 112; Deppe v. Chicago, R. I. & P. R. Co. 36 Iowa, 52; Iowa Medical College Asso. v. Schrader, 87 Iowa, 663, 20 L.R.A. 355, 55 N. W. 24; Missouri P. R. Co. v. Mackey, 127 U. S. 205, 210, 36 L. ed. 107, 109, 8 Sup. Ct. Rep. 1161.

It does not interfere with the constitutional right to contract.

Holden v. Hardy, 169 U. S. 394, 42 L. ed. 792, 18 Sup. Ct. Rep. 383.

The relief system is contrary to public policy.

Miller v. Chicago, B. & Q. R. Co. 65 Fed. 305.

The legislature has a discretion vested in it to determine when an act is necessary in the exercise of the reserve and police power.

Powell v. Pennsylvania, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 1257.

The legislature, in its plenary power, "can even consult the prejudice of the people" in making laws of the kind under discussion.

State v. Marshall, 64 N. H. 549, 1 L.R.A. 51, 15 Atl. 210; State v. Addington, 12 Mo. App. 214; State v. Addington, 77 Mo. 110; Butler v. Chambers, 36 Minn. 69, 1 Am. St. Rep. 638, 30 N. W. 308; Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; People v. Rudd, 117 N. Y. 7, 5 L.R.A. 559, 15 Am. St. Rep. 460, 22 N. E. 670; Ohio L. Ins. & T. Co. v. Debolt, 16 How. 428, 14 L. ed. 1002; Missouri P. R. Co. v. Mackey, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161.

The power to classify is peculiarly within the discretion of the legislature.

Missouri v. Lewis (Bowman v. Lewis) 101 U. S. 22, 25 L. ed. 989; Hayes v. Missouri, 120 U. S. 68, 30 L. ed. 578, 7 Sup. Ct. Rep. 350; Atchison, T. & S. F. R. Co. v. Matthews, 174 U. S. 104, 43 L. ed. 912, 19 Sup. Ct. Rep. 609; Duncan v. Missouri, 152 U. S. 377, 38 L. ed. 485, 14 Sup. Ct. Rep. 570; Marchant v. Pennsylvania R. Co. 153 U. S. 380, 38 L. ed. 751, 14 Sup. Ct. Rep. 894; Chicago, K. & W. R. Co. v. Pontius, 157 U. S. 209, 39 L. ed. 675, 15 Sup. Ct. Rep. 585; Lowe v. Kansas, 163 U. S. 81, 33 L.R.A. (N.S.)

41 L. ed. 78, 16 Sup. Ct. Rep. 1031; Plessy v. Ferguson, 163 U. S. 537, 41 L. ed. 256, 16 Sup. Ct. Rep. 1138; Covington & L. Turnp. Road Co. v. Sandford, 164 U. S. 578, 41 L. ed. 560, 17 Sup. Ct. Rep. 198; Jones v. Brim, 165 U. S. 180, 41 L. ed. 677, 17 Sup. Ct. Rep. 282; Western U. Teleg. Co. v. Indiana, 165 U. S. 304, 41 L. ed. 725, 17 Sup. Ct. Rep. 345; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581; Holden v. Hardy, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; Savings & L. Soc. v. Multnomah County, 169 U. S. 421, 42 L. ed. 803, 18 Sup. Ct. Rep. 392; Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594; Tinsley v. Anderson, 171 U. S. 101, 43 L. ed. 91, 18 Sup. Ct. Rep. 805.

Mr. C. H. Elgin also for appellant.

Messrs. H. H. Trimble, Palmer Trimble, F. S. Payne, and J. W. Blythe for appellee.

Weaver, J., delivered the opinion of the court:

The plaintiff's petition at law alleges that, while in the service of the defendant railway company as brakeman and while in the exercise of reasonable care for his own safety, he was seriously and permanently injured by reason of the negligence of a coemployee in the management of the train on which he was employed, and he asks to recover damages in the sum of \$2,000. As a bar to the plaintiff's right of recovery the defendant alleges that at the time of the accident in which plaintiff was injured he was a member of the Burlington Relief Department, an association organized by the defendant and its employees (the rules and regulations of which are made a part of the answer), and that by reason of such membership the plaintiff became entitled to recover certain benefits while disabled by physical injury, and that he did in fact receive from the association on that account the aggregate sum of \$822. It is further alleged that by the terms of the contract embodied in the relief department regulations, plaintiff had an election to accept said benefits, or to waive them and insist upon his claim against the defendant for damages, but he was not entitled to both, and that by reason of his acceptance of such benefits he is now estopped to recover anything in this action. The answer further asserts that the provisions of Code, § 2071, as amended by the twenty-seventh general assembly (Acts 27th Assemb. p. 23, chap. 49), have no effect to bar or estop the defendant from relying upon the defense above stated because said amendment is in contravention of the Constitution of the

United States and the Constitution of the state of Iowa. A demurrer to the answer having been overruled, the plaintiff appeals.

The questions suggested by the record and argued by counsel may be condensed as follows: (1) Assuming the truth of the matters pleaded in the petition and answer, is the case one calling for the application of the statutory provision upon which plaintiff relies? (2) If the foregoing question be answered in the affirmative, is Code, § 2071, as it now stands, a valid exercise of legislative power, or is it void as being in contravention of the Constitution, national or state?

1. As originally enacted Code, § 2071, was in words as follows: "Every corporation operating a railway shall be liable for all damages sustained by any person, including employees of such corporation, in consequence of the neglect of the agents, or by any mismanagement of the engineers or other employees thereof, and in consequence of the wilful wrongs, whether of commission or omission, of such agents, engineers, or other employees, when such wrongs are in any manner connected with the use and operation of any railway on or about which they shall be employed, and no contract which restricts such liability shall be legal or binding." The amendment to which reference has been made adds to said section the following: "Nor shall any contract of insurance relief, benefit, or indemnity in case of injury or death, entered into prior to the injury, between the person so injured and such corporation or any other person or association acting for such corporation, nor shall the acceptance of any such relief, insurance, benefit, or indemnity by the person injured, his widow, heirs, or legal representatives after the injury, from such corporation, person, or association, constitute any bar or defense to any cause of action brought under the provisions of this section; but nothing contained herein shall be construed to prevent or invalidate any settlement for damages between the parties subsequent to the injuries received." The events leading up to the adoption of this amendment are matters of common knowledge. Subsequent to the enactment of Code, § 2071, in its original form, a relief department scheme for the payment of benefits to injured employees was organized by the appellee herein; one of the provisions or regulations of the department being that the bringing of suit by a member for damages should suspend his right to receive further benefits until the suit was discontinued, and the acceptance of the benefits should operate as a release and satisfaction of all claims for damages. Prior to the adoption of the amendment it was held by this court

that the relief contract was not void as being against public policy, and employees of the railway who accepted benefits from the association on account of injuries received in the company's service were held to be barred from the recovery of damages. *Donald v. Chicago, B. & Q. R. Co.* 93 Iowa, 284, 33 L.R.A. 492, 61 N. W. 971; *Maine v. Chicago, B. & Q. R. Co.* 109 Iowa, 260, 70 N. W. 630, 80 N. W. 315. Upon the announcement of the first of the cited decisions the matter of further legislation to restrict or prohibit contracts of this nature became a topic of very general discussion throughout the state, and in apparent response to the public sentiment manifested, the twenty-eighth general assembly enacted the amendment quoted above. That it was intended to invalidate defenses like that which is here pleaded, and to permit an employee injured by the neglect of the corporation or its servants to recover his damages, notwithstanding the terms of his membership in the relief department, or the receipt of benefits thereunder, seems to be very clear from the language employed. To the extent that the legislative will is here expressed, the question of public policy which has been argued by counsel is eliminated; for the statute, if constitutional, must stand as the authoritative expression of the public policy of the state, which the courts are bound to observe and enforce.

But it is said in behalf of appellee that the amendment, even if valid, has reference to such relief contracts only as operate to "restrict the liability" of the company, and that this court, by its decisions under the statute as it stood before the amendment, has already held contracts similar to the one now before us not to be of that character. This argument is reinforced by the further proposition that, if the amendment is to be construed as enlarging the scope of the section and applied to cases not before within its prohibition, it must be held unconstitutional, because the title, "An Act to Amend Code, § 2071," does not sufficiently set forth the subject of the legislation. It will be conceded that, to be of any effect, an amendment to a statute must have some relevancy to the original act, and the two are to be read together in seeking to discover the legislative will and purpose. But there is no rule of interpretation requiring us to give the amended statute a meaning which differs in any degree from that which would have been given it had the matter of amendment been made a part of the original act. In other words, unless the contrary intent is clearly indicated, the amended statute is to be construed as if the original statute had been repealed and a new and independent act in the amended

form had been adopted. *Holbrook v. Nichol*, 36 Ill. 161; *McKibben v. Lester*, 9 Ohio St. 627; *Farrell v. State*, 54 N. J. L. 421, 24 Atl. 725; *Kamerick v. Castleman*, 21 Mo. App. 587; *Humphrey v. Parsons*, 15 N. Y. 595; *Conrad v. Nall*, 24 Mich. 277. Now, Code, § 2071, as first enacted, making railway companies liable for injuries occasioned to a servant by the negligence of a fellow servant, gave to employees in that service an important right or measure of protection which did not before exist, and undertook to guard the same by a provision rendering void any agreement or stipulation in the contract of employment waiving or restricting the benefit of such statutes. This provision was stated in general terms only, and, when it was invoked to avoid the effect of appellee's relief department contract, this court decided, as we have already seen, that such contract did not restrict the statutory liability of the corporation and was therefore not affected by the prohibition. Thereafter, and by the amendment referred to, the legislature added a clause enumerating certain specific acts, agreements, contracts, and stipulations which shall constitute no defense to an action brought for the enforcement of the statutory liability. That enumeration so accurately describes the contract upon which the appellee here relies that it would be a mere affectation to profess to misunderstand it. To place upon it the construction asked for by the appellee is to deprive the amendment of all force and effect. The section in its original form invalidated in general terms all contracts restricting the liability of the corporation; and if, as contended, the amendment must be construed as applying only to such agreements for insurance, indemnity, or benefits as tend to "restrict" that liability within the meaning of the court's opinion in the *Donald Case*, then it neither increases nor diminishes the scope of the original provision, and the passage of the amending act was an idle and useless ceremony. Its words are not in the least obscure, its purpose is obvious, and unless we arbitrarily disregard the plain terms of the statute it must be construed in substantial accord with the appellant's contention. This being determined, we have next to inquire concerning its validity.

2. There is, in our judgment, no fatal defect in the title of the amending act. That act has but one purpose,—the amendment of Code, § 2071, and that purpose is succinctly stated. It is a general rule that a title which simply names or describes an amending act as such, without stating the specific character or substance of the amendment, is sufficient. *Morford v. Unger*, 8 Iowa, 82; *Iowa Sav. & L. Asso. v. Selby*, 111 Iowa, 33 L.R.A. (N.S.)

402, 82 N. W. 968; *Timm v. Harrison*, 109 Ill. 593; *People ex rel. Gere v. Whitlock*, 92 N. Y. 191; *Robinson v. Lane*, 19 Ga. 337. The act as amended relates to but one subject. The object sought to be obtained by the original statute was the imposing of a liability upon railway corporations in favor of their employees and the protection of the latter in the right thus created. If, in view of the practical operation of the statute, the legislature wisely or unwisely concluded that the protection thus provided was not sufficient for the intended purpose, and desired to specifically provide that the right given to the employees should not be waived or lost by reason of his membership in a railway relief department or by a participation in its benefits, it seems plain that (assuming the validity of such legislation in any form) it was entirely competent to so enact by way of amendment to the original statute, and that such amendment does not introduce a new subject of legislation. Generally speaking, the purpose of every amendment is to enlarge or restrict the application or effect of the statute so sought to be amended, and the fact that in the case at bar the amended statute is made to include within its prohibition a class of contracts which escaped the ban of the original act does not introduce a new or independent subject of legislation. It is only the general purpose which is to be expressed in the title, and not the methods or provisions by which that purpose is to be accomplished. *People ex rel. Le Roy v. Hurlbut*, 24 Mich. 44, 9 Am. Rep. 103; *People ex rel. Rochester v. Briggs*, 50 N. Y. 553; *Murdock v. Woodson*, 2 Dill. 188, Fed. Cas. No. 9,942. It is sufficient if the provisions of the statute expressed have congruity and proper connection. *De Witt v. San Francisco*, 2 Cal. 289; *Com. v. Green*, 58 Pa. 226; *State v. Mines*, 38 W. Va. 125, 18 S. E. 470; *Robinson v. State*, 15 Tex. 311; *Reed v. State*, 12 Ind. 641. The title to an act "need not go into details. It is sufficient if it indicates with reasonable precision and clearness the subject it embraces. Nor is an act invalid because it includes details not mentioned in the title, provided the details are germane to the general subject designated in the title." *Pittsburgh, C. C. & St. L. R. Co. v. Montgomery*, 152 Ind. 1, 69 L.R.A. 875, 71 Am. St. Rep. 301, 49 N. E. 582. The title to the original act and of the amendment comes fairly within the rule of these authorities, and the objection thereto is not well taken.

3. Summing up their argument against the validity of the statute, counsel narrow the question to the proposition that it violates the 14th Amendment to the Constitution of the United States, as well as the

somewhat similar provisions found in our state Constitution. They say: "There are but two provisions of the Constitution of the United States relied upon by appellee in this case. These are found in the 14th Amendment. The substance of these provisions is that no state shall pass any law that will deprive any person of the right of life, liberty, and property, or deprive any person of the equal protection of the law. There are two provisions in our state Constitution, substantially similar: Section 1, art. 1 (Code, p. 60), and § 6, art. 1 (Code, p. 61). We assume that the court will regard itself bound to determine whether the Temple amendment is repugnant to these two provisions of the state Constitution." The questions thus raised are of great importance, and have been thoroughly and exhaustively presented in the briefs of counsel. It is well, at the threshold of the discussion, to recall the familiar rule by which we are bound in passing upon any proposition affecting the constitutionality of a legislative enactment. While it is an imperative duty, from which no court will shrink, to declare void any statute the unconstitutionality of which is made apparent, due regard to the boundary between the legislative and judicial departments of our government requires that this prerogative be exercised with the greatest caution, and only after every reasonable presumption has been indulged in favor of the validity of the act. *Merchants' Union Barb Wire Co. v. Brown*, 64 Iowa, 275, 20 N. W. 434; *Stewart v. Polk County*, 30 Iowa, 9, 1 Am. Rep. 238; *Duncombe v. Prindle*, 12 Iowa, 1; *Reed v. Wright*, 2 G. Greene, 15; *State ex rel. Weir v. County Judge*, 2 Iowa, 280; *Whiting v. Mt. Pleasant*, 11 Iowa, 482; *Flint & F. Pl. Road Co. v. Woodhull*, 25 Mich. 99, 12 Am. Rep. 233; *Evans v. Job*, 8 Nev. 322. It is not the province of the court to pass upon the policy, wisdom, or justice of the statute, or upon the expediency of its enactment. *Central Iowa R. Co. v. Wright County*, 67 Iowa, 199, 25 N. W. 128; *Merchants' Union Barb Wire Co. v. Brown*, *supra*.

So thoroughly are the courts committed to this theory of the law that in *Stewart v. Polk County*, 30 Iowa, 9, 1 Am. Rep. 238, it is said that a legislative act may be declared unconstitutional only when it violates that instrument clearly, palpably, plainly, and in such manner as to leave no reasonable doubt. In this same case we approvingly quoted the language of Mr. Justice Baldwin of the Federal court as follows: "We cannot declare a legislative act void because it conflicts with our opinions of policy, expediency, or justice. We are not the guardians of the rights of the

people of the state, unless they are secured by some constitutional provision which comes within our judicial cognizance. The remedy for unwise or oppressive legislation within constitutional bounds is by appeal to the justice and patriotism of the representatives of the people. If this fail, the people in their sovereign capacity can correct the evil; but the courts cannot assume their rights." The inquiry to which we are confined is one of legislative power alone. It is fundamental in our system of government that all powers not delegated to the United States by the terms of the Federal Constitution and its amendments, nor prohibited by it to the states, are reserved to the states or to the people. U. S. Const. Amend. 10. Subject to the authority thus expressly or by necessary inference delegated to the Federal government, the state has sovereign legislative power over all subjects, except such as are withheld from it by the Constitution of the state itself. *Boyd v. Ellis*, 11 Iowa, 97; *Stewart v. Polk County*, 30 Iowa, 9, 1 Am. Rep. 238; *Purezell v. Smidt*, 21 Iowa, 540; *Morrison v. Springer*, 15 Iowa, 324; *Boyer v. Kinnick*, 90 Iowa, 74, 57 N. W. 691; *Hawkeye Ins. Co. v. French*, 109 Iowa, 588, 80 N. W. 660; *New York v. Miln*, 11 Pet. 102, 9 L. ed. 648; *Burlington, C. R. & N. R. Co. v. Dey*, 82 Iowa, 312, 12 L.R.A. 436, 3 Inters. Com. Rep. 584, 31 Am. St. Rep. 477, 48 N. W. 98; *Re Meador*, 1 Abb. (U. S.) 317, Fed. Cas. No. 9,375; *Wadleigh v. Develling*, 1 Ill. App. 596; *Moor v. Veazie*, 32 Me. 343, 52 Am. Dec. 655; *Beyman v. Black*, 47 Tex. 558. It is not for the court to inquire or determine whether a state of facts existed calling for the enactment of the legislation in question. That is for the exclusive consideration of the legislature. If under any possible state of facts the act would be constitutional and valid, the court is bound to presume that such condition existed. *Murin v. Illinois*, 94 U. S. 113, 24 L. ed. 77; *State v. Peckham*, 3 R. I. 289; *Re Ten Hour Law*, 24 R. I. 603, 61 L.R.A. 612, 54 Atl. 602.

4. Is the statute objectionable as class legislation, or as denying to the corporation the equal protection of the laws? The 14th Amendment to the Constitution of the United States provides, among other things, that no state shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. While a corporation is not a citizen within the meaning of this amendment, it is a "person," and as such may not rightfully be denied the protection of the laws of the state upon equal terms with all other persons under like circumstances and conditions. *Smyth v. Ames*, 169 U. S. 466, 42

L. ed. 819, 18 Sup. Ct. Rep. 418; *Blake v. McClung*, 172 U. S. 239, 43 L. ed. 432, 19 Sup. Ct. Rep. 165; *Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania*, 125 U. S. 188, 31 L. ed. 653, 2 Inters. Com. Rep. 24, 8 Sup. Ct. Rep. 737; *New York & N. E. R. Co. v. Bristol*, 151 U. S. 556, 38 L. ed. 269, 14 Sup. Ct. Rep. 437. But the reasonable classification of persons for the purposes of legislation according to occupation, business, or other circumstances, by which one class or portion of the people is differentiated from other portions or classes, has often been held not to be a violation of this constitutional guaranty. The mere fact that legislation is special, and made to apply to certain persons, and not to others, does not affect its validity, if it be so made that all persons subject to its terms are treated alike under like circumstances and conditions. *Hayes v. Missouri*, 120 U. S. 68, 30 L. ed. 578, 7 Sup. Ct. Rep. 350; *Com. v. Interstate Consol. Street R. Co.* 187 Mass. 436, 11 L.R.A.(N.S.) 973, 73 N. E. 530, 2 A. & E. Ann. Cas. 418; *State v. Nelson*, 52 Ohio St. 88, 26 L.R.A. 317, 39 N. E. 22; *People v. Smith*, 108 Mich. 527, 32 L.R.A. 853, 62 Am. St. Rep. 715, 66 N. W. 382; *People v. Walbridge*, 6 Cow. 512; *Dugger v. Mechanics' & T. Ins. Co.* 95 Tenn. 245, 28 L.R.A. 796, 32 S. W. 5; *Walston v. Nevin*, 128 U. S. 578, 32 L. ed. 544, 9 Sup. Ct. Rep. 192; *Duncan v. Missouri*, 152 U. S. 377, 38 L. ed. 485, 14 Sup. Ct. Rep. 570; *Broadfoot v. Fayetteville*, 121 N. C. 422, 39 L.R.A. 245, 61 Am. St. Rep. 668, 28 S. E. 515; *State v. Tower*, 185 Mo. 79, 68 L.R.A. 402, 84 S. W. 10; *People v. Bellett*, 99 Mich. 151, 22 L.R.A. 696, 41 Am. St. Rep. 589, 57 N. W. 1094.

Such, also, has been the uniform holding of this court with reference to the corresponding provision in our state Constitution. A leading case to this effect is *McAunich v. Mississippi & M. R. Co.* 20 Iowa, 338. As we there said: "Such laws are general and uniform, not because they operate upon every person in the state, . . . but because every person who is brought within the relations and circumstances provided for is affected by the law. They are general and uniform in their operation upon all persons in the like situation, and the fact of their being general and uniform is not affected by the number of persons within the scope of their operation." Treating the same question, the Supreme Court of the United States by Field, J., in *Missouri P. R. Co. v. Mackey*, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161, says: "The greater part of all legislation is special, either in the objects sought to be attained by it or in the extent of its application. . . . Such legislation does 33 L.R.A.(N.S.)

not infringe upon the clause of the 14th Amendment requiring equal protection of the laws, because it is special in its character. . . . And when legislation applies to particular bodies or associations, imposing upon them additional liabilities, it is not open to the objection that it denies to them the equal protection of the laws, if all persons brought under its influence are treated alike under the same condition." See also *People v. Havnor*, 149 N. Y. 206, 31 L.R.A. 689, 52 Am. St. Rep. 707, 43 N. E. 541; *Missouri v. Lewis* (*Bowman v. Lewis*), 101 U. S. 22, 25 L. ed. 989; *Duncan v. Missouri*, 152 U. S. 377, 38 L. ed. 485, 14 Sup. Ct. Rep. 570; *Watson v. Nevin*, 128 U. S. 578, 32 L. ed. 544, 9 Sup. Ct. Rep. 192; *Giozza v. Tiernan*, 148 U. S. 657, 37 L. ed. 599, 13 Sup. Ct. Rep. 721; *Pittsburgh, C. C. & St. L. R. Co. v. Backus*, 154 U. S. 421, 38 L. ed. 1031, 14 Sup. Ct. Rep. 1114; *Illinois C. R. Co. v. Crider*, 91 Tenn. 501, 19 S. W. 618; *Butte v. Paltrovich*, 30 Mont. 18, 104 Am. St. Rep. 698, 75 Pac. 521.

That legislation imposing upon railway companies special restrictions, obligations, and liabilities not generally applicable to other persons or corporations, is not a denial of the equal protection of the laws, has been so often decided as to be no longer a debatable question. Thus the courts have upheld statutes depriving railway companies of the benefit of the fellow-servant doctrine (*Herrick v. Minneapolis & St. L. R. Co.* 31 Minn. 11, 47 Am. Rep. 771, 16 N. W. 413; *Missouri P. R. Co. v. Mackey*, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161; *Minneapolis & St. L. R. Co. v. Herrick*, 127 U. S. 210, 32 L. ed. 109, 8 Sup. Ct. Rep. 1176); requiring a railway company to pay attorneys' fees to the landowner in condemnation proceedings (*Gano v. Minneapolis & St. L. R. Co.* 114 Iowa, 719, 55 L.R.A. 263, 89 Am. St. Rep. 393, 87 N. W. 714; *Id.*; 190 U. S. 557, 47 L. ed. 1183, 23 Sup. Ct. Rep. 854); subjecting railway corporations to double damages under certain circumstances (*Missouri P. R. Co. v. Humes*, 115 U. S. 512, 29 L. ed. 463, 6 Sup. Ct. Rep. 110; *Minneapolis & St. L. R. Co. v. Beckwith*, 129 U. S. 26, 32 L. ed. 585, 9 Sup. Ct. Rep. 207); denying railway corporations the right of appeal from assessment for taxation, although such right is given to owners of other taxable property (*Pittsburgh, C. C. & St. L. R. Co. v. Backus*, 154 U. S. 421, 38 L. ed. 1031, 14 Sup. Ct. Rep. 1114); making such corporations liable, without regard to negligence, for fires set by their engines (*Atchison, T. & S. F. R. Co. v. Matthews*, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609); and requiring

them to pay without discount to a discharged employee wages earned at the time of discharge (St. Louis, I. M. & S. R. Co. v. Paul, 173 U. S. 404, 43 L. ed. 746, 19 Sup. Ct. Rep. 419). In each of these cases, and in many others which might be cited, the statute under consideration was made applicable to railway companies only, and in each case it was vigorously assailed as a denial of the equal protection of the laws; but in each instance, after thorough argument proceeding along the lines followed by counsel for the appellee herein, the court of last resort has uniformly held the legislation to be a valid exercise of the police power of the states. In view of these decisions we think it beyond question that the statute here under consideration cannot be said to be void as a denial of the equal protection guaranteed by the 14th Amendment. As to the general nature of this amendment and the limits of its application, see Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 616; Missouri P. R. Co. v. Humes, 115 U. S. 512, 29 L. ed. 463, 6 Sup. Ct. Rep. 110; Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; Missouri, K & T. R. Co. v. May, 194 U. S. 267, 48 L. ed. 971, 24 Sup. Ct. Rep. 638; Farmers' & M. Ins. Co. v. Dobney, 189 U. S. 301, 47 L. ed. 821, 23 Sup. Ct. Rep. 565; Froelich v. Toledo & O. C. R. Co. 24 Ohio C. C. 359; Texas & P. R. Co. v. Mahaffey, — Tex. Civ. App. —, 81 S. W. 1047.

5. Is the statute an unwarranted interference with liberty of contract? The right of contract is not one of the rights which are guaranteed in express words by the Constitution, but such protection exists as a necessary inference from the express guaranty of property rights. This right, like all others possessed by the individual member of society, is held subject to such reasonable restrictions and regulations as may be imposed for the general good. The power by which these limitations are imposed upon the liberty of the individual is commonly called the "police power," which is but another name for that portion of the sovereignty of the state not surrendered by the terms of the national compact. The police power, as that term is commonly employed, may be paraphrased as society's natural right of self-defense, and its definition and limitation vary with the circumstance calling for its exercise. To enshrine it in any fixed or rigid formula would be to destroy its value, for it would then be deprived of its indispensable quality of adaptation to changing conditions, and thus defeat the ends it was intended to promote. 6 Words & Phrases, p. 5424, and cases there cited. While protection of public health and public morals and the

promotion of social order are peculiarly within its province, these are but instances of its application, and do not limit its sphere of action. People v. Budd, 117 N. Y. 1, 5 L.R.A. 559, 15 Am. St. Rep. 460, 22 N. E. 670, 682; Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357. The police power of the state is the power to govern men and things within the limit of its dominions. It comprehends all those general laws of internal regulations necessary to secure peace, good order, health, and prosperity of the people, and the regulations and protection of property and property rights. State v. Harrington, 68 Vt. 622, 34 L.R.A. 100, 35 Atl. 515; State v. Reynolds, 77 Conn. 131, 58 Atl. 755. It adapts itself to the changing conditions of society, and makes it competent for the state to devise, adopt, and enforce any new regulation or restriction, not clearly forbidden by the Constitution, which it believes to be expedient under the peculiar circumstances with which it is sought to deal. The spirit which pervades the police power is closely related to that which is embodied in the common-law maxim, *Sic utere tuo alienum non ladas*. The liberty of the individual may always be restrained where its unregulated exercise becomes a source of danger or injury to the society of which that individual is a member. "As soon as any part of a person's conduct affects prejudicially the interests of others, society has jurisdiction over it." Mill, Liberty, chap. 4. See also Powell v. Com. 114 Pa. 265, 60 Am. Rep. 350, 7 Atl. 913, 7 Am. Crim. Rep. 32; Oil City v. Oil City Trust Co. 151 Pa. 454, 31 Am. St. Rep. 770, 25 Atl. 124; Crowley v. Christensen, 137 U. S. 89, 34 L. ed. 620, 11 Sup. Ct. Rep. 13; Jamison v. Indiana Natural Gas & Oil Co. 128 Ind. 560, 12 L.R.A. 652, 3 Inters. Com. Rep. 613, 23 N. E. 76; Garrett v. Aby, 47 La. Ann. 618, 17 So. 238; Stone v. Mississippi, 101 U. S. 814, 25 L. ed. 1079; State v. Tower, 185 Mo. 79, 68 L.R.A. 402, 84 S. W. 10.

Of course, it must be kept in mind that the police power, like all other powers of the state, is subordinate to the Constitution, and if the legislature, under the guise of police regulation, transgress the express or clearly implied limits drawn by the Constitution, the courts will hold the act void and of no effect. But this authority of the court involves a duty of the most delicate and responsible character, and, as we have already said, is to be exercised in no doubtful case. The court is not to substitute its own ideas for those of the legislature as to the propriety, wisdom, or justice of the statute. It must not arrogate to itself superior knowledge of the public

needs, nor assume to prescribe remedies for public ills. Cases may, perhaps, be found where this fundamental distinction has apparently been overlooked, thus affording some measure of support for the proposition advanced by counsel that "the validity of the statute depends upon the question whether it is a measure for the public good." The adoption of such a rule would be to transfer the lawmaking power to the judiciary, and work the utter elimination of the legislative department as a co-ordinate branch of the government. The courts do not sit to revise or review legislative action, and if they hold an act invalid it is because the legislature has failed to keep within the express or clearly implied limitations of the Constitution. A court has no right to declare an act invalid solely because of unjust and oppressive provisions, or because it is supposed to violate the natural, social, or political rights of the citizen, unless it can be shown that such injustice is prohibited, or such rights guaranteed, by the Constitution. Except when the Constitution has imposed limits upon the legislative power, it must be considered practically absolute. Neither are the courts at liberty to declare an act void merely because, in their judgment, it is opposed to the spirit of the Constitution. They must be able to point out the specific provision, expressed or clearly implied from what is expressed, which the act violates. *Cooley*, Const. Lim. chap. 7; *Winter v. Jones*, 10 Ga. 190, 54 Am. Dec. 379.

The duty to keep within the constitutional limits of its jurisdiction is no less binding upon the court than upon the legislature. It is a settled proposition that the 14th Amendment to the Federal Constitution was not intended to limit or hamper the states in the exercise of their police powers. *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; *Re Kemmler*, 136 U. S. 436, 34 L. ed. 519, 10 Sup. Ct. Rep. 930; *Re Converse*, 137 U. S. 624, 34 L. ed. 796, 11 Sup. Ct. Rep. 191; *Powell v. Pennsylvania*, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257. Considering a statute like our Code, § 2071, the Minnesota court declares it to be "a police regulation intended to protect life, person, and property by securing a more careful selection of servants and a more rigid enforcement of their duties by railroad companies." *Mikkelsen v. Truesdale*, 63 Minn. 137, 65 N. W. 260. Nor is this protection confined to the employees alone. It tends as well to increase the safety of the millions of people and the vast aggregate of property daily transported by these companies, and the public interest is directly subserved and promoted by every

reasonable rule or device by which negligence in such business is lessened or prevented. The Ohio court, discussing a similar statute of that state, has said that the liability is not created for the benefit of the employees alone, but has its reason and foundation in public necessity and policy. *Lake Shore & M. S. R. Co. v. Spangler*, 44 Ohio St. 471, 58 Am. Rep. 833, 8 N. E. 467. See also *Kane v. Erie R. Co.* 63 L.R.A. 788, 67 C. C. A. 653, 133 Fed. 681.

6. Assuming, then, that the statute is not to be avoided as class legislation, or as depriving railway corporations of the equal protection of the laws, let us inquire whether it is of such manifestly arbitrary and unreasonable character that it cannot be justified by reference to the police power? For several reasons we are constrained to answer this inquiry in the negative:

(1) It should be kept in view of all stages of this discussion that the enactment, the validity of which is denied by the appellee, is an attempt by the legislature to protect a right which Code, § 2071, in its original form, conferred upon railway employees; and we think it a rule, the soundness of which cannot be successfully denied, that where the legislature, acting within its constitutional power, provides a right or confers a benefit which did not before exist, it may, in its discretion, also provide that no contract by which that right or benefit may be waived, lost, or impaired shall be of any validity whatever. For instance, having given homestead rights to heads of families and exemptions to debtors in execution, no one at this day will question the power of the legislature to provide that any contract which in its judgment may serve to defeat or lessen the value of the right so created shall be void. The authorities upon this and kindred propositions are too numerous and familiar to require citation. Congress, having provided pensions and bounties for the benefit of persons performing military service, may make invalid any contract by which the soldier agrees to pay more than a certain fixed sum to his attorney for assistance rendered in establishing his right to the benefit thus created, and may even make it a crime for the attorney to demand or receive more than the statutory fee, even though he demands or receives no more than he has reasonably earned. *Frisbie v. United States*, 157 U. S. 160, 39 L. ed. 657, 15 Sup. Ct. Rep. 586. As we have already noted, the validity of the statute abolishing the fellow-servant rule in the interest of railway employees has been fully established in both state and Federal courts, and in our judgment the amendment

of 1898 was a legitimate exercise of the inherent power of the legislature to protect the right which it had created. That the act is reasonably adapted to effect its ostensible purpose to prevent an improvident waiver or surrender by the employee of the right conferred upon him by the law can hardly be questioned. Without some limitation upon the right of contract, a law imposing liability upon the employer in favor of the employee would be of no practical benefit to the latter; for, in the absence of any restriction, the natural and certain recourse of the employer would be to make the waiver of such benefit a condition of every contract of employment. Possibly, even without a statute, such waiver would be held void on grounds of public policy, but that fact does not negative the propriety or validity of protective legislation.

It was in view of this situation that our lawmakers sought, both in the original act and in the amendment, to fence against the frustration of its purpose to confer a substantial benefit upon a large class of citizens engaged in a hazardous quasi public employment. That the appellee's relief department was devised to require or induce its employees to pool their contributions, and through the medium of an insurance or benefit fund, made up chiefly by deductions from their wages, pay their own losses, and thus in some degree relieve the corporation from the liability imposed by the statute, is not seriously disputed. Under the original statute this contract did not constitute a restriction upon the liability of the corporation, because, as held by us in the cases of Donald and Maine, the employee who became a member of the relief department retained the option to pursue his action for damages or accept the alternative relief afforded by the department. But the legislature might not unreasonably believe, and evidently did believe, that such contract, even if as a technical legal proposition it did not restrict the corporate liability, operated to lessen the value of the benefit conferred by the statute. Entertaining such view, the enactment of the amendment of 1898 was a natural and appropriate measure to prevent the indirect defeat of the benevolent purpose of the original statute. Our decisions upon the statute as at first enacted could have no effect to prevent further legislation upon the subject. So, too, it may well be said that if the legislature believed that, by reason of the relations between employer and employee, or by reason of the peculiar circumstances liable to surround the latter when called upon to exercise his option, the practical operation of the re-

lief plan might be to relieve the company from its statutory liability without a corresponding adequate benefit to the employee, then an amendment specifically including the relief contract within the prohibition of the statute would not be an unreasonable stretch of legislative power. Nor is this legislative view of the necessity or propriety of the amendment wholly without foundation. The average railway employee is not a man of wealth. More often than otherwise his total possessions, if any, are represented by a modest home, and he depends upon his wages to meet his current living expenses. If he has a family, they, too, are dependent upon his earnings. If severely injured, the pain from his wounds, the anxiety for his dependent family, the pressure of his immediate needs, are not conducive to calm and businesslike reflection upon what may prove to be a matter of great importance to him and those who look to him for support. The immediate aid which the relief department offers may, under such circumstances, assume an exaggerated importance in his eyes, and in his weakness and distress lead him to accept a benefit inferior to that which he might otherwise be entitled to recover. Moreover, the legislature may well have believed that while membership in the relief department was entirely voluntary, in the legal sense of the word, it was still possible for the employer, by making the tenure of service more secure to those who became members, to bring to bear an influence in that direction savoring of moral coercion. That the possibility of this pressure upon the laborer is not entirely the creature of imagination finds support in appellee's argument, where all employees who refuse to enter the relief department are classified as belonging to the "thoughtless and improvident class" of persons whom railway companies try to avoid, and are the "first to go" whenever the service is to be cut down. Conceding that it is beyond the power of the state to take from the employer the right to discharge his employee, or from the employee the equal right to leave the service of his employer, with or without cause, subject, of course, to any legitimate claim for damages for violation of contract, it is none the less true that the state may still properly provide that no contract into which the employer invites his employee, under the express or implied threat that his refusal will mark him as the first to be discharged from employment, shall be of any avail as a defense to an action for the enforcement of a statutory liability created for his benefit.

(2) The relations between employer and employee are, and always have been, recog-

nized as proper subjects of police regulation; but recent years, with the extraordinary changes wrought in industrial affairs, have given that phase of our law peculiar prominence. New social and economic conditions have demanded and received the attention of lawmakers and courts. Employer and employee do not stand in the same relative positions which they occupied before the various lines of industry became concentrated in comparatively few hands, and before workers were marshaled into such vast armies that employers must of necessity deal with them in masses rather than as individuals. These changes have not been accomplished without serious friction between wage payers and wage earners. Where the blame or responsibility rests is not for us to consider. The condition has existed and still exists, and neither legislature nor courts can with propriety ignore it. In every industry employing any considerable amount of labor the employees are organized for associated effort, seeking to maintain or increase labor's share of the wealth it assists in producing. Employers are likewise organized to check or offset the power and influence of associated labor. Strikes and lock-outs are by no means uncommon, and no year goes by when some one or more of these contests does not assume formidable proportions, disturbing the peace and good order of society, and inflicting injury of a most serious nature upon all lines of business. The tying up for a single day of a single railroad system is attended by grave inconvenience and loss to the public, while anything like a general suspension of traffic is productive of immediate and widespread calamity. So close and vital is the dependence of the public welfare upon harmony between labor and capital that the legislature may well exercise a liberal discretion in the enactment of measures to suppress and guard against every influence which tends to promote discontent or discord between them. This truth has already challenged general attention, and has found expression in the statutes and court decisions of every state of our Union. Among the legislative measures recognizing the propriety, if not the necessity, of laws for the protection and promotion of the interests of labor, we may mention those providing for the establishment of bureaus of labor, for preference to claims for labor in the settlement of insolvent estates, for laborer's liens, for employer's liability for personal injuries to employees, for the screening and weighing of coal as a basis of miner's wages, for compulsory payment of wages at frequent or regular intervals, limiting the hours of labor, allowing attor-

neys' fees in actions for the recovery of wages, forbidding the payment of wages in store orders or other paper not redeemable in money, and invalidating the assignment of wages before they are earned. These are but samples of the many which might be enumerated of laws already in existence in many of the states, and the volume and variety of such legislation is rapidly increasing. Some of these experiments may be crude and of doubtful expediency, and others may be marred by fatal defects; but the general movement of which they mark the progress is proof of the urgency of the demand for an adjustment of the law to meet new and unprecedented conditions. It is true that some of these measures have been invalidated in certain jurisdictions as unconstitutional, while in others they are sustained. Indeed, it is not strange that, in dealing with untried conditions, legislatures should have occasionally exceeded their constitutional power, nor is it strange if courts in their conservatism should sometimes have failed to give due consideration to the thought that radical changes in circumstances affecting the public welfare may justify the application of remedies which, under former conditions, would have been rightfully held arbitrary and unreasonable.

We cannot undertake to collate the conflicting precedence, or determine the mere numerical preponderance of the authorities. After a thorough examination of the cases, we are satisfied that the present current of authority tends to uphold all reasonable provisions for the protection of labor, and that Code, § 2071, is fairly within the scope of the powers of the state. We are not impressed with the suggestion, made by some courts which condemn such legislation, on the theory that it is an offensive imputation upon the manhood and independence of the laborer to thus assume that he needs the special guardianship and protection of the law. This easy method of argument would wipe out most of our statutes. Generally speaking all law is made to protect man against undue advantage at the hands of other men, and the chief justification for legislation upon matters of personal and property right is the fact that men do not and cannot always deal on equal footing. Under no circumstances is this inequality more frequent than in the relations between employer and employee under modern conditions. Indeed, in this inequality of advantage is found the only justification for any of the many labor laws to which we have referred. This condition, as affording sufficient basis for the exercise of police regulation, has often been recognized by the courts.

In *Holden v. Hardy*, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383, the Supreme Court of the United States, in sustaining a statute regulating the hours of labor in mines, and making it a penal offense to disregard its terms, says: "The legislature has recognized the fact, which the experience of legislators in many states has corroborated, that the proprietors of these establishments and their operatives do not stand upon an equality, and that their interests are to a certain extent conflicting. The former naturally desire to obtain as much labor as possible from their employees, while the latter are often induced by the fear of discharge to conform to regulations which their judgment, fairly exercised, would pronounce to be detrimental to their health or strength. In other words, the proprietors lay down the rules, and the laborers are practically constrained to obey them. In such cases self-interest is often an unsafe guide, and the legislature may properly interpose its authority. . . . But the fact that both parties are of full age and competent to contract does not necessarily deprive the state of the power to interfere, where the parties do not stand upon an equality, or where the public health demands that one party to the contract shall be protected against himself. 'The state still retains an interest in his welfare, however reckless he may be. The whole is no greater than the sum of all the parts, and when the individual health, safety, and welfare are sacrificed or neglected the state must suffer.'"

Sustaining the validity of an act requiring certain corporations to pay off their laborers in money and at specified short intervals, the supreme court of Rhode Island uses this language: "If it be said that, however rich and powerful corporations may be and however poor and weak their employees, the latter are not obliged to work for the former, and if they choose to work for corporations they can, but for chapter 918, make such agreements as they see fit and thus protect themselves, then it may be replied that poverty and weakness can wage but an unequal contest with corporate wealth and power, and that the legislature, in granting valuable corporate powers and privileges, might be willing to do it, or if already granted to continue them, if it has retained the power to amend such original grant, only on condition of minimizing the corporate power to drive hard bargains with their employees, who too often, in the sharp and bitter competition for work, have to submit to such terms and conditions as their employers see fit to prescribe." *State v. Brown & S. Mfg.* 33 L.R.A. (N.S.)

Co. 18 R. I. 16, 17 L.R.A. 856, 25 Atl. 246.

The state of Tennessee has a statute by which employers of labor who issue store orders or scrip in payment for labor are required to redeem the same in money if demanded, any agreement or contract to the contrary notwithstanding. This provision was upheld by the supreme court of that state in an able and exhaustive opinion as within the proper limits of the police power. Among other reasons stated in support of this view, the court says: "The legislature evidently deemed the labor at some disadvantage under existing laws and customs, and by this act undertook to ameliorate his condition in some measure by enabling him, . . . at his election and at a proper time, to demand and receive his unpaid wages in money, rather than in something less valuable. Its tendency, though slight it may be, is to place the employer and employee upon equal ground in the matter of wages, and so far as calculated to accomplish that end it deserves commendation." *Harbison v. Knoxville Iron Co.* 103 Tenn. 421, 56 L.R.A. 316, 76 Am. St. Rep. 682, 53 S. W. 953. On appeal to the Supreme Court of the United States this judgment was affirmed. The opinion, written by Shiras, J., expressly quotes from and readopts the opinion of the Tennessee court as being "so full and satisfactory" as to make it unnecessary to again go over the ground. *Knoxville Iron Co. v. Harbison*, 183 U. S. 13, 46 L. ed. 55, 22 Sup. Ct. Rep. 1.

Following the same line of thought, the supreme court of Vermont upholds a statute which in effect forbids a railway employee to contract for the assumption of risk of a hazardous appliance or unsafe place to work, saying: "If it be objected that the statute, when thus read, deprives the laborer of his right to make his own contracts, the answer is to be found in the principle that the state has the right to protect its poor and helpless, even to that extent if need be. . . . Such is the basis of the decisions that uphold the Utah labor law restricting the hours of mining work to eight [hours] per day, . . . statutes that forbid the employment of children in certain callings, the store order acts, and the long standing statutes against usury, in defense of one the last-named of which this court held, some twenty years ago, that even a release under seal given by the borrower at the time of the loan did not bar his right to recover the unlawful rate, declaring that 'the statute was intended for the protection of the weak against the strong, and public policy requires that it should not be evaded nor its force abated.' . . . Everybody knows that there are

large classes who get their living from day to day in such service as that in which the plaintiff was engaged, who must work where they are working and keep their job at all hazards, if they would not bring themselves and their families to want. To say to such men, 'if you do not like the conditions, you may quit,' is often only a heartless mockery." *Kilpatrick v. Grand Trunk R. Co.* 74 Vt. 288, 93 Am. St. Rep. 887, 52 Atl. 531.

Mr. Freund, addressing himself to the objection that such statutory restrictions deprive the laborer himself of liberty of contract, says the "argument is fallacious in the case of wage contracts where the voluntary assumption of a burden by one may, through the stress of competition, force others to assume the same burden against their will." Freund, Pol. Power, §§ 500-503. See also Keating, J. in *Archer v. James*, 2 Best & S. 73; and Byles, J., in same case, page 82. In the very recent case of *Lochner v. New York* (decided by the Supreme Court of the United States) reported in 198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. Rep. 539, 3 A. & E. Ann. Cas. 1133, a statute prohibiting owners and proprietors of bakeries from requiring or permitting employees to labor more than ten hours per day, and making a violation of this provision punishable as a public offense, was by a majority decision held to be an unconstitutional interference with liberty of contract. The case is not parallel in fact or principle with the one at bar, but it is worthy of note that four of the nine members of that court unite in a vigorous dissent, holding that even such drastic legislation is clearly within the police power of the state.

In recognizing the soundness of the views expressed by the cited authorities, we do not say, nor is it necessary to believe, that the employer is actuated by a wanton or oppressive spirit. It is enough to say that he is human, and as such is therefore only humanly and naturally inclined to exact a profitable bargain if the opportunity offers, just as the laborer himself is ready to take advantage of favoring circumstances to exact the highest wage. But the opportunities are not equal. The employer, as a rule, has some store of capital to stand between him and immediate want if business grows slack or suspends, while the average laborer has little or no reserve for the proverbial "rainy day," and sooner or later must accept the terms which are offered him. It is with this condition in view that the legislature has enacted the statute under consideration, for the purpose of preserving as near as possible that equality of advantage to both parties which 33 L.R.A. (N.S.)

is essential to the general good, and, as is well said in the *Harbison Case*, supra, "this alone commends the act as a valid police regulation." To same effect see *Hancock v. Yaden*, 121 Ind. 366, 6 L.R.A. 576, 16 Am. St. Rep. 396, 23 N. E. 253.

(3) The right of the state to regulate liberty of contract is peculiarly applicable to corporations. That corporations are entitled to the equal protection of the laws has already been shown, but this does not mean that corporations and natural persons stand in the same relation to the power which inheres in the state to regulate their conduct or methods of business. The distinction between them is fundamental and ineradicable. The natural person has certain inalienable rights, for which he is not indebted to organized society. He is born to them. The Constitution and laws recognize them and provide safeguards for them, but do not create them. The corporate person has no rights except those with which it is endowed by the law-making power, and the power of creation necessarily implies the power of regulation. See *New York & N. E. R. Co. v. Bristol*, 151 U. S. 556, 38 L. ed. 269, 14 Sup. Ct. Rep. 437; *St. Louis, I. M. & S. R. Co. v. Paul*, 173 U. S. 404, 43 L. ed. 746, 19 Sup. Ct. Rep. 419; *Atchison, T. & S. F. R. Co. v. Matthews*, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609; *Hooper v. California*, 155 U. S. 648, 39 L. ed. 297, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 209; *Orient Ins. Co. v. Daggs*, 172 U. S. 557, 43 L. ed. 552, 19 Sup. Ct. Rep. 281; *Dayton Coal & I. Co. v. Barton*, 183 U. S. 23, 46 L. ed. 61, 22 Sup. Ct. Rep. 5; *Chicago L. Ins. Co. v. Needles*, 113 U. S. 574, 28 L. ed. 1084, 5 Sup. Ct. Rep. 681; *Sinking Fund Cases*, 99 U. S. 700, 25 L. ed. 496; *Herrick v. Minneapolis & St. L. R. Co.* 31 Minn. 11, 47 Am. Rep. 771, 16 N. W. 413; *State v. Brown & S. Mfg. Co.* 18 R. I. 16, 17 L.R.A. 856, 25 Atl. 246; *Pittsburgh, C. C. & St. L. R. Co. v. Lyon*, 123 Pa. 140, 2 L.R.A. 489, 10 Am. St. Rep. 517, 16 Atl. 607; *State v. Peel Splint Coal Co.* 36 W. Va. 802, 17 L.R.A. 385, 15 S. E. 1000; *St. Louis, I. M. & S. R. Co. v. Paul*, 64 Ark. 83, 37 L.R.A. 504, 62 Am. St. Rep. 154, 40 S. W. 705; *Tullis v. Lake Erie R. Co.* 175 U. S. 353, 44 L. ed. 192, 20 Sup. Ct. Rep. 136; *Skinner v. Garnett Gold Min. Co. (C. C.)* 96 Fed. 735; *Union P. R. Co. v. Mason City & Ft. D. R. Co.* 61 C. C. A. 348, 128 Fed. 238; *Com. v. New York, L. E. & W. R. Co.* 129 Pa. 463, 15 Am. St. Rep. 724, 18 Atl. 412; *Knoxville Iron Co. v. Harbison*, 183 U. S. 13, 46 L. ed. 55, 22 Sup. Ct. Rep. 1; *Sioux City Street R. Co. v. Sioux City*, 78 Iowa, 746, 39 N. W. 498. It is true that in some of

the foregoing cases special prominence is given to an express reservation of power in the state to amend or repeal corporate charters, a rule the applicability of which to the present controversy we need not consider; but the Supreme Court of the United States, which upheld that contention in *St. Louis, I. M. & S. R. Co. v. Paul*, supra, advances another step in the later case of *Knoxville Iron Co. v. Harbison*, supra, and announces the rule that irrespective of the right of charter amendment the state is vested with power to enact such legislation. It says: "It is true that stress was laid in the opinion in that case [*St. Louis, I. M. & S. R. Co. v. Paul*, 173 U. S. 404, 43 L. ed. 746, 19 Sup. Ct. Rep. 419] on the fact that, in the Constitution of the state, the power to amend corporation charters was reserved to the state, and it is asserted that no such power exists in the present case. But it is also true that, inasmuch as the right to contract is not absolute in respect to every matter, but may be subjected to the restraints demanded by the safety and welfare of the state and its inhabitants, the police power of the state may, within defined limitations, extend over corporations outside of and regardless of the power to amend charters." Citing *Atchison, T. & S. F. R. Co. v. Matthews*, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609.

The same question was broached in the first case carried to the Supreme Court of the United States to test the validity of a statute abolishing the fellow-servant rule in actions against railway companies. To the objection that the statute was in violation of the 14th Amendment, Field, J., speaking for the court, replies: "The plain answer to this contention is that the liability imposed by the law of 1874 arises only for injuries subsequently committed. It has no application to past injuries, and it cannot be successfully contended that the state may not prescribe the liabilities under which corporations created by the laws shall conduct their business in the future, where no limitation is placed upon its power in this respect by their charters. Legislation to this effect is found in the statute books of every state." *Missouri P. R. Co. v. Mackey*, 127 U. S. 208, 32 L. ed. 108, 8 Sup. Ct. Rep. 1161; *Virginia Development Co. v. Crozer Iron Co.* 90 Va. 126, 44 Am. St. Rep. 893, 17 S. E. 806.

(4) Nor does the fact that the corporation is the creature of another state afford it any advantage in this respect. *Hooper v. California*, 155 U. S. 648, 39 L. ed. 297, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207; *Orient Ins. Co. v. Daggs*, 172 U. S. 557, 43 L. ed. 552, 19 Sup. Ct. Rep. 281; *Dayton Coal & I. Co. v. Barton*, 183 33 L.R.A.(N.S.)

U. S. 23, 46 L. ed. 61, 22 Sup. Ct. Rep. 5. In the *Daggs Case* the court, sustaining the validity of a statute requiring insurance companies to pay the full sum insured in case of loss, any condition or stipulation of the contract to the contrary notwithstanding, says: "That which a state may do with corporations of its own creation, it may do with foreign corporations admitted into the state. . . . The power of a state to impose conditions upon foreign corporations is certainly as extensive as the power over domestic corporations." Subject alone to the condition that the regulation imposed does not operate upon interstate commerce, or otherwise violate the provisions of the Federal Constitution, the power of the state to prescribe the terms on which foreign corporations may do business within its jurisdiction is unlimited. The fact that the corporation is engaged in interstate commerce does not exempt it from control by the state in respect to all business done therein not directly connected with traffic between the states. For instance, the local statutes pertaining to the duty to fence railway tracks, imposing liability for live stock killed by moving trains or for damages by fire set out by engines, regulating speed of trains within city or yard limits, abolishing the fellow-servant rule, requiring the redemption of unused tickets, and regulating contracts of employment, are no less applicable to foreign corporations engaged in interstate commerce, than to domestic corporations doing only a local business. *Smith v. Alabama*, 124 U. S. 465, 31 L. ed. 508, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564; *Nashville, C. & St. L. R. Co. v. Alabama*, 128 U. S. 96, 32 L. ed. 352, 2 Inters. Com. Rep. 238, 9 Sup. Ct. Rep. 28; *Willfong v. Omaha & St. L. R. Co.* 116 Iowa, 551, 90 N. W. 358; *Central R. Co. v. Murphy*, 116 Ga. 870, 60 L.R.A. 817, 43 S. E. 265; *New York, N. H. & H. R. Co. v. New York*, 165 U. S. 631, 41 L. ed. 853, 17 Sup. Ct. Rep. 418; *State v. Indiana & I. S. R. Co.* 133 Ind. 85, 18 L.R.A. 502, 32 N. E. 817; *Geer v. Connecticut*, 161 U. S. 519, 40 L. ed. 793, 16 Sup. Ct. Rep. 600; *Chicago, M. & St. P. R. Co. v. Bolan*, 169 U. S. 133, 42 L. ed. 688, 18 Sup. Ct. Rep. 289.

(5) Considered from the standpoint of precedent alone, we think the weight of the better reasoned cases supports the conclusion at which we have arrived. Such is the manifest force and effect of most of the cases already cited. The following additional precedents, selected from the many found among the decisions of recent date, indicate something of the extent to which the power to regulate and restrict the right of contract, and more especially between

employer and employee has been upheld. In citing them, it is proper to suggest that the decision of the question before us does not require us to adopt all the conclusions reached in these cases, or all of the reasoning on which they are based. They are in point, however, as illustrating the trend of judicial thought, and the gradually extending application of the police power in the interest of the general welfare.

In Maryland a statute requiring operators of coal mines to pay the wages of employees in money and at stated intervals, and restricting the right of operators to contract for payment of such wages in merchandise, has been upheld. *Shaffer v. Union Min. Co.* 55 Md. 74, 15 Mor. Min. Rep. 59. A similar statute in Indiana has been held valid. *Hancock v. Yaden*, 121 Ind. 366, 6 L.R.A. 576, 16 Am. St. Rep. 396, 23 N. E. 253. The same court, in a very recent case, sustains the validity of a statute which prohibits the assignment of claims for wages not yet earned. *International Text-Book Co. v. Weissinger*, 160 Ind. 349, 65 L.R.A. 599, 98 Am. St. Rep. 334, 65 N. E. 521. A statute of the United States making it unlawful to pay any seaman wages in advance, or to pay such wages to any other person on a seaman's account, and providing that such payment in advance shall not absolve the employer from full payment after the wages have been earned, is held not to invade any right guaranteed by the 14th Amendment. *Patterson v. The Eudora*, 190 U. S. 169, 47 L. ed. 1002, 23 Sup. Ct. Rep. 821. The court, by Brewer, J., there says: "While it may be conceded that, generally speaking, among the inalienable rights of the citizen is that of the liberty of contract, yet such liberty is not absolute and universal. It is within the undoubted power of government to restrain some individuals from all contracts, as well as all individuals from some contracts. It may deny to all the right to contract for the purchase of lottery tickets, to the minor the right to assume any obligations except for the necessities of existence, to the common carrier the power to make any contract releasing himself from negligence, and, indeed, may restrain all engaged in any employment from any contract in the course of that employment which is against public policy. The possession of this power by government in no manner conflicts with the proposition that, generally speaking, every citizen has a right freely to contract for the price of his labor, services, or property."

Statutes have been sustained which invalidate contracts to waive homestead and exemption laws. *Curtis v. O'Brien*, 20 Iowa, 376, 89 Am. Dec. 543; *Kneettle v.* 33 L.R.A. (N.S.)

Newcomb, 22 N. Y. 249, 78 Am. Dec. 186; *Maloney v. Newton*, 85 Ind. 565, 44 Am. Rep. 46. A debtor cannot waive stay of execution by contract. *McLane v. Elmer*, 4 Ind. 239. Parties may be required to insert the words "given for a patent" in promissory notes given upon such consideration. *New v. Walker*, 108 Ind. 365, 58 Am. Rep. 40, 9 N. E. 386; *Herdie v. Roessler*, 109 N. Y. 127, 16 N. E. 198. Parties may be prohibited from contracting to pay attorneys' fees for the collection of a claim against them. *Churchman v. Martin*, 54 Ind. 380. In Vermont it has been held that a statute which forbids a railway employee to contract to assume the risk of a hazardous appliance or unsafe place to work is not unconstitutional. *Kilpatrick v. Grand Trunk R. Co.* 74 Vt. 288, 93 Am. St. Rep. 887, 52 Atl. 531. *Stafford, J.*, speaking for the court, says: "If the doctrine of assumption of risk is to be regarded as contractual, then we hold that the statutory protection cannot be bought and sold, but that the policy of the law forbids it in the interest of public welfare. . . . The legislature understood this, and the act we are considering was an attempt to better the condition of that very class by compelling the employer to yield something of profit in the interest of humanity, and to save the lives and limbs of his workmen by adopting safer instruments of labor. It seems to us that a court should be very slow to construe the beneficial purpose out of such a law or to make it of no effect. On broad lines of public good and social progress it is plain that such legislation must be largely looked to if government is to remain firm and secure in the respect and affection of the people."

Massachusetts having already a statute requiring certain corporations to pay their employees in money in weekly instalments, its legislature submitted to the supreme court of that state the question whether such provision could be constitutionally extended to private persons and partnerships. To this inquiry the court responded, and, after citing approvingly many of the cases we have already mentioned and the many statutes regulating and restricting liberty of contract, announced the conclusion that such legislation is not a violation of any constitutional guaranty. *Re House Bill No. 1230*, 163 Mass. 589, 28 L.R.A. 344, 40 N. E. 713. A provision prohibiting all sales of corporate stocks to be delivered in the future is not a violation of the 14th Amendment, although its prohibition includes bona fide as well as gambling transactions. *Otis v. Parker*, 187 U. S. 606, 47 L. ed. 323, 23 Sup. Ct. Rep. 168. In sup-

port of this holding it is said: "Even if the provision before us should seem to us not to have been justified by the circumstances locally existing in California at the time when it was passed, it is shown by its adoption to have expressed a deep-seated conviction on the part of the people concerned as to what that policy required. Such a deep-seated conviction is entitled to great respect. If the state thinks that an admitted evil cannot be prevented, except by prohibiting a calling or transaction not in itself necessarily objectionable, the courts cannot interfere unless in looking at the substance of the matter, they can see that it 'is a clear, unmistakable infringement of rights secured by the fundamental law.'"

From a general review of the authorities, Mr. Freund says (Police Power, §§ 502, 503): "The general principle of police regulation of the liberty of contract may perhaps be formulated as follows: Where a contractual relation is voluntarily entered into, rights and obligations which are conformable to the nature of the relation may be defined by the law and made conclusive upon the parties, irrespective of stipulations attempting to set them aside, especially where such stipulations involve the waiver of valuable personal rights, or where they are virtually imposed by one party without power of choice on the part of the other." The case of *State v. Peel Splint Coal Co.* 36 W. Va. 802, 17 L.R.A. 385, 15 S. E. 1000, affirms the validity of a statute prescribing the manner of weighing coal in determining the amount of a miner's earnings, and forbidding payment in script or store orders. It is true that this affirmance was by a divided court, but the opinion is so well argued and so well supported by reason and authority that no one desiring to master the learning of the law on this subject should fail to examine it. Moreover, the principle there upheld, having since been fully settled as authoritative by the Supreme Court of the United States in *Knoxville Iron Co. v. Harbison*, 183 U. S. 13, 46 L. ed. 55, 22 Sup. Ct. Rep. 1, the opinion is entitled to rank as authority, notwithstanding the division of the court by which it was pronounced.

As a fitting conclusion to this examination of authorities, we quote from the opinion in *Atkin v. Kansas*, 191 U. S. 207, 48 L. ed. 148, 24 Sup. Ct. Rep. 124, sustaining an act making it unlawful for any contractor engaged upon a work of public improvement to require or permit an employee to work more than eight hours per day: "If it be said that a statute like the one before us is mischievous in its tendencies, the answer is that the responsibility therefor

rests upon legislators, not upon the courts. No evils arising from such legislation could be more far-reaching than those that might come to our system of government if the judiciary, abandoning the sphere assigned to it by the fundamental law, should enter the domain of legislation, and upon grounds merely of justice or reason or wisdom annul statutes that had received the sanction of the people's representatives." As bearing generally upon the extent to which the police power may restrict the liberty of contract, see *Re Scrip Bill*, 23 Colo. 504, 48 Pac. 512; *White v. Farmers' Highline Canal & Reservoir Co.* 22 Colo. 191, 31 L.R.A. 828, 43 Pac. 1028; *Cook v. Howland*, 74 Vt. 393, 59 L.R.A. 338, 93 Am. St. Rep. 912, 52 Atl. 973; *Com. v. Vrooman*, 164 Pa. 306, 25 L.R.A. 250, 44 Am. St. Rep. 603, 30 Atl. 217; *Com. v. Hamilton Mfg. Co.* 120 Mass. 385; *Sweeny v. Hunter*, 145 Pa. 363, 14 L.R.A. 594, 22 Atl. 653; *Kreibohm v. Yancey*, 154 Mo. 67, 55 S. W. 261; *Naglebaugh v. Harder & H. Coal Min. Co.* 21 Ind. App. 551, 51 N. E. 427; *State v. Crescent Creamery Co.* 83 Minn. 284, 54 L.R.A. 466, 85 Am. St. Rep. 464, 86 N. W. 107; *State v. Moore*, 104 N. C. 714, 17 Am. St. Rep. 696, 10 S. E. 143; *Richardson v. Chicago & A. R. Co.* 149 Mo. 311, 50 S. W. 785; *State ex rel. Beek v. Wagener*, 77 Minn. 483, 46 L.R.A. 442, 77 Am. St. Rep. 681, 80 N. W. 633, 778, 1134; *Firnstone v. Mack*, 49 Pa. 387, 88 Am. Dec. 507; *Eaton v. Kegan*, 114 Mass. 433; *Davis v. State*, 68 Ala. 58, 44 Am. Rep. 128; Act Cong. June 26, 1884, 23 Stat. at L. 53, chap. 121, U. S. Comp. Stat. 1901, p. 2804, construed in case of *The Edwin (D. C.)* 23 Fed. 255; *Higgins v. Graham*, 143 Cal. 131, 76 Pac. 898; *Johnson v. Spartan Mills*, 68 S. C. 339, 47 S. E. 695, 1 A. & E. Ann. Cas. 409; *Bowlby v. Kline*, 28 Ind. App. 659, 63 N. E. 724; *Purdy v. Erie R. Co.* 162 N. Y. 49, 48 L.R.A. 669, 56 N. E. 508; *Wheeler v. Russell*, 17 Mass. 258; *Karnes v. American F. Ins. Co.* 144 Mo. 413, 46 S. W. 166; *Brechbill v. Randall*, 102 Ind. 528, 52 Am. Rep. 695, 1 N. E. 362; *Butler v. Chambers*, 36 Minn. 71, 1 Am. St. Rep. 638, 30 N. W. 308; *Graham v. Magann Fawke Lumber Co.* 118 Ky. 192, 80 S. W. 799, 4 A. & E. Ann. Cas. 1026; *Great Southern Fireproof Hotel Co. v. American Blower Co.* 54 C. C. A. 160, 116 Fed. 793; *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77; *San Antonio & A. P. R. Co. v. Wilson*, 4 Tex. App. Civ. Cas. (Willson) 568, 19 S. W. 910; *Booth v. Illinois*, 184 U. S. 425, 46 L. ed. 623, 22 Sup. Ct. Rep. 425; *Skinner v. Garnett Gold Min. Co. (C. C.)* 96 Fed. 735; *Garrett v. Western U. Tele. Co.* 83 Iowa, 257, 49 N. W. 88; *Miller v. Chicago, B. & Q. R. Co. (C. C.)* 65 Fed. 305; *John P. Squire & Co.*

v. Tellier, 185 Mass. 18, 102 Am. St. Rep. 322, 69 N. E. 312; Carroll v. Greenwich Ins. Co. 199 U. S. 401, 50 L. ed. 246, 26 Sup. Ct. Rep. 68; State v. Wilson, 61 Kan. 32, 47 L.R.A. 71, 58 Pac. 981; Warren v. Sohn, 112 Ind. 213, 13 N. E. 863; Reilly v. Franklin Ins. Co. 43 Wis. 449, 28 Am. Rep. 552; Queen Ins. Co. v. Leslie, 47 Ohio St. 409, 9 L.R.A. 45, 24 N. E. 1072; Walp v. Moorar, 78 Conn. 515, 57 Atl. 277; State v. Reynolds, 77 Conn. 131, 58 Atl. 755.

Whether the appellee's relief department is in the nature of a scheme for insurance, and therefore peculiarly subject to supervision and regulation by the state, has been suggested, but not argued, by counsel. In the Donald and Maine Cases we held that said department was not an "insurance company" within the meaning of our laws governing such corporations, and expressly refrained from any further expression of opinion. That an organization may do an insurance business without being an "insurance company" within the meaning of the statute is settled, as is also the further proposition that it is the nature of the business rather than the form of the organization by which it is carried on, which justifies the state in exercising supervision over it. *Martin v. Stubbings*, 126 Ill. 387, 9 Am. St. Rep. 620, 18 N. E. 657; *Burlington Voluntary Relief Dept. v. White*, 41 Neb. 547, 43 Am. St. Rep. 701, 59 N. W. 747; *Grimes v. Northwestern Legion of Honor*, 97 Iowa, 315, 64 N. W. 806, 66 N. W. 183; *State ex rel. Graham v. Miller*, 66 Iowa, 26, 23 N. W. 241. But whether the relief department is of that character we do not now undertake to say.

We are aware that the courts are not in entire unison as to the extent to which the police power of the state may properly be exercised, and that cases are quite numerous which lend color, if not support, to views advanced by the appellee herein. The lack of harmony is in some instances more apparent than real. For instance, the cases from Pennsylvania have been decided under a state Constitution differing very widely from our own. See Pa. Const. 1874, art. 3, § 7. With a single exception, none of the cases in which courts have sustained the validity of relief-department contracts has involved the question whether such contracts may be regulated or prohibited by statute. They have simply considered the general proposition whether, in the absence of statute, the contract should be held void on grounds of public policy, and upon that question they coincide with the views of this court in *Donald v. Chicago, B. & Q. R. Co.* 93 Iowa, 284, 33 L.R.A. 492, 61 N. W. 971, and *Maine v. Chicago, B. & Q. R. Co.* 109 Iowa, 260, 70 N. W. 630, 80 33 L.R.A. (N.S.)

N. W. 315. The exception to which we have referred is *Shaver v. Pennsylvania Co.* (C. C.) 71 Fed. 931, where a trial court held a statute of Ohio to be unconstitutional. The statute there considered differs in material respects from our own, and we may further say that, if the argument employed by the court in support of its conclusion is to be construed as announcing the doctrine in support of which it is here cited by counsel, we think it is not to be approved. Moreover, the *Shaver Case* is in effect overruled, or at least discredited, by *Peires v. Van Dusen*, 69 L.R.A. 705, 24 C. C. A. 280, 47 U. S. App. 339, 78 Fed. 693. But we freely concede that, after eliminating all merely apparent conflict in the cases, not a few others remain which no amount of ingenuity can reconcile, and only confusion could result from the attempt. This court has not before been called upon to consider the central question in the form now presented, and, while recognizing the divergence in the authorities, we feel at liberty to follow the precedents which appear to us most persuasive and authoritative, and uphold that which appeals to our judgments as the sounder doctrine.

It is urged upon our attention that the relief fund contract is not unfair in its terms, and that the practical working of the plan is beneficial to the employees. All this may be true, but it is a consideration to be addressed to the legislature, and not to the court. The contract is not assailed because of its oppressive character, but because the statute forbids its use as a defense in an action to enforce a statutory liability. Nor need we dispute the proposition that a plan of economical insurance against sickness, injury, and death is much to be commended, and we can readily conceive that members of the relief department may find it a valuable resource under many circumstances. We may also admit that, in the absence of a statute forbidding it, the company is not to be censured for making any legal contract which it is able to negotiate with its employees to protect itself from liability for damages. But none of these are controlling considerations. The legislature does not in this act forbid or place any obstacle in the way of such insurance, nor does it forbid or prevent any settlement of the matter of damages with an injured employee fairly made after the injury is received. On the contrary, the right to make such settlement is expressly provided for in the amendment to Code, § 2071. The one thing which that amendment was intended to prevent was the use of this insurance, or relief, for which the employee has himself paid, in whole or in

part, as a bar to the right which the statute has given him to recover damages from the corporation. And this, as we have already said, is clearly within the legislative discretion. Nor does it work any hardship to the railway company. The hardship, if any exists, is in the creation of the liability (the validity of which legislation is now beyond question), and not in the statute which prevents its circumvention.

We do not attempt the review of any of the foregoing questions with special reference to our state Constitution. The provisions relied upon by counsel are those which announce the right of all persons to acquire, possess, and protect property, and require all laws of a general character to have uniform operation. Iowa Const. art. 1, §§ 1, 6. The rules there expressed do not differ materially in effect from those embodied in the 14th Amendment to the Federal Constitution. Certainly they place no narrower restriction upon the legislative power. The discussion already had embraces all which need be said upon this branch of the case, and we hold that the objection to the statute, as being in contravention of our state Constitution, must be overruled.

The dissent from this conclusion, prepared by Ladd, J., and filed herewith, rests in its final analysis upon two propositions: First, that although it would have been within the constitutional powers of the legislature, in originally enacting Code, § 2071, to have protected the right thereby created by a provision such as is contained in the amendatory act of the twenty-seventh general assembly, yet, the right having been in fact created without it, the subsequent addition of such protection is an unconstitutional discrimination against the railway company; and, second, that the classification by which railway companies alone are made subject to such statutory restrictions is arbitrary and unreasonable, and is therefore unconstitutional and void.

The first of these propositions, that a provision which could have been constitutionally embodied in the original act cannot be constitutionally added by amendment, is one for which we can find neither authority nor precedent, and is in our judgment indefensible in principle. Indeed, it would seem that the very statement of the doctrine is its own sufficient refutation. To adopt such a rule is to say that, by the creation of any statutory right or liability, the state exhausts its constitutional power to legislate upon the subject, save perhaps to repeal the statute. Most assuredly this cannot be correct. If one general assembly may create a homestead or exemption right, and protect it by a pro-

vision that no waiver of such right shall be of any validity unless expressed in a given manner and form, or may provide a lien to secure to certain classes of labor the payment of their wages, or may abolish the general rule as to contributory negligence in actions against railway companies for damages by fire, or may abolish the rule as to assumption of risk by railway employees injured because of the company's neglect to equip its cars with automatic couplers and brakes, or may enact any of hundreds of rights and liabilities such as are to be found upon nearly every page of our statute books, may not the next general assembly amend each and every one of these acts to remedy defects which experience has developed in them, or to increase their efficiency, or to prevent the destruction of a right or the avoidance of a liability so created? For instance, Code, § 2083, provides that an employee who may be injured by the running of a car or engine without automatic brakes and couplers as provided by law shall not be considered as waiving his right to recover damages by continuing in the employ of the corporation. This provision was first enacted by the twenty-third general assembly. Let us suppose that a subsequent general assembly had amended said section by a further provision that the plaintiff in such case should not be required to negate contributory negligence on his part, would we hesitate for an instant to hold such an amendment was clearly a constitutional exercise of legislative power? In the very nature of governmental and legislative power, the authority to create a statutory liability or right of action implies, of necessity, the right of amendment. The only conceivable exception to this rule is a case where the original statute is in the nature of a grant or contract, within the rule of the Dartmouth College Case. That famous precedent has been made a house of refuge for many theories, but its shelter has never been held broad enough to cover a case like this. The legislature has seen fit to impose a peculiar liability upon railway companies in favor of a particular class of employees whose service exposes them to peculiar dangers. That it is not an unconstitutional discrimination has time and again been declared by our courts of last resort. If this be so, by what specious method of reasoning shall we justify ourselves in holding that this constitutional power may not be exercised in amendment, as well as in original legislation? It violates no contract right. It disturbs no vested right. There is no pretense that the contract pleaded in the appellee's answer was entered into before the

amendment was enacted. Says the supreme court of Wisconsin: "No principle of law is better settled than that 'whatever is given by statute may be taken away by statute,' except vested rights acquired under it, and except, also, that the statute must not be in the nature of a contract on the part of the legislature." *State ex rel. Voight v. Hoeflinger*, 31 Wis. 263.

If the power to abolish or to take away a statutory right is an essential attribute of the legislative authority, is not the power to modify or amend equally broad and equally clear? Under the reserve power of the state to regulate and control corporations and to amend charters, it has often been held that whatever regulation or restriction might lawfully have been included in the original charter may be imposed by subsequent legislation. *Sinking Fund Cases*, 99 U. S. 700, 25 L. ed. 496; *Sioux City Street R. Co. v. Sioux City*, 78 Iowa, 746, 39 N. W. 498; *Louisville & N. R. Co. v. Williams*, 103 Ky. 378, 45 S. W. 229; *Stanislaus County v. San Joaquin & K. River Canal & Irrig. Co.* 192 U. S. 212, 48 L. ed. 412, 24 Sup. Ct. Rep. 241. For still stronger reasons must we hold that, as respects a statute which contains no grant of franchise or other element of contract, and on which no claim of vested rights can be grounded, the power of amendment is no less broad and universal than is the power to create and repeal. When, therefore, the appellee herein employed the appellant, and at the same or subsequent time procured his agreement to the benefit scheme, this law was in existence in its present form, and by an elementary rule of construction the contract must be read as if the terms of the statute were embodied in it. While its right to go into the labor market and hire servants upon terms of equal advantage with other railway corporations was a property right of which the company could not be lawfully deprived, it had no legal right to exact terms which the law forbade to all such employers, and, having exacted them, it must be held to have done so with knowledge that the courts would not enforce them for its benefit. It was its privilege, perhaps, to speculate upon the possibility of securing a ruling invalidating the statute, or upon the reluctance of its employees to insist upon their rights under the statute, and thereby to a greater or less extent get the benefit of its practical nullification; but it is in no position to complain if, when the test is applied, it is held to the full measure of liability which the lawmaking power has rightfully imposed upon it.

Concerning the second proposition, that the amendment to Code, § 2071, makes an

unreasonable discrimination against railway companies as employers, as well as between different classes of employees, it is to be said that this is neither more nor less than a revival of the objection which has been raised against every legislative measure which has ever been enacted for the benefit or relief of any special class of employees, and in practically every instance has been overruled by the courts of last resort. To hold with appellant on this proposition is to attempt to reverse the entire current of the decisions of our own court, of courts of sister states, and of the Supreme Court of the United States. *Kane v. Erie R. Co.* 68 L.R.A. 790, 67 C. C. A. 653, 133 Fed. 681; *Herrick v. Minneapolis & St. L. R. Co.* 31 Minn. 11, 47 Am. Rep. 771, 16 N. W. 413; *Minneapolis & St. L. R. Co. v. Herrick*, 127 U. S. 210, 32 L. ed. 109, 8 Sup. Ct. Rep. 1176; *Missouri P. R. Co. v. Mackey*, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161; *Pittsburgh, C. C. & St. L. R. Co. v. Montgomery*, 152 Ind. 1, 69 L.R.A. 875, 71 Am. St. Rep. 301, 49 N. E. 582; *St. Louis, I. M. & S. R. Co. v. Paul*, 173 U. S. 404, 43 L. ed. 746, 19 Sup. Ct. Rep. 419; *Holden v. Hardy*, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; *State v. Brown & S. Mfg. Co.* 18 R. I. 16, 17 L.R.A. 856, 25 Atl. 246; *Harbison v. Knoxville Iron Co.* 103 Tenn. 421, 56 L.R.A. 316, 76 Am. St. Rep. 682, 53 S. W. 955; *Kilpatrick v. Grand Trunk R. Co.* 74 Vt. 288, 93 Am. St. Rep. 887, 52 Atl. 531; *Patterson v. The Eudora*, 190 U. S. 169, 47 L. ed. 1002, 23 Sup. Ct. Rep. 821; *Hancock v. Yaden*, 121 Ind. 366, 6 L.R.A. 576, 16 Am. St. Rep. 396, 23 N. E. 253; *Shaffer v. Union Min. Co.* 55 Md. 74, 15 Mor. Min. Rep. 59; *Tullis v. Lake Erie & W. R. Co.* 175 U. S. 348, 44 L. ed. 192, 20 Sup. Ct. Rep. 136; *Peirce v. Van Dusen*, 69 L.R.A. 705, 24 C. C. A. 280, 47 U. S. App. 339, 78 Fed. 693, and numerous other cases hereinbefore cited. In the *Peirce Case*, supra, Mr. Justice Harlan says that, as the statute applies to all railroads operating in the state, it is general in its nature within the meaning of the Constitution, and as it applies alike to all of a given class of employees it operates uniformly, and is therefore not unconstitutional. This language affords a complete answer to the second ground of the dissent herein.

The assertion that the amendment to Code, § 2071, "does not purport to deal with the company's liability at all," and that "the contract contemplated has no bearing on the liability of the railroad company to its employee," is irreconcilable with the clear and express language of the statute. The amended section provides in

so many words that under certain circumstances the company shall be liable in damages to its employee, and that in such case no contract of insurance, relief, benefit, or indemnity, nor the acceptance of such insurance, relief, benefit, or indemnity shall be available to the company as a defense to an action by the employee for the recovery of such damages. How can it be said that this provision, which eliminates a defense which might otherwise be successfully asserted, has "no bearing" on the company's liability? Does not such a provision, which means all the difference between a right of recovery and no right of recovery, "purport to deal with the company's liability?" If, then, as has been settled beyond all controversy, the power exists in the state to create rights and liabilities for the benefit of employees engaged in the use and operation of railways, which are not given to other classes of employees, it is not for this court to say that the legislature may not properly and constitutionally make special provisions by which those rights may be preserved and those liabilities made effective. It is entirely too late in the day to insist that special legislation affecting the rights and liabilities of railway companies or other distinct class or kind of corporations constitutes a denial of the equal protection of the laws, simply because the same regulation or restriction is not extended over other corporations or other kinds of business. *St. Louis & S. F. R. Co. v. Mathews*, 165 U. S. 1, 41 L. ed. 611, 17 Sup. Ct. Rep. 243; *Tullis v. Lake Erie & W. R. Co.* 175 U. S. 348, 44 L. ed. 192, 20 Sup. Ct. Rep. 136; *Chicago, K. & W. R. Co. v. Pontius*, 157 U. S. 209, 39 L. ed. 675, 15 Sup. Ct. Rep. 585; *St. Louis, I. M. & S. R. Co. v. Paul*, 173 U. S. 404, 43 L. ed. 746, 19 Sup. Ct. Rep. 419; *Orient Ins. Co. v. Daggs*, 172 U. S. 557, 43 L. ed. 552, 19 Sup. Ct. Rep. 281; *Fidelity Mut. Life Assn. v. Mettler*, 185 U. S. 308, 46 L. ed. 922, 22 Sup. Ct. Rep. 662; *Duncan v. Missouri*, 152 U. S. 377, 38 L. ed. 485, 14 Sup. Ct. Rep. 570; *Pittsburgh, C. C. & St. L. R. Co. v. Backus*, 154 U. S. 421, 38 L. ed. 1031, 14 Sup. Ct. Rep. 1114; *Minneapolis & St. L. R. Co. v. Herrick*, 127 U. S. 210, 32 L. ed. 109, 8 Sup. Ct. Rep. 1176; *Minneapolis & St. L. R. Co. v. Beckwith*, 129 U. S. 26, 32 L. ed. 585, 9 Sup. Ct. Rep. 207; *Peoria, D. & E. R. Co. v. Duggan*, 109 Ill. 537, 50 Am. Rep. 619; *Burlington, C. R. & N. R. Co. v. Dey*, 82 Iowa, 312, 12 L.R.A. 436, 3 Inters. Com. Rep. 584, 31 Am. St. Rep. 477, 48 N. W. 98; *Gano v. Minneapolis & St. L. R. Co.* 114 Iowa, 713, 55 L.R.A. 263, 89 Am. St. Rep. 393, 87 N. W. 714; *Cameron v. Chicago, M. & St. P. R. Co.* 63 33 L.R.A.(N.S.)

Minn. 384, 31 L.R.A. 553, 65 N. W. 652; *Missouri, K. & T. R. Co. v. Simonson*, 64 Kan. 802, 57 L.R.A. 765, 91 Am. St. Rep. 248, 68 Pac. 653; *Farmers & M. Ins. Co. v. Dobney*, 189 U. S. 301, 47 L. ed. 821, 23 Sup. Ct. Rep. 565; *Iowa L. Ins. Co. v. Lewis*, 187 U. S. 335, 47 L. ed. 204, 23 Sup. Ct. Rep. 126; *Campbell v. Missouri P. R. Co.* 121 Mo. 340, 25 L.R.A. 175, 42 Am. St. Rep. 530, 25 S. W. 936; *State v. Nelson*, 52 Ohio St. 88, 26 L.R.A. 317, 39 N. E. 22; *Missouri, K. & T. R. Co. v. May*, 194 U. S. 267, 48 L. ed. 971, 24 Sup. Ct. Rep. 638; *Cincinnati Street R. Co. v. Snell*, 193 U. S. 30, 48 L. ed. 604, 24 Sup. Ct. Rep. 319.

The demurrer to the appellee's answer should have been sustained. The ruling and judgment of the District Court are reversed, and cause remanded for further proceedings not inconsistent with this opinion.

Ladd, J., dissenting:

I cannot yield my assent to the conclusion reached by the majority. I am of the opinion that the amendment to § 2071 of the Code, enacted by the twenty-seventh general assembly, is in plain and palpable violation of those portions of the Federal and state Constitutions prohibiting class legislation, and will in as brief a way as practicable state my reasons for so thinking. The general rules applicable to the case are correctly stated in the opinion of the majority, and need not be repeated. The difficulty arises in their application. The section before amendment read: "Every corporation operating a railway shall be liable for all damages sustained by any person, including employees of such corporation, in consequence of the neglect of the agents, or by any mismanagement of the engineers or other employees thereof, and in consequence of the wilful wrongs, whether of commission or omission, of such agents, engineers, or other employees, when such wrongs are in any manner connected with the use and operation of any railway on or about which they shall be employed, and no contract which restricts such liability shall be legal or binding." This statute merely does away with the common-law rule that the master is not responsible for the negligence of a fellow servant engaged in the use and operation of a railroad, which results in damage to another employee injured, when his employment exposed him to the hazards of such use and operation. A cause of action is created in favor of a class of employees whose work exposes them to the perils peculiar to railroading. The legislation is not in the interest and for the protection of all rail-

road employees, but for one class of them, a mere fraction of the entire body. This was noted in *Deppe v. Chicago & N. W. R. Co.* 36 Iowa, 52, where, in order to uphold the constitutionality of the law as it then stood, when assailed as class legislation, the court limited the employees to those operating a railway, saying: "The manifest purpose of the statute was to give its benefits to employees engaged in the hazardous business of operating railroads. When thus limited, it is constitutional; when extended further, it becomes unconstitutional." The soundness of this decision was questioned in *Malone v. Burlington, C. P. & N. R. Co.* 61 Iowa, 328, 47 Am. Rep. 813, 16 N. W. 203, but it was approved in the same case, reported in 65 Iowa, 422, 54 Am. Rep. 11, 21 N. W. 756, wherein it is said: "To meet the objection that the act of 1862 created a rule of liability which was applicable to railroad companies alone, and did not affect other employees under precisely the same circumstances, and that it was therefore class legislation, and in violation of the state Constitution, the court in *Deppe's Case* construed the act as creating a remedy only in favor of that class of employees who were engaged in the hazardous business of operating railroads, and the correctness of the holding of that case on that question is not doubted." See also *Connors v. Chicago & N. W. R. Co.* 111 Iowa, 387, 82 N. W. 953.

The same thought was expressed by the supreme court of Minnesota in *Johnson v. St. Paul & D. R. Co.* 43 Minn. 222, 8 L.R.A. 419, 45 N. W. 156, where, speaking through Mr. Justice Mitchell, in referring to a previous case, declaring that a similar statute in that state must be construed as designed exclusively for the benefits of those who would, in the course of their employment, be exposed to the peculiar hazards incident to the use and operation of railroads, it said: "If a distinction is to be made as to the liability of employers to their employees, it must be based upon a difference in the nature of the employment, and not of the employers. One rule of liability cannot be established for railway companies merely as such, and another rule for other employers under like circumstances and conditions. . . . Neither would it relieve the act from the imputation of class legislation that it applies alike to all railroads. It has been sometimes loosely stated that special legislation is not class, 'if all persons brought under its influence are-treated alike under the same conditions.' But this is only half the truth. Not only must it treat alike, under the same conditions, all who are 33 L.R.A. (N.S.)

brought 'within its influence,' but in its classification it must bring within its influence all who are under the same conditions. Therefore, if a distinction is to be made between railway corporations and other employers as respects their liability to their employees, it must be based upon some difference in the nature of the employment, and can only extend to cases where such difference exists." In passing on a like statute in *Chicago, K. & W. R. Co. v. Pontius*, 157 U. S. 209, 39 L. ed. 675, 15 Sup. Ct. Rep. 585, the Supreme Court of the United States based its approval of the decision of the supreme court of Kansas in the same case, reported in 52 Kan. 264, 34 Pac. 739, on the same ground, saying: "The hazardous character of the business of operating a railroad seemed to call for special legislation with respect to railroad corporations having for its object the protection of their employees as well as the safety of the public."

As the fellow-servant law applies only to a certain well-defined class of railroad employees, and excludes all others, the majority are certainly mistaken in suggesting that the mere fact that the employer must be a railway company is controlling in the matter of classification. The reason for sustaining the original section, as seen, was the hazardous employment of those for whose protection it was enacted. It operated upon all who might be injured while engaged in an occupation of peculiar peril. A right of action is given when, but for the statute, none would have existed. All other employees of the railroad companies are excluded from its operation. The difference in their situation was thought to be such as to warrant separate legislation applicable to one class, and not to the other. In creating this new liability the legislature guarded against its impairment by adding that "no contract which restricts such liability shall be legal or binding." This law stood on the statute book without any material change for thirty-six years. In the meantime causes of action created thereby were shielded by no protective legislation other than that accorded those arising otherwise or possessed by the class of railroad employees not exposed to the peculiar perils incident to the use and operation of railroads. Was there anything in the nature of this statutory right of action, or the class of persons to whom it was made available, which so differentiated it from other rights of action or from other classes of employees, that separate and distinct legislation might be demanded for the protection of it or the class for whom it was created? Certainly the origin of the right can furnish no sound

reason for its separate classification. A cause of action is no more nor less sacred when created by statute than it would be had it existed at common law; and in order that legislation with respect thereto not applicable to other causes of action may be sustained, there must be some ground for such discrimination. It is not enough that the amendment might have been permissible in the enactment of the original statute a third of a century ago. The conditions which will justify the separation of subjects into different classes for the purpose of legislation must have relation to the time when it is enacted. Otherwise the constitutional inhibition of class legislation may be defeated by a classification based solely on past events having no connection with the needs of the hour or the demands of the present generation. In *State v. Garbroski*, 111 Iowa, 496, 56 L.R.A. 570, 82 Am. St. Rep. 524, 82 N. W. 959, the classification was condemned because it rested "on a past and completed transaction having no relation to the particular legislation enacted. All citizens are divided," said the court, "into two classes—those who served in the Army and Navy thirty-five years ago, and all those who did not. . . . In present conditions and circumstances, there are no differences between them in their relation to society and the administration of the law, and other citizens of the state. . . . Equality in right, privilege, burdens and protection is the thought running through the Constitution and laws of the state; and an act intentionally and necessarily creating inequality therein, based on no reason suggested by necessity or difference in condition or circumstances, is opposed to the spirit of free government and expressly prohibited by the Constitution."

If there is some present difference between causes of action which arise by virtue of the statute enacted thirty-six years before any protection was attempted, and those arising in favor of other employees of a railroad company by virtue of those natural principles of justice which have been recognized for so long a time that the memory of man runneth not to the contrary, or if there is anything in the genesis of either, or if there are such distinctions between the classes of employees entitled thereto respectively, these have not been pointed out, and I assert, without fear of successful contradiction, they cannot be. True, a statute may be amended, and when this has been done it will be read with the amendment, and both construed prospectively as though they had been enacted at the same time. This, however, is merely a rule of construction. Endlich, *Interpretation of Statutes*, § 297. But this in no way obvi-

ates the fact that the amendment may constitute distinct and independent legislation, to be construed in connection with the original only from the time of its adoption. *Ely v. Holton*, 15 N. Y. 595. Its validity must be determined as of the time of its enactment and in the light of circumstances and conditions then existing, or, if not existing then having relation to the present and to the particular legislation.

Let us examine this amendment, remembering that it is applicable to but the one class of employees. For convenience it may be set out: "Nor shall any contract of insurance, relief, benefit, or indemnity in case of injury or death, entered into prior to the injury, between the person so injured and such corporation, or any other person or association acting for such corporation, nor shall the acceptance of any such insurance, relief, benefit, or indemnity by the person injured, his widow, heirs, or legal representatives after the injury, from such corporation, person or association, constitute any bar or defense to any cause of action brought under the provisions of this section; but nothing contained herein shall be construed to prevent or invalidate any settlement for damages between the parties subsequent to injuries received." If this can be said to restrict in any way the liability of the company, it adds nothing to the original statute, for it declared any such contract invalid. But it purports to deal, not with the company's liability, but with its enforcement. It relates, first, to an independent and different subject, namely, to contracts of "insurance, relief, benefit, or indemnity," invalidating them as to both parties; and, second, to the remedy in declaring that acceptance of the above shall not operate as a bar or defense to an action for an injury suffered. The contract contemplated does not affect the liability of the railroad company. Its only relation to the original act is the fact that both concern the same class of employees. Nor does the portion with respect to the acceptance of benefits in any way restrict the liability of the company. *Donald v. Chicago, B. & Q. R. Co.* 93 Iowa, 284, 33 L.R.A. 492, 61 N. W. 971. Its only relation to the statute as it stood is that it protects the cause of action thereby created from waiver involved in the election of remedies. That such election as between any insurance, relief, benefit or indemnity that may be stipulated, and recovery of damages against the railroad company, is essential to avoid restricting its liability in violation of the original act, was pointed out in *Donald's Case*. The requirement of an election between remedies is not restrictive of the right to either, and the only effect of the second portion of

the amendment is to declare that an election to take insurance, relief, benefits, or indemnity will not estop the injured party from availing himself of the other remedy; that is, prosecuting his cause of action against the company. In other words, this amendment has no connection with the original act, further than that it concerns the same class of employees, and declares that a certain election of remedies shall not constitute an estoppel of the cause of action therein created.

I shall not stop to discuss whether these are so germane to the subject of the section of the Code before being amended as that the title to the amendment was sufficient. It is enough for present purposes that the amendment does not limit in any way, nor add to the duties imposed or liabilities created by that section. It merely accepts the classification of that statute as the basis of legislation upon different subject-matter, namely, contracts with reference to insurance, etc., and the effect of accepting thereunder as constituting an estoppel. Surely these are not so connected with the object and purpose of the original act that the amendment can be upheld because based on the classification there recognized. The subjects covered by the amendment are just as important to railroad employees not exposed to the peculiar hazards of operating trains, and precisely as applicable to their situation and condition. Why invalidate insurance or relief contracts of the former, and enforce those of the latter? Why give effect to the acceptance of benefits by the latter as an estoppel against the prosecution of a cause of action against the employer, and not do so when the acceptance is by the former? If there is "some apparent natural reason, some reason suggested by necessity, by such a difference in the situation and circumstances of the subjects placed in different classes as suggests the necessity or propriety of different legislation with respect to them," it has not been mentioned in the opinion of the majority. The fundamental defect in the amendment is that it does not bring "within its influence all who are under the same conditions." The conditions under which the injuries are received can have no bearing on the question as to whether one shall be bound by a waiver of his right to maintain his cause of action by reason of some contract of insurance, relief, benefit, or indemnity, and another shall not. Both stand in the same relation to the company. Notwithstanding, this amendment declares with respect to the employee within the fellow-servant act, that receiving benefits of such a contract shall not be a bar to the maintenance of an action against the company, 33 L.R.A. (N.S.)

while receiving the benefits by a servant within the terms of that act may be a bar to any further recovery. There is no ground for thus discriminating between the employees of the same corporation, and such classification is arbitrary and unreasonable.

The facts of this case will very well illustrate the inequality of the law. The benefits of the defendant's relief department are not restricted to any class of employees. All may become members. Nor are these limited to injuries for which the company might be liable. All manner of injury, as well as sickness, is included. "In case of injury to a member, he may elect to accept the benefits in pursuance of these regulations, or to prosecute such claims as he may have at law against the company or any company associated therewith in the administration of their relief departments." But acceptance of the benefits is made a bar to the maintenance of an action against the company, as is also the maintenance of such action a bar to any claim for relief. That is, a member must elect whether he will take the benefits stipulated by the regulations of the department, or rely on redress in the courts for his injuries. The plaintiff, though he had contributed but 85 cents to the relief fund, and had expressly agreed to all the conditions, and accepted benefits to the amount of \$492 and \$330 paid to his physicians, and then in disregard of said conditions instituted this action. As he had been exposed to the peculiar hazards of railroading, taking this money did not bar his right to recover from the defendant, if the amendment to the statute is valid. Had he suffered like injury while engaged in some of the other employments of the company, the amendment would not apply, and under the decision in *Donald v. Chicago, B. & Q. R. Co.* 93 Iowa, 284, 33 L.R.A. 492, 61 N. W. 971, election to take the benefits of the relief department would have been final, and he could not maintain the action. Is this equality before the law? The difference in the employments could by no possibility furnish ground for a distinction. What difference can there be, when it comes to the matter of settlement of claims between one of the trainmen and the company, growing out of the alleged negligence of a coemployee in the train service, and the claim of a shopman, growing out of the negligence of the master or vice principal in that department? None whatever, for the manner of the injury has no relation to the subjects touched by the amendment. Nor is there any very satisfactory reason for making such a law applicable to railroad companies, and not to manufacturing and other corpo-

rations within the state. It would not seem that there is anything peculiar about railroad companies which should deprive them or their employees of the advantage of contracts of insurance, relief, benefit, or indemnity, in case of injury or death of their employees, when such advantage is accorded to other corporations and their employees in the adjustment of the claims between them.

The only difference which might support separate legislation which suggests itself is the public character of the common carrier and the possible tendency of the relief department, by obviating burdens involved, to lessen the vigilance and care of the railroads essential to the safety of the public. If this were so (and it is to be said that in so far as indicated by the record it is purely imaginary), it would furnish no ground for the distinction between employees of the same company. The safety of the public is quite as dependent on the diligence and foresight of the great body of men doing the work of railroads in positions not exposing them to the dangers of moving trains, as of those who are thus exposed. The inclusion of railroad companies only in a class to be affected by statute has sometimes been upheld, not because the subjects to be affected are railroad companies, but owing to the character of their business, the peculiar nature of the risks included, or the nature of their property. Thus special laws with reference to the assessment and taxation of property have been sustained, owing to difference in the nature of railroad property. *Taylor v. Secor*, 92 U. S. 575, 23 L. ed. 689; *Pittsburgh, C. C. & St. L. R. Co. v. Backus*, 154 U. S. 421, 38 L. ed. 1031, 14 Sup. Ct. Rep. 1114. An examination of the decisions generally will demonstrate that something more tangible than a mere name, business, or purpose of a corporation, is exacted by the courts as a basis of classification. There must be some connection between the legislation and the subjects upon which it operates, and within the latter must be included all subjects in like situation and circumstances.

An instructive case is that of *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255. The legislature of Texas had enacted a statute providing that where a claim in certain instances against a railroad company, not exceeding in amount \$50, shall be presented to the company, supported by an affidavit, and if the company fail to pay the same within thirty days, a recovery may be had, and an attorney fee of \$10 shall be "assessed and awarded by the court or jury trying the issue." This was denounced as class legislation, and the court, speaking 33 L.R.A. (N.S.)

through Mr. Justice Brewer, said: "No individuals are thus punished and no other corporations. The act singles out a certain class of debtors and punishes them, when for like delinquencies it punishes no others. They are not treated as other debtors or equally with other debtors. They cannot appeal to the courts as other litigants under like conditions and with like protection. If litigation terminates adversely to them, they are mulcted in the attorneys' fees of the successful plaintiff; if it terminates in their favor they recover no attorneys' fees. It is no sufficient answer to say that they are punished only when adjudged to be in the wrong. They do not enter the courts upon equal terms. . . . Before a distinction can be made between debtors, and one be punished for a failure to pay his debts, while another is permitted to become in like manner delinquent without any punishment, there must be some difference in the obligation to pay, some reason why the duty of payment is more imperative in the one instance than in the other. If it be said that this penalty is cast only upon corporations, that to them special privileges are granted, and therefore upon them special burdens may be imposed, it is a sufficient answer to say that the penalty is not imposed upon all corporations. The burden does not go with the privilege. Only railroads of all corporations are selected to bear this penalty. The rule of equality is ignored. It may be said that certain corporations are chartered for charitable, educational, or religious purposes, and abundant reason for not visiting them with a penalty for the nonpayments of debts is found in the fact that their chartered privileges are not given for a pecuniary profit. But the penalty is not imposed upon all business corporations, or chartered for the purpose of private gain. The banking corporations, the manufacturing corporations, and others like them are exempt. Further, the penalty is imposed not upon all corporations charged with the quasi public duty of transportation, but only upon those charged with a particular form of that duty. So, the classification is not based on any idea of special privileges by way of incorporation, nor of special privileges given thereby for purposes of private gain, nor even of such privileges granted for the discharge of one general class of public duties. But, if the classification is not based upon the idea of special privileges, can it be sustained upon the basis of the business in which the corporations to be punished are engaged? That such corporations may be classified for some purposes is unquestioned. The business in which they are engaged is of a peculiarly dangerous nature, and the

legislature, in the exercise of its police powers, may justly require many things to be done by them in order to secure life and property. Fencing of railroad tracks, use of safety couplers, and a multitude of other things easily suggest themselves. And any classification for the imposition of such special duties—duties arising out of the peculiar business in which they are engaged is a just classification, and not one within the prohibition of the 14th Amendment. Thus it is frequently required that they fence their tracks, and as a penalty for a failure to fence double damages in case of loss are inflicted. *Missouri P. R. Co. v. Humes*, 115 U. S. 512, 29 L. ed. 463, 6 Sup. Ct. Rep. 110. But this and all kindred cases proceed upon the theory of a special duty resting upon railroad corporations by reason of the business in which they are engaged,—a duty not resting upon others, a duty which can be enforced by the legislature in any proper manner; and whether it enforces it by penalties in the way of fines coming to the state, or by double damages to a party injured, is immaterial. It is all done in the exercise of the police power of the state and with a view to enforce just and reasonable police regulations.”

This decision is not impinged by what was said in *St. Louis, I. M. & S. R. Co. v. Paul*, 173 U. S. 404, 43 L. ed. 746, 19 Sup. Ct. Rep. 419, where an act of the general assembly of Arkansas, requiring railroad companies, upon the discharge of employees, to pay the wages due on the day of such discharge, and providing as a penalty for nonpayment that wages shall continue at the same rate until paid, but not longer than sixty days unless action is begun, was upheld as amendment of the railroad charter. See same case reported in 62 Am. St. Rep. 154, and note. The *Ellis Case* was again adhered to in *Atchison, T. & S. F. R. Co. v. Matthews*, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609, which construed a statute of Kansas declaring the setting out of fines in the operation of a railroad shall be prima facie evidence of negligence, and upon recovery authorizing the assessment of a reasonable attorneys' fee. This was justified on the ground that its purpose was to secure the utmost care on the part of the railroad companies to prevent the escape of fires from their moving trains. The distinction drawn between it and the *Ellis Case* is rather hazy, and the denunciation of the statute as class legislation by Mr. Justice Harlan, in which three other justices concurred, seems unanswerable; yet the classification, in any event, included all companies or individuals operating trains. The *Ellis Case* was again approved in *Fidelity Mut. Life Assn. v. Mettler*, 185 33 L.R.A. (N.S.)

U. S. 308, 46 L. ed. 922, 22 Sup. Ct. Rep. 662, in which a statute of Texas enacting that life and health insurance companies, upon failure to pay losses within the time specified in their policies after demand made, shall pay the beneficiaries, “in addition to the amount of the loss, 12 per cent damages on the amount of such loss, together with all reasonable attorneys' fees for the prosecution and collection of such loss.” This was put on the ground, first, of the state's power to impose conditions on its own and foreign corporations; and, second, on the differences between life and health companies and fire, marine, and inland insurance, and also mutual benefit and relief associations, and “the necessity of prompt payment in order to provide the means of living, of which the beneficiaries have been deprived by the death of the insured,” is emphasized.

In my opinion there is no way by which to uphold the amendment to § 2071 of the Code, without disregarding the *Ellis Case* and ignoring the necessity of material differences between classes of individuals or corporations to justify the application of different laws thereto. Attention to the question involved in the concrete, rather than the abstract, can lead to no other result. The amendment nullifies agreements of one class of employees of railroad companies, and permits those of another to be enforced. A “square deal” would exact that all employees be included, and each be accorded the same protection by the law. It singles out for protection the claims of a part of those in the service of railroad companies, and excludes from its benefits the claims of the remainder and of all employees in the service of all other corporations in like situation. The courts are open to the favored class, notwithstanding any contract of insurance, relief, benefit, or indemnity, and acceptance thereunder, but to all others they are closed. In the words of Mr. Justice Brewer, “they do not enter court on equal terms.” What I object to is the discrimination by this statute between men when there is no basis for such discrimination. All in like situation should stand equal before the law. No favoritism should be tolerated. If it is a good law for an employee who operates an engine, it is equally good for the despatcher who directs the movement of engines and trains. If its enactment is essential for the protection of the brakemen from undue pressure from their employer, it is equally essential to shield the trackmen from the same influence. There is nothing in the situation of the one which will justify extending the protection of a statute like that under consideration for his benefit, and denying such

protection to the other. "The true principle requires something more than a mere designation by such characteristics as will serve to classify, for the characteristics which thus serve as a basis of classification must be of such a nature as mark the objects so designated as peculiarly requiring exclusive legislation. There must be substantial distinction, having a reference to the subject-matter of the proposed legislation, between the objects or places embraced in such legislation and the objects or places excluded. The marks of distinction on which the classification is founded must be such, in the nature of things, as will, in some reasonable degree at least, account for or justify the restriction of the legislation." *State ex rel. Richards v. Hammer*, 42 N. J. L. 440. The 14th Amendment to the Constitution of the United States prohibits the denial to any person within its jurisdiction the equal protection of the laws. The 6th section of article 1 of the Constitution of this state exacts that all laws shall have a uniform operation, and that privileges and immunities shall not be granted to any citizen or class of citizens which, upon the same terms, shall not equally belong to all citizens. These provisions of the fundamental law, denouncing discrimination, should not be frittered away. Their importance in guarding against the segregation of society into classes, and in assuring to all citizens that equality before the law which is essential to free government, cannot be overestimated. The constitutionality of this amendment cannot be sustained save by resort to refinements in distinction and sophistry in reasoning, in which no court should indulge, and which would be destructive of the above limitations on legislative power. For these reasons I am of the opinion that the district court rightly held the statute invalid. So believing, it is unnecessary for me to consider whether it was also violative of a portion of the Constitution guarantying the freedom of contracts.

Since submitting the foregoing, the majority have added to their opinion a rejoinder, which may be responded to briefly. The assertion that anything which might have been included in the statute as originally enacted may be added by way of amendment is not borne out by the illustrations cited. Thus, in case of an exemption or homestead, it is quite as essential to the protection of the family that these be preserved, as that they be granted, and hence protective measures enacted by way of amendment are supported by the same classification as the original act. The vice in the reasoning lies in the assumption that protective measures have been enacted and sustained regardless of any present require-

ment of conformation to the provisions of the Constitution. In every instance cited, the subsequent statute, if challenged, has been sustained because the class for which enacted was such as to render special legislation appropriate. If the doctrine asserted were to be accepted, all necessary in order to avoid the constitutional prohibition against class legislation would be the enactment of a law by way of an amendment to some former statute of ten years or a century ago, instead of a new and independent act. Lapse of time and changes in conditions cannot be thus obliterated in determining whether a statute is open to the charge of unjust discrimination, and no authority is cited so holding. No one questions the legislative power to abolish, take away, or modify statutory rights. All insisted upon is that in doing so the legislature is not independent of or superior to the Constitution, but must accomplish this in the way exacted by that instrument. Here is a cause of action created by statute. It has stood, with respect to the remedy, for thirty-six years on precisely the same footing as other causes of action, existing or created before or since. After the lapse of that time it is amended. The liability created by the original statute must not be confused with the remedy which is sought to be affected by the amendment. The liability arises upon the happening of the injury. The amendment does not purport to change it in any way. It in no way restricts the liability previously created. It adds nothing thereto. It relates solely to the remedy. Had it been enacted as part of the original act, it would have constituted a part of the right and must have been upheld as valid; for, being part of the right created, the same classification of necessity would sustain it. See *Major v. Burlington*, C. R. & N. R. Co. 115 Iowa, 309, 88 N. W. 815; *Hawley v. Griffin*, 121 Iowa, 667, 92 N. W. 113, 97 N. W. 86. But, as seen, this remedy was not added until long after the cause of action was created, and consequently did not become a part of the right. It was a distinct and independent provision for the protection of a particular cause of action, and can no more be upheld than had it related to any other liability created by statute or existing at the common law. Had the subject of its protection been some other liability of a railroad company or individual, no question could arise as to whether it should comply with the constitutional requirements of the uniformity and classification. Can it be that the mere fact alone that a liability has been created by statute will justify a separate and peculiar remedy not available to all persons in like situation? Such is the logical deduction

from the opinion of the majority. The legislature may look back 1 or 100 years, and if, perchance, the cause of action had its origin in a statutory enactment, it may be singled out for a special remedy, and this, regardless of its similarity with other causes of action, or the persons to be affected, or the changes wrought by lapse of time. I am not ready to indorse any such theory. I am unwilling to resort to any species of reasoning, having no substantial basis, in order to avoid the clauses of the Constitution denouncing unjust discrimination.

Believing that the amendment to the statute is in conflict with the requirements of the Constitution, I am of opinion that the judgment of the district court so declaring should be affirmed.

Bishop, J., dissenting:

I concur in the result reached by Ladd, J., upon the views expressed by him.

Affirmed by the United States Supreme Court, February 25, 1911, 219 U. S. 549, 55 L. ed. 328, 31 Sup. Ct. Rep. 259.

KANSAS SUPREME COURT.

TOBE FLEEMAN

v.

CHICAGO, ROCK ISLAND, & PACIFIC RAILWAY COMPANY, Appt.

(82 Kan. 574, 109 Pac. 287.)

Appeal — right to — void judgment.

A party is entitled to appeal from, and obtain a reversal of, a void judgment brought to the supreme court on a case made.

(June 11, 1910.)

Headnote by JOHNSTON, Ch. J.

Note. — Right to appeal from void judgment, decree, or order.

Many cases are to be found in which it may be possible to read into the decision an implied ruling of the court upon the question suggested in the title of the present note, but the endeavor has been to consider only such cases as more or less clearly pass upon the point.

Although the courts are not of one mind as to whether a void judgment, decree, or order is appealable, the prevailing opinion, as attested by the collated cases, is clearly to the effect that the appellate court will so far take cognizance of the void entry as to reverse it and restore the parties to the position they originally occupied: *Livermore v. Campbell*, 52 Cal. 75; *Bates v. Gage*, 40 Cal. 185; *Norwood v. Kenfield*, 33 L.R.A. (N.S.)

APPEAL by defendant from a judgment of the Circuit Court for Wyandotte County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Messrs. M. A. Low and Paul E. Walker for appellant.

Messrs. Bird & Pope for appellee.

Johnston, Ch. J., delivered the opinion of the court:

In this proceeding the Chicago, Rock Island, & Pacific Railway Company asks that the judgment rendered against it and in favor of Tobe Fleeman in the circuit court of Wyandotte county be set aside and reversed. The contention is that the court had no existence, and that the judge of the court who assumed to render the judgment was without authority. By chapter 52 of the Laws of 1908 the legislature undertook to create the circuit court of Wyandotte county and to define its jurisdiction, and in pursuance of the provisions of the act a judge was appointed, who proceeded to try causes and exercise other judicial functions. The validity of the act creating the court was challenged by a proceeding brought in this court, and it was decided that the statute was repugnant to the Constitution and without force. *State ex rel. Jackson v. Hutchings*, 79 Kan. 191, 98 Pac. 797. This cause, which was pending in the court of common pleas, was transferred to the circuit court, and at the end of a trial a decision in the form of a judgment was rendered against the appellant, which it seeks to have annulled and reversed.

As the act was unconstitutional, the court and judge were without jurisdiction, and the judgment is therefore invalid. *Re Norton*, 64 Kan. 842, 91 Am. St. Rep. 255, 68 Pac. 639. Is a void judgment reviewable? Although there is some conflict in

34 Cal. 329, s. c. upon former trial, 30 Cal. 394; *Peabody v. Phelps*, 7 Cal. 53; *Coffinberry v. Horrill*, 5 Cal. 493; *Smith v. Chichester*, 1 Cal. 409; *Bean v. People*, 6 Colo. 100; *Filley v. Cody*, 4 Colo. 109; *Kirtley v. Marshall Silver Min. Co.* 4 Colo. 111; *Francis v. Wells*, 4 Colo. 274; *Cooper v. American Cent. Ins. Co.* 3 Colo. 318; *Skinner v. Beshoar*, 2 Colo. 385; *Stonington v. States*, 31 Conn. 213; *Seymour v. Belden*, 28 Conn. 443; *Re Dahlgren*, 30 App. D. C. 588; *Memmler v. Roberts*, 81 Ga. 351, 8 S. E. 525; *Duff v. Jones & Sons Mfg. Co.* 81 Ga. 351, 8 S. E. 525; *Maxwell v. Tumlin*, 79 Ga. 570, 4 S. E. 858; *Pope v. Jones*, 79 Ga. 487, 4 S. E. 860; *Castleberry v. State*, 68 Ga. 49; *Worsham v. Murchison*, 66 Ga. 715; *Galusha v. Butterfield*, 3 Ill. 227; *Ross v. Hamer*, 52 Ill. App. 251; *Bates v. Kaestner*, 69 Ill. App.

the authorities, the rule in this state is that a judgment which is a nullity may be reversed and set aside in a proceeding in error. This was held in *Earls v. Earls*, 27 Kan. 538, where it was said: "In such a case the defendant in error claims that the judgment is not void, but that it is valid, and that he has a right to enforce it, and therefore he cannot, for the purpose of defeating the proceedings of the plaintiff in error, say that the judgment is void and that the plaintiff's petition in error should be dismissed; while on the other hand, the plaintiff in error may simply treat the void judgment as a merely erroneous one, and ask that it be reversed." While the decision attacked is a nullity, it is in the form of a judgment, and appellee is asserting that it is a valid and binding obligation. Although void, it may be treated as in existence so far as to allow appellant to challenge its validity on appeal, and to enable this court to declare its invalidity and reverse it. *Winkfield v. Brinkman*, 31 Kan. 25, 2 Pac. 113; *Shaffer v. Brinkman*, 31 Kan. 124; *Kidder v. Fay*, 60 Wis. 218, 18

N. W. 839; *Shoemaker v. Grant County*, 36 Ind. 175; *Louisville, N. A. & C. R. Co. v. Lockridge*, 93 Ind. 191; *McCoy v. Allen*, 16 W. Va. 724; *Ex parte Martin*, 5 Yerg. 456, 26 Am. Dec. 276; *Smith v. Jacobs*, 77 Mo. App. 254; *Loeb v. Smith*, 24 Misc. 200, 52 N. Y. Supp. 677; *Powell*, App. Proc. 265, § 6.

Appellee appears to concede that a void judgment might be reversed if the case were here on a transcript of the record, but asserts that, as it is brought on a case made, which the trial court had no authority to settle, it cannot be considered. The judgment attacked is preserved and presented in one of the methods prescribed by statute for the taking of an appeal. If the judgment may be reviewed at all, no reason is seen why its validity may not be determined as well upon a case made as upon a transcript of the record.

On the face of the record, as preserved, it is clearly shown that the judgment is void, and it is therefore reversed.

All the Justices concur.

620; *Leary v. Dyson*, 98 Ind. 317; *Brown v. Goble*, 97 Ind. 86; *Dyer v. Steuben County*, 84 Ind. 542; *Shoultz v. McPheeters*, 79 Ind. 379; *Kyle v. Kyle*, 65 Ind. 387; *Shoemaker v. Grant County*, 36 Ind. 175; *Palmer v. Fuller*, 22 Ind. 115; *Davis v. Fish*, 1 G. Greene, 406, 48 Am. Dec. 387; *Shaffer v. Brinkman*, 31 Kan. 124; *Atchison, T. & S. F. R. Co. v. Keller*, 31 Kan. 439, 2 Pac. 771; *Earls v. Earls*, 27 Kan. 538; *Mears v. Remare*, 33 Md. 246; *Price v. Taylor*, 21 Md. 356; *Jordon v. Dennis*, 7 Met. 590; *Monger v. New Era Asso.* 145 Mich. 683, 108 N. W. 1111; *State v. Eddy*, 58 Mich. 318, 25 N. W. 299; *State v. Roberts*, 8 Nev. 240; *Adams v. Adams*, 50 N. J. Eq. 751, 26 Atl. 903; *McMahon v. Rauhr*, 47 N. Y. 67; *Kundolf v. Thalheimer*, 12 N. Y. 593; *Horowitz v. Decker*, 88 N. Y. Supp. 217; *Marty v. Marty*, 66 App. Div. 527, 73 N. Y. Supp. 369 (point was mentioned but not decided); *Catlin v. Rundell*, 1 App. Div. 157, 37 N. Y. Supp. 979; *Evers v. Gould*, 55 Misc. 266, 105 N. Y. Supp. 150; *Barron v. Feist*, 51 Misc. 589, 101 N. Y. Supp. 72; *Loeb v. Smith*, 24 Misc. 200, 52 N. Y. Supp. 677; *Wands v. Robarge*, 24 Misc. 273, 53 N. Y. Supp. 700; *Frost v. Frost*, 15 Misc. 167, 37 N. Y. Supp. 18; *Gillingham v. Jenkins*, 40 Hun. 594; *People ex rel. Wait v. Eggleston*, 13 How. Pr. 123; *Harris v. Clark*, 10 How. Pr. 415; *Gormly v. McIntosh*, 22 Barb. 271; *Fitch v. Devlin*, 15 Barb. 47; *Striker v. Mott*, 6 Wend. 465; *Darden v. Maget*, 18 N. C. (1 Dev. & B. L.) 498; *Baker v. Newton*, 22 Okla. 664, 98 Pac. 931 (strong dictum); *State v. Simpson*, 5 Yerg. 365; *Ex parte Martin*, 5 Yerg. 456, 26 Am. Dec. 276; *Oregon R. & Nav. Co. v. Eastlack*, 54 Or. 196, 102 Pac. 1011; *Sturgis v. Sturgis*, 51 Or. 10, 15 L.R.A. (N.S.) 1034, 131 Am. 33 L.R.A. (N.S.)

St. Rep. 724, 93 Pac. 696; *Whelan v. McMahon*, 47 Or. 37, 114 Am. St. Rep. 906, 82 Pac. 19; *Hoover v. Hoover*, 39 Or. 456, 65 Pac. 796; *Stites v. McGee*, 37 Or. 574, 61 Pac. 1129; *Therkelsen v. Therkelsen*, 35 Or. 75, 54 Pac. 885, on another point, 35 Or. 78, 57 Pac. 373; *William Deering & Co. v. Creighton*, 26 Or. 556, 38 Pac. 710; *Fox v. Nachtshein*, 3 Wash. 684, 29 Pac. 140; *Williams v. Steele*, 101 Tex. 382, 108 S. W. 155; *Hearn v. Cutberth*, 10 Tex. 216; *Butler v. Thompson*, 52 W. Va. 316, 43 S. E. 174; *Cook v. Dorsey*, 38 W. Va. 196, 18 S. E. 468; *McCoy v. Allen*, 16 W. Va. 724; *Johnson v. Young*, 11 W. Va. 684; *Monroe v. Bartlett*, 6 W. Va. 441; *Ashland Lodge No. 63, I. O. O. F. v. Williams*, 100 Wis. 223, 69 Am. St. Rep. 912, 75 N. W. 954 (the judgment was not void, but it was said that if it were, the appeal would not be dismissed, because a void judgment is appealable and reversible on that ground); *Kidder v. Fay*, 60 Wis. 218, 18 N. W. 839; *Spaulding v. Milwaukee, L. S. & W. R. Co.* 57 Wis. 304, 14 N. W. 368, 15 N. W. 482; *Van Slyke v. Trempealeau County Mut. F. Ins. Co.* 39 Wis. 390, 20 Am. Rep. 50 (the court said whether the judgment in the court below was void or voidable, it should be reversed); *Sayles v. Davis*, 20 Wis. 302 (void judgment; the better practice would be to move the court below to set it aside, as it expedites the remedy and saves expense); *Calkins v. Hays*, 4 Wis. 200; *Abrams v. Jones*, 4 Wis. 806; *Delles v. Second Nat. Bank*, 7 Wyo. 66, 75 Am. St. Rep. 875, 50 Pac. 190; *Alexander v. Crollott*, 199 U. S. 580, 50 L. ed. 317, 26 Sup. Ct. Rep. 161; *Baker v. Power*, 124 U. S. 167, 31 L. ed. 382, 8 Sup. Ct. Rep. 416; *Wilson v. Daniel*, 3 Dall. 401, 1 L. ed. 655.

The conflict of opinion upon the question considered was recognized and commented upon by Mr. Justice Hoyt in *Stewart v. Lohr*, 1 Wash. 341, 22 Am. St. Rep. 150, 25 Pac. 457, in the following language: "In the appellate courts of some of the states it is the practice in cases like this [judgment was void], to simply dismiss the appeal, and leave the judgment of the court below to stand in form as a judgment in force. These say that as the judgments are upon their face absolutely void, they will not take jurisdiction, even to reverse them. Other appellate courts, however, take the ground that as they have the power to clear their own records of objectionable entries, even though as standing thereon they are absolutely void, they have like power to set aside like void entries in the inferior courts, when the form of removing such void entries to such appellate courts has been complied with. We think the latter practice the better one. See *Lynch v. Divan*, 66 Wis. 490, 29 N. W. 213.

A judgment unreversed, though void upon its face, may seriously embarrass the person against whom it is in form rendered, though it can, of course, be of no benefit to the person who has secured it. This being so, such judgment should not be allowed to stand."

In *Hind v. Wilder's S. S. Co.* 14 Haw. 215, it was said: "There is much difference of opinion as to whether a void decree is appealable or not, with, perhaps, the weight of authority in favor of the view that it is appealable."

Valentine, J., said in *Earls v. Earls*, 27 Kan. 538: "Mr. Powell, in his work on Appellate Proceedings, uses the following language: 'When considering the question whether proceedings in error might or should be brought or not, it should be remembered that there are some errors so obvious and gross that they render the judgment void, a nullity, collaterally, or in any manner the question may arise, without a writ of error to reverse it. But even in such case, error for the reversal of such judgments might be sustained, and that would be the better way, as being more direct and positive. Errors of this sort are such as exist where there was a failure of jurisdiction in the court; or the want of jurisdiction over the person of the defendant in the judgment, on the account that there has been no service of process or appearance of the defendant, or that there was no legal cause of action or complaint. . . . In either of these instances the judgment may be treated as void, even collaterally; but it will be so far regarded as to lay the foundation of proceedings in error.' Powell, Appellate Proceedings, p. 265, § 6."

A person has a clear legal right to except to an illegal judgment because rendered by a court without jurisdiction, for the purpose of having it reviewed and reversed. *Walker v. Banks*, 65 Ga. 20, wherein it was said: "It is true that it is a mere

nullity, but so is every judgment upholding pleas to the jurisdiction where the court has none, and the injured party can except in the former as in the latter case, and have the illegal judgment reversed, whether attacked for want of jurisdiction or for any other legal reason."

The right to appeal is by no means limited to legal judgments. The great object of an appeal is to show that the judgment is not legal, and that it should be reversed. *Petty v. Durall*, 4 G. Greene, 120.

A party may secure an order declaring the invalidity of a void judgment by appeal. It is true that he may enjoin its enforcement; but it is also true that he may secure a judicial declaration of its invalidity by invoking the aid of an appellate court. *Cass County v. Logansport & R. C. Gravel Road Co.* 88 Ind. 199.

In *Cain v. Goda*, 84 Ind. 209, it was said: "We are not willing to hold that a void judgment can only be set aside upon a bill of review, for such a judgment may be attacked in any of the methods recognized by law, as, for instance, by a complaint for an injunction, or by an action to have it vacated. It is, indeed, not even necessary that the attack should be a direct one, for a void judgment may be collaterally impeached."

A concession that the judgment is void because the trial court was without jurisdiction could be of no avail to appellee in support of his motion to dismiss the appeal. Such a concession might overthrow his judgment, but would not justify a dismissal of the appeal. There may be an appeal from a void judgment. *Louisville, N. A. & C. R. Co. v. Lockridge*, 93 Ind. 191.

Where a decree is a nullity because of want of jurisdiction, it is the better practice to reverse the judgment and remand the cause, rather than to dismiss the writ. *Russell v. Sargent*, 7 Ill. App. 98.

So, in *Trullinger v. Todd*, 5 Or. 36, where it was claimed that, since the service of summons was insufficient to give the court in which the judgment was rendered jurisdiction of the person of the appellant, the judgment was an absolute nullity, on account of the want of such jurisdiction, and that no appeal would lie from such judgment, Prim, J., said: "While it appears to be generally conceded that a void judgment may be disregarded and treated as a nullity, whenever any right is claimed under such judgment, whether it has been appealed from and set aside by a competent court or not, it appears also to be the constant practice for courts of review to entertain appeals from such judgments, for the purpose of reversing and purging the records of such judgments."

Certainly, it would seem more consonant with the good order of society to permit such counterfeit and void presentments to be questioned and set aside in due order, upon a proceeding looking directly to that end, execution being superseded in the meantime, than to leave the party ag-

grieved to await the issuance of process, and then to resist its execution *manu forte*, or to restrain it by some counter process. *Skinner v. Beshoar*, 2 Colo. 383.

A void judgment, if permitted to stand, would be in form a judgment, entered in the records of a court, upon which final process might be issued, which, although void, might through judicial machinery be made oppressive to individuals. It is therefore a grievance which may properly be remedied by a tribunal which exists for the correction of errors. *Merced Bank v. Rosenthal*, 99 Cal. 39, 31 Pac. 849, 33 Pac. 732.

"This order," said Beatty, J., in *Hastings v. Burning Moscow Co.* 2 Nev. 93, "although void, may operate unjustly to defendant, and we see no reason why this court may not correct it. This court has jurisdiction of the parties and of the action, and we think should correct all illegal orders made in the case, although, perchance, where the order is clearly void, the defendant might be able to maintain an action against a ministerial officer enforcing it."

It is immaterial too whether the judgment is void for want of jurisdiction or for any other reason; the defendants against whom it was rendered have the right to avoid it by appeal to a higher court. *Smith v. Jacobs*, 77 Mo. App. 254.

A void order may be reversed on appeal notwithstanding nearly two years have elapsed since its entry, because it is not "made valid by lapse of time, and ever remains without effect as completely as if never entered." *Kelner v. Cowden*, 60 W. Va. 600, 55 S. E. 649.

But in Kansas, by reason of statute, in order for a void judgment to be reversed upon appeal the petition in error must be filed within one year after its rendition. *Winkfield v. Brinkman*, 31 Kan. 25, 2 Pac. 113.

In *Officer v. Price*, 5 Yerg. 285, Catron, Ch. J., said: "There is but one case known to a court of error where a plaintiff can reverse because of an error in his favor, and that is where the court rendering the judgment has no jurisdiction of the person of the defendant or of the subject-matter, being, in fact, a void judgment, to rid himself of it, so that he may proceed anew."

But upon the question of the appealability of a judgment for contempt, the supreme court of Tennessee in *State v. Gallo-way*, 5 Coldw. 333, 98 Am. Dec. 404, after expressing no doubt as to its jurisdiction to reverse and annul ordinary judgments which are void, and because they are void, said it was quite another thing to hold that it ought to exercise, or possessed, appellate jurisdiction in regard to judgments for contempt, because, and for the reason only, that they are void. Smith, J., said: "The rule, we think, proper and in harmony with the practice of the courts everywhere, is that the judgment of a court for contempt is not subject to appellate review."

If such judgment be void, the law has provided other modes of redress, sufficiently prompt and effectual and entirely compatible with the power of the courts, to punish contempts promptly and effectually." And in the course of the same opinion the learned justice said that "to hold otherwise would precipitate into this court the whole flood of judgments for contempts, upon the ground of being void; and would greatly paralyze the power of the inferior courts, indispensable to their efficiency and existence."

It has been held too that a court cannot review a void order in an action unless it affects a substantial right. *DeLancey v. Piepgras*, 141 N. Y. 88, 35 N. E. 1089.

Likewise, in *Elmira Realty Co. v. Gibson*, 103 App. Div. 140, 92 N. Y. Supp. 913, where the lack of jurisdiction did not appear upon the record of the case upon appeal, but from an accompanying certificate of the judge, the court said: "Whether or not the court would have power to reverse upon the appearance, apart from the record, of a fact rendering the judgment void for want of jurisdiction, we think the better practice is to dismiss this appeal, remitting the parties to a motion in the court below, to rid themselves, if need be, of the void judgment in that court."

And it has been held that a judgment of a district court rendered at a term held without authority of law is not appealable. *Campbell v. Chandler*, 37 Tex. 32; *Doss v. Waggoner*, 3 Tex. 515; *Baker v. Chisholm*, 3 Tex. 157; *Hodges v. Ward*, 1 Tex. 244.

In *Backer v. Eble*, 144 Ind. 287, 43 N. E. 233, while the court admitted that an appeal would lie from a void judgment, it was held that a judgment, so-called, entered by a judge in vacation, is not in that class, and that "the most that can be said of it is that it is a special finding on which no judgment has been rendered by the court," and therefore an appeal will not lie.

In *Hughes v. Chapman*, 60 Ga. 595, it was held that, since a land court had no power to try a *caveat* to the issuing of a warrant or to the granting of land, but the ordinary could only transmit the *caveat*, etc., to the superior court as an original case, in pursuance of a statute, if he rendered a judgment upon the *caveat*, and the caveator appealed, and the appeal was transmitted, it should be dismissed, "there being no provision of law for such a judgment, or for an appeal therefrom."

And in *Alabama Midland R. Co. v. Stevens*, 116 Ga. 790, 43 S. E. 46, it was held that, since judgment should have been rendered dismissing a writ of certiorari for failure to give a valid bond, a subsequent hearing of the case was nugatory, and therefore a writ of error to the overruling of the certiorari would be dismissed.

It is true that in *Wicks v. Ludwig*, 9 Cal. 173, the court decided squarely that a judgment entered in vacation, where the Constitution of California conferred jurisdiction only on the district courts to try cases

in term time, was illegal and void, and that no appeal could be taken from such judgment. But not only the earlier California cases, but the later ones also, sustain exactly the reverse doctrine, as one may observe by the citations supra.

Thus, in *Livermore v. Campbell*, 52 Cal. 75, the court says: "It has been repeatedly held by this court that an appeal lies from a void judgment, and it follows that an order setting aside a judgment in form, on the ground that it is in fact invalid, is also appealable."

In *Tate v. Hennessey*, 7 B. C. 262, the intimation is strong that an appeal from a void order is not the proper remedy, but that a motion should be made in the court below to set it aside.

And in *Brigman v. McKenzie*, 6 B. C. 58, while an order was held to be appealable, the court approves the making of a motion before the judge to set the same aside, as the better practice. So, in *Re Kootenay Brewing Co.* 7 B. C. 131, Irving, J., was of the opinion that a void order is to be set aside upon motion being made for that purpose.

In *Voight Brewery Co. v. Orth*, 5 Ont. L. Rep. 443, 2 Ont. Week. Rep. 304, it was held that a void judgment could be appealed from.

But in *Re Scottish Ontario & M. Land Co.* 21 Ont. Rep. 676, there is a *dictum* to the contrary.

And in *Cochrane v. Boucher*, 8 Ont. App. Rep. 555, it was held that where a statute required the adjudication to be made by a certain number of judges, a judgment rendered contrary to its mandate was not valid, and would not support an appeal.

In Kentucky, by reason of statute (Civil Code, § 763), it is held that a void judgment cannot be modified or reversed on appeal until a motion to set aside or modify the judgment shall have been made in the inferior court and overruled. *Hermann v. Martin*, 107 Ky. 642, 55 S. W. 429; *Easterling v. Chiles*, 93 Ky. 315, 20 S. W. 227; *Louisville Rock & Lime Co. v. Kerr*, 78 Ky. 12; *Bullitt v. Com.* 14 Bush, 74; *Hager v. New South Brewing Co.* 28 Ky. L. Rep. 895, 90 S. W. 608; *Swafford v. Howard*, 20 Ky. L. Rep. 1703, 50 S. W. 43; *Felton v. Munson*, 20 Ky. L. Rep. 1321, 49 S. W. 204; *Barbourville Real Estate Co. v. Matthews*, 14 Ky. L. Rep. 767; *Curd v. Williams*, 13 Ky. L. Rep. 855, 18 S. W. 634; *Turner v. Pash*, 13 Ky. L. Rep. 639; *Robinson v. Louisville*, 13 Ky. L. Rep. 366; *Louisville, St. L. & T. R. Co. v. Barrett*, 13 Ky. L. Rep. 232; *Sullivan v. Frankfort Bldg. & L. Asso.* 13 Ky. L. Rep. 48; *Bamberger v. Vincent*, 12 Ky. L. Rep. 165; *Rubel v. Bushnell*, 11 Ky. L. Rep. 810; *Ulin v. Ford*, 10 Ky. L. Rep. 39; *Stamper v. Central Kentucky Lumber & Min. Co.* 9 Ky. L. Rep. 175, 4 S. W. 330; *Sweeney v. Middleton*, 5 Ky. L. Rep. 612; *Carpenter v. Layton*, 5 Ky. L. Rep. 611; *Ruby v. Grace*, 2 Duv. 540.

And the appeal is then prosecuted from the order overruling the motion. *Bald-* 33 L.R.A. (N.S.)

ridge v. Baldridge, — Ky. —, 117 S. W. 253.

But where the party is in court, and objects and excepts to the entry of the orders and judgments complained of, then the motion in the lower court to set the same aside on the ground that they are void is not a condition precedent to the right of appeal. *Williams v. Williams*, 107 Ky. 496, 54 S. W. 716.

As was stated supra, some courts in cases where the judgment, decree, or order rendered is void simply dismiss the appeal, and leave the void entry of the court below to stand in form as a judgment in force. *Gartman v. Lightner*, 160 Ala. 202, 49 So. 412; *Singo v. McGhee*, 160 Ala. 245, 49 So. 290; *Wertheimer v. Ridgeway*, 157 Ala. 398, 47 So. 569; *Tidmore v. Perritt*, — Ala. —, 42 So. 818; *Walker v. State*, 142 Ala. 7, 39 So. 242; *Barber v. State*, 143 Ala. 1, 39 So. 318; *McMillan v. Gadsden*, — Ala. —, 39 So. 569; *T. J. Mattox Cigar & Tobacco Co. v. Gato Cigar Co.* — Ala. —, 39 So. 777; *Kidd v. Burke*, 142 Ala. 625, 38 So. 241; *Berlin Mach. Works v. Marbury Lumber Co.* — Ala. —, 38 So. 1033; *Kansas City, M. & B. R. Co. v. McLaughlin*, — Ala. —, 38 So. 1036; *Kansas City, M. & B. R. Co. v. Martin*, — Ala. —, 38 So. 1036; *Kansas City, M. & B. R. Co. v. Smith*, — Ala. —, 38 So. 1036; *Kansas City, M. & B. R. Co. v. Wright*, — Ala. —, 38 So. 1036; *Northern Alabama R. Co. v. Musgrove*, — Ala. —, 38 So. 1037; *Drennen v. Jasper Inv. Co.* — Ala. —, 38 So. 1034; *Pearce & Son Co. v. Norris*, — Ala. —, 38 So. 1037; *Poe v. State*, — Ala. —, 38 So. 1037; *Randall v. Wadsworth*, 130 Ala. 633, 31 So. 555; *Holdsombeck v. Fancher*, 112 Ala. 473, 20 So. 519; *Jackson v. State*, 102 Ala. 76, 15 So. 351; *Leslie v. Tucker*, 57 Ala. 483; *Pettus v. McKinney*, 56 Ala. 41; *David v. David*, 56 Ala. 49; *State ex rel. Dixon v. Fifth Dist. Judge*, 26 La. Ann. 119; *Culver v. Leovy*, 21 La. Ann. 306; *Second Municipality v. Tulane*, 1 La. Ann. 179; *Staab v. Atlantic & P. R. Co.* 3 N. M. 606, 9 Pac. 381; *Adams v. Wheeler*, 1 D. Chip. (Vt.) 417.

In *Hoagland v. Creed*, 81 Ill. 506, it was held that the court would not grant a writ of error to review a void judgment.

The idea seems to be that, as such entries are upon their face absolutely void, and therefore productive of no rights to anyone, the appellate court will not take jurisdiction, even to reverse them.

"An appeal from a lower to a higher court only exists where something has been passed on and definitely settled in the lower court, and which is susceptible of being properly adjudicated in the appellate court; such does not appear to us to be the effects of this decree. So far as the question of appeal is concerned, we think this decree is a nullity, and that the remedy of the plaintiff is on motion to the court of common pleas, to set the decree aside for irregularity, which we have no doubt that court has the right to do." *Dougherty v. Walters*, 1 Ohio St. 201.

A void decree can neither be affirmed nor reversed, and does not support an appeal. *Adams v. Wright*, 129 Ala. 305, 30 So. 574.

And where there is no valid judgment to support the appeal, this court will *ex mero motu* dismiss the appeal. *Gunter v. Mason*, 125 Ala. 644, 27 So. 843.

Nor does the fact that the prisoner did not object in the trial court, to being tried on a day after the lawful term of the court expired, preclude him from raising the question of the invalidity of the proceedings in the appellate court. *Johnson v. State*, 141 Ala. 7, 109 Am. St. Rep. 17, 37 So. 421, wherein the appeal was dismissed because the judgment was void.

E. M. S.

KANSAS SUPREME COURT.

ROSSVILLE STATE BANK, Appt.,
v.

J. M. HESLET.

(— Kan. —, 113 Pac. 1052.)

Note — provision for extension of time — effect on negotiability.

A promissory note, otherwise in negotiable form, contained the following provision: "The makers and indorsers of this note hereby severally waive presentment for pay-

Headnote by BENSON, J.

Note. — Effect on negotiability of promissory note of provision permitting extension of time.

The earlier cases on this subject are collected in the notes to *First Nat. Bank v. Buttery*, 16 L.R.A. (N.S.) 878, and to *Anniston Loan & T. Co. v. Stickney*, 31 L.R.A. 234, where the lack of harmony in the cases is pointed out at length.

In *Sykes v. Citizens' Nat. Bank*, 78 Kan. 688, 19 L.R.A. (N.S.) 685, 98 Pac. 206, cited in *ROSSVILLE STATE BANK v. HESLET*, it was held that the law of Missouri, while having a "trend" against that of Kansas, had not been shown to be contrary to it in the case of the note then in question, containing the provision as to extension which the court quotes in its opinion, in the *HESLET CASE*.

In *Stitzel v. Miller*, 260 Ill. 72, — L.R.A. (N.S.) —, 95 N. E. 53, a note containing the clause, "We also agree that in case said note is not paid at maturity, that it is at the option of the holder hereof to extend, as he deems proper, the payment of the above note, and that said extension shall not in any manner release one or either of us from the payment hereof," was held negotiable, under the negotiable instrument law providing that the instrument must be payable on demand or at a fixed or determinable future time, and that one is payable at a determinable future time which is expressed to be payable: "(1) At a

fixed period after date or sight; or (2) on or before a fixed or determinable future time specified therein; or (3) on or at a fixed period after the occurrence of a specified event which is certain to happen, though the time of happening be uncertain. An instrument payable upon a contingency is not negotiable, and the happening of the event does not cure the defect." The court placed its decision on the ground that the time of payment was certain, as the option to extend could be exercised only upon the failure of the payors to make payment at maturity, and that after maturity negotiability, for all practical purposes, was at an end, and considered that cases where the note reserved to the buyer the right of option of extension at any time, either before or after maturity, were not in point, and said: "The quoted words do not affect the character of the note, before or up to its maturity, either in its certainty, amount to be paid, the date of payment, or the person to whom the payment is to be made. The clause in question does not destroy the negotiability of the note. The following authorities in other jurisdictions tend to uphold this conclusion: *National Bank v. Kenney*, 98 Tex. 293, 83 S. W. 368; *First Nat. Bank v. Buttery*, 16 L.R.A. (N.S.) 878, and note; *Farmer v. Bank of Graettinger*, 130 Iowa, 469, 107 N. W. 170; *Anniston Loan & T. Co. v. Stickney*, 31 L.R.A. 234, and note."

(March 11, 1911.)

A PPEAL by plaintiff from a judgment of the District Court for Shawnee County in defendant's favor in an action brought to recover the amount alleged to be due upon a promissory note. Affirmed.

The facts are stated in the opinion.

Messrs. George H. Whitcomb and Clad Hamilton, for appellant:

The note is negotiable.

First nat. Bank v. Buttery, 17 N. D. 326, 16 L.R.A. (N.S.) 878, 116 N. W. 341, 17 A. & E. Ann. Cas. 52; *Capron v. Capron*, 44 Vt. 410; *Jacobs v. Gibson*, 77 Mo. App. 244; *City Nat. Bank v. Goodloe-McClelland Commission Co.* 93 Mo. App. 123; *Krouskop v. Shontz*, 51 Wis. 204, 37 Am. Rep. 817, 8 N. W. 241; *Woodbury v. Roberts*, 59 Iowa, 348, 44 Am. Rep. 685, 13 N. W. 312; *Farmer v. Bank of Graettinger*, 130 Iowa, 469, 107 N. W. 170.

The note in question expressly authorizes the holder of the note to extend the time of payment without consultation with

fixed period after date or sight; or (2) on or before a fixed or determinable future time specified therein; or (3) on or at a fixed period after the occurrence of a specified event which is certain to happen, though the time of happening be uncertain. An instrument payable upon a contingency is not negotiable, and the happening of the event does not cure the defect." The court placed its decision on the ground that the time of payment was certain, as the option to extend could be exercised only upon the failure of the payors to make payment at maturity, and that after maturity negotiability, for all practical purposes, was at an end, and considered that cases where the note reserved to the buyer the right of option of extension at any time, either before or after maturity, were not in point, and said: "The quoted words do not affect the character of the note, before or up to its maturity, either in its certainty, amount to be paid, the date of payment, or the person to whom the payment is to be made. The clause in question does not destroy the negotiability of the note. The following authorities in other jurisdictions tend to uphold this conclusion: *National Bank v. Kenney*, 98 Tex. 293, 83 S. W. 368; *First Nat. Bank v. Buttery*, 16 L.R.A. (N.S.) 878, and note; *Farmer v. Bank of Graettinger*, 130 Iowa, 469, 107 N. W. 170; *Anniston Loan & T. Co. v. Stickney*, 31 L.R.A. 234, and note."

B. B. B.

any other party, and without making or entering into any agreement whatsoever.

Woodbury v. Roberts, 59 Iowa, 348, 44 Am. Rep. 685, 13 N. W. 312; Glidden v. Henry, 104 Ind. 278, 54 Am. Rep. 316, 1 N. E. 369; Second Nat. Bank v. Wheeler, 75 Mich. 546, 42 N. W. 963; Smith v. Van Blarcom, 45 Mich. 371, 8 N. W. 90; Rosenthal v. Rambo, 28 Ind. App. 265, 62 N. E. 637; Coffin v. Spencer, 39 Fed. 262; Mitchell v. St. Mary, 148 Ind. 111, 47 N. E. 224; Matchett v. Anderson Foundry & Mach. Works, 29 Ind. App. 207, 94 Am. St. Rep. 272, 64 N. E. 229; Union Stock Yards Nat. Bank v. Bolan, 14 Idaho, 87, 125 Am. St. Rep. 146, 93 Pac. 508.

Mr. J. B. Larimer, for appellee:

If, on its face, a note is doubtful and uncertain as to the time when it is ultimately payable, it is non-negotiable, and therefore is open to all the defenses that the maker could make against the payee, no matter under what circumstances or by whomsoever held.

City Nat. Bank v. Gunter Bros. 67 Kan. 227, 72 Pac. 842; Sykes v. Citizens' Nat. Bank, 69 Kan. 135, 76 Pac. 393, 78 Kan. 688, 19 L.R.A. (N.S.) 665, 98 Pac. 206; Johnson v. Merchants' Bank, 69 Kan. 849, 76 Pac. 1129; Delaney v. Great Bend Implement Co. 79 Kan. 131, 98 Pac. 781; Coffin v. Spencer, 39 Fed. 262; Merchants' & M. Sav. Bank v. Fraze, 9 Ind. App. 161, 53 Am. St. Rep. 341, 36 N. E. 378; Rosenthal v. Rambo, 28 Ind. App. 265, 62 N. E. 637; Matchett v. Anderson Foundry & Mach. Works, 29 Ind. App. 207, 94 Am. St. Rep. 272, 64 N. E. 229; Evans v. Odem, 30 Ind. App. 207, 65 N. E. 755; Glidden v. Henry, 104 Ind. 278, 54 Am. Rep. 316, 1 N. E. 369; Mitchell v. St. Mary, 148 Ind. 111, 47 N. E. 224; Rosenthal v. Rambo, 165 Ind. 584, 3 L.R.A. (N.S.) 678, 76 N. E. 404; Smith v. Van Blarcom, 45 Mich. 371, 8 N. W. 90; Second Nat. Bank v. Wheeler, 75 Mich. 546, 42 N. W. 963; Miller v. Poage, 56 Iowa, 96, 41 Am. Rep. 82, 8 N. W. 799; Woodbury v. Roberts, 59 Iowa, 348, 44 Am. Rep. 685, 13 N. W. 312; Citizens' Nat. Bank v. Piollet, 126 Pa. 194, 4 L.R.A. 190, 12 Am. St. Rep. 860, 17 Atl. 603; Union Stock Yards Nat. Bank v. Bolan, 14 Idaho, 87, 125 Am. St. Rep. 146, 93 Pac. 508; National Bank v. Kenney, 35 Tex. Civ. App. 434, 80 S. W. 555; Selover, Neg. Inst. 2d ed. 68, 69; 7 Cyc. Law & Proc. p. 600, note 10; 4 Am. & Eng. Enc. Law, 2d ed. p. 91, note 5; Eaton & G. Com. Paper, § 39, p. 200, note 18; Dan. Neg. Inst. 5th ed. 49; First Nat. Bank v. Buttery, 16 L.R.A. (N.S.) 878, note.

Benson, J., delivered the opinion of the court:

This action is upon a promissory note 33 L.R.A. (N.S.)

payable to the order of J. M. Heslet, on January 1, 1909, containing the following clause: "The makers and indorsers of this note hereby severally waive presentment for payment, notice of payment, protest, and notice of protest, and all exemption that may be allowed by law, and valuation and appraisal laws waived, and each signer and indorser makes the other an agent to extend the time of this note."

The question for decision is whether the note is a negotiable instrument. It is conceded that, if the note is negotiable, the plaintiff should recover, and that, if it is not, the judgment for the defendant was right.

It is contended that the element of certainty in time of payment necessary in commercial paper is destroyed by the stipulation for extension. An instrument to be negotiable "must be payable on demand, or at a fixed or determinable future time." Neg. Inst. Law, § 8 (Gen. Stat. 1909, § 5254). An instrument is payable at a determinable future time "which is expressed to be payable: (1) At a fixed period after date or sight; or (2) on or before a fixed or determinable future time specified therein; or (3) on or at a fixed period after the occurrence of a specified event which is certain to happen, though the time of happening be uncertain. An instrument payable upon a contingency is not negotiable, and the happening of the event does not cure the defect." Neg. Inst. Law, § 11 (Gen. Stat. 1909, § 5257).

In City Nat. Bank v. Gunter Bros. 67 Kan. 227, 72 Pac. 842, followed in Sykes v. Citizens' Nat. Bank, 69 Kan. 134, 76 Pac. 393, and Id. 78 Kan. 688, 19 L.R.A. (N.S.) 665, 98 Pac. 206, it was held that a note was not negotiable, because of the following clause: "The makers and indorsers hereby severally waive protest, demand, and notice of protest and nonpayment, in case this note is not paid at maturity, and agree to all extensions and partial payments before or after maturity without prejudice to holder."

The negotiable instruments law did not apply in the Gunter Case (§ 6); but the provisions of that statute to which we have referred are only declaratory of the common law. Adhering to the views expressed in that case, they must, if applicable, govern the controversy here. In that case the makers and indorsers agreed to all extensions before or after maturity; here signer and indorser made the other an agent to extend the time. Interpreting "signer" to mean maker, and the agency of each maker and indorser to act for the other, as equivalent to a consent to the action of either to an agreement for extension made by another, the only material dif-

ference discernible is that in the Gunter Case the note stated that the extension might be made before or after maturity, while in this case it authorizes the extension without stating when it may be made. The precise inquiry suggested is whether the authority to extend here given may be exercised only after maturity; if so, the time is fixed for payment; for the promise, apart from this clause, is to pay on January 1, 1909, and an authority to extend afterwards would only amount to a waiver of the right to be relieved from liability for an extension without such authority. If, however, the clause is to be construed as giving the parties named the right to extend the time before maturity, its effect would be precisely the same as though the words "on or before" had been inserted, and the rule of the Gunter Case would apply.

Counsel for the bank say: "At most the clause in question can only be construed to give authority to the parties named to 'extend' the time of payment at or after maturity by an agreement to be then made. That is what the word 'extend' means." To "extend" is to stretch, or stretch out. Webster's Dict. As here used, it means that the time of payment may be lengthened to a date beyond that stated in the instrument. Extension of time of payment rests in contract, and the contract may be made before as well as after maturity, unless some restriction is expressed or is to be implied from the terms used. Thus, the parties to a lease for one year may agree before the end of the term that it shall be extended for another year, and this may be done ordinarily in any contract or transaction involving a fixed period of time. The general authority given in this instrument is to extend the time for payment; each signer and indorser being made an agent of every other to do this. It is not stated that this shall be done only at maturity or after maturity, and it is not perceived why such a restriction should be implied, and no precedent is cited for such a rule. Indeed, it would seem that extensions in such cases would ordinarily be made before a note falls due, in order to prevent the impairment of credit, and to avoid inconveniences that might arise from disappointed expectations of receiving payment.

It is argued, however, that the opinion in the Gunter Case warrants the interpretation claimed by the appellant. The clause relied upon is: "If the time is to remain fixed until maturity, when another time is to be fixed by the parties, or if payment is made to depend upon events which necessarily must occur, and the time of payment is ultimately certain, other con-

siderations would arise." While it was said that other considerations would arise if the time of payment remained fixed until maturity of the note, it was not suggested that the right to an extension before the time of payment stated in the note had elapsed depended on the words "before or after maturity" in the clause giving such right. Nor is such a conclusion to be inferred from the language used. In reading the cases cited in the opinion referred to, it will be found that in all, or nearly all, of them, the instruments under consideration gave the right to extend in general terms, without stating when it should be exercised, and the distinction now contended for was not suggested. In *Oyler v. McMurray*, 7 Ind. App. 645, 34 N. E. 1004, cited on page 233 of 67 Kan., the clause was that "the drawers and indorsers severally waive . . . all defenses on the ground of any extension of the time of payment . . . given by the holder or holders." The court said: "This evidently means before or after January 1, 1888" (the date of maturity). This seems to be the construction placed upon the general authority to extend, as given in the other cases cited.

In *Woodbury v. Roberts*, 59 Iowa, 348, 44 Am. Rep. 685, 13 N. W. 312, also cited in the Gunter Case, the stipulation was that "the makers and indorsers . . . agree that the payee or his assigns may extend the time of payment," etc. The court said: "The note before us may never fall due, for payment may be extended indefinitely." If, however, extensions could be made only after maturity, the objection that it might never fall due would have no foundation, for it would necessarily fall due before an extension could be made.

The vice of the stipulation in question is that the day of payment cannot be determined. The signer (maker) or any indorser may, at any time he sees fit to do so, as agent one for another, extend the time for payment by agreement with the holder. The payee, in transferring the note, may become an indorser, and therefore an agent for the maker, and his indorsee may in turn become an indorser with like power, so that the time of maturity must be indefinite, and not determinable from the instrument. As stated in *Coffin v. Spencer* (C. C.) 39 Fed. 262, also cited in the Gunter Case: "Every successive taker of the paper is, of course, bound to take notice of this stipulation, and, instead of looking only to the face of the instrument for the time of its maturity, as in case of commercial paper he must, is put upon inquiry whether or not any agreement for a renewal or extension of time

has been made by his proposed assignor or by any previous holder."

In a note in 17 A. & E. Ann. Cas. 55, the cases upon the general subject of certainty in time of payment of negotiable paper are collated, including City Nat. Bank v. Gunter Bros. 67 Kan. 227, 72 Pac. 842. The cases are also collated in a note in 125 Am. St. Rep. 199. Many of these authorities are discussed in exhaustive briefs furnished by the parties here. There is a distinct line of cleavage between cases holding in harmony with City Nat. Bank v. Gunter Bros., and those in other jurisdictions holding that stipulations like the one contained in that case are not fatal to negotiability. No useful purpose would be served by reviewing these cases here. The opposing views upon this question are clearly stated in the majority and minority opinions in First Nat. Bank v. Buttery, 17 N. D. 326, 16 L.R.A.(N.S.) 878, 116 N. W. 341, 17 A. & E. Ann. Cas. 52.

The plaintiff calls attention to the statute declaring that the negotiable character of an instrument is not affected by a provision which "waives the benefit of any law intended for the advantage or protection of the obligor." Neg. Inst. Law, § 12 (Gen. Stat. 1909, § 5258). By applying this waiver to subdivision 6 of § 127 of the same statute (Gen. Stat. 1909, § 5373), providing for the release of parties secondarily liable by extensions given without their consent, it is argued that the maker is bound. These provisions are not novelties in commercial law. But the plaintiff's contention overlooks the fact that the question to be determined in this case is whether the instrument is a negotiable promissory note, and this depends on whether it has the element of certainty in time of payment necessary in commercial paper. It is not a question of the waiver of the right of an obligor upon a negotiable instrument, to be released by an extension of time given without his consent, but whether there is such an instrument. Simple contracts, although for the payment of money, cannot be transformed into commercial paper by mere waiver.

The court is satisfied that the rule it has adopted and followed in the cases first referred to is sustained by the weight of authority, and by the better reasoning. The formal essentials of a negotiable instrument are so simple and so generally known that there is little reason for the insertion of debatable provisions; to encourage experiment in this field would tend to uncertainty in a matter which ought, as far as possible, to be free from doubt. As observed by Gibson, Ch. J., in Overton v. Tyler, 3 Pa. St. 346, 45 Am. Dec. 33 L.R.A.(N.S.)

645: "A negotiable bill or note is a courier without luggage. It is a requisite that it be framed in the fewest possible words, and those importing the most certain and precise contract; and, though this requisite be a minor one, it is entitled to weight in determining a question of intention."

The same court, by Sharswood, J., in Woods v. North, 84 Pa. 407, 24 Am. Rep. 201, said: "It is a necessary quality of negotiable paper that it should be simple, certain, unconditional, not subject to any contingency. It would be a mere affectation of learning to cite the elementary treatises and the decided cases which have established this principle. It is very important to the commercial community that it should be maintained in all its rigor."

The importance of avoiding stipulations in commercial paper, like the one under consideration, is also emphasized in Woodbury v. Roberts, 59 Iowa, 348, 44 Am. Rep. 686, 13 N. W. 312.

After a careful consideration of this important and interesting question, we are satisfied that plaintiff's contention rests upon a repudiation or modification of the rule declared in the Gunter Case, rather than upon the denial of its application.

The judgment is affirmed.

All the Justices concur.

Petition for rehearing denied.

MARYLAND COURT OF APPEALS.

J. MILTON LYELL, Assignee of W. Jeff Adams, Appt.,
v.

MARY A. WALBACH.

(113 Md. 574, 77 Atl. 1111.)

Married women — promise — moral obligation.

The moral obligation of a married woman to pay for supplies furnished for use in her family at a time when she had no legal power to contract for them is not sufficient to support her promise after her disability has been removed to make such payments.

(June 23, 1910.)

Note. — Validity of new promise by woman after removal of disability of coverture to pay debt incurred during disability.

As shown in the note to Gilbert v. Brown, 7 L.R.A.(N.S.) 1053, the decision in LYELL v. WALBACH, that the moral obligation arising from a contract made by a married woman at a time when it was void

A PPEAL by plaintiff from a judgment of the Superior Court of Baltimore City in defendant's favor in an action brought to recover the amount alleged to be due on an account stated. Affirmed.

The facts are stated in the opinion.

Mr. J. Milton Lyell in *propria persona*.

Mr. Leigh Bonsal for appellee.

Briscoe, J., delivered the opinion of the court:

This case is before us on a second appeal. The first appeal is reported in 111 Md. 610, 75 Atl. 339, and the questions of law on the pleadings were established on that appeal. A judgment of the superior court of Baltimore city, in favor of the defendant, was there reversed, with costs, and the case was remanded for a new trial.

because of the disability of coverture will not constitute a sufficient consideration to sustain a new promise by her after the removal of her disability, is sustained, by the numerical weight of authority at least. In addition to the many cases there cited in support of that doctrine, should be added the following cases: Hetherington v. Hixon, 46 Ala. 297; Horton v. Hill, 138 Ala. 625, 36 So. 465; Howard v. Simpkins, 70 Ga. 322, *obiter*; Thompson v. Minnich, 227 Ill. 430, 81 N. E. 336; LYELL v. WALBACH; State Nat. Bank v. Robidoux, 57 Mo. 446; Kent v. Rand, 64 N. H. 45, 5 Atl. 760; Groene v. Frondhof, 1 Disney (Ohio) 504.

As shown in the earlier note, however, there is considerable authority, especially in New York and Pennsylvania, against that doctrine. While, as above intimated, the decision in Thompson v. Minnich, *supra*, is well supported by other cases, none of those which the court cites in support of its conclusion seems to be in point. One of those cases (Brick v. Campbell, 122 N. Y. 337, 10 L.R.A. 259, 25 N. E. 493), is merely to the effect that the removal by the act of 1879 of the disability of a married woman having a child to assign a policy of insurance upon the life of her husband for her benefit did not *ipso facto* validate a prior assignment made by her. Another case (Loftus v. Farmers' Nat. Bank, 133 Pa. 97, 7 L.R.A. 313, 19 Atl. 347) seems to be even less in point, dealing merely with the question whether a statute empowering married women to sell and transfer government loans extended to foreign or nonresident married women owning such securities. As stated, both New York and Pennsylvania are committed by other cases cited in the earlier note to a contrary doctrine.

In Bibbs v. Davis, 2 Hayw. & H. 364, Fed. Cas. No. 18,235, it was held that where a woman, during marriage, made a contract in reference to her separate estate, and subsequently, after the death of her husband, promised to pay the same, she was liable thereon at law. Probably, however, the original promise in this case, though un-

The case is now before us upon its merits, and the questions are presented by a single exception to the rulings of the court upon the prayers. The court below, at the close of the testimony, refused all of the plaintiff's prayers, and granted the defendant's prayer that there was no evidence legally sufficient for the plaintiff to recover, and that their verdict must be for the defendant, and this action of the court forms the basis of the plaintiff's appeal from the judgment so entered on the verdict.

The suit was brought by the plaintiff on the third day of February, 1909, in the superior court of Baltimore city, as assignee for the benefit of creditors of W. Jeff Adams, trading as W. Jeff Adams & Company, against the defendant, Mary A. Walbach, wife of John De-Barth Walbach,

enforceable at law, was binding in equity upon her separate estate, so that the decision falls within the exception referred to in the earlier note.

Cases like Candy v. Coppock, 85 Ind. 594, and Radican v. Radican, 22 R. I. 405, 48 Atl. 143, where there was a mere acknowledgment, after the removal of the disability, of an agreement made while the disability was in force, are not in point, for the reason stated in the former case that such an acknowledgment does not constitute a new promise, and does not present the question whether a new promise under such circumstances would be binding.

So, cases like Walker v. Owen, 79 Mo. 563, involving the question whether a woman who was under coverture at the time of making an agreement with respect to her property may afterwards, upon becoming discover, affirm the contract and enforce it against the other party, are not within the scope of these notes.

Additional authority for both sides of the general question whether a moral obligation arising from the receipt of actual pecuniary benefit will sustain a new promise after the removal of the disability will be found in the note to Muir v. Kane, 26 L.R.A.(N.S.) 520. If the criterion suggested in that note for determining whether the moral obligation arising from a previous invalid and unenforceable contract will sustain a new promise—namely, whether or not the promisor in consideration of the original promise received actual pecuniary benefit, as contrasted with the mere satisfaction of his ethical obligations—is accepted, it is apparent that a new promise after removal of the disability of coverture to pay a debt contracted during coverture would be sustained if the wife, under the original contract, obtained an actual material benefit of a character which, independently of any consideration of detriment to the other contracting party, would have constituted a sufficient consideration to have sustained the original promise had she not been under disability at that time.

G. H. P.

deceased, to recover a balance of \$784.82 alleged to be due by her on an account stated between them. The declaration as amended contained two counts; but the cause of action is fully set out and stated in the second count, and it is as follows: "And for that the said W. Jeff Adams and a certain Henry V. Waltjen, trading as W. Jeff Adams & Company, during and about the years 1896, 1897, and 1898, at the request of Mrs. Mary A. Walbach, otherwise known as Mrs. John De B. Walbach, sold and delivered to the defendant quantities of meat, game, vegetables, and other goods and merchandise generally known as 'green groceries,' on account of which the defendant made sundry payments, until the amount due by her to the firm of W. Jeff Adams & Co. upon account stated amounted on the 11th day of November, 1907, and some time prior thereto, to the sum of \$784.82 (not including any interest thereon); that prior to the 11th day of November, 1907, the defendant admitted to W. Jeff Adams and to John E. Hood, then clerk and salesman for the W. Jeff Adams & Company, the correctness of the amount of \$784.82, due and owing by her, as shown by the account stated, and her liability thereon, and promised to pay the same; that on or about the 11th day of November, 1907, Henry V. Waltjen duly assigned unto W. Jeff Adams all of his right, title, and interest in the business of W. Jeff Adams & Company, and from and after the date W. Jeff Adams conducted the business in the same firm name, until he assigned the same, with all the assets thereof, to J. Milton Lyell, trustee, for the benefit of creditors, on or about the 28th day of May, 1908; that in the year 1908, prior to the 28th day of May, 1908, the defendant again admitted the sum to be due and owing by her, and promised to pay the same upon the death of her mother, Mrs. Priscilla G. Savin; that Priscilla G. Savin, mother of the defendant, has since departed this life, and the defendant has been requested to pay the amount of \$784.82 due by her, but has not paid the same."

It will not be necessary for us to discuss the evidence in detail, for the purpose of disposing of the legal questions raised on the record, or to attempt to reconcile the conflicting statements of the witnesses who testified in the case. The record shows that in the course of the trial the plaintiff offered evidence tending to prove the facts set out in the second count of the declaration, while, on the other hand, the evidence upon the part of the defendant was in strict denial and in direct conflict with that offered by the plaintiff, and tended to sustain the defense interposed by the defend-

ant. The undisputed testimony is that the defendant was a married woman, at the time of the alleged sale of the goods to her, and that the firm of W. Jeff Adams & Company, was fully advised of this fact. There may be conflict in the testimony as to the precise date of the dealings, but it is not disputed that all of the sales were prior to the 1st day of January, 1899, the date on which the law relating to the ability of married women to contract became effective in this state. Acts 1898, chap. 457, was approved on the 9th of April, 1898, but did not take effect until on or after the 1st day of January, 1899. According to the plaintiff's testimony, the last sales were made on or about the month of July, 1896, and the defendant some time in the month of November, 1907, admitted the account as stated, and promised to pay it when her mother died and when she came into possession of her money. The defendant, in her testimony, denied the indebtedness and the alleged promise to pay it, and testified that she had no dealings with the firm from December, 1893, to 1900; that the alleged account was a debt due by her husband, who was living at the time, and who paid the household expenses, until 1896, and she was not responsible for his debts; that she had no separate estate, and did not unite in any written obligation with her husband to pay the debt.

The sole question, then, is: Can the defendant, a married woman, assuming the plaintiff's theory of the case to be correct, be held liable in this action? Manifestly, she would not be liable if it was her husband's debt, because the alleged promise to pay the debt was not in writing as required by the statute of frauds, and such a promise would be void and unenforceable.

It is very clear that prior to Acts 1898, chap. 457, the contracts of married women, in this state, were void at law and in equity, except in those instances where her common-law powers of contracting were changed and enlarged by statute. Code Pub. Gen. Laws 1904, vol. 2, p. 1274, art. 45. There is nothing in this case to take it out of the common-law rule relating to the disabilities of a *feme covert*, or to bring it within any of the existing statutory exceptions or modifications prior to Acts 1898, chap. 457. Acts 1882, chap. 265 (earnings); Acts 1892, chap. 590 (boarding-house keeper); Poffenberger v. Poffenberger, 72 Md. 321, 19 Atl. 1043; Wolf v. Bauereis, 72 Md. 481, 8 L.R.A. 680, 19 Atl. 1045; Wolf v. Frank, 92 Md. 142, 52 L.R.A. 102, 48 Atl. 132. But by § 5, chap. 457 of the Acts of 1898, a complete change was effected in the law as to the liability and the capacity to con-

tract, of married woman, in this state. This section (5) provides that married women shall have power to engage in any business and to contract, whether engaged in business or not, and to sue upon their contracts, . . . as fully as if they were unmarried; contracts may also be made with them and they may also be sued separately, upon their contracts, whether made before or during marriage, as fully as if they were a *feme sole*, etc. And by § 20 of the same act it is provided that nothing shall be construed to relieve the husband from liability for the debts, contracts, or engagements which the wife may incur or enter into upon the credit of her husband or as his agent, or for necessities for herself or for his or their children; but as to all such cases his liability shall be and continue as at common law. Now, it appears from the undisputed evidence that all of the goods and merchandise claimed in this suit were sold before the act of 1898 was effective, and when the defendant was under the disability of coverture, her legal status, at that date. So, conceding, without deciding, for the purposes of the case, that she contracted the debt at the time alleged and testified to by the plaintiff, she clearly would not be liable on the contract, and the defense of coverture becomes a good bar and answer to the suit.

But it is insisted, upon the part of the appellant, that since the act of 1898, which removed the wife's disability, the defendant admitted the debt, and promised to pay it, as set out in the count stated and as stated in the declaration. Now, assuming that the evidence was legally sufficient to sustain this contention, although it is absolutely denied by the appellee, we are brought to the question: Was there such a valid and sufficient legal consideration to support this promise, as to permit a recovery against her in this case? In other words, was there a sufficient legal consideration to support the express promise to pay which the defendant is alleged to have made after her disabilities were removed, and to be enforced against her?

In *Ingersoll v. Martin*, 58 Md. 67, 42 Am. Rep. 322, this court said: It may be conceded that there was a moral obligation to pay the debt in full, notwithstanding the technical release, and yet a mere moral obligation simply would not be sufficient legal foundation for the promise. The general statement, used by Lord Mansfield, in *Hawkes v. Saunders*, Cowp. pt. 1, p. 289, said Judge Alvey, is now understood, both in England and in this state, as being so restricted as not to apply or extend to that class of cases which arise out of the moral duties or affections alone. There must be

something to support an express promise to pay. *Ellicott v. Turner*, 4 Md. 492; *State use of Barnard v. Gott*, 44 Md. 341; *Yates v. Hollingsworth*, 5 Harr. & J. 216; *Eastwood v. Kenyon*, 11 Ad. & El. 438, 3 Perry & D. 276, 9 L. J. Q. B. N. S. 409, 4 Jur. 1081, 6 Eng. Rul. Cas. 23. In the case of *Linz v. Schuck*, 106 Md. 230, 11 L.R.A.(N.S.) 789, 124 Am. St. Rep. 481, 67 Atl. 286, 14 A. & E. Ann. Cas. 495, a recent case, Chief Judge Boyd, in a very clear and forcible opinion, after reviewing the previous cases upon this subject at some length, said the rule as announced in *Ingersoll v. Martin* must be accepted as the law of this state on that subject. The decisions of State use of *Stevenson v. Reigart*, 1 Gill, 1, 39 Am. Dec. 628; *Drury v. Briscoe*, 42 Md. 154, and *Robinson v. Hurst* (*Mutual Reserve Fund Life Assn. v. Hurst*) 78 Md. 69, 20 L.R.A. 761, 44 Am. St. Rep. 266, 26 Atl. 956, were considered, and, in so far as the statements in those cases conflicted with *Ingersoll v. Martin*, supra, were overruled, and the doctrine asserted in *Ingersoll v. Martin*, supra, was affirmed.

We are of opinion, after a careful consideration of the authorities, that the promise to pay the debt, in this case, is not supported by a sufficient legal consideration to make it binding on the wife. It is well settled by all the well-considered cases that, the contracts of a married woman, being void, cannot be revived in this way. Whatever may be the decisions elsewhere, and there are undoubtedly conflicting opinions, we cannot give our assent to the appellant's contention in this case. The subject is discussed in 6 Am. & Eng. Enc. Law, 2d ed. p. 681, and the authorities are there collected and cited. The distinction between contracts that are void and those that are voidable are discussed, and it is there said, supported by a number of citations: "Where, however, the original contract is absolutely void, as for instance a debt contracted by a married woman, there is no such legal foundation for the moral obligation as will support her promise to pay the debt after her discovery."

In *Watkins v. Halstead*, 2 Sandf. 311, where goods were sold to a married woman during coverture, and a promise made by her after a divorce to pay for them, it was held the promise was not supported by a proper consideration, and was void. The court said: "In a note to *Wennall v. Adney*, 3 Bos. & P. 252, the rule as to what precedent consideration will support an express promise is laid down with a precision and accuracy that have commended it to repeated judicial approbation. It is there said that an express promise can only revive a precedent good consideration which

might have been enforced at law through the medium of an implied promise, had it not been suspended by some positive rule of law, but can give no original right of action, if the obligation on which it is founded never could have been enforced at law, though not barred by any legal maxim or statute provision. This rule was approved by Justice Spencer in *Smith v. Ware*, 13 Johns. 257; by Bronson, J., in *Ehle v. Judson*, 24 Wend. 97; and by Lord Denman in *Eastwood v. Kenyon*, 11 Adl. & El. 438, 3 Perry & D. 276, 9 L. J. Q. B. N. S. 409, 4 Jur. 1081, 6 Eng. Rul. Cas. 23. Tested by this rule, this promise must surely fail. The precedent consideration relied upon never could have been enforced through the medium of an implied promise, because: 1st, The wife was incapable, at the origin of the consideration, of making a valid promise; and, 2d, the goods, in contemplation of law, were sold on the credit of another (the husband). The original promise, whether express or implied, on the sale of the goods, when the defendant was under coverture, was altogether void."

In *Valentine v. Bell*, 66 Vt. 280, 29 Atl. 251, the court said: "But plaintiff claims that he can recover on defendant's promise made since the passage of said act, that she would pay for keeping the child while she was covert of Minor and while she was sole. But as the promise made while she was covert of Minor was void, both at law and in equity, it constitutes no consideration for the subsequent promise to perform it. . . . It amounts to no more than this,—that, being liable to pay she promised to pay. Such a promise, without more, is null and affords no ground of action. It left the debt and the parties as they were before. *Hayward v. Barker*, 52 Vt. 429, 36 Am. Rep. 762.

In the case of *Littlefield v. Shee*, 2 Barn. & Ad. 811, 1 L. J. K. B. N. S. 12, where the plaintiff furnished goods to the defendant while she was a *feme covert*, living apart from her husband, and after his death she promised to pay for them, it was held that, as the price of the goods originally constituted a debt from the husband, and not from the defendant, there was not a sufficiently precedent legal obligation to constitute the defendant's moral obligation a sufficient consideration. *Waters v. Bean*, 15 Ga. 358.

The case of *Lee v. Muggeridge*, 5 Taunt. 36, relied upon by the appellant to sustain a contrary doctrine, was vigorously condemned in *Watkins v. Halstead*, supra; and in *Dixie v. Worthy*, 11 U. C. Q. B. 338, it was said it had been in effect overruled.

The cases of promises to pay debts barred by limitations, debts discharged by the

operation of the bankrupt law, a debt contracted by an infant, and the like, are voidable contracts, and rest upon a different rule and principle, and need not be considered by us. *Webster v. Le Compté*, 74 Md. 250, 22 Atl. 232.

It follows, from what we have said, that the judgment must be affirmed.

There was no error in rejecting the plaintiff's prayers, and the defendant's prayer, withdrawing the case from the jury and directing a verdict for the defendant, was properly granted. In this view of the case, it is not necessary for us to discuss the other questions presented on the record in disposing of the case.

Judgment affirmed, with costs.

UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT.

RE LOUIS FRAZIN et al.

UNITED CIGAR STORES COMPANY, Petitioner.

(105 C. C. A. 320, 183 Fed. 28.)

Bankruptcy—leasehold—right to re-enter.

The title to a leasehold held by a bankrupt vests in the trustee only upon some act of acceptance on his part, notwithstanding the provision of the bankruptcy act that the trustee shall upon his appointment be vested with the title of the bankrupt as of the date he was adjudged a bankrupt, and therefore acceptance of rent from him prior to that time will not waive a right to re-enter under the terms of the lease, for devolution of the term by operation of law.

(Ward, Circuit Judge, dissents.)

(November 14, 1910.)

Note.—Vesting of title to leasehold in lessee's trustee in bankruptcy as dependent upon acceptance by trustee.

Under the bankruptcy act of 1867, it was held that assignees in bankruptcy did not, by accepting the trust, become assignees of the term (*Re Washburn*, Fed. Cas. No. 17,211, 11 Nat. Bankr. Rep. 66); that they were not bound to accept a lease unless it was valuable, their duty being to determine whether it would or would not be beneficial to creditors, and to act accordingly (*White v. Griffing*, 44 Conn. 437, 18 Nat. Bankr. Rep. 399). It was held that, unless restrained by the terms of the lease itself, the assignee might adopt or reject it on behalf of the estate as he should find most beneficial for creditors, and could take a reasonable time in which to do so (*Re Laurie*, 4 Nat. Bankr. Rep. 32; *Ex parte*

PETITION by the lessor of certain premises for a revision of an order of the District Court of the United States for the Southern District of New York enjoining petitioner from claiming and asserting the right of re-entry in the leased premises. Reversed.

Statement by Noyes, Circuit Judge:

In 1907 the petitioner leased to the bankrupts certain premises in the city of New York, and this lease was in force at the time of the bankruptcy. The lease contained the following provision: "If, at any

time during the term hereby demised, proceedings in bankruptcy shall be instituted by or against the lessee, . . . or if a receiver or trustee shall be appointed of the lessee's property, or if this lease shall by operation of law devolve upon or pass to any person or persons other than the said lessee, then and in each of said cases it shall and may be lawful for the lessor, at the lessor's election, into and upon the said demised premises or property, or any part thereof in the name of the whole, to enter the same and to have, hold, possess, and enjoy."

Faxon, 1 Low. Dec. 404, Fed. Cas. No. 4,704); and that there must be some positive and unequivocal act of acceptance before the assignee could be held liable for rent accruing after the bankruptcy (Re Washburn, supra; Re Yeaton, 1 Low. Dec. 420, Fed. Cas. No. 18,133); where he failed to act within a reasonable time, he was held to have elected not to take the leasehold (Smith v. Gordon, Fed. Cas. No. 13,052); and it seems that the assignee's occupation of the premises after the adjudication was not regarded as evidence of an election to take (Re Ten Eyck, Fed. Cas. No. 13,829, 7 Nat. Bankr. Rep. 26); for, as stated in Re Ives, Fed. Cas. No. 7,116, 18 Nat. Bankr. Rep. 28, while an assignee in bankruptcy was bound to compensate a landlord for the use of premises occupied by him in winding up the estate, he did not become the assignee of leases belonging to the bankrupt, or become bound by any covenant therein unless he elected to accept the lease.

It was held in Re O'Dowd, Fed. Cas. No. 10,439, 8 Nat. Bankr. Rep. 451, that the lessee's assignee in bankruptcy did not become vested with the lessee's interest, where it was not such an interest as could have been conveyed by him to a third party without the consent of the lessor.

Other cases that recognized the right of election differed as to whether the relation of landlord and tenant was terminated, but, of course, this difference does not go to the question considered in this note.

Thus, in Re Breck, 8 Ben. 93, Fed. Cas. No. 1,822, 12 Nat. Bankr. Rep. 215, it was intimated that a lease which by its terms could not be assigned without the consent of the lessor was undoubtedly canceled by the bankruptcy of the lessee.

And in Re Hamburger, Fed. Cas. No. 5,975, 12 Nat. Bankr. Rep. 277, it appeared that the assignee after his appointment surrendered the premises to the landlord, and the court held, without expressly assigning such fact as its reason, that in that case the lease was terminated by the bankruptcy.

While in Ex parte Houghton, 1 Low. Dec. 554, Fed. Cas. No. 6,725, it was said that since the assignees did not assume the lease, the original parties stood simply as landlord and tenant.

Under the bankruptcy act of 1898, it is held that the trustee in bankruptcy is not 33 L.R.A. (N.S.)

bound to accept property of an onerous or unprofitable character, or to assume a lease of the bankrupt unless such course is for the benefit of creditors, and if he is confronted with the alternative of an immediate ejection from the premises, with the consequent depreciation of the bankrupt's personal estate, or the assumption of an undesirable lease and the payment of large sum for unsecured rent, a court of equity should relieve him from the coercion of the situation, and if time is essential for an equitable adjustment of the various rights, the court may impose such delay as is reasonably necessary. Re Chambers, 98 Fed. 865, 3 Am. Bankr. Rep. 537.

In Re Adams, 134 Fed. 142, 14 Am. Bankr. Rep. 23, a somewhat different view was taken, the court seeming to be of the opinion that upon the adjudication a leasehold passes to the lessee's trustee, and that its future disposition is to be governed by the best judgment of the trustee. This case, although presenting the view that the leasehold passes to the trustee in the first instance, seems to recognize the trustee's right to relinquish it. But the majority of the cases decided under the act of 1898, together with those involving the act of 1867, seem to make it fairly plain that the lease does not vest in the trustee unless he accepts it.

The adjudication does not terminate a lease or change the legal relation of landlord and tenant, unless the landlord re-enters or the trustee assumes the lease, in which event, the adjudication operates like any other assignment, and all liability of the tenant ceases. Witthaus v. Zimmermann, 91 App. Div. 202, 86 N. Y. Supp. 315, 11 Am. Bankr. Rep. 314.

And the trustee upon his appointment has the option to abandon the lease or accept it, and if he accepts it, he will be bound by its conditions to the same extent as the bankrupt was bound, at least so far as the payment of rent is concerned, and both he and the purchaser at the sale of the lessee's interest are bound to observe its covenants. Summerville v. Kelliher, 144 Cal. 155, 77 Pac. 889.

In Re Jefferson, 93 Fed. 948, 2 Am. Bankr. Rep. 206, one of the first cases decided under the bankruptcy act of 1898, the court said that § 47 of that act could in

Receivers in bankruptcy were appointed in February, 1909, and they continued to occupy the leased premises, paying the stipulated rent, until August, 1909, when a trustee was appointed and took possession.

The lessor accepted one month's rent from the trustee, but the trustee did no affirmative act to accept the lease. The trustee applied to the referee in bankruptcy for an order enjoining the petitioner from setting up any claim of the right to re-enter upon said premises in the event of

the sale or assignment of the leasehold interest by the trustee. The referee denied this application of the trustee; but, upon review, the district court reversed the order of the referee, and enjoined the petitioner from re-entering upon said premises by reason of the breach of any covenant or condition in said lease.

The present petition is for the revision of said order of the district court.

Argued before Lacombe, Ward, and Noyes, Circuit Judges.

no way be construed as making the trustee in bankruptcy the tenant, nor as authorizing the estate to be a tenant of the landlord under the lease, however much the trustee might become such by the express or implied agreement with the landlord for the short time he might be compelled to occupy the premises in the discharge of his duties as trustee, and that the amount he should be required to pay during such period should be treated as a part of the expense of administration of the estate.

And in *Re Hays*, F. & W. Co. 117 Fed. 879, 9 Am. Bankr. Rep. 144, the court upholds the position taken in *Re Jefferson*, and holds that upon the adjudication the bankrupt ceases to be a tenant, and that his trustee is not authorized by law to become such in his stead, though, if necessary to carry on the business of selling the assets as distinguished from that which has been carried on by the bankrupt, the trustee may rent the old premises or other premises at his option, and pay the cost thereof as part of the expenses of administration. This, says the court in the *Hays* Case, is the more equitable rule, for in such circumstances, the landlord is entitled to prove his claim for rent which accrued up to the time of the adjudication, and to be entitled to the premises thereafter.

But in *Re Ellis*, 98 Fed. 967, 3 Am. Bankr. Rep. 564, the court takes issue with *Re Jefferson* with respect to whether the bankruptcy of the lessee terminates the relation of landlord and tenant, and holds that it does not terminate it, and says that where there is no clause giving the lessor the right to re-enter, the trustee has a reasonable time to elect whether to assume or to refuse the lease, and that, if he refuses to take the lease, the bankrupt remains the tenant as before.

And it was held in *Shapiro v. Thompson*, 160 Ala. 363, 49 So. 391, 24 Am. Bankr. Rep. 91, that the relation of landlord and tenant continues after the adjudication, that the bankrupt's liability to pay rent continues also, and that neither the trustee's temporary occupation of the premises, nor the landlord's acceptance of rent for the period of such occupation, affects the relation or the liability of the bankrupt to pay rent for the remainder of the term.

33 L.R.A. (N.S.)

A provision in a lease against the assignment thereof without the lessor's consent is not the equivalent of an express provision declaring the lease void in case of bankruptcy, and is not applicable to an assignment by operation of law, so as to prevent the vesting of the term in the lessee's trustee. *Re Bush*, 126 Fed. 878, 11 Am. Bankr. Rep. 415.

A lessor who serves upon his tenant notice to quit for breach of covenant is entitled to enforce the forfeiture against the lessee's trustee in bankruptcy in proceedings subsequently instituted, and additional service of notice upon the trustee is not necessary, for he stands simply in the shoes of a bankrupt at the time he succeeds to the estate. *Lindeke v. Associates Realty Co.* 77 C. C. A. 56, 146 Fed. 630, 17 Am. Bankr. Rep. 215.

The right of the lessee's trustee to reject or accept a lease has been recognized, in passing, in other cases involving the provability of a claim for rent to accrue in the future. *Bray v. Cobb*, 100 Fed. 270, 3 Am. Bankr. Rep. 788, reversed on other grounds in *Cobb v. Overman*, 54 L.R.A. 369, 48 C. C. A. 223, 109 Fed. 65, 6 Am. Bankr. Rep. 324; *Atkins v. Wilcox*, 53 L.R.A. 118, 44 C. C. A. 626, 105 Fed. 595, 5 Am. Bankr. Rep. 313; *Re Pennewell*, 55 C. C. A. 571, 119 Fed. 139, 9 Am. Bankr. Rep. 490; *Watson v. Merrill*, 69 L.R.A. 719, 69 C. C. A. 185, 136 Fed. 359, 14 Am. Bankr. Rep. 454; *Re Koester*, 17 Am. Bankr. Rep. 391; *Re J. Frank Stanton Co.* 162 Fed. 169, 20 Am. Bankr. Rep. 549; *Re Rubel*, 166 Fed. 131, 21 Am. Bankr. Rep. 566; *Re Criblier*, 184 Fed. 338, 25 Am. Bankr. Rep. 765; *Brooklyn Improv. Co. v. Lewis*, 136 App. Div. 861, 122 N. Y. Supp. 111.

This right to accept or reject is also recognized in *Re Roth*, 31 L.R.A. (N.S.) 270, 104 C. C. A. 649, 181 Fed. 667, 24 Am. Bankr. Rep. 588, where the court stops to point out that, of course, if the lease contains a stipulation for re-entry in case of the bankruptcy of the lessee, the trustee cannot assume the lease against the lessor's objection. See the note to this case in 31 L.R.A. (N.S.) 270, on the provability of claim under covenant indemnifying against loss of rent or accelerating future rent.

L. A. W.

Messrs. S. M. Stroock, Charles Levy, and E. F. Spitz, with Messrs. Stroock & Stroock, for petitioner:

The receipt and acceptance of compensation for use and occupation of the premises did not act as a waiver of the provisions of the lease authorizing re-entry.

Jones, Land. & T. p. 497; Doe ex dem. Cheny v. Batten, Cowp. pt. 1, p. 243, 9 East, 314, note, 9 Revised Rep. 570, note; Croft v. Lumley, El. Bl. & El. 1069; Doe ex dem. Griffith v. Pritchard, 5 Barn. & Ad. 765, 2 Nev. & M. 489, 3 L. J. K. B. N. S. 11; Bennecke v. Connecticut Mut. L. Ins. Co. 105 U. S. 355, 26 L. ed. 990; People's Bank v. Mitchell, 73 N. Y. 406; Okey v. State Ins. Co. 29 Mo. App. 105; Robinson v. Boys, 61 N. J. L. 179, 38 Atl. 813; Fitch v. Woodruff & B. Iron Works, 29 Conn. 82.

A mere payment of a sum equal to the rent reserved for the use and occupation of premises, by a receiver or trustee having an option to assume a lease, does not of itself determine such option.

Woodworth v. Harding, 75 App. Div. 54, 77 N. Y. Supp. 969; St. Joseph & St. L. R. Co. v. Humphreys, 145 U. S. 105, 36 L. ed. 640, 12 Sup. Ct. Rep. 795; United States Trust Co. v. Wabash Western R. Co. 150 U. S. 287, 37 L. ed. 1085, 14 Sup. Ct. Rep. 86; McAdam, Land. & T. p. 504; Clark v. Greenfield, 13 Misc. 124, 34 N. Y. Supp. 1; Murray v. Harway, 56 N. Y. 337; Collins v. Haabrouck, 56 N. Y. 157, 15 Am. Rep. 407.

Until the assignee of a bankrupt assumed the lease, the title remained in the bankrupt.

Copeland v. Stephens, 1 Barn. & Ald. 593; Tuck v. Fyson, 6 Bing. 321, 3 Moore & P. 715, 8 L. J. C. P. 10; Thomas v. Pemberton, 7 Taunt. 206; Clark v. Hume, 1 Ryan & M. 207, note; Cartwright v. Glover, 30 L. J. Ch. N. S. 324; Wilson v. Wallani, 49 L. J. Exch. N. S. 437, L. R. 5 Exch. Div. 155, 42 L. T. N. S. 375, 28 Week. Rep. 597; Lowell, Bankr. § 372; Beall v. Dushane, 149 Pa. 439, 24 Atl. 284; Dushane v. Beall, 161 U. S. 513, 40 L. ed. 791, 16 Sup. Ct. Rep. 637; Re Otis, 101 N. Y. 580, 5 N. E. 571; United States Trust Co. v. Wabash R. Co. 150 U. S. 289, 37 L. ed. 1085, 14 Sup. Ct. Rep. 86; Sunflower Oil Co. v. Wilson, 142 U. S. 313, 35 L. ed. 1025, 12 Sup. Ct. Rep. 235; American File Co. v. Garrett, 110 U. S. 288, 28 L. ed. 149, 4 Sup. Ct. Rep. 90; Glenny v. Langdon, 98 U. S. 20, 25 L. ed. 43; Re Ella, 98 Fed. 967, 3 Am. Bankr. Rep. 564; Re Roth, 31 L.R.A. (N.S.) 270, 104 C. C. A. 649, 181 Fed. 667.

No right to re-enter accrued under the covenant providing for a re-entry in the event of the devolution of the lease by operation of law, until the trustee affirmatively accepted the lease.

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Brandenburg, Bankr. 3d ed. § 1171; Loveland, Bankr. p. 486; Witthaus v. Zimmerman, 91 App. Div. 202, 86 N. Y. Supp. 315, 11 Am. Bankr. Rep. 314; Martin v. Black, 9 Paige, 641, 38 Am. Dec. 574; People v. National Trust Co. 82 N. Y. 283; Re Koeater, 15 Ohio Fed. Dec. 257, 17 Am. Bankr. Rep. 392; Sparhawk v. Yerkes, 142 U. S. 1, 35 L. ed. 915, 12 Sup. Ct. Rep. 104; Re Ella, 98 Fed. 967, 3 Am. Bankr. Rep. 564; Watson v. Merrill, 14 Am. Bankr. Rep. 453, 69 L.R.A. 719, 69 C. C. A. 185, 136 Fed. 359; Re Roth, 31 L.R.A. (N.S.) 270, 104 C. C. A. 649, 181 Fed. 667.

Mr. Guthrie B. Plante, for respondent:

The receipt and acceptance by the lessor of rent constituted a waiver of the right of forfeiture.

Remington, Bankr. §§ 980 et seq.; Gazlay v. Williams, 210 U. S. 41, 52 L. ed. 950, 28 Sup. Ct. Rep. 687.

The lessor, to avail itself of the right of re-entry for condition broken, was obliged to express its election of forfeiture within a reasonable time, and by some unequivocal act, after knowledge of the breach.

Re Montello Brick Works, 20 Am. Bankr. Rep. 859, 163 Fed. 624; Murray v. Harway, 56 N. Y. 337; Conger v. Duryee, 90 N. Y. 594; Gazlay v. Williams, 210 U. S. 41, 52 L. ed. 950, 28 Sup. Ct. Rep. 687; Clark v. Greenfield, 13 Misc. 124, 34 N. Y. Supp. 1.

Noyes, Circuit Judge, delivered the opinion of the court:

It is clear that the lessor, by the acceptance of the rent stipulated in the lease, waived the right to re-enter on account of the bankruptcy or the appointment of the receiver or the trustee. The inquiry then is whether there was devolution of the lease by operation of law, and whether the lessor waived the right of re-entry by reason of it.

If the title to the leasehold interest devolved upon the trustee immediately upon his appointment, it is manifest that a breach of the condition took place at that time, and the lessor, by thereafter accepting rent from the trustee, waived the right to re-enter and was properly enjoined.

On the other hand, if the title to the leasehold interest did not pass to the trustee until after some act of acceptance upon his part, then there was no devolution of title prior to the receipt of the rent from the trustee, and, consequently, no waiver and no ground for the injunction. So, the real question in the case is this: When does the title to a lease held by a bankrupt vest in the trustee?

In the very recent case of Re Roth, 31 L.R.A. (N.S.) 270, 104 C. C. A. 649, 181 Fed. 670, decided by this court in August, 1910, it was said: "We think the early

law as stated in *Ex parte Houghton*, 1 Low. Dec. 554, Fed. Cas. No. 6,725, is the law, under the present bankruptcy statute, applicable in the case of leases having the usual covenants and conditions. In that case the court said: "The earlier law of England, which we have adopted in this country, was that the assignees of a bankrupt have a reasonable time to elect whether they will assume a lease which they find in his possession; and, if they do not take it, the bankrupt retains the term on precisely the same footing as before, with the right to occupy, and the obligation to pay rent."

A further examination of the authorities confirms our opinion that the extract from *Ex parte Houghton* correctly states existing law.

The early English bankruptcy statute was construed in the leading case of *Copeland v. Stephens*, 1 Barn. & Ald. 593, decided in 1818, Lord Ellenborough writing the opinion. The following is the headnote of that case: "The general assignment of a bankrupt's personal estate under his commission does not vest a term of years in the assignees, unless they do some act to manifest their assent to the assignment, as it regards the term and their acceptance of the estate, rents, etc. And therefore, till some act of this sort is done by them, the term still remains in the bankrupt, and he is liable to the payment of rent accruing, due subsequent to the bankruptcy."

The later English statutes provide for the vesting of a bankrupt's property in the trustee, and expressly authorize him to disclaim burdensome leases. Under these statutes, it is held that the title to all leases vests in a trustee upon his appointment, and that he is liable upon them unless he disclaim them. But, in view of the changes in the acts, the later decisions can hardly be regarded as materially modifying the law of the earlier English cases, or as affecting the American decisions referring to them.

The law as stated in *Ex parte Houghton* is also in accordance with decisions of the Supreme Court of the United States and other courts, under the bankruptcy act of 1867 (Act March 2, 1867, chap. 176, 14 Stat. at L. 517).

In *Dushane v. Beall*, 161 U. S. 513, 515, 40 L. ed. 791, 792, 16 Sup. Ct. Rep. 637, 638, the Supreme Court said: "It is well settled that assignees in bankruptcy are not bound to accept property which, in their judgment, is of an onerous, and unprofitable nature, and would burden instead of benefiting the estate, and can elect whether they will accept or not after due con-

sideration and within a reasonable time, while, if their judgment is unwisely exercised, the bankruptcy court is open to compel a different course."

And in the same case the supreme court of Pennsylvania said (149 Pa. 439, 443, 24 Atl. 284, 285), its decision in this respect being unaffected by the reversal in the Supreme Court of the United States: "It has always been a principle of the bankrupt law that property which from its nature or condition may be a burden, rather than a benefit, to the estate, does not pass to the assignee without a distinct acceptance by him, and that in the absence of such acceptance it remains with the bankrupt."

In *United States Trust Co. v. Wabash Western R. Co.* 150 U. S. 289, 37 L. ed. 1085, 14 Sup. Ct. Rep. 86, 90, the Supreme Court also said: "The general rule applicable to this class of cases is undisputed that an assignee or receiver is not bound to adopt the contracts, accept the leases, or otherwise step into the shoes of his assignor, if in his opinion it would be unprofitable or undesirable to do so; and he is entitled to a reasonable time to elect whether to adopt or repudiate such contracts."

In *Re Otis*, 101 N. Y. 580, 5 N. E. 571, the New York court of appeals said: "It is well settled that a receiver or an assignee in bankruptcy, or an assignee for the benefit of creditors, if he elects to accept a lease belonging to the debtor or assignor, becomes, by such election, assignee of the lease and personally liable on the covenant to pay rent, of which liability he can only discharge himself by an assignment or surrender. . . . This doctrine proceeds on the ground that, on the election being made, the receiver or assignee becomes vested with the title to the leasehold interest, and a privity of estate is thereby created between the lessor and the receiver or assignee, by virtue of which the latter becomes liable on the covenants running with the land."

As already noted, these decisions were under the act of 1867, but the act of 1898 (Act July 1, 1898, chap. 541, 30 Stat. at L. 544, U. S. Comp. Stat. 1901, p. 3418) cannot be regarded as essentially different.

The following is the relevant provision of the act of 1867: "All the property . . . shall, in virtue of the adjudication of bankruptcy and the appointment of his assignee [and subject to the exceptions stated in the preceding section], be at once vested in such assignee."

The act of 1898 (§ 70) provides: "The trustee of the estate of a bankrupt, upon his appointment and qualification, . . .

shall . . . be vested by operation of law with the title of the bankrupt as of the date he was adjudged a bankrupt."

A provision that property shall vest in a trustee as of the date of adjudication is not very different from a provision that, by virtue of the adjudication and the appointment of an assignee, all property shall at once vest in him. The only distinction would seem to be that if, under the act of 1867, the adjudication preceded the appointment of the trustee, the passing of title might not relate back to the date of adjudication; but such a distinction is of no importance in this case.

That the same principles are applicable under the act of 1898 as under the act of 1867 is held by the authorities. Thus, in *Re Ellis* (D. C.) 98 Fed. 967, the court said: "I can find nothing in the act of 1898 to produce a result different from that of the act of 1867. Had there been no clause giving the lessor the right to re-enter, the trustee in bankruptcy would have had a reasonable time to elect whether to assume or to refuse the lease. If he had assumed it, the bankruptcy would have operated like any other assignment, and would have released the bankrupt from all liability, except upon those of his covenants not already broken which would have remained binding upon him after any other assignment. If the trustee had refused to take the lease, the bankrupt would have remained tenant as before."

And in *Watson v. Merrill*, 69 L.R.A. 719, 722, 69 C. C. A. 185, 189, 136 Fed. 359, 363, the circuit court of appeals of the eighth circuit said, with respect to the act of 1898: "An adjudication in bankruptcy does not dissolve or terminate the contractual relations of the bankrupt. . . . Its effect is to transfer to the trustee all the property of the bankrupt except his executory contracts, and to vest in the trustee the option to assume or to renounce these."

Now, if the title to a lease passes *volens* to the trustee immediately upon his appointment, he has not the election which the Supreme Court says that he has of accepting it or not. His only option is to retain it or convey it back to the bankrupt, which is a very different thing. Moreover, if the bankrupt be divested of his interest in the leasehold estate, and it be vested in the trustee immediately upon his appointment, it is difficult to see upon what theory he can escape its obligations pending its retransfer. And if reconveyance be necessary, upon what principle can the bankrupt be compelled to accept it? In our opinion, upon principle and authority, a trustee, having the option to assume or re-

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ject a lease, takes title to such lease only in case he elect to accept it. If he elect to accept it, then, by virtue of the provision of the bankruptcy act already quoted, the vesting of the title relates back to the date of adjudication. But, if the trustee do not elect to accept the lease, it remains the property of the bankrupt.

It is said, however, that this conclusion is at variance with the express provision of the bankruptcy act that all the estate of the bankrupt shall vest in the trustee as of the date of the adjudication; that a leasehold interest is property, and must necessarily pass with all other property. In our opinion, however, the provisions of the bankruptcy act must be read in view of the principle stated in many decisions and expressly recognized in the English bankruptcy statutes, that there is a distinction between property which may be burdensome to an estate, and that which is manifestly beneficial to it. The latter, of course, passes upon the adjudication. The former passes only when accepted by the trustee; but, when accepted, the passing of title relates back to the time of the adjudication. If there be no acceptance, however, the title to a burdensome lease never passes. The property which may be said to pass immediately to the trustee in every case is not the lease itself, but the option of accepting it.

It follows as a corollary to these conclusions that, prior to the petition upon which the order in question was made, there had been no devolution of the title to the lease, and, consequently, that the petitioner was erroneously enjoined from enforcing the forfeiture provided for in the lease in case of such devolution.

The order of the District Court is reversed, with costs.

Ward, Circuit Judge, dissenting:

I think this case should be affirmed. We ought not to say, in the face of the express provisions of the bankruptcy act, that the lease did not vest in the trustee. Of course, the trustee has by the decisions of our courts the same right to disclaim that is expressly given by the English statute. Upon disclaimer in either case, the title would revert in the bankrupt without any formal conveyance. All this was held as to the act of 1867 in *Sessions v. Romadka*, 145 U. S. 29, 39, 36 L. ed. 609, 613, 12 Sup. Ct. Rep. 799. No doubt an option is property, but the option to accept or disclaim the lease never was the property of the bankrupt, and could not pass as such to his trustee.

PENNSYLVANIA SUPREME COURT.

IDA B. ROSENSTIEL

v.

PITTSBURG RAILWAYS COMPANY,
Appt.

(— Pa. —, 79 Atl. 556.)

Master — incompetence of servant — general reputation.

1. The incompetence of a servant which will render a master liable for injury caused to a fellow servant by his negligence may be established by evidence of reputation, although the alleged incompetence did not arise until after his lawful employment.

Same — character of incompetence — relation to injury.

2. To hold a master liable for injury to

a servant through the negligence of an incompetent fellow servant, it is not necessary to show that the bad general reputation of such servant extended to the precise character of negligence which caused the injury.

Same — superintendent's knowledge of incompetence — sufficiency.

3. The admission by the general superintendent of a division of a street railway system, who is the person designated to receive complaints concerning employees and management of cars, that a motorman is reckless and that he would have trouble, will bind the company with knowledge of such incompetence.

Same — complaint to one having no authority to discharge.

4. Complaints to the train despatcher of a street railway company, of the incom-

Note. — Evidence of reputation to show incompetency of servant or master's knowledge thereof.

For earlier cases on this subject, see subdivision of note to *Walkowski v. Penokee & G. Consol. Mines*, 41 L.R.A. at page 97; subdivision of note to *Smith v. St. Louis & S. F. R. Co.* 48 L.R.A. at page 389; and subdivision of note to *McQuiggan v. Ladd*, 14 L.R.A.(N.S.) at page 763.

As to character of servant in action against master, generally, see subdivision of note in 14 L.R.A.(N.S.) at page 756; and as to liability of employer to injured servant, predicated from constructive knowledge as to capacity of servants, and non-liability predicated from want of constructive knowledge, see subdivisions of note in 41 L.R.A. at pages 46 and 53, respectively.

Actual incompetency.

The question as to the admissibility and probative value of evidence of reputation to show incompetency of a servant arises almost solely in cases of injuries to servants through the fault of fellow servants alleged to be incompetent, where the employer is charged with liability on account of his negligence in employing or retaining in his employ the incompetent servant.

As appears from the earlier notes above cited, it was held in many of the earlier cases that evidence of a servant's reputation is not competent to show his actual incompetency; and this seems to be the rule in New York. Thus, in *O'Donnell v. American Sugar Ref. Co.* 41 App. Div. 307, 58 N. Y. Supp. 640, holding that plaintiff's evidence was amply sufficient to sustain a finding that the culpable fellow servant of the plaintiff was incompetent, the court said: "His counsel was careful to observe the rule which has recently received the approval of the court of appeals in *Park v. New York C. & H. R. R. Co.* 155 N. Y. 215, 63 Am. St. Rep. 663, 49 N. E. 674, where Haight, J., says: 'We are aware that in some states the courts have permitted incompetency of servants to be shown by general reputation, but we have 33 L.R.A.(N.S.)

never gone to that extent in this state. It appears to us that the safer and better rule is to require incompetency to be shown by the specific acts of the servant, and then, that the master knew or ought to have known of such incompetency. The latter may be shown by evidence tending to establish that such incompetency was generally known in the community."

So, in *McCarty v. Ritch*, 59 App. Div. 145, 69 N. Y. Supp. 129, following *Park v. New York C. & H. R. R. Co.* supra, it was held that evidence of the general reputation of a culpable servant is not admissible to prove his incompetency.

—at time of employment.

But where the alleged negligence of the master was in the original selection and employment of the culpable fellow servant, it would seem that evidence of the latter's bad reputation at the time of hiring is admissible,—if not to show actual incompetency, at least to show actionable negligence on the part of the master in the hiring, in which he was bound to exercise due care and diligence. *Stasch v. Cornwall Ore Bank Co.* 19 Pa. Super. Ct. 113 (*obiter*).

Thus, in *Chicago, L. S. & E. R. Co. v. Hartman*, 71 Ill. App. 427, an action against a railroad by a yard switchman to recover damages for injuries alleged to have been sustained by him by reason of the negligence of the company, among other things, in employing and retaining in its employ an incompetent engineer, evidence concerning the reputation of the engineer as to competency was held to be admissible.

And evidence of the general reputation of a pit boss, whose functions and duties make him a vice principal, for competency and regard for the lives and limbs of the miners under his charge, is admissible on the question of negligence of the mine operator in employing an incompetent man for such position. *Green v. Western American Co.* 30 Wash. 87, 70 Pac. 310.

So, in *Harrington v. New York C. & H. R. R. Co.* 19 N. Y. S. R. 20, 4 N. Y. Supp. 640, although it was held that even if the

petence of a motorman, are not sufficient to charge the company with knowledge of that fact, if he had no authority to employ or discharge such employees, and is not shown to have transmitted the complaint to one who had the power.

Appeal — incompetent evidence — permitting use — error.

5. The admission in an action by a servant of a street railroad company to hold the master liable for injury caused by the negligence of a fellow servant who was alleged to be incompetent, of incompetent evidence as to the making of complaints to an officer having no authority to discharge him, is reversible error, although the jury are instructed to consider it merely as to a subordinate fact, if they are permitted to consider it on the question of notice to the company of such incompetence, and the of-

ficer alleged to have received the notice is made a witness and obliged to meet the testimony, which might destroy his value as a witness.

(January 3, 1911.)

A PPEAL by defendant from a judgment of the Court of Common Pleas, No. 3, for Allegheny County, in plaintiff's favor in an action brought to recover damages for the death of her husband, alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

The charge of the trial judge was as follows:

"The employer is never liable to the em-

defendant was negligent in employing a section foreman of intemperate habits, such negligence did not contribute to the plaintiff's injury, it appears that on the question of negligence there was testimony from several witnesses, apparently admitted without question, that the foreman had the reputation in the neighborhood where he resided "of being a drinking man."

—during employment.

Where a culpable fellow servant was competent when employed, and the alleged negligence on the part of the master is in retaining him after he has become incompetent, it is necessary, under the presumption that a competent servant will remain competent, in order to charge the master with liability, to show both the actual incompetence of the servant and the master's notice thereof; and some cases have held, as in *ROSENSTIEL v. PITTSBURG R. Co.*, that the incompetence of a culpable fellow servant may be established by evidence of reputation, although no other case seems so clearly to have applied this rule, where the alleged incompetence did not arise until after the servant's lawful employment. The Pennsylvania cases relied on in *ROSENSTIEL v. PITTSBURG R. Co.* are sufficiently set out in the opinion therein.

In *Pittsburgh R. Co. v. Thomas*, 98 C. C. A. 437, 174 Fed. 591, an action against a street railway company based upon its negligence in employing or retaining in its employ an incompetent motorman, it was held that the testimony of several conductors and motormen who daily congregated, to the number of thirty or forty, in the car barn, to the effect that such motorman's reputation for competence as a motorman was bad, was pertinent as tending to show incompetence,—being the general reputation among those best capable of forming an opinion in regard to it.

So, evidence of a servant's general reputation in the conduct of the business in which he is employed, among those with whom he works or lives, has been held admissible upon the question whether he

is incompetent. *Giordano v. Brandywine Granite Co.* 3 Penn. (Del.) 423, 52 Atl. 332.

And in *Galveston, H. & S. A. R. Co. v. Henning*, 90 Tex. 656, 40 S. W. 392, evidence seems to have been admitted without question, apparently for the purpose of showing the incompetency of an engineer, that his general reputation was that of a careless and reckless person.

Master's knowledge.

As to evidence of a culpable servant's reputation to show the master's knowledge, actual or constructive, of the servant's incompetence, otherwise proved, the cases are almost unanimous that such evidence is admissible. *Giordano v. Brandywine Granite Co.* 3 Penn. (Del.) 423, 52 Atl. 332; *Metropolitan West Side Elev. R. Co. v. Fortin*, 203 Ill. 454, 67 N. E. 977; *Cincinnati & Mt. V. R. Co. v. Thompson*, 21 Ohio C. C. 778, 12 Ohio C. D. 326; *Shoemaker v. Texas & P. R. Co.* 29 Tex. Civ. App. 578, 69 S. W. 990; *El Paso & S. W. R. Co. v. Smith*, 50 Tex. Civ. App. 10, 108 S. W. 988.

"General reputation of a servant's unfitness to fill a position, while insufficient to bring home notice to a fellow servant working with him, yet, because it is the duty of the master to inquire and keep constant watch over such matters, is sufficient to affect him with such notice." *Shoemaker v. Texas & P. R. Co.* 29 Tex. Civ. App. 578, 69 S. W. 990.

Thus, evidence as to the reputation of a railroad hospital surgeon for sobriety is admissible, after the fact of his incompetence by reason of drunkenness has been shown by other evidence, to show that officials of the company knew of his incompetency, and were consequently negligent in not removing him after learning of his inefficiency. *Wabash R. Co. v. Kelley*, 153 Ind. 119, 52 N. E. 152, rehearing denied in 54 N. E. 752.

And after other evidence has been offered sufficient to warrant a jury in finding a servant incompetent, evidence of his gen-

ployee for an injury occasioned through the negligence of a fellow employee, unless the employer was negligent in keeping an incompetent man in its employ. So that it becomes important if you come to that question, to determine whether Staley was a competent or an incompetent man. The only evidence here as to his competency would go, not to the knowledge of the duties of his employment, but to his reckless manner of performing those duties. Was he such a reckless man? is the first question. Was he such a reckless man as to render him unfit to be placed in the position in which he was placed, in charge of the motive power of his car? . . . The test is: Was he reasonably competent? Under the circumstances, did his recklessness go

beyond the average carelessness of men in his employment? The evidence on the part of the plaintiff on that subject is evidence of reputation. You can see, probably, the difficulties that present themselves to both sides on a question of this kind when you have in consideration the question of a man's character for any purpose, and require that character to be proven from the witness stand. As I have stated, it is not the fact that he may have been negligent at one time, or twice; it is not a question of whether he had accidents happen to the car which he was operating, because then the question arises as to whether such accidents were due to his negligence or whether they were not. And so it is not absolutely determined by the question as to

eral reputation for incompetency, among those acquainted with his work, is admissible as tending to show the master's notice of the incompetency, although his reputation among a particular class, which includes but a part of those who know his character or work, is inadmissible for this purpose. *Moering v. Falk Co.* 141 Wis. 294, 124 N. W. 402, 18 A. & E. Ann. Cas. 926.

In an action against a pawnbroker by a pledgee, to recover the value of certain pledged property carried away by the defendant's absconding manager, through the alleged negligence of the defendant in keeping as manager a man unfitted for the trust, evidence as to the reputation of the manager is admissible, after proof of his unfitness, to show that the defendant might or ought to have known the reputed facts. *Carson v. Canning*, 180 Mass. 461, 62 N. E. 964.

So, evidence that the general reputation of a coach carpenter employed by a railroad, among his fellow workmen, for competency and care, was bad, is admissible on the issue as to whether or not the company exercised ordinary care to discover his incompetency. *International & G. N. R. Co. v. Jackson*, 25 Tex. Civ. App. 619, 62 S. W. 91.

And evidence that a servant's general reputation was that of a careless engineer is proper as tending to prove that the master knew, or by the exercise of due care would have known, that he was habitually careless, and thus incompetent. *Stoll v. Daly Min. Co.* 19 Utah, 271, 57 Pac. 295.

In *Kansas City Consolidated Smelting & Ref. Co. v. Taylor*, 48 Tex. Civ. App. 605, 107 S. W. 889, it was held that evidence of an incompetent servant's general reputation is admissible to show, in connection with other evidence, that the master had notice of his incompetency, and was negligent in retaining him in its employ.

And in *Morrow v. St. Paul City R. Co.* 71 Minn. 326, 73 N. W. 973, later appeal, 74 Minn. 480, 77 N. W. 303, evidence tending to show that a servant's general reputation

was that he was incompetent, together with other evidence, was held to be sufficient to go to the jury on the question of the defendant's knowledge of the servant's incompetency.

But in *Pittsburgh R. Co. v. Thomas*, 98 C. C. A. 437, 174 Fed. 591, it was held that testimony that a motorman has a bad reputation for competency among the conductors and motormen who daily congregate, to the number of thirty or forty, in the car barn, and who are best able to form an opinion in regard to it, is not conclusive, and should be of such a character as to satisfy the jury that it should have come to the knowledge of the company.

And testimony of witnesses not acquainted with the general reputation of a railway engineer, as to his reputation among conductors and brakemen, excluding from consideration the engineers and others acquainted with him and his service, is inadmissible to show that his reputation for incompetence is so notorious that the officers of the railway company, whose duty it was to hire and discharge the servants, would have been aware of it if they had exercised reasonable diligence. *Southern P. Co. v. Hetzer*, 1 L.R.A. (N.S.) 288, 68 C. C. A. 26, 135 Fed. 272.

In New York, it has been held that the knowledge of a master of the incompetence of a servant may not be shown by testimony as to mere general reputation, although it may be shown by evidence tending to establish that such incompetency was generally known in the community,—that is, by testimony that knowledge of the specific acts evidencing his incompetency was general in the community. *McCarty v. Ritch*, 59 App. Div. 145, 69 N. Y. Supp. 129. The court said: "Reputation general in the community for incompetency, based upon acts or reputed acts of ignorance or carelessness, is one thing; the mere gossip or speech of people, that may have no foundation upon acts even alleged, is another."

A. C. W.

what a man's reputation is, because a man may have a reputation which he does not deserve. The question for your determination is: Was he so reckless in the discharge of his duties as to render him unfit to be kept in that position? Nor, did he have such a reputation? That is not the first question here. But, has the evidence of reputation satisfied you, or can you find from the evidence of reputation, that he was in fact unfit for this position by reason of his negligent habit? If you find that in the negative, that is, if you find that the evidence does not justify your finding that he was of such negligent habits as to render him unfit to be placed in this position, then your verdict should be for the defendant. If, however, you find that he was unfit to be placed in the position as a motorman in charge of a car, then the next question for your consideration is: Was the fact that he was incompetent known to this company? Or was his incompetency such, did it so manifest itself, that the company should have known it had they exercised the ordinary care which an employer is bound to exercise in the supervision of its employees? We have evidence on the part of the plaintiff of his reputation, which also goes to the question as to whether his character was known to his employers or should have been known. We have evidence of one witness, I believe, that complaint had been made to the division superintendent, or possibly not a complaint, but that a statement of this man's character had been made to a division superintendent, and that statements of the fact had been made to dispatchers. There is no evidence that any statement was made to any person who had the power to discharge Staley; but there is evidence that reports of this kind, under the rules of the company, should be made to the division superintendent. Now, in passing upon this question, if you come to that, as to whether or not Staley's character for care was known or should have been known to his employer, you consider evidence of his reputation, and the evidence of the information given to the different persons in the employ of the defendant company. If you find that he was incompetent, but that that fact was not known to his employer, and by the exercise of reasonable care could not have been known to his employer, then your verdict should be for the defendant. But if you find . . . that Staley was incompetent, and that his incompetency was known to his employer, then your verdict should be for the plaintiff."

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Messrs. Clarence Burleigh and William A. Challoner, for appellant:

The defendant exercised ordinary care and skill in the hiring of Staley.

Mansfield Coal & Coke Co. v. McEnergy, 91 Pa. 185, 36 Am. Rep. 662; Reiser v. Pennsylvania Co. 152 Pa. 38, 34 Am. St. Rep. 620, 25 Atl. 175.

Proof of reputation is good evidence only when it relates to the character of the person prior to the employment, and such evidence is not admissible when the alleged incompetency of the employee arises after his lawful employment; as to the latter, proof of actual incompetency must be made.

Stasch v. Cornwall Ore Bank Co. 19 Pa. Super. Ct. 113; Snodgrass v. Carnegie Steel Co. 173 Pa. 228, 33 Atl. 1104; Frazier v. Pennsylvania R. Co. 38 Pa. 104, 80 Am. Dec. 467.

The notice of incompetency was not notice to the defendant.

Reiser v. Pennsylvania Co. 152 Pa. 41, 34 Am. St. Rep. 620, 25 Atl. 175; Gier v. Los Angeles Consol. Electric R. Co. 108 Cal. 129, 41 Pac. 22; Haskin v. New York C. & H. R. R. Co. 65 Barb. 129; Park v. New York C. & H. R. R. Co. 155 N. Y. 215, 63 Am. St. Rep. 663, 49 N. E. 674; Connors v. Morton, 160 Mass. 333, 35 N. E. 860; Hatt v. Nay, 144 Mass. 186, 10 N. E. 807; Michigan C. R. Co. v. Gilbert, 46 Mich 176, 9 N. W. 243; Frazier v. Pennsylvania R. Co. 38 Pa. 104, 80 Am. Dec. 467; Pittsburgh, Ft. W. & C. R. Co. v. Ruby, 38 Ind. 316, 10 Am. Rep. 111; Baulee v. New York & H. R. Co. 59 N. Y. 360, 17 Am. Rep. 325.

Mr. Ralph P. Tannehill for appellee.

Moschzisker, J., delivered the opinion of the court:

Crawford B. Rosenstiel, a lineman in the employ of the defendant company, was killed on November 10, 1905, while engaged at work on the repair of an overhead trolley wire. His death was due to the act of Joseph Staley, a motorman in the employ of the same company, who ran his car into the ladder upon which Rosenstiel was standing. The plaintiff, the decedent's widow, recovered a verdict, and the defendant has appealed. The statement of claim avers the facts as we have given them, with certain details surrounding the accident, that Staley was a reckless, careless, and incompetent employee, and that this was known, or should have been known, to the defendant, had it made a reasonable and proper investigation. The issues on the negligence of Staley and the contributory negligence of the decedent were properly submitted to the jury, and the only questions raised by the assignments of error go the issues concerning the alleged incompetency of Staley, and

notice of that fact to the defendant. In this relation the appellant attacks certain rulings on the evidence and the charge of the trial judge, contending that the evidence was incompetent, and insufficient; that it should not have been submitted to the jury; and that the court should have given binding instructions for the defendant.

Without quoting *in extenso* from the testimony, there was evidence to show that Staley had been employed by the defendant from 1902 until the time of the accident; that during this period his reputation for care, skill, and competency as a motorman was "bad," and that of "one who was continually running reckless at places where he should not;" that he was "very reckless," "a careless and reckless motorman," "a wild, careless sort of a fellow." One who had had worked with him stated that "he was a reckless runner." Another, "He was sort of reckless." Mr. Harget, a witness, who had been superintendent of construction on a branch of the defendant company's road between 1902 and 1904, testified that he had held a conversation with a Mr. Lawton, who was the superintendent of the division upon which Staley was then employed; that, "in a discussion of the employees in general," Mr. Lawton mentioned Staley, and the witness then said that he had been a passenger on Staley's car upon several occasions; that he had observed his actions and thought Staley "very reckless;" that Lawton replied, "I know what you tell me is true, and eventually he will have trouble." The occasion for, or the object of, this conversation does not appear. There was testimony also of a statement or complaint made to a Mr. Fitch, one of the despatchers of the defendant, concerning Staley on a particular occasion when his car ran off the track. This Mr. Fitch was the only witness produced by the defendant. He testified that he had been with the company since 1902; that he had worked himself up from motorman to division superintendent; that he had known Staley for some years; that he had seen him operating his car frequently between 1902 and 1905; that "Mr. Staley was a good, competent motorman;" that he did not remember that the alleged complaint had been made to him. Speaking in reference to the operation of the cars, he further testified that "the proper person was the division superintendent to make complaints to," and that "complaints of the character of which you were speaking should go properly to the division superintendent."

The issues concerning Staley's incompetency, and the defendant's knowledge of that fact, were submitted upon this testi-

mony. The trial judge instructed the jury that it was incumbent upon the plaintiff to establish "that Staley was an incompetent motorman, because of his reckless and careless habits; that the fact that he was incompetent to occupy the position which he did was known, or under the circumstances should have been known, if reasonable, ordinary care had been exercised, by the defendant corporation." This was followed by explicit instructions upon the several points in the case, and the law in relation thereto, as appears by the abstract from the charge printed in the reporter's notes preceding this opinion.

While we find no reversible error in the statements of law contained in the charge, the point is: Was there any evidence to justify a submission of the issues in question? Counsel for the appellant argues that there was not; that the plaintiff had not produced anything more than proof of reputation; "that under our authorities proof of reputation is good evidence only when it relates to the character of the person prior to the employment; and that such evidence is not admissible when the alleged incompetency of the employee arises after his lawful employment; as to the latter, proof of actual incompetency must be made." He further argues that the evidence offered by the plaintiff was faulty in that it did not tend to prove a bad reputation for the particular kind of negligence which caused the injury in this case. We must consider the soundness of these propositions.

The leading case in Pennsylvania upon the subject of the evidence required to show the incompetency of a fellow servant is *Frazier v. Pennsylvania R. Co.* 38 Pa. 104, 80 Am. Dec. 467. There the action was by a brakeman to recover damages for personal injuries caused by the negligence of a conductor. The declaration averred that the defendant had, on ("the day on which the collision happened), carelessly and wrongfully put the said train under the conduct and charge of one Henry Shaeffer, in the capacity of conductor, etc.; that said Henry Shaeffer was at the time a 'reckless, untrustworthy, careless, and negligent man, and not skilled in the duties which appertained to the office or station of conductor of a train;' . . . that said company, at and before that time, well knew that Shaeffer was a . . . careless, . . . man; . . . [or] that the defendants might by proper care have known the character of the conductor." At the trial the plaintiff proved that Shaeffer "had had several collisions on the road before, for which he was fined by the company, and that the agents, etc., of the company, knew this;

that the former collisions were caused by his carelessness." The report further shows that the defendants objected to this testimony on the ground that "previous acts of negligence are not matter for the jury as to general character." In reversing the judgment, Mr. Chief Justice Lowrie said: "The fundamental averment here is that it was because of the carelessness of the conductor that the brakeman was injured, and, in order to show that the company was responsible for this, it is averred that they were in fault in knowingly or negligently employing a careless conductor. . . . The question of character thus became an important one, and we are constrained to say that it was tried on improper evidence. Character for care, skill, and truth, of witnesses, parties, or others, must all alike be proved by evidence of general reputation, and not of special acts. The reasons for this have been so often given that we need not repeat them. 1 Greenl. Ev. §§ 461-469; Elliott v. Boyles, 31 Pa. 67." From the report of this case, it is evident that the negligence averred was not the employment of an incompetent conductor, but the retention of the conductor after his incompetency had arisen. This is clearly demonstrated when we consider the pleadings and the fact that the very testimony, the admission of which caused the reversal, was of particular prior acts of negligence committed by the conductor while he was in the employ of the defendant company. When the writer of that opinion used the word "employing," he evidently meant it in the sense of "keeping in employ," and, where he subsequently used the word "employ," it was in the sense of "have in its employ." Therefore, at the very outset, we meet with this case, which is squarely against the contention of the appellant.

A study of the other cases submitted by counsel for the appellant, and of those disclosed by our own research, fails to convince us that this court has modified or departed from the rule laid down in the Frazier Case. At first blush, *Huntingdon & B. T. M. R. & Coal Co. v. Decker*, 82 Pa. 119, would seem at variance with that case; but consideration will show this not to be the fact. The offer there was to show that the conductor, whose competency was at issue, was "of intemperate habits; that he had been repeatedly discharged by McKillips [the superintendent] for disobedience of orders and drunkenness." In sustaining the admission of this testimony, we said: "It was clearly competent to prove Bowser's [the conductor's] accustomed disobedience of orders and his habitual drunkenness; that these facts were known to the superintendent, who had the entire control and management of the road, including the 33 L.R.A. (N.S.)

right to employ and discharge conductors." Proof of the disobedience of an order differs from proof of a special act of negligence. The former would usually present a single issue; whereas, the latter, to be of any real value, would practically mean the trial of another negligence case; and, if more than one special act were alleged, it would mean the trial of as many negligence cases as there might be specific acts of negligence involved. In addition, in the case under review, the element of habitual drunkenness was coupled with the disobedience of the orders, and we have expressly ruled: "If by direct evidence it appeared that the conductor was a man of intemperate habits, it would cast upon the defendants the burden of proving that he was not intoxicated at the time. . . . Where a habit of intoxication in a conductor is shown, it raises, in the case of an accident, a presumption of negligence." *Pennsylvania R. Co. v. Books*, 57 Pa. 339, 98 Am. Dec. 229.

The case of *Snodgrass v. Carnegie Steel Co.* 173 Pa. 228, 33 Atl. 1104, relied upon by the appellant, is not at variance with the Frazier Case. In the first place, Mr. Justice Green starts his opinion by quoting the rule laid down in the Frazier Case, after which he says: "In order that the plaintiff might recover against this defendant, he was bound to show by affirmative testimony: . . . (2) That Snyder was an incompetent servant for the duty he had to perform; and (3) that the fact of his incompetency was known to the defendant when he was employed, by means of his having a reputation for incompetency, or by acquiring a knowledge of it during his employment and before the accident." There is nothing in this which rules that incompetency arising after employment, or the knowledge of such incompetency, could not be proven by evidence of general reputation. Then, too, the opinion in that case expressly states that there was no proof that Snyder had the reputation of being incompetent. "Not a word of testimony was given or offered on this most vital subject. Not a witness testified that he had such a reputation."

The appellant calls our attention to the case of *Stasch v. Cornwall Ore Bank Co.*, 19 Pa. Super. Ct. 113, concerning which it is sufficient to say that the case relies upon those we have already cited, and there is no ruling in it at variance with our decisions. The latest Pennsylvania case upon the subject is *Zeigler v. Simplex Foundation Co.* 228 Pa. 64, 77 Atl. 239, which is in accord with our other cases.

When we look at the cases cited from other jurisdictions, there seems to be a divergence of view in the different states.

The law of New York is that incompetency cannot be shown by general reputation, but must be shown by specific acts. *Park v. New York C. & H. R. R. Co.* 155 N. Y. 215, 63 Am. St. Rep. 663, 49 N. E. 674. The same rule prevails in California. *Gier v. Los Angeles Consol. Electric R. Co.* 108 Cal. 129, 41 Pac. 22. And in Indiana, *Pittsburgh, Ft. W. & C. R. Co. v. Ruby*, 38 Ind. 294, 10 Am. Rep. 111. While Massachusetts follows the Pennsylvania rule, holding evidence of specific acts to be inadmissible on the ground that they "would necessarily have a tendency to confuse the case by collateral inquiries, to protract it indefinitely if those inquiries were carefully made, and to mislead and distract the court and jury from the true issue." *Hatt v. Nay*, 144 Mass. 186, 10 N. E. 807.

It is not necessary to prove that the person whose competency is at issue had a bad general reputation for the precise character of negligence which caused the injury. Proof of habitual recklessness and carelessness in the work he is employed to do is sufficient. In *Frazier v. Pennsylvania R. Co.* 38 Pa. 104, 80 Am. Rep. 467, the court charged: "The question is: Was he a careful and competent conductor? Or was he careless and imprudent and incompetent in the discharge of his duties? If he was the latter, and the company knew it, it was their duty to discharge him. And their neglect in not discharging him renders them liable for any injuries resulting from his carelessness, although it might not be of the same specific character of the careless acts he has been guilty of before." While the assignment of error embracing this particular instruction was not expressly passed upon, the opinion in that case ends by saying: "These views seem to cover all the points that stand in need of correction by us." In *Huntingdon & B. T. M. R. & Coal Co. v. Decker*, 82 Pa. 119, where the negligence was the failure on the part of a conductor to obey an order, and the incompetency of the conductor was at issue, evidence was admitted to show that his "character as a conductor was that of a reckless, careless man, . . . who was unfit for the position of conductor." In reversing upon other assignments, we said that we discovered no substantial error in the remaining assignments, among which was one covering the admission of the testimony just referred to.

Our conclusions upon the points under consideration can be best summed up in the language of the learned judge of the court below, in his opinion refusing a new trial: "Character in Pennsylvania is established by reputation, and not by specific acts. The law recognizes that a careful

man may sometimes do acts of negligence, and it is only the care or character of the ordinary man that is required. Besides, the introduction of evidence of specific acts of negligence would confuse the issue on trial. Every alleged act of negligence would raise a new issue which would have to be tried and determined by the jury. It would be unfair to the defendant, for he would have no notice and no opportunity to meet the alleged acts of specific negligence." Aside from these practical reasons for excluding evidence of specific acts of negligence, the theory seems to be that, when a servant's general reputation for negligence, carelessness, or incompetency is properly established, the reputation is assumed to reflect the character to such an extent that the fact of the actual existence of such a character may be found therefrom, as well as the fact of the master's knowledge that the servant had such a character. We are of the opinion that no error was committed in admitting the testimony of general reputation, or in submitting it to the jury on the issues as to the incompetency of the motorman and the defendant's knowledge thereof. Although the testimony set forth in some of the assignments, standing alone, may appear faulty, it has a different aspect when taken with its context; and, as a whole, it was sufficient in quality and quantity to justify its submission. The assignments of error 3 to 11, inclusive, are all dismissed.

The first two specifications of error go to the refusal of binding instructions, and to the denial of judgment for the defendant. While these assignments simply raise the question of the sufficiency of the evidence produced by the plaintiff, we take occasion to say that there was no effort on the part of the defendant to meet the evidence of bad reputation by counter evidence of good reputation; there was no attempt to show by the official designated to receive complaints, or by the official whose duty it was to discharge, that in point of fact they did not know of the motorman's bad reputation, or to show that prior to the accident the defendant had investigated and had failed to find any foundation for the alleged bad reputation. After producing one witness, who expressed his opinion that Staley was a competent motorman, the appellant rested its case. We cannot rule that the court below was in error in refusing binding instructions, or in subsequently refusing to enter judgment *n. o. v.* for the defendant. Assignments 1 and 2 are dismissed.

The twelfth assignment raises a point not yet touched upon. In addition to the evidence of general reputation, the plaintiff

relied upon the statement made by Mr. Lawton to the witness Harget. The testimony is very meager; but it might justify the inference that Harget was addressing Lawton as a division superintendent, and that the conversation was in reference to the recklessness of Staley as a motor-man. No denial of this conversation was entered by the defendant, and the plaintiff argues that when Mr. Lawton said, "I know what you tell me is true, and eventually he (Staley) will have trouble," he uttered an admission showing knowledge on the part of the company of the incompetency of Staley. The appellant replies that the evidence was too vague to justify a finding thereon, and besides, as there was no evidence that Mr. Lawton had the power to employ and discharge, his admission could not bind the defendant company. There was evidence, however, that Mr. Lawton was the general superintendent of the division in which Staley was employed, and that he was the person designated to receive complaints concerning employees and their management of the cars. This being the fact, any knowledge of Staley's incompetency possessed by Lawton in his official capacity would be fixed upon the officer whose duty it was to employ and discharge men, and hence upon the defendant company. But the appellant points to the case of *Snodgrass v. Carnegie Steel Co.* 173 Pa. 228, 33 Atl. 1104, and contends thereunder that the evidence was of no value to show an admission. The information conveyed and the reply made by the superintendent in that case are of a different character from those in this case, and the one does not in any sense rule the other. We are of the opinion that, when properly shown, Mr. Lawton's admission of knowledge of the incompetency of an employee, would bind the defendant company. It is not necessary to decide whether or not the testimony offered was sufficient for that purpose, as the judgment in this case must be reversed on other grounds which we are about to discuss. But, since the case will go back for a new trial, we call attention to the fact that the testimony concerning Mr. Lawton's alleged admission, and his powers and duties as division superintendent, as it appears upon the present record, is most lacking in essential detail. Testimony of this character must be susceptible of much fuller and more satisfactory presentation. We dismiss this assignment as we did the others.

The particular matters which require reversal are called to our attention in the two remaining specifications, and we will rule the case upon those assignments. Under the thirteenth specification the appel-

lant assigns for error that part of the charge in which the trial judge said: "Now, in passing upon the question . . . as to whether or not Staley's character or care was known, or should have been known, to his employer, you consider the evidence of his reputation, and the evidence of the information given to the different persons in the employ of the defendant company." Immediately before this, the judge had referred to the fact that statements concerning the character of Staley had been made to the "despatchers" of the defendant company. The admission of this testimony is assigned for error under the fourteenth specification. It consisted of the narration of a statement concerning Staley, made by the witness to the despatcher named Fitch, as follows: "We got off the tracks out past Castle Shannon there, and, of course, it was our place to make a report about it, and I says to Fitch, 'That man runs like a crazy horse.' There was a sign up there, 'Run slow,' crossing a new bridge down there between Arlington and Castle Shannon; and we went off the track there." This is dangerously near evidence of a special or particular act of negligence, and, as such, in conflict with *Frazier v. Pennsylvania R. Co.* 38 Pa. 104, 80 Am. Dec. 467.

Although the trial judge immediately explained to the jury that the testimony in question was not accepted as evidence of negligence, but merely to fix the time of a conversation, the trouble is that it was not proper evidence for any legitimate purpose. Moreover, its admission and subsequent submission to the jury, as evidence from which the fact of notice might be found, was directly contrary to our rule in *Reiser v. Pennsylvania Co.* 152 Pa. 38, 34 Am. St. Rep. 620, 25 Atl. 175. There the negligence complained of was the employment of an incompetent telegraph operator, and, in affirming a judgment for the defendant, we said: "Did the company have notice while Crossman was in its service that he was incompetent? We think not, unless notice to Pardue was notice to the company." Pardue was the defendant company's "chief train despatcher," and we held that, in the absence of testimony showing that he had the power to employ and discharge its servants, notice to him was not notice to the defendant company. The only other case which we find touching upon this subject is *Huntingdon & B. T. M. R. & Coal Co. v. Decker*, 82 Pa. 119, where the plaintiff proved complaints made to a train master. In disposing of the question of the admissibility of this testimony, we said that, "under the whole evidence we discover no substantial error." But

there the report shows that the complaints to the train master had been transmitted by him to the general superintendent, who had power to employ and discharge. In the present case there was no testimony that the despatcher had the authority to employ or discharge, or that he transmitted the complaint to one who had such power. We cannot say that the admission of the testimony was harmless error, for it is only reasonable to assume that the evidence concerning the complaint to the despatcher must have had substantial weight in affecting the determination of the questions at issue. Not only may it have been the deciding element in determining the substantive issue of incompetency, but Mr. Fitch, to whom the complaint was made, was the sole witness produced by the defense, and his testimony was relied upon to overcome the plaintiff's testimony as to the motor-man's bad reputation. After testifying to facts showing long observation of Staley, he was allowed to express the opinion that "Staley was a good, competent motorman." See *Gahagan v. Boston & L. R. Co.* 1 Allen, 187, 79 Am. Dec. 724. As Mr. Fitch was obliged to meet the plaintiff's story concerning the complaint made to him, and to submit to cross-examination on that point, it well may be that his value as a witness was utterly destroyed by this irrelevant testimony which was admitted against the objection of the defendant, and not withdrawn from the jury.

In a line of cases commencing with *Delaware & H. Canal Co. v. Barnes*, 31 Pa. 193, followed by *Huntingdon & B. T. M. R. & Canal Co. v. Decker*, 82 Pa. 119; *Erie & M. Valley R. Co. v. Smith*, 125 Pa. 259, 11 Am. St. Rep. 895, 17 Atl. 443; *Rathgebe v. Pennsylvania R. Co.* 179 Pa. 31, 36 Atl. 160; *Hamory v. Pennsylvania, M. & S. R. Co.* 222 Pa. 631, 72 Atl. 277, and *Willock v. Beaver Valley R. Co.* 229 Pa. 626, 79 Atl. 138, we have held that, "where evidence has been improperly received which tends to prejudice the minds of the jurors, the error is not cured by an instruction . . . to disregard it;" and we have said: "It may be withdrawn by the party who has given it, or the court may withdraw it and positively instruct the jury to disregard it,—to discard it from their view. In such a case, it is the duty of the court to see to it that no mischief is done; that the illegal evidence be withdrawn, wholly withdrawn, and withdrawn for every purpose." *Delaware & H. Canal Co. v. Barnes*, supra. We have further said that it must be stricken from the record before counsel make their addresses to the jury. Here, not only was there a failure to withdraw the objection-

able testimony, but it was submitted to the jury, and they were told to consider it in determining the issues. We are constrained to hold that this constituted error for which we must reverse.

The thirteenth and fourteenth assignments are sustained, and the judgment of the court below is reversed, with a venire facias de novo.

WEST VIRGINIA SUPREME COURT OF APPEALS.

BLUEFIELD WATERWORKS & IMPROVEMENT COMPANY et al., Appts.,
v.

CITY OF BLUEFIELD et al.

(— W. Va. —, 70 S. E. 772.)

Municipal corporation — control of public service rates.

1. In the absence of a delegation thereof by the legislature, express or necessarily implied, a municipal corporation has no power to regulate or control rates for pub-

Headnotes by **POFFENBARGER, J.**

Note. — Power of municipality, apart from contract, to regulate the rates to be charged by public service corporations.

As to the right of a municipality to exact a license from a telegraph or telephone company which has been authorized by statute to use the streets, see *Wisconsin Teleph. Co. v. Milwaukee*, 1 L.R.A. (N.S.) 581, and note.

The power which municipalities have to regulate public service corporations operating within their limits is derived from the legislature, and the rule is, as stated in *BLUEFIELD WATERWORKS & IMPROV. Co. v. BLUEFIELD*, that, in the absence of express or necessarily implied authority from the legislature, a municipality has no power, at least in the absence of contract, to regulate by ordinance the rates to be charged by such a corporation. *Old Colony Trust Co. v. Atlanta*, 83 Fed. 39, affirmed in 32 C. C. A. 125, 59 U. S. App. 230, 88 Fed. 859; *Jacksonville v. Southern Bell Teleph. & Teleg. Co.* 57 Fla. 374, 49 So. 509; *Re Pryor*, 55 Kan. 724, 29 L.R.A. 398, 49 Am. St. Rep. 280, 41 Pac. 958; *State ex rel. Garner v. Missouri & K. Teleph. Co.* 189 Mo. 83, 88 S. W. 41; *Wabaska Electric Co. v. Wymore*, 60 Neb. 199, 82 N. W. 626; *Ball v. Texarkana Water Corp.* — Tex. Civ. App. —, 127 S. W. 1068.

Where the statute expressly prohibited a city from demanding or receiving any compensation for the use of its streets, except that necessary to restore the pavements, it was held that a telephone company could not be compelled to agree to the fixing of

lic service, such as the furnishing of water, gas, or electricity, or the terms and conditions of contracts therefor, otherwise than by contract with the corporation of person rendering such service.

Same — enforcement by penalty.

2. Though such regulation is usually in the form of an ordinance, it is nevertheless contractual or administrative in character, and not enforceable by criminal penalties, except in those instances in which the legislature has delegated to the municipal corporation power and authority to enforce compliance therewith in that way.

Same — scope of authority.

3. Authority in a municipal charter to pass all ordinances necessary to the execution of the powers vested in the city, and such as may be deemed necessary and proper to conserve the health, comfort, happiness, and convenience of its inhabitants, and enforce the same by reasonable fines and penalties, does not include power to regulate or control such public service rates and conditions otherwise than by contract, nor to enforce regulations so made by fines or criminal penalties.

Injunction — enforcement of rate regulation.

4. Attempted enforcement of contractual regulations of public service, by criminal proceedings, under an ordinance of a city not authorized by legislative enactment to adopt such means of enforcement, may be enjoined.

(March 7, 1911.)

its rates as a condition for a renewal of its franchise. *State ex rel. Matthews v. Central U. Teleph. Co.* 14 Ohio C. C. 273, 7 Ohio C. D. 536.

And under this same statute it was held in *Farmer v. Columbiana County Teleph. Co.* 72 Ohio St. 526, 74 N. E. 1078, that, though a telephone company consented to the fixing of its rates by a municipality, it was not bound by such rates, because of the want of authority by the municipality to make such an agreement.

In *Noblesville v. Noblesville Gas & Improv. Co.* 157 Ind. 162, 60 N. E. 1032, it was held that where a gas company having a franchise accepted an ordinance subsequently passed regulating certain rates, it retained power to fix its own rates for service not specified in the new ordinance.

The power which is given to municipalities to regulate public service corporations is strictly construed, and will not be extended beyond its clear meaning.

Thus, in *Lewisville Natural Gas Co. v. State*, 135 Ind. 49, 21 L.R.A. 734, 34 N. E. 702, overruling *Rushville v. Rushville Natural Gas Co.* 132 Ind. 575, 15 L.R.A. 321, 28 N. E. 853, it was held that power to fix the rates of a gas company was not included in a general grant of power to provide reasonable regulations for the safe supply, distribution, and consumption of natural gas.

In *Wright v. Glen Teleph. Co.* 112 App. 33 L.R.A. (N.S.)

A PPEAL by plaintiffs from a decree of the Circuit Court for Mercer County dismissing a bill filed to enjoin defendants from enforcing by criminal proceedings an ordinance of the city alleged to affect property rights of the plaintiffs and the conduct of their business. Reversed in part.

The facts are stated in the opinion.

Messrs. A. W. Reynolds and Sanders & Crockett, for appellants:

If the ordinance of the city of Bluefield, in the attempted enforcement of which the plaintiff was arrested, is void, and the enforcement of it will interfere with the private property rights of the plaintiffs, a court of equity has jurisdiction, at the suit of the plaintiffs, to enjoin its enforcement. *Block v. Crockett*, 61 W. Va. 421, 56 S. E. 826; 22 Cyc. Law & Proc. pp. 903, 904; *Flaherty v. Fleming*, 58 W. Va. 669, 3 L.R.A. (N.S.) 461, 52 S. E. 857; 5 Pom. Eq. Jur. § 354; *High*, Inj. 3d ed. § 1247; 20 Cyc. Law & Proc. p. 1159; *Mills v. Chicago*, 127 Fed. 731.

The city had no power to legislate on the subject embraced in the ordinance.

Christie v. Malden, 23 W. Va. 667; *Charleston v. Reed*, 27 W. Va. 681, 55 Am. Rep. 336; *Parkersburg Gas Co. v. Parkersburg*, 30 W. Va. 435, 4 S. E. 650; *Richards v. Clarksburg*, 30 W. Va. 491, 4 S. E. 774; *Judy v. Lashley*, 50 W. Va. 628, 57 L.R.A.

Div. 745, 99 N. Y. Supp. 85, where the state was given power to regulate only the setting of poles and stringing of telephone wires, it was held that it had no power to regulate rates, and that a franchise purporting to do so was not binding on the company though accepted by it.

In *Tacoma Gas & E. L. Co. v. Tacoma*, 14 Wash. 288, 44 Pac. 655, a statute authorizing cities to provide for lighting streets and furnishing inhabitants with gas or other light was held not to empower it to fix the price at which gas should be furnished.

Power to fix rates is not conferred upon the city by a statute giving gas companies the right to lay pipes in the streets subject to such regulations as the city may impose by ordinance. *Mills v. Chicago*, 127 Fed. 731.

Nor is such power embraced in a grant of general power to regulate the streets. *St. Louis v. Bell Teleph. Co.* 96 Mo. 623, 2 L.R.A. 278, 9 Am. St. Rep. 370, 10 S. W. 197.

Even express power to license, tax, and regulate such corporations does not authorize a municipality to fix rates. *Ibid.*; *State ex rel. Wisconsin Teleph. Co. v. Sheboygan*, 111 Wis. 23, 86 N. W. 657.

Power given to a municipality by the legislature to regulate the manner of construction of telephone or telegraph lines does not include power to fix rates or to

413, 41 S. E. 197; *St. Louis v. Bell Teleph. Co.* 96 Mo. 623, 2 L.R.A. 278, 9 Am. St. Rep. 370, 10 S. W. 197; *Lewisville Natural Gas Co. v. State*, 135 Ind. 49, 21 L.R.A. 734, 34 N. E. 702; *Dill. Mun. Corp.* 4th ed. § 89; *State ex rel. Atty. Gen. v. Cincinnati Gaslight & Coke Co.* 18 Ohio St. 262; *Tacoma Gas & E. L. Co. v. Tacoma*, 14 Wash. 288, 44 Pac. 655; *State ex rel. Garner v. Missouri & K. Teleph. Co.* 189 Mo. 83, 88 S. W. 41; *Cambridge v. Cambridge Water Co.* 99 Md. 501, 58 Atl. 442, 2 A. & E. Ann. Cas. 311; 20 Cyc. Law & Proc. p. 1166.

The ordinance impairs the obligation of contracts.

Clarksburg Electric Light Co. v. Clarksburg, 47 W. Va. 739, 50 L.R.A. 142, 35 S. E. 994; *Louisiana ex rel. Nelson v. St. Martin's Parish*, 111 U. S. 716, 28 L. ed. 574, 4 Sup. Ct. Rep. 648; *Louisiana v. New Orleans*, 102 U. S. 203, 26 L. ed. 132.

The ordinance is unreasonable and oppressive.

Charleston v. Reed, 27 W. Va. 681, 55 Am. Rep. 336; *Kirkham v. Russell*, 76 Va. 956; *Danville v. Hatcher*, 101 Va. 523, 44 S. E. 723; 1 *Dill. Mun. Corp.* § 328; 30 Am. & Eng. Enc. Law, 2d ed. p. 418, § 19; *Williams v. Mutual Gas Co.* 52 Mich. 499, 50 Am. Rep. 266, 18 N. W. 236; *Exchange & Bldg. Co. v. Roanoke Gas & Water Co.* 90 Va. 83, 17 S. E. 789.

exclude telephone lines from the streets. *South McAlester-Eufaula Teleph. Co. v. State*, 25 Okla. 524, 106 Pac. 962.

A probate court, under a statute giving it the power to direct the mode in which a telephone company may construct its lines along the streets, has no authority to fix the rates to be charged by such a company. *State ex rel. Sheets v. Toledo Home Teleph. Co.* 72 Ohio St. 60, 74 N. E. 162.

What is commonly known as the general welfare clause does not authorize a municipality to regulate by ordinance the rates to be charged by a water company operating under a prior franchise. *Schroeder v. Scranton Gas & Water Co.* 20 Pa. Super. Ct. 255.

Where the right to use streets and highways is given to a company directly by the state, the municipality can exercise its police power only in regulating such a company, and not to regulate rates. *Macklin v. Home Teleph. Co.* 24 Ohio C. C. 446.

Even when authority to fix rates is conferred upon a municipality by statute, it seems that such authority will be strictly limited.

This limitation may be as to the extent of its power, as in *Richmond v. Richmond Natural Gas Co.* 168 Ind. 82, 79 N. E. 1031, 11 A. & E. Ann. Cas. 746, where it was held that statutory authority to fix rates by contract or franchise does not confer power to fix rates by ordinance as to a company operating under an existing franchise.
33 L.R.A. (N.S.)

Messrs. D. E. French and Ritz & Ritz, for appellees:

The city had the power, and a perfect right, to pass and enforce the ordinance in question.

Parkersburg Gas Co. v. Parkersburg, 30 W. Va. 439, 4 S. E. 650; *Christie v. Malden*, 23 W. Va. 667; *Charleston v. Reed*, 27 W. Va. 681, 55 Am. Rep. 336; *Richards v. Clarksburg*, 30 W. Va. 491, 4 S. E. 774; *Abbott, Mun. Corp.* § 192, p. 2130; *Knoxville v. Knoxville Water Co.* 107 Tenn. 647, 61 L.R.A. 888, 64 S. W. 1075; *Mason v. Ohio River R. Co.* 51 W. Va. 183, 41 S. E. 418; *Northwestern Teleph. Exch. Co. v. Minneapolis*, 81 Minn. 140, 53 L.R.A. 175, 83 N. W. 537, 86 N. W. 69; *Springfield Water Co. v. Darbey*, 199 Pa. 400, 49 Atl. 275; *Judy v. Lashley*, 50 W. Va. 628, 57 L.R.A. 413, 41 S. E. 197; *Charleston Natural Gas Co. v. Lowe*, 52 W. Va. 662, 44 S. E. 410.

The ordinance in question and all of its provisions are not only just and reasonable, but necessary to protect the citizens in their rights, and prevent the water company by its rules from imposing unjust and unreasonable hardships upon them.

State, Trenton Horse R. Co. Prosecutor, v. Trenton, 53 N. J. L. 132, 11 L.R.A. 410, 20 Atl. 1076; *State ex rel. Milsted v. Butte City Water Co.* 18 Mont. 199, 32 L.R.A. 697, 56 Am. St. Rep. 574, 44 Pac. 966;

Thus, where an ordinance granting a franchise to a street railway company fixed the maximum fare to be charged, a reservation of the right from time to time to make such further rules, orders, or regulations as to the common council may seem proper, does not include power further to regulate rates during the term of the franchise. *Detroit v. Detroit Citizens' Street R. Co.* 184 U. S. 368, 46 L. ed. 592, 22 Sup. Ct. Rep. 410; *Cleveland City R. Co. v. Cleveland*, 94 Fed. 385.

Or the limitation upon the power of the municipality may be as to the right so to exercise the power as to prevent future regulation, as in *Knoxville v. Knoxville Water Co.* 107 Tenn. 647, 61 L.R.A. 888, 64 S. W. 1075, where, under a charter provision that a city shall have power to regulate the price of water, it was held that the city was not authorized to make an irrevocable contract for rates, and hence that it may later fix other rates, subject only to the limitation that they are reasonable; and *Home Teleph. & Teleg. Co. v. Los Angeles*, 155 Fed. 554, affirmed in 211 U. S. 265, 53 L. ed. 176, 29 Sup. Ct. Rep. 50, where a city authorized by its charter to fix rates for telephones granted a franchise in which certain maximum rates were fixed, and it was held that by doing so it did not surrender its power further to regulate the rates within the period limited for the life of the franchise.
R. L. S.

Turner v. Revere Water Co. 171 Mass. 329, 40 L.R.A. 657, 68 Am. St. Rep. 432, 50 N. E. 634; Sheffield Waterworks Co. v. Wilkinson, L. R. 4 C. P. Div. 411, 48 L. J. Mag. Cas. N. S. 145; Spring Valley Waterworks v. San Francisco, 82 Cal. 286, 6 L.R.A. 756, 16 Am. St. Rep. 116, 22 Pac. 910, 1045; International Water Co. v. El Paso, 51 Tex. Civ. App. 321, 112 S. W. 816; Pocatello Water Co. v. Standley, 7 Idaho, 155, 61 Pac. 518; Franke v. Paducah Water Supply Co. 88 Ky. 467, 4 L.R.A. 265, 11 S. W. 432, 718; National Waterworks Co. v. Kansas City, 20 Mo. App. 237; Roanoke Gas Co. v. Roanoke, 88 Va. 810, 14 S. E. 665; Belfast Water Co. v. Belfast, 92 Me. 52, 42 Atl. 235; Rockland Water Co. v. Rockland, 83 Me. 267, 22 Atl. 166; Montgomery v. Capital City Water Co. 92 Ala. 361, 9 So. 339; New Haven v. New Haven Water Co. 44 Conn. 105; Water Comrs. v. Hudson, 13 N. J. Eq. 420.

Poffenbarger, J., delivered the opinion of the court:

The questions in this case arise out of the action of the circuit court of Mercer county, upon a bill in equity, filed by the Bluefield Waterworks & Improvement Company and William McCarthy, agent of said company, to enjoin the city of Bluefield, its officers, agents, and attorneys, from enforcing, by criminal proceedings, a certain ordinance of the city, affecting property rights of said company and the conduct of its business. A preliminary injunction was awarded, and, later, upon a full hearing of the cause, the court dissolved the injunction and dismissed the bill.

The city of Bluefield seems to have been originally incorporated under chapter 47 of the Code. The legislature, at the session of 1897, granted it a special charter, found in chapter 99 of the acts of that session. This was amended and re-enacted by chapter 3 of the Acts of 1905. Certain sections were again amended by chapter 2 of the Acts of 1907, and the entire charter was amended and re-enacted by chapter 1 of the Acts of 1909. The ordinance here complained of was passed on the 24th day of August, 1908, and the franchise of the waterworks company is found in ordinances passed on the 20th day of January, 1891, and October 3, 1892. The franchise ordinance is very informal and incomplete. As first granted, it conferred upon the water company the right to construct and forever maintain its waterworks, pipes, and mains through, beneath, over, across, and along any and all of the streets, alleys, and public grounds of the city, for the purpose of supplying and furnishing water to the city 33 L.R.A. (N.S.)

and the citizens and property owners thereof for domestic and manufacturing purposes, and for all other purposes for which it should be desirable, for rent, lease, hire, sale, and reward, upon any terms and conditions that, from time to time, might be agreed upon between the company, its successors and assigns, and the city and other patrons and customers. This ordinance did not affirmatively require the waterworks company to furnish water nor fix any maximum rate. Deeming it not sufficiently explicit and obligatory in these respects, the council amended it on the 3d day of October, 1892, by the addition of four clauses, by the first and second of which it was made obligatory upon the waterworks company to furnish water to the town and the general public and all persons and corporations desiring it, to the extent of the company's ability so to do, at prices to be agreed on by it and the purchasers of water, provided the rate should not exceed the then existing rate for private consumers, whatever that means, and 25 cents per thousand gallons for consumers by meter. The third additional clause provided that the company should conduct its business of supplying the public with water in accordance with the ordinances of the town, theretofore or to be thereafter enacted, so long as said company should operate its said business under the authority conferred on it by the ordinances of the town, except that the maximum rate to be charged for water as fixed by the ordinance should not be changed without the consent of the company. The fourth clause approved and confirmed the powers conferred upon the company by the former ordinance, that of January 20, 1891.

Under its franchise, as evidenced by these two ordinances, the waterworks company continued its business without any attempt on the part of the city to regulate or control the same in respect to its contracts with citizens, from 1892 until 1908. Some of the rules and forms of contract adopted and enforced by it seem to have caused dissatisfaction and complaint. It required owners of property into which it carried water to agree to pay the water rents, not only for water consumed by themselves, but also for that furnished to their tenants. Another rule required payment of three months' flat rate water rent in advance. Another required the customer or patron to bear the cost of putting in the pipes or fixtures from the property line to a certain point in the street. Another required any person causing the main to be tapped by a plumber not employed by the company itself, to give bond for any damages that might result from negligent or unskillful

work, even though such plumber had a license from the city. The public dissatisfaction with these rules and regulations, and others which need not be mentioned, found its way into the city council, and on the 24th day of August, 1908, that body passed an ordinance purporting to be a general rule or law for the government or regulation of persons, firms, or corporations furnishing water in the city. It consists of two sections, the first of which lays down ten rules, only two of which are involved here, those designated "c" and "d." They read as follows: "(c) The water shall not be cut off from any consumer thereof, so long as the same is used in a proper and legitimate manner, and the water rents are paid, or tender for same has been made by the owner or occupant of the property to which such water is furnished. (d) Water rent shall not be required to be paid for more than one month in advance when charged on flat rate. When water is furnished through meter, the rent for same shall be due on the first of the month immediately following the month in which the service was rendered, but the water shall not be cut off from any consumer on account of the nonpayment of water rent, until a bill has been rendered therefor, and the party against whom same is charged given an opportunity to pay for same." The 2d section is a penal clause providing for the enforcement of the regulations prescribed by § 1, and reads as follows: "Any person, firm, or corporation, or the agent, representative, or employee of any such person, firm, or corporation, violating any of the provisions of this ordinance, shall, upon conviction thereof, be fined not less than one, nor more than one hundred., dollars for each offense."

Florence A. Harstock and H. J. Harstock had, on April 19, 1908, entered into a contract with the company for water to be furnished in certain property owned by them, and thereby agreed to pay all water bills at the company's office as they should become due, against both themselves and their tenants, according to the rules, regulations, and rates as they then were or should thereafter be, and this contract was to remain in force until canceled by notice. The Harstocks neglected to pay some of the water rents, and, while these rents were in arrears, J. L. Peters became their tenant of the property, and demanded service from the water company. This it refused to furnish until the arrearages of rent should be paid, and also until Peters would pay three months' water rent in advance. He tendered rent in advance for one month. William McCarthy, superintendent of the waterworks company, who, on its behalf, had

declined to furnish water to Peters, was arrested and taken before the recorder of the city, charged with violation of the ordinance. He denied the validity of the ordinance, but was convicted and fined \$100, which he was required to pay as a condition of his appeal to the criminal court of the county. He was further informed that, for each day he failed and refused to furnish the water, he would be fined \$100.

If the ordinance, for the enforcement of which the proceedings against the superintendent of the waterworks company were instituted, is invalid, in so far as it attempts to provide a remedy by fine, there can be no doubt about the jurisdiction by injunction. The object and direct effect of the criminal proceeding is to control the waterworks company in respect to the use of its property, and works a restraint thereon, affecting its use and enjoyment. The jurisdiction does not depend solely upon the invalidity of the ordinance. Two elements are necessary, invalidity of the proceeding and invasion by it of a personal or property right. *Coal & Coke R. Co. v. Conley*, 67 W. Va. 129, 67 S. E. 613; *State v. Ehrlick*, 65 W. Va. 700, 23 L.R.A.(N.S.) 691, 64 S. E. 935; *Fellows v. Charleston*, 62 W. Va. 665, 13 L.R.A.(N.S.) 737, 125 Am. St. Rep. 990, 59 S. E. 623, 13 A. & E. Ann. Cas. 1185; *Block v. Crockett*, 61 W. Va. 421, 56 S. E. 826; *Flaherty v. Fleming*, 58 W. Va. 669, 3 L.R.A.(N.S.) 461, 52 S. E. 857. If the ordinance is invalid to the extent aforesaid, both of these elements are present in this case.

The regulation of rates for public service belongs to the police power of the state. *Coal & Coke R. Co. v. Conley*, cited. The state has very ample powers for the control and government of corporations and the transaction of their business, and may no doubt ordain and enforce such regulative measures as are embodied in the ordinance complained of, and enforce compliance therewith by making failure to observe them a criminal offense, punishable by fine. But municipal corporations do not possess all the police powers of the state. They have only such portions thereof as are granted to them by the legislature in express terms or by necessary implication. *Judy v. Lashley*, 50 W. Va. 628, 57 L.R.A. 413, 41 S. E. 197. The city of Bluefield, therefore, to maintain its position, must find warrant for the power it has assumed to exercise in some act of the legislature. Its powers respecting gas, electric light, and waterworks companies, as found in § 28 of chapter 47 of the Code, are "to erect, or authorize, or prohibit the erection of gas works, electric light works, or waterworks in the city, town, or village; to

prevent injury to or pollution of the same, or to the water or healthfulness thereof." As we have said, the city was originally incorporated under that chapter. Its special charter, granted by the act of 1897, contained only this provision: "To erect waterworks and provide a water supply for said city, or to authorize or prohibit the erection of gas works in or near the city, to prevent injury to, and provide for the protection of, the same; to provide for the purity of the water and healthfulness of the city." Section 21. If the amended charter of 1905 contains any provision relating, in express terms, to the subject of waterworks, it is no broader than that of the charter of 1897. The only provisions relied upon as conferring the authority claimed are §§ 24, 44, and 87. These are all very general, and signify no legislative intent to vest power in the city to regulate rates or prescribe regulations for the transaction of business by corporations or between citizens. Section 24 gives authority to pass all ordinances necessary to carry into effect any power granted to or vested in the city, and to enforce them by reasonable lines and penalties. Section 44 gives authority to pass and enforce such rules as may be deemed necessary and proper to preserve the health of the inhabitants, and pass such ordinances as the comfort, health, happiness, and convenience of the inhabitants of the city shall require. Section 87 reserves to the city all powers conferred upon it or the council or any of its officers by general law, not inconsistent with the powers conferred by that act. These are such provisions as are generally found in municipal charters. If they conferred the authority claimed here, almost every municipal corporation in this state and every other state would have such power. These provisions manifestly do no more than vest power in the council to carry into execution the limited police powers therein granted and those granted by other parts of the charter. Power to conserve the health, comfort, happiness, and convenience of the inhabitants of a city, as defined by the courts, does not include power to determine in what manner one citizen may deal with another or on what terms they shall contract for particular services. This delegation of legislative power is entirely too general and indefinite to include matters of that kind. A general welfare clause does not extend beyond the police powers ordinarily vested in municipal corporations. Tiedeman, Mun. Corp. § 135.

The waterworks company derives its power to do business as a corporate entity from the state, not from the city of Bluefield. Its charter was obtained under the

general law authorizing it to construct its works and lay its pipe lines and mains to supply the city and its inhabitants with water for all proper purposes. Its power to do business and make and enforce contracts is as ample and full as that of an individual, and is subject to regulation in the exercise thereof only by the state itself, or under authority delegated by the state. Of course, its operations within a city are subject to the police power of the city; that is, such police power as has been delegated by the legislature, but nothing more. The legislature has not delegated to the city of Bluefield any authority to regulate or control it in its business or operations, except in so far as its operations may conflict with the delegated police powers of the city, its control of its streets; power to keep them clean, in repair, and free from obstruction; its power to give or withhold permission to any corporation or person to permanently occupy them for public purposes; its power to prescribe conditions upon which they may be so occupied for such purposes; its power to require cleanliness and purity throughout the city for the comfort and health of the people; and other similar powers. This corporation is subject to the exercise of all these city powers just as other corporations and all inhabitants are, and the city itself cannot surrender them, nor barter them away, nor bind itself not to exercise them.

This corporation, chartered by the state, could not obtain the right to occupy the streets of the city or do business therein under its state franchise, without the consent of the city. In order to obtain that consent, it was bound to submit itself to such regulatory conditions as the city saw fit to impose. When these conditions were imposed and accepted by the company, the prescription and acceptance thereof formed a contract between the city and the company. *Wheeling & E. G. R. Co. v. Triadelphia*, 58 W. Va. 487, 4 L.R.A. (N.S.) 321, 52 S. E. 499; *Clarksburg Electric Light Co. v. Clarksburg*, 47 W. Va. 739, 50 L.R.A. 142, 35 S. E. 994. The power thus conferred upon the company to occupy the streets and do business is not revocable, except for breach of the contract in some form by the company. It is a contract fully protected by the constitutional guaranties, and immune from destruction or impairment by the city. The contractual relation extends not only to the immediate parties, the city and the company, but also to the inhabitants of the city. It confers upon them rights which the company cannot withhold nor deny, and also upon the company rights which the city cannot destroy. The rates prescribed by the con-

tract, if any, and the remedies for the enforcement thereof, left in the hands of the company, such as rules and regulations, form parts of the contract. *Detroit v. Detroit Citizens' Street R. Co.* 184 U. S. 368, 46 L. ed. 592, 22 Sup. Ct. Rep. 410; *Knoxville Water Co. v. Knoxville*, 189 U. S. 434, 47 L. ed. 887, 23 Sup. Ct. Rep. 531; *Cleveland v. Cleveland Electric R. Co.* 201 U. S. 529, 50 L. ed. 854, 26 Sup. Ct. Rep. 513. Of course, the rates and method of doing business are subject to regulation to some extent by the state, under its general police power, but not by the city; the state not having delegated to it power to make such regulations. In its use of the streets and its general conduct, it is subject to such regulations as the city may make under the police powers delegated to it; but these do not extend to rates and terms of contract. The function performed by a municipal corporation in securing rates and guaranties of modes of transacting business between itself and public utility corporations seems to rest upon its contractual, not its legislative, capacity. Mr. Tiedeman, in his valuable work on *Municipal Corporations*, at § 163, refers the municipal capacity to obtain and secure for the city and its inhabitants such rights as are involved here to its contractual powers. The function may be, to some extent, legislative; but it seems to be more nearly administrative. Being administrative, it is exercised in connection with the police power, which is legislative, so that the two functions are not always readily distinguishable in respect to the basis of authority. The one may be easily confounded with the other. We think the city's power of regulation as to the rates to be charged, and the forms of contract between the company and its patrons, both public and private, rests solely upon its right to make contracts, and not upon delegated legislative power. Its administrative powers, under its right to make such contracts, may be exercised in the form of ordinances; but its right to pass ordinances upon the subject does not include the right to enforce its contracts, either in favor of itself or the inhabitants, by the imposition of criminal penalties. It can enforce its contracts only in those modes allowed to individuals and private corporations. Not having the power to make violations of contracts criminal, it could not reserve any such power to itself in the ordinances by which it granted the franchise. Nor could the waterworks company, having no power to add anything to the capacity of the city, confer upon it such right or power. Two private persons cannot, by their contract, confer upon each other right to in-

flict fines and imprisonment for violations of their contract. This power, if it exists at all, is vested in the legislature of the state, and has not been delegated to the city of Bluefield. It could not be obtained from any other source. Hence it is plain that the city does not possess it.

It is said this court, in *Charleston Natural Gas Co. v. Lowe*, 52 W. Va. 662, 670, 44 S. E. 410, has recognized and asserted power in municipal corporations of this state to regulate rates. The question was not directly involved in that case. The inquiry there was the right of a gas company, having a city franchise for furnishing gas to the inhabitants of the city, to exercise the power of eminent domain. It became necessary to say whether or not the land sought to be taken was required for a public purpose. In the discussion of that question, it was said that such company is bound to furnish gas to every inhabitant of the city or town who applies therefor, and complies with the regulations prescribed by the ordinances of the town, or fixed by contract between the council and company, and also that the transportation and use of gas seems to be susceptible of but little regulation beyond fixing the maximum price to the consumer by municipal corporations, to which the legislature has qualifiedly delegated powers of local government. This was followed by the observation that they have ample authority to regulate rates, as well as to impose terms and conditions such as will insure safety of the lives and property of citizens in the use of gas. This language may go somewhat beyond the position taken here; but the source of power to regulate and the mode of regulation was not the subject of inquiry in that case. It was only necessary to say that the city had power to secure to the inhabitants the right to obtain the gas from the company, and to provide against danger and injury to persons and property in the conduct of the business of the gas company. Whether this power was legislative, administrative, or contractual was wholly unimportant in that case. Hence, what is said in the opinion upon the subject is not to be regarded as a deliberate judgment or conclusion. Capacity derived from either source sufficed.

Our conclusion, therefore, is that § 2 of the ordinance adopted by the city of Bluefield August 24, 1908, is void, and the proceedings on the part of the city under it wholly without legal sanction.

Where the regulations prescribed in § 1 are valid as modifications of the franchise, under power reserved in the amended ordinance of October 3, 1892, it is unnecessary to determine. The city or any citizen

may test that question by any proper proceeding in a judicial forum having jurisdiction, upon an application for the appropriate remedy to enforce the right alleged to have been conferred or secured by these regulations. Though we have referred the power of the city to make such regulations to its contractual rights and capacity, the waterworks company is a public service corporation, and the rights, so secured to it and the inhabitants, may rest upon a legal foundation, giving a remedy by mandamus. We deem it proper to make this observation, lest what has been said here may be regarded as precluding that remedy. As a public service corporation, the company may be under a legal duty to the city and its inhabitants though the rights were fixed and secured by virtue of the city's contractual powers. In other words, a legal duty may rest upon the waterworks company, though the rates were secured by virtue of the contractual powers of the city. At any rate, §§ 28c. I. and 28c. II. of chapter 47 of the Code of 1906, gives a remedy, and this signifies legislative intent to withhold the drastic one adopted by the city.

For the reasons stated, the decree complained of will be reversed, the demurrer and the motion to dissolve the injunction overruled, and the injunction reinstated, in so far as it inhibits proceedings under said § 2 of the ordinance of August 24, 1908, and perpetuated; but, in so far as it relates to the other provisions of said ordinance, the injunction was properly dissolved, and, to that extent, the decree of dissolution will be affirmed.

Brannon, J., absent.

COLORADO SUPREME COURT.

PEOPLE OF THE STATE OF COLORADO,
Plff. in Err.,
v.

R. E. TURPIN et al.

(— Colo. —, 112 Pac. 539.)

Voter — residence — selection — non-presence.

1. The selection and purchase of a home in a state, with the intention of making it a permanent residence, is not of itself sufficient to make one a citizen of the state for the purpose of fixing his right to vote, if, pending the vacation of the property by the former occupant, he continues to occupy his former residence in another state.

Witness — voter — duty to disclose candidate voted for.

2. An unqualified person who has voted at 33 L.R.A. (N.S.)

a school election, the laws governing which provide no method for identifying and rejecting his ballot, may be required in a proceeding to contest the validity of the election, to state how he voted.

(December 5, 1910.)

ERROR to the District Court for Mesa County to review a judgment in defendants' favor in a proceeding to contest the validity of an election for the consolidation of certain school districts. Reversed.

The facts are stated in the opinion.

Messrs. R. M. Logan, Wheeler & Weiser, and R. D. Thompson, for the People:

To effect a change of domicile, there must be both act and intention. There must be a severance from the old place, with the intention of uniting with the new one, and these must concur.

Jain v. Bossen, 27 Colo. 423, 62 Pac. 194; Sharp v. McIntire, 23 Colo. 99, 46 Pac. 115; Parsons v. People, 30 Colo. 388, 70 Pac. 689; Kellogg v. Hickman, 12 Colo. 256, 21 Pac. 325; McCrary, Elections. ¶ 62; 10 Am. & Eng. Enc. Law, 2d ed. p. 599; Welsh

Note. — Gaining new domicile or residence before abandoning occupation of old residence, by purchasing or hiring property in new locality with intention of establishing permanent residence there.

This note is confined to cases where there has been a purchase or renting of property in a new locality, with intent to acquire a domicile there, while the occupation of the old residence has not yet been abandoned. It will be observed that this note by its scope presupposes the existence of the intention essential to a change of domicile or residence, and, with the exception of a few cases which were decided before that intention had been fully carried out, or after it had been abandoned, the question is practically as to when the change of domicile or residence was effected, rather than whether there has been any change at all.

For cases upon the general question as to when a person who intends to leave a state permanently, but has not yet done so, becomes a nonresident, see the note to Brown v. Beckwith, 1 L.R.A. (N.S.) 778.

Cases where the statute attaches presumption to the residence of a man's "family" are omitted.

The reader is reminded that a change of domicile requires act and intent,—there must be both *factum et animus*, an actual new residence and an intention to make it home. Also that the courts often do not distinguish between domicile and residence and citizenship, although, in some special cases, a distinction is necessary, as where a man has two or more residences; so, also, it has been held that a citizen may be a nonresident for attachment purposes, or that he may acquire a new residence to

v. Shumway, 232 Ill. 54, 83 N. E. 549; State v. Hallett, 8 Ala. 160.

Illegal voters can be forced to testify as to how they voted.

Black v. Pate, 130 Ala. 514, 30 So. 434; Montgomery v. Dormer, 181 Mo. 5, 79 S. W. 913; Van Winkle v. Crabtree, 34 Or. 462, 55 Pac. 831, 56 Pac. 74.

Mr. Henry J. Hersey, with Messrs. S. M. Logan and N. C. Miller, for defendants in error.

Hill, J., delivered the opinion of the court:

This action was brought under § 289 of Mills's Annotated Code, to determine the right of the defendants in error to hold certain offices, the existence of which depends

qualify as an administrator without changing his domicile.

"When once it is ascertained what is necessary to constitute one's domicile in any place, it is easy to point out what must be done in order to effect a change of that person's domicile to another place. All the conditions which are required to constitute the domicile in the given place must be transferred to the new place. When this is done, the domicile is changed; and until this is done, the domicile is not changed. The old one is not abandoned, the new one is not acquired. This, of course, excludes the existence of an intention to return to the former place; for the existence of an intention to return is inconsistent with the idea that the former home is abandoned." Hartford v. Champion, 58 Conn. 275, 20 Atl. 471.

The general principles are well set out by Leventritt, J., in Plant v. Harrison, 36 Misc. 649, 74 N. Y. Supp. 411, where he says: "A domicile of choice, being gained *animo et facto*, can be relinquished only in the same manner. Udney v. Udney, L. R. 1 H. L. Sc. App. Cas. 441, 9 Eng. Rul. Cas. 782. But both the *animus et factum* must be expressive of the present intention to reside presently and permanently in the domicile. Personal presence, coupled with the intention to begin in *futuro* a residence of however permanent character, is not sufficient. Jacobs, Domicil, § 177. Abandonment in fact of the old domicile, residence in the new locality, and the intention to remain there, are the essential requisites. The length of the residence in the new domicile is quite immaterial, so long as the intention is bona fide, and is consummated by an adequate act. It is well, perhaps, to bear in mind, in considering the facts of the case at bar, that, while a domicile of origin reverts easily upon relinquishment of a domicile of choice, the American decisions have not gone the length of the English authorities in the application of this principle. The English rule that the domicile of origin reverts at once upon the abandonment of the domicile of choice (Udney v. Udney, *supra*) has not been fol-

upon the validity of an election for the consolidation of certain school districts in Mesa County. Elections were held in three school districts, under an act of the legislature approved May 5, 1909 (Laws 1909, chap. 204), entitled, "For the Consolidation of Adjoining School Districts," etc. This proceeding pertains, in part, to the election upon this question in district No. 32, known as "Pomona school district in Mesa county," in which the judges of election canvassed the votes and declared that sixty-two had been cast for, and that sixty had been cast against, such consolidation. After the results of these elections were announced (all of which were for consolidation), the defendants in error, at their union meeting (called as provided for by

allowed in this country, where the rule seems to be that a domicile once acquired continues not only until it is abandoned, but until another is acquired. Jacobs, Domicil, § 114."

Necessity of actual removal.

As held in PEOPLE v. TURPIN, there must be an actual removal to effect a change of residence.

Thus, renting a farm in a town about the 1st of March, and moving on it on the 9th, will not make a man a residence on the 8th, and so able to vote thirty days later, on the 7th of April, although his corn, plows, chickens, and a cupboard were moved before the 9th of March. Carter v. Putnam, 141 Ill. 133, 30 N. E. 681.

Where a man built a house and, with his wife, occupied it on January 6, he and she, until that time, having occupied rooms in another ward, it was held he had not resided in the new house for voting purposes until January 6. State ex rel. Goodell v. McGeary, 69 Vt. 461, 44 L.R.A. 446, 38 Atl. 165.

Where an employee who slept over the shop, with his wife, rented a house in another ward, intending to hold his first residence until after an election, and moved some of his furniture, having a bed in each place, he and his wife sleeping in the rented house during the moving, and, while there, he was taken sick and quarantined till three days before the election, and, on the night before the election, he slept in the old house, but his wife in the new, it was held that he kept his old residence until after the election. Welsh v. Shumway, 232 Ill. 54, 83 N. E. 549.

Where a man rented a house in another voting district, moved in some of his furniture, and there was conflict as to whether he and his wife began to sleep in the new house more than thirty days before the election, the court threw out his vote in the new district, being largely moved there-to because he first attempted to vote in the old district, where he was challenged, and then voted in the new. Ibid.

the act), were elected as the president, secretary, and treasurer of the consolidated district, to be known as "district No. 38," and they entered upon their duties as such.

The prayer of the complaint is that judgment be entered decreeing that the defendants and each of them are unlawfully and illegally usurping the office of school directors of said consolidated school district No. 38, and that they and each of them be ousted therefrom, and ordered to desist from further attempting to exercise such offices; that the organization of the so-called consolidated school district be declared illegal; that the defendants be enjoined from further acting as a school board for said so-called school district No. 38, etc. Among other reasons alleged why this

prayer should be granted is the claim that at said election in district No. 32, there were five illegal votes or ballots cast, received, and counted for consolidation, which were included in the sixty-two votes declared by the judges to have been cast in favor of consolidation; that a majority of said qualified electors of said school district did not cast their ballots for consolidation; that it did not carry at said election by a majority of the votes cast, etc.; that, on account thereof, said consolidated school district No. 38 had not been organized and created according to law, etc. The answer denied in detail the allegations concerning the illegal votes. Trial was to the court. At the conclusion of plaintiff's testimony, a motion for a nonsuit was granted, and the

Removal of family.

It is generally held that the removal of the man's family must precede the change of domicil. Thus, where a resident of Georgia came to Alabama with the design of settling there, leased land, and procured materials for erecting a foundry, returned to Georgia to bring his family, but for some cause was so delayed that it was over two months before he returned with them, it was held that until his return with his family he acquired no domicil in Georgia, and that he was not legally entitled to vote at a presidential election held less than a year thereafter. *State v. Hallett*, 8 Ala. 159.

Where the only evidence of the abandonment of an acquired residence in Osceola was that the plaintiff had gone to Chicago, purchased property, and gone into business with the intention of permanently locating there, his family continuing to reside in Osceola, where to all appearances they were permanently located, it was held that the plaintiff was a resident of Osceola, and rightly assessed and taxed there upon his personal property. *Nugent v. Bates*, 51 Iowa, 77, 33 Am. Rep. 117, 50 N. W. 76.

Where the plaintiff, having been appointed clerk of court, came to Dedham on October 28, and took possession of the apartments of the courthouse assigned for the clerk's use, his family and household establishment remaining in Roxbury until November 12th, when he removed them to Dedham, he having on October 29th contracted for a house in Dedham which he was to rent and occupy from November 12th, and until November 12th he lodging part of the time in Roxbury and part of the time at a public house in Dedham, it was held that he did not become a resident of Dedham to qualify as an elector for Congressman until November 12th. *Williams v. Whiting*, 11 Mass. 424.

Where a resident of Texas, having purchased the controlling interest in a St. Louis hotel company, came there April 15th, and remained about a month, when he returned to Texas, where he remained, 33 L.R.A. (N.S.)

abandoning the hotel business, having never removed his family or any of his household effects from Texas, it was held that he was a citizen of Texas on May 7th, so as to support the jurisdiction of a suit against him in the United States circuit court founded upon diverse citizenship, although he had come to St. Louis to look after his hotel business and with the intention of permanently removing his family there later in the season. *State Sav. Asso. v. Howard*, 31 Fed. 433.

So, in *McCalley v. Moore*, 14 Pa. Co. Ct. 37, a case perhaps not strictly within the scope of this note, it was held that a man engaging in business in another place where he owns no property, and living in lodgings there, with the intention of making that place his permanent residence, will not, while his wife and children remain in the former abode, escape giving security for costs as a nonresident of the place where he lodges.

Where a lawyer in May, 1879, went to D., a distant state, took up government land, built a shanty, returned, and sometime later, viz., May 23, 1880, removed his family to D., selling and conveying his old homestead May 8, 1880, it was held that, conceding that he became a resident of D. in May, 1879, his original homestead was not subject to a judgment lien when conveyed, both because his family had not removed with him at first, and because his wife's signature was necessary to the sale of the homestead. *Savings Bank v. Kennedy*, 58 Iowa, 454, 12 N. W. 479.

Reference may be here made to *Smith v. Croom*, 7 Fla. 81, where, however, the evidence of the man's declarations of intention were conflicting. It was there held that when a man domiciled in one state had not disposed of his family mansion there, which continued to be the actual habitation of his wife and children, his domicil of succession was not changed to another state by his purchase of large tracts of land there, transferring thither the greater part of his slaves, so that the bulk of his property was in the new locality, spending a considerable time there

case dismissed. Numerous errors have been assigned. We will only consider those pertaining to the validity of the votes cast by a Mr. and Mrs. Wooliston, as the court's ruling thereon will necessitate a reversal of the judgment.

This election was held upon November 16, 1909. The substance of the Woolistons' testimony given at the trial (upon May 5, 1910) is to the effect that they moved from Phillips, Nebraska, to a fruit farm in this school district, between the 7th and 10th of March, 1909, when they shipped their household goods and other effects from Nebraska to Grand Junction, and at once moved them out to this place. Until they moved their effects direct to Grand Junction, in March, 1909, they had not lived at

any other place in this state, but had lived at Phillips, Nebraska.

Upon cross-examination it was shown that they first came to Colorado in August, 1908, stopped in Denver a few days; from there went to Colorado Springs; thence to Grand Junction, where they stayed four or five days, during which period they bought this farm. It being occupied, they did not get possession of it at that time, and after their four or five days' sojourn at Grand Junction, they returned to their home in Nebraska, where they continued to reside between six and seven months. In cross-examination it was shown that, prior to coming here in August, 1908, they had decided to locate in Colorado in the future, and came here in August, 1908, for

each year himself, voting in the new place, and ceasing to vote in the old. The court held that the political domicile was not necessarily that of succession, and emphasized the necessity of present, as distinguished from future, intention.

It has been held, however, that under some circumstances the delay of the wife in joining her husband will not postpone his acquisition of a new domicile. Thus, where a resident of Maine, having bought a plantation in Virginia with the intention of making it his permanent home, went there in the fall with one of his daughters, sending on some of his household furniture, and, during the winter, made repairs to the plantation for the convenience of his family, it being his intention to bring his wife and other daughter from Maine in the spring, they living, at least, until January in his house in Maine, which was sold at that time; but, his wife being unwilling to go except with him personally, and he not being able conveniently to come for her until the following September, he then came to Maine, sold the residue of his furniture there on September 28, and sailed for Virginia with his wife and other daughter the following day, it was held that he was not a citizen of Maine on September 28, so as to support suit against him in the United States court there by citizens of New Hampshire. *Burnham v. Rangeley*, 1 Woodb. & M. 7.

Where a man removed from New York to Illinois, purchased a farm, cultivated it, lived on it some three years, having a female relation as housekeeper, making one or more short visits to his wife, who continued to live in New York, he declaring his intention to make Illinois his permanent home, improving his house with that intent, and saying that his wife would join him on the decease of her mother, who was too old to be removed, it was held that his property was not subject to attachment in Illinois as that of a nonresident; but the court held that the reason of the separation was immaterial. *Wells v. People*, 44 Ill. 40.

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And in some cases the prior removal of the family has been held unnecessary.

Thus, where a man bought and obtained possession of a farm, removed part of his household goods to it, and remained on it and commenced work on it with two of his sons, with the intention of making it his permanent residence, it was held that the new residence for voting purposes was acquired at once, although the rest of his family, consisting of a wife and three children, did not move till a fortnight or more later. *Lankford v. Gebhart*, 130 Mo. 621, 51 Am. St. Rep. 585, 32 S. W. 1127.

And it was held in *State ex rel. Smith v. Deniston*, 46 Kan. 359, 26 Pac. 742, that filing a homestead claim in Oklahoma in June, and cultivating it, building a house on it in November and December, where the intention was to have one's home there, and where his family followed him soon after the 7th of November, made a man an illegal voter on November 5th at his old home in Kansas, where he had returned to see his family.

It may be noted that the converse of this decision was reached in *Carwile v. Jones*, 38 Mont. 590, 101 Pac. 153, a case without the scope of this note, as arising under an election law providing that "the place where a man's family resides is presumed to be his place of residence," it being there held that filing upon a homestead with intent to make it one's permanent home effected a change of residence at once, although the filer did not bring his family on till later.

Some cases may be noted where it does not appear from the report that there had been any property acquired or rented in the new locality, and yet it seems that there may possibly have been under the circumstances.

In *Plummer v. Brandon*, 40 N. C. (5 Ired. Eq.) 190, where a man starting for another state declared he was going there to look about, and, if pleased with the country, intended to stay or make a permanent location there, and, taking with him eight or ten valuable negroes, he re-

the purpose of looking up a location; with that object in view, they at that time purchased this farm in the Pomona district for the purpose of making it their future home; but they both testified that after this purchase they went back to Nebraska, and lived there until they came here in March, 1909; that, at the time of the purchase of the farm, they left no personal effects in Colorado. Mr. Wooliston was asked, "Did you live in Phillips, Nebraska, until you moved direct to Grand Junction in March, 1909?" He answered, "Yes, sir; I did." Referring to this question he was further asked, "Had you lived in Colorado previous to coming here at that time,—had you resided in Colorado previous to moving here in March?" His answer was, "No, sir; I had lived in Nebraska, but I had intended to buy here. I had come out here and bought a place in August before." Upon cross-examination he stated he bought this place to make it his home, and that when he bought it he did elect to make that his home; that at that time he had no home except his rented home in Nebraska. Upon redirect examination he stated that he first made his home here about the 7th of March; that he did not be-

come a resident here until 1909, but that he had the place and was intending to come here; that between the date of the purchase in August, 1908, and March, 1909, he resided back in Nebraska, and that he did not reside here until he moved here in March, 1909. He further stated that after his purchase here, his purpose in returning to Nebraska was to prepare to return to Colorado.

Upon the question of intention, in response to the question, "Had you been advised by anyone that you was a qualified voter at that election?" Mrs. Wooliston answered, "I was given the impression by people whom I thought knew. I had never read up on the state law of Colorado, but it was my impression that had we had the intention of residing in the state for a year, that we were entitled to vote at a school election at any rate." From this undisputed testimony, we concluded that Mr. and Mrs. Wooliston, who were husband and wife, did not become residents of this state until they moved here (in March, 1909) for the purpose of making this their permanent home, for which reasons at the time of the election they had not resided within the state a year, as required by our

sided in the new state a year and died, his family continuing to live on and cultivate the old place, it was held, in the matter of administration, that he had not changed his domicile.

Where a debtor left his home in Illinois, and removed with his family to Minnesota, where he resided with them for two years, and then returned with them to his old home, and had stated before going away that, if he liked the country and could do well in his business, he would remain, otherwise he would return, it was held that his homestead in Illinois (leased during his absence) had thus been abandoned as such, and that it was subject to a judgment lien upon debts contracted before his departure. *Cabeen v. Mulligan*, 37 Ill. 230, 87 Am. Dec. 247.

Where a man domiciled in Wisconsin went to Buffalo, New York, and secured employment there, and some months later concluded to make that his residence, and returned to Wisconsin to bring on his family and household goods, but, finding his wife in delicate health, he returned without his family, whom he brought on later, and shortly before they joined him he was sued in Wisconsin, it was held that he had not met the burden of showing that his domicile was changed before his family joined him. *Huntley v. Baker*, 33 Hun, 578.

In *Faires v. Young*, 69 Tex. 482, 6 S. W. 800, it appeared that a physician, about September 1, sold his residence in F. county, settled up his accounts, notified his patrons, did everything necessary to prevent the need of his return, and went to another

county, where he formed a partnership, but was recalled to F. county by the illness of his mother, and was detained there till October 29, by the illness of himself and family, when he left with his family for his new home. His personal effects were shipped October 22, and his family occupied the old home after he had sold it until October 19 or 20, and he was sued in F. county on October 23, and it was held that he was not then a resident of that county.

Where a man rented a farm in an adjoining state, and lived on it with his family for two years cultivating it, and then moved back with his family to his father's house in Illinois, with the intention of making it his home, the fact that his lease had not expired, that he left considerable property behind not disposed of till later, and that some of his household goods were not moved till later, did not make him an illegal voter in Illinois. *Behrensmeyer v. Kreitz*, 135 Ill. 591, 26 N. E. 704.

In *Whitly v. Steakly*, 3 Baxt. 393, it was held that the court correctly charged the jury "that if they believed from the evidence that the plaintiff went to Texas with the intention to make that his residence, or if, after he got to Texas, he determined to make that his residence, and was actually residing there when the attachment was levied, then he would be a nonresident, although he might not have carried his family with him; but if he went on a visit, or had not changed his residence, he would not be a nonresident."

B. B. R.

Constitution. In the case of *Jain v. Bos- sen*, 27 Colo. 427, 62 Pac. 195, this court said: "The requirements of the law on the qualification of electors are mandatory, and must be strictly observed."

All the authorities point to the fact that, to effect a change of residence from one state to another, there must be an actual removal, an actual change of domicile, and a bona fide intention of abandoning the former place of residence and establishing a new one, and the acts of the parties must correspond with such purpose. This intention of the parties to at that time make the state they removed to the place of their permanent residence is to be gathered from their acts, declarations, and from a variety of other circumstances. If a citizen of one state, in good faith, gives up his residence there, goes to another state, and takes up a permanent residence therein, he at once loses his former residence, and acquires a residence in the new domicile, but it must appear that he has left the former state with the intention of then giving up his residence there.

In the case of *Sharp v. McIntire*, 23 Colo. 99, 46 Pac. 115, referring to the construction to be given the residence qualification provided by our Constitution, as it then read, this court said: "We think the residence therein contemplated is synonymous with 'home' or 'domicil,' and means an actual settlement within the state, and its adoption as a fixed and permanent habitation; and requires not only a personal presence for the requisite time, but a concurrence therewith of an intention to make the place of inhabitancy the true home; and that one who has made a home or domicile in some other state or territory, where his family reside, cannot, by a sojourn here on business or pleasure, however long, without abandoning such former domicile, acquire a residence in the constitutional and statutory sense."

It is earnestly urged by the defendants in error that the facts pertaining to the voters *Jones* and *Laffaty* in the case of *Kellogg v. Hickman*, 12 Colo. 256, 21 Pac. 325, are similar to those here, and hence that case is decisive of this one. We cannot agree with this contention. Pertaining to the voter *Jones*, the court said: "The domicile or residence, in a legal sense, is determined by the intention of the party. He cannot have two domiciles at the same time. When he acquires the new home he loses the old one; but to effect this change there must be both act and intention. . . . There must be the act of severance from the old place, with the intention of uniting with the new place. The intention should be gathered from the acts of the

party." Referring to the voter *Laffaty*, the court said: "The act of changing from Illinois to Colorado was consummated May 3d. That such was the intention is verified by every act thenceforward. This voter had no family." Referring to which it was further stated: "The domicile or residence in the state may commence before a definite county or precinct is fixed for a permanent residence. . . . As to the six months' residence required by statute, if the purpose of remaining in the state be clearly proved, a particular home is not necessary."

In the case under consideration the particular home to be secured in the future was decided upon; it was purchased in August, 1908, but it was understood that possession could not be secured at that time. It is true, these people intended to make it their home in the future, to establish their residence there at a later period. The fact was then settled in their minds as to where their home in Colorado would be when it became established, to wit, when they gave up their home in Nebraska and located here. This could not be done so long as they were maintaining a home in Nebraska, which they had not yet abandoned. Neither the intent nor the act of doing so was perfected, because the intent in this case referred to a future date, and the physical act itself was not accomplished until some future date, so that the facts urged in the case of *Kellogg v. Hickman*, supra, are not applicable here. This is further demonstrated by the questions asked both Mr. and Mrs. *Wooliston* as to when they did establish their residence in Colorado, and as to when they moved here, to both of which they frankly answered, in March, 1909.

The facts pertaining to the voter *Herne* in the case of *Kellogg v. Hickman*, supra, are more in harmony with the facts here. In speaking of this the court said: "The evidence does not make it clear as to the time this voter terminated his residence in Kansas. It appears from his testimony that he was a man with a family, residing in Abilene, Kansas, and was interested in a drug store there; that he came to Colorado May 1st, and looked around a couple of weeks for a location. About the middle of May he went back to Kansas, to close out his interest in the drug store there. He did so then, and broke up housekeeping there when the drug store was sold. He returned to Colorado, and his wife went visiting until he could send for her. It does not appear that the act of terminating his residence in Kansas had occurred until after the 8th day of May. He could not have his residence in Colorado while he had one in Kansas. The residence there must

terminate before the residence here can commence. The evidence tends to show that he did not terminate his residence there until he sold his drug-store interest there, which was after May 8th."

It stands undisputed that at the time the Woolistons first came to Colorado they had not abandoned their residence in Nebraska, and, after staying here but a few days while making the purchase of the farm, they again returned to the state of Nebraska, where they continued to occupy their home there for a period of about seven months, at the expiration of which time they abandoned it, shipped their goods to Colorado, and came themselves, which was in March, 1909, when they moved out upon this property; at which time, and not before, both the act and intent were consummated by which they became residents of the precinct as well as of the state. When one has a residence either of origin or of choice, he must abandon it before he can acquire another, and to effect this there must be both act and intention. There must be the act of severance from the old place, with the intention of uniting with the new place, and these must concur. 10 Am. & Eng. Enc. Law, 2d ed. p. 599. The abandonment of the old residence must be actual. The mere intention to change the domicile unaccompanied by an actual removal, avails nothing. *State v. Hallett*, 8 Ala. 169; *Smith v. Croom*, 7 Fla. 81.

A very recent case where the facts were similar to those under consideration is that of *Welsh v. Shumway*, 232 Ill. 54, 83 N. E. 549, where numerous cases are cited, all of which are in harmony with our conclusions here.

The case of *State v. Hallett*, supra, is directly in point. At page 161 of 8 Ala., in speaking to this point, the court said: "Here the facts were that the defendant, being domiciled in Georgia, came to this state with the design of settling here, and manifested his intention of making this state his permanent residence by leasing a piece of land, procuring materials for the erection of a foundry, and going to Georgia to bring his family. These acts all mark, unequivocally, his intention to change his residence from Georgia to this state. These facts, however, are not sufficient to cause a loss of the domicile he previously had. If, on his return to Georgia, he had died before being able to carry his purpose into effect, it can admit of no doubt, the courts of Georgia, and not of this state, would have been entitled to distribute his estate."

The above conclusions are applicable here. In case Mr. Wooliston, after returning to his home in Nebraska, had changed his mind and decided that he would not re-

turn to Colorado, would anyone have questioned his right to vote there? Likewise, had he died before returning, the courts of Nebraska, and not of this state, would have been entitled to distribute his personal estate. The evidence having established that Mr. and Mrs. Wooliston were not entitled to vote, it follows that the trial court misconceived the legal effect of their testimony, and erred in not requiring them to answer how they voted. By our present system of voting at general elections, under what is commonly called the Australian ballot system, in cases of this kind the ballots cast by these voters could have been secured, identified and rejected; but as our school laws do not so provide, and the evidence showing that no record was kept by which any ballots cast at this election could be identified, the testimony of the voter was then competent. The law protecting the secrecy of the ballot is only intended for lawful voters, and does not apply to or protect illegal voters, who, when that fact is shown, can be forced to testify as to how they voted. Colo. Const. art. 7, § 9; *Black v. Pate*, 130 Ala. 514, 30 So. 434; *Montgomery v. Dormer*, 181 Mo. 5, 79 S. W. 913; *Van Winkle v. Crabtree*, 34 Or. 462, 55 Pac. 831, 56 Pac. 74; *Vallier v. Brakke*, 7 S. D. 343, 64 N. W. 180; *State ex rel. Heath v. Kraft*, 18 Or. 550, 23 Pac. 663; *Lane v. Bailey*, 29 Mont. 548, 75 Pac. 191.

It is true, if it is not shown that the vote was illegal, the voter cannot be compelled to answer how he voted; but if illegal, in addition to compelling him to answer, other evidence may be received and considered on the subject. *Black v. Pate*, 130 Ala. 514, 30 So. 434; *Rexroth v. Schein*, 206 Ill. 80, 69 N. E. 240; *Welsh v. Shumway*, 232 Ill. 55, 83 N. E. 549; *Sorenson v. Sorenson*, 189 Ill. 179, 69 N. E. 555; *People ex rel. Smith v. Pease*, 27 N. Y. 45, 84 Am. Dec. 242; *People ex rel. Boyer v. Teague*, 106 N. C. 576, 19 Am. St. Rep. 547, 11 S. E. 665.

Other errors are assigned, some pertain to the validity of other votes, others urge constitutional questions, while others pertain to the regularity of this election in other respects, etc.; but, inasmuch as the ruling upon the two votes heretofore considered compels a reversal of the judgment, and, if they were cast as counsel claim they were, and the way the record as a whole appears to indicate, it makes unnecessary the consideration of any of the other questions urged.

For the reasons stated, the judgment is reversed, and the cause remanded.

Reversed.

KANSAS SUPREME COURT.

NORA L. SAVAGE

v.

MODERN WOODMEN OF AMERICA

and

RUSSELL SAVAGE et al., Appts.

(— Kan. —, 113 Pac. 802.)

Appeal — departure in pleading — refusal to reverse.

1. A judgment will not be reversed because new matter in a reply constitutes a departure from the petition, although timely objection has been made thereto in the trial court, where, notwithstanding the fault in the pleading, the contention of each par-

Headnotes by MASON, J.

Note. — Effect of consideration moving from beneficiary originally named in the certificate issued by a mutual benefit association, upon the right of a member to change beneficiaries.

This question is discussed in the note to *Stronge v. Supreme Lodge, K. P. 12 L.R.A. (N.S.) 1206*, where the cases up to that time will be found collected. In that note it is said that, notwithstanding the general rule that the beneficiary in a certificate issued by a mutual benefit association has no vested interest therein prior to the death of the member, and that the latter may change beneficiaries at his pleasure if he conforms to the rules of the association, yet, by an agreement sufficiently specific between the member and such beneficiary, duly performed by the latter, the former may waive his right to change beneficiaries and the latter may acquire a vested right which will be recognized, at least, on principles of equity, against a substituted beneficiary having no superior equity. This principle of law finds support in cases reviewed in that note, in which the consideration moving from the beneficiary was money advanced to, or a promise of support of, the assured.

It is also stated in that note that there was some conflict among the cases whether the payment of assessments by the beneficiary originally designated in pursuance of an agreement or understanding to that effect, would operate to give the beneficiary a vested right, and prevent the member from changing beneficiaries; and the same conflict is found in the cases decided since the preparation of that note.

"Where a proper beneficiary has been designated, and the beneficiary has advanced the member money upon the faith of the certificate, or paid dues and assessments thereon, the fraudulent change of the certificate without the knowledge of the beneficiary will not be permitted to defeat the right of the beneficiary named in the original certificate, on the ground that such beneficiary has acquired a beneficial interest which may be enforced in a court of equity."

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ty has been made clear, and each has had full opportunity to develop the facts.

Benefit society — interest of beneficiary — right to change.

2. Where the designation of the beneficiary in a certificate issued by a mutual benefit association is made in pursuance of an agreement founded upon a sufficient consideration, the person so designated acquires a vested interest, and, unless by reason of countervailing equities, cannot be displaced, although the rules of the order permit the member to change the beneficiary at will.

Same — agreement with wife — payment of dues.

3. Where a husband agrees that if his wife will help to pay the assessments upon a certificate in a mutual benefit association in her favor, he will not change the beneficiary, and in consequence of such agree-

Supreme Council, *R. A. v. McKnight*, 238 Ill. 349, 87 N. E. 299.

"Where . . . a contract exists between the member of a mutual benefit society, on whose life a benefit certificate has been issued, and the beneficiary named therein, whereby it has been agreed that said beneficiary should be named in such certificate on consideration that he would pay the dues and assessments on such benefit certificate, or that he would render unto such member some other valuable consideration therefor, and where such contract has been fully performed and such consideration rendered on the part of the beneficiary, the courts recognize the equities arising in favor of such a beneficiary, and will protect them, as against a person who has been substituted as a beneficiary, and who has no superior equities in his favor." *McKeon v. Ehringer*, — Ind. App. —, 95 N. E. 604.

To the same effect are *Hill v. Hill*, 130 Ill. App. 278; *Callahan v. Supreme Tent, K. M.* 121 N. Y. Supp. 354; *Pollock v. Household of Ruth*, 150 N. C. 211, 63 S. C. 940; *Eatman v. Eatman*, — Tex. Civ. App. —, 135 S. W. 165.

On the other hand, it was held in *Grand Lodge, A. O. U. W. v. Denzer*, 129 Ky. 202, 110 S. W. 882; *Grand Lodge, A. O. U. W. v. McFadden*, 213 Mo. 269, 111 S. W. 1172; and *Supreme Council, R. A. v. Heitzman*, 140 Mo. App. 105, 120 S. W. 628, that a member of a fraternal benefit association was not prevented from changing the beneficiary by the mere payment of assessments and dues by the beneficiary originally named, under an agreement with the member that the beneficiary should pay them.

In *Grand Lodge, A. O. U. W. v. Jones*, 47 Tex. Civ. App. 533, 106 S. W. 184, an injunction was refused to prevent a fraternal benefit association from changing, in accordance with its laws and at the direction of an assured, the beneficiary in a certificate issued by it, thereby defeating the claim of a creditor who was the beneficiary named in such certificate, as trustee for a son of the assured, under an agreement by which the creditor was to keep alive the certificate

ment she makes a part of the payments thereon, using for the purpose what are in fact the proceeds of her own labor outside of her ordinary household duties, she cannot be displaced as such beneficiary without her consent, notwithstanding she commingles her earnings with those of her husband as soon as received, keeping no separate account thereof, and then takes the money for the assessments from the common fund.

Witness — transaction with decedent — benefit certificate.

4. The statutory rule that no party shall testify in his own behalf in respect to any transaction had personally with a person since deceased, where the adverse party is the heir at law, next of kin, or assignee of such deceased person, does not apply where the adverse party claims as the beneficiary of a certificate issued by a mutual benefit association to such decedent, because the beneficiary named in the certificate is not the assignee of the member to whom it was issued, and the circumstance that he is in fact his heir or next of kin is not material where his claim is not founded on that relationship.

(February 11, 1911.)

APPEAL by defendants Russell Savage et al. from a judgment of the District Court for Wyandotte County in plaintiff's favor in an action to recover upon a certificate issued by a mutual benefit association. Affirmed.

The facts are stated in the opinion.

Messrs. Nathan Cree, E. R. Blum, and C. O. Littick, for appellants:

Mrs. Savage never paid anything to keep up the policy out of any earnings which were in law her own.

Wyandotte v. Agan, 37 Kan. 528, 15 Pac. 529; Mewhirter v. Hatten, 42 Iowa, 288,

by paying the assessments thereon, and in return therefor to discharge his claim against the insured out of the proceeds thereof. It is to be noted that the laws of the association required the beneficiary to be a member of the family of, or related by blood to, the assured, but the court merely assumed the validity of the certificate without passing upon that question.

It is also stated in the note above referred to that the voluntary payment of assessments upon a certificate by the beneficiary named therein, without any agreement with the member to do so, will not deprive the latter of the right to change beneficiaries, nor entitle the beneficiary originally named to the insurance fund as against a subsequent beneficiary named by the member in accordance with the rules of the association. This proposition of law finds further support in Supreme Tent K. M. v. Altmann, 134 Mo. App. 363, 114 S. W. 1107, decided since the preparation of that note.

33 L.R.A. (N.S.)

20 Am. Rep. 618; Hamill & Co. v. Henry, 69 Iowa, 752, 28 N. W. 32; McClintic v. McClintic, 111 Iowa, 615, 82 N. W. 1017; Danham v. Danham, 30 W. Va. 222, 4 S. E. 273; Birbeck v. Ackroyd, 74 N. Y. 356, 30 Am. Rep. 304; McCluskey v. Providence Sav. Inst. for Savings, 103 Mass. 300; Klapper v. Metropolitan Street R. Co. 34 Misc. 528, 69 N. Y. Supp. 955; Barnes v. Klug, 129 App. Div. 192, 113 N. Y. Supp. 325; Van Doran v. Marden, 48 Iowa, 186; Grant v. Green, 41 Iowa, 88; Coleman v. Burr, 93 N. Y. 17, 45 Am. Rep. 180; Overbeck v. Ahlmeier, 106 Ill. App. 606; Switzer v. Kee, 146 Ill. 577, 35 N. E. 180; Brittain v. Crowther, 4 C. C. A. 341, 12 U. S. App. 148, 54 Fed. 295; Citizens' Street R. Co. v. Twiname, 121 Ind. 375, 7 L.R.A. 352, 23 N. E. 159; Kennedy v. Swisher, 34 Ind. App. 676, 73 N. E. 724; Plummer v. Trost, 81 Mo. 425; Whitaker v. Whitaker, 52 N. Y. 368, 11 Am. Rep. 711; Reynolds v. Robinson, 64 N. Y. 589; Michigan Trust Co. v. Chapin, 106 Mich. 384, 58 Am. St. Rep. 490, 64 N. W. 334; Perkinson v. Clarke, 135 Wis. 584, 116 N. W. 229.

The alleged contract was made with a deceased person; in such cases the contract must be established by the "strongest evidence."

Hamlin v. Stevens, 177 N. Y. 39, 69 N. E. 118; Rosseau v. Rouss, 180 N. Y. 116, 72 N. E. 916; Re Donaldson, 126 Iowa, 174, 101 N. W. 870.

A voluntary payment of a part, or even of the whole, of the dues, by the beneficiary, will not give such beneficiary any interest in the policy or its proceeds.

Fisk v. Equitable Aid Union, 7 Sadler (Pa.) 567, 20 W. N. C. 290, 11 Atl. 84; Masonic Mut. Ben. Soc. v. Burkhart, 110 Ind. 189, 10 N. E. 79, 11 N. E. 449; Masonic

Another proposition established by the cases cited in the note above referred to, that the failure of the beneficiary, without the fault of the member, to perform the agreement on his part constituting the consideration for his designation as beneficiary, will deprive the beneficiary of any vested right which he or she might otherwise have in the certificate, and enable the member to designate a new beneficiary, is also supported by Eatman v. Eatman, — Tex. Civ. App. —, 135 S. W. 165 (failure to continue payment of assessments).

In Knights of Modern Maccabees v. Sharp, post, 780, it was held that where a husband and wife mutually insured their lives for the benefit of each other, and further agreed that the survivor would continue the insurance for the benefit of their children, such agreement could not be enforced by the children so as to prevent the survivor from changing the beneficiaries.

J. A. C.

Benev. Asso. v. Burch, 109 Mo. 560, 19 S. W. 25; Preusser v. Supreme Hive, L. M. 123 Wis. 164, 101 N. W. 358; Pollock v. Household of Ruth, 150 N. C. 211, 63 S. E. 940; Sabin v. Phinney, 30 Am. St. Rep. 681, and note, 134 N. Y. 423, 31 N. E. 1087; Pilcher v. Puckett (Modern Woodmen v. Puckett) 77 Kan. 284, 17 L.R.A.(N.S.) 1083, 94 Pac. 132; Ptacek v. Pisa, 134 Ill. App. 155; Grand Lodge, A. O. U. W. v. Denzer, 129 Ky. 202, 110 S. W. 882; Grand Lodge, A. O. U. W. v. Jones, 47 Tex. Civ. App. 533, 106 S. W. 184; Supreme Council, R. A. v. Heitzman, 140 Mo. App. 105, 120 S. W. 628; Jory v. Supreme Council, A. L. H. 105 Cal. 20, 26 L.R.A. 733, 45 Am. St. Rep. 17, 38 Pac. 524; Titaworth v. Titaworth, 40 Kan. 571, 20 Pac. 213; Atchison, T. & S. F. R. Co. v. Wagner, 33 Kan. 660, 7 Pac. 204; Moulton v. Sanford & C. P. R. Co. 99 Me. 508, 59 Atl. 1023; Theobold v. Shepard Bros. — N. H. —, 71 Atl. 26; First Nat. Bank v. Farmers' & M. Nat. Bank, 171 Ind. 323, 84 N. E. 1077, 86 N. E. 417; Chapman v. Liverpool Salt & Coal Co. 57 W. Va. 395, 50 S. E. 601.

Messrs. W. L. Wood and J. O. Fife, for appellee:

Plaintiff acquired a vested interest in the insurance.

29 Cyc. Law & Proc. pp. 127, 128; Leaf v. Leaf, 92 Ky. 166, 17 S. W. 354, 854; McGrew v. McGrew, 190 Ill. 604, 60 N. E. 861; Supreme Council, R. A. v. Tracy, 109 Ill. 123, 48 N. E. 401; Benard v. Grand Lodge, A. O. U. W. 13 S. D. 132, 82 N. W. 404; Jory v. Supreme Council, A. L. H. 105 Cal. 20, 26 L.R.A. 733, 45 Am. St. Rep. 17, 38 Pac. 524; King v. Supreme Council, C. M. B. A. 216 Pa. 553, 65 Atl. 1108; Stronge v. Supreme Lodge, K. P. 189 N. Y. 346, 12 L.R.A.(N.S.) 1206, 121 Am. St. Rep. 902, 82 N. E. 433, 12 A. & E. Ann. Cas. 941; Smith v. National Ben. Soc. 123 N. Y. 85, 9 L.R.A. 616, 25 N. E. 197; Carter v. Carter, 35 Ind. App. 73, 72 N. E. 187; Goodrich v. Bohan, — Tenn. —, 52 S. W. 1105; Grand Lodge, A. O. U. W. v. O'Malley, 114 Mo. App. 191, 89 S. W. 68; Sovereign Camp, W. W. v. Wood, 114 Mo. App. 471, 89 S. W. 891; Supreme Council, C. B. L. v. Murphy, 65 N. J. Eq. 60, 55 Atl. 497; Hoeft v. Supreme Lodge, K. H. 113 Cal. 91, 33 L.R.A. 174, 45 Pac. 185; Cade v. Head Camp, P. J. W. W. 27 Wash. 218, 67 Pac. 603; Grimbley v. Harrold, 125 Cal. 24, 73 Am. St. Rep. 19, 57 Pac. 558.

Plaintiff had the right to testify in her own behalf.

Heery v. Reed, 80 Kan. 381, 102 Pac. 846; Clifton v. Meuser, 79 Kan. 655, 100 Pac. 645; Griffith v. Robertson, 73 Kan. 666, 85 Pac. 748.
33 L.R.A.(N.S.)

Mason, J., delivered the opinion of the court:

In 1898 George T. Savage obtained a benefit certificate in the Modern Woodman of America in favor of his wife, Nora L. Savage. The rules of the association authorized him to change the beneficiary at his pleasure. On July 13, 1908, he elected to constitute his son, Russell Savage, and his daughter, Mabel Sebree, the beneficiaries. Upon complying with the prescribed forms, he obtained, on July 16th, a new certificate designating them as such. Three days later he died. His widow brought action for the amount of the certificate, making the son and daughters parties. The association admitted indebtedness under one certificate or the other, and asked that the rights of the rival claimants be determined. A trial resulted in a judgment in favor of the widow, and the son and daughter, who will be referred to as the defendants, appeal.

The plaintiff's petition declared upon the original certificate. The defendants each filed an answer and cross petition setting out the change of beneficiary and the issuance of the new certificate. The plaintiff filed replies alleging in effect that George T. Savage had agreed with her that if she would help pay the premiums, he would never change the beneficiary; that she had done so for a term of years, thereby acquiring a vested right in the certificate; and that the attempted change was therefore ineffectual. The defendants demurred, and now urge that a reversal should be ordered upon the ground that the new matter in the replies constituted a departure from the petition; that, to have been available to the plaintiff, the allegations regarding the accrual of a vested right should have been inserted in the petition, instead of in the replies. As the issues were framed, the contention of each party was made clear, and in the trial neither was denied a full opportunity to develop the facts. Whether or not the plaintiff's pleadings presented a departure, and whether or not she should have been required to reshape them, the error, if any, did not prejudice the substantial rights of the defendants, and does not justify a reversal.

While there is some conflict on the subject, the weight of authority supports the view, which we think well founded in reason, that, where the designation of the beneficiary in a certificate issued by a mutual benefit association is made in pursuance of an agreement founded upon a sufficient consideration, the person designated acquires a vested interest, and, unless by reason of countervailing equities, cannot be displaced, although the rules of the association permit the member to change the beneficiary at

will. *Stronge v. Supreme Lodge*, K. P. 189 N. Y. 346, 82 N. E. 433, 12 L.R.A. (N.S.) 1207, note, 121 Am. St. Rep. 902, 12 A. & E. Ann. Cas. 944, note. See also opinion in *Great Camp, K. O. T. M. v. Savage*, 135 Mich. 459, 98 N. W. 26.

"Where the member, upon taking out the certificate, makes an agreement with the beneficiary that the latter should pay the assessments, and that no substitution should be made, the beneficiary, upon performing this agreement, acquires a vested right." 3 Am. & Eng. Enc. Law, 2d ed. p. 993.

"Equities may exist in favor of the original beneficiary which will preclude the member from substituting a new beneficiary who has no equity superior to that of the person originally designated. . . . An equity in favor of the original beneficiary, precluding the substitution of another in his place, may rest on a contract between him and the member, based on a sufficient consideration, by which he is to receive the benefits. Thus, if a member designates a beneficiary, or, having designated a beneficiary, delivers the certificate to him, on an agreement that he shall receive the benefits in consideration of past advances made by him, or present or future advances, or in consideration of his promise to pay dues and assessments, which promise is fulfilled, the member cannot thereafter substitute a different person as beneficiary." 29 Cyc. Law & Proc. p. 128.

The defendants claim that there was no substantial evidence of any agreement on the part of George T. Savage to name and retain his wife as the beneficiary of his membership certificate. The argument is in part a challenge of the credibility of a portion of the testimony. A daughter of the plaintiff testified that she heard her father tell her mother that he intended to take out insurance for her if she would assist in paying the dues, and he would never change it. The plaintiff testified that he said substantially the same thing to the children in her presence. Her testimony is objected to as a violation of the statute reading: "No party shall be allowed to testify in his own behalf in respect to any transaction or communication had personally by such party with a deceased person, when the adverse party is the executor, administrator, heir at law, next of kin, surviving partner, or assignee of such deceased person, where they have acquired title to the cause of action immediately from such deceased person." Gen. Stat. 1909, § 5914 (Code Civ. Proc. § 320). The plaintiff maintains that the rule has no application, because, she testified, that in the particular conversation to which she referred her husband addressed his remarks to the children more than to her. We think it

unnecessary to indulge in this refinement. The statute does not apply because the defendants are not within its protection.

"The statutes are strictly construed in respect to the persons excluded from testifying, and the exclusion will not be extended by implication to a class of persons not named, though the reasons for embracing them may have been equally as strong as those which existed for excluding the persons expressly designated. . . . Where the statutes prohibit parties or persons interested from testifying when the adverse or opposite party sues or defends as trustee, guardian, executor, administrator, heir, legatee, devisee, etc., in order for such opposite party to be entitled to the protection of the statute, he must come within its terms, and, if the suit is not by or against parties in such enumerated classes, the other may testify. The rule only applies in favor of the persons named in the various statutes." 30 Am. & Eng. Enc. Law, 2d ed. pp. 983, 1019.

The rule of strict construction is in full force in this state. A witness is deemed competent unless clearly rendered incompetent by the terms of the statute. *Williams v. Campbell*, 84 Kan. —, 113 Pac. 800, decided this session. The defendants are not, within the meaning of the law, heirs or next of kin of the deceased person, George T. Savage. They do not claim in that capacity or in virtue of that relationship, and the circumstance that they are so related to him does not enable them to invoke the statute. 30 Am. & Eng. Enc. Law, p. 1022, note 8; 30 Am. & Eng. Enc. Law, p. 1024, paragraph "f." They are not assignees of the decedent. "An assignment involves contractual relations. But the claim of a beneficiary is not based upon contract on his part." *Shuman v. Supreme Lodge*, K. H. 110 Iowa, 480, 482, 81 N. W. 717, 718. See also *Crowell v. Northwestern Nat. L. Ins. Co.* 140 Iowa, 258, 118 N. W. 412; 30 Am. & Eng. Enc. Law, p. 1023, ¶ "d." The supreme court of Michigan holds that under such circumstances the witness is disqualified. *Franken v. Supreme Court*, I. O. F. 152 Mich. 502, 116 N. W. 188. The ruling seems to have originated in *Wallace v. Fraternal Mystic Circle*, 127 Mich. 387, 86 N. W. 853, although it was there justified upon the ground that in principle it was controlled by an earlier decision. In the opinion it was said: "It is strenuously contended that the plaintiff is not a legatee, heir, or assignee, within the meaning of the statute. It is possibly correct to say that she does not come within the precise words of the statute, and, were the question entirely new, there might be ground for hesitancy. It should be kept in mind,

however, that plaintiff is a beneficiary of the assured, and that, up to the time of his decease, he retained the power of disposition of his policy. She takes, therefore, by virtue of a right bestowed upon her by the deceased." At page 389 of 127 Mich. That case was followed in *Great Camp, K. O. T. M. v. Savage*, 135 Mich. 459, 98 N. W. 26, although two of the five justices dissented. The doctrine results from excluding witnesses who are within the reason of the statutory rule, although not within its terms, while the general practice and the practice in this state is to the contrary.

The defendants assert that there is nothing to show that the plaintiff ever accepted the proposition of her husband to make her the beneficiary if she would help pay the assessments. We think this may fairly be implied from the fact that she did render such assistance, and from her general course of conduct. There was evidence that many of the payments were the act of the plaintiff; but the defendants maintain that they were made from community money, of which the husband was, in legal contemplation, the owner; that an agreement of a wife to assist in maintaining such a common fund is in effect to promise to perform her marital duties, and cannot be made the basis of a business contract, within the rule of such cases as *Dempster Mill Mfg. Co. v. Bundy*, 64 Kan. 444, 56 L.R.A. 739, 67 Pac. 816. The plaintiff in a sense had no separate property. But there was evidence that at various times she was given money by her relatives, which she used in paying assessments; that she made money by keeping boarders and selling milk, eggs, and chickens; that, while her husband was on the police force, she borrowed money from her mother and started a grocery store, which was run in her husband's name, but which she personally managed for a considerable period. No separate sum was at any time set apart as belonging to her individually, and the assessments were paid out of the common fund, except where, as already noted, money furnished by her relatives was used for that purpose. In this state the married woman's field of individual action is enlarged beyond the bare letter of the statute. Her marriage does not deprive her of the legal capacity to enter into a personal contract. *Harrington v. Lowe*, 73 Kan. 1, 16, 4 L.R.A. (N.S.) 547, 84 Pac. 570. According to the usual interpretation of statutes similar to our own, the wife is entitled to treat as her separate property the proceeds of her labor outside of her ordinary household duties. 21 Cyc. Law & Proc. p. 1393; 25 Am. & Eng. Enc. Law, p. 357. Here the plaintiff had a basis for the creation of an independent estate. 33 L.R.A. (N.S.)

The fact that she permitted the proceeds of her efforts to be commingled with the community property ought not to operate to her prejudice in such a case as the present. It is unnecessary to review decisions made where the rights of creditors are concerned, for the questions there presented are very different from that now under discussion. Upon the plaintiff's version of the facts, she agreed to help pay the assessments and did so, using to that end in part, at least, the fruits of her own efforts exerted in a field beyond the scope of her marital obligation. This furnished a sufficient consideration for the agreement, notwithstanding her earnings were turned into the common fund. The judgment is affirmed.

All the Justices concur.

KANSAS SUPREME COURT.

THE SUPREME LODGE OF THE KNIGHTS OF PYTHIAS

v.

LLOYD B. FERRELL, Appt.,
and
EDITH M. STANLEY, formerly Edith M. Ferrell.

(83 Kan. 491, 112 Pac. 155.)

Husband and wife — antenuptial contract — execution — validity.

1. In an action by a widow to maintain her rights derived through the execution of a parol antenuptial contract, the contract being executed by both parties thereto, the statute of frauds has no application. Such executed contract is valid.

Same — change of insurance policy.

2. Where, in the part performance of an antenuptial contract, a husband procures a change in a certificate of insurance in which his children were the sole beneficiaries, so as to make his wife an equal beneficiary with the children, and where she has fully executed the antenuptial contract on her part, she thereby obtains an equitable interest in the certificate, and he cannot thereafter, without her consent, surrender the certificate, and obtain the issuance of a new one in which a third party is named as the sole beneficiary, and thus divest her of her interest in the certificate which was procured pursuant to such contract.

Headnotes by SMITH, J.

Note. — The question of the effect of consideration moving from the beneficiary originally named in the certificate issued by a mutual benefit association, upon the right of the member to change beneficiaries, is discussed in the note to *Savage v. Modern Woodmen*, ante, 773.

Insurance — rights of beneficiary — possession of policy.

3. The rights of a beneficiary named in a certificate of insurance in no wise depend upon the possession thereof by the beneficiary.

(December 10, 1910.)

APPEAL by defendant Ferrell from a judgment of the District Court for Sedgwick County in favor of defendant Stanley in an action brought to determine rights under a certificate issued by a fraternal insurance company. Affirmed.

The facts are stated in the opinion.

Messrs. Kos Harris and V. Harris, for appellant:

The antenuptial agreement was contrary to the statute of frauds, being an agreement made in consideration of marriage.

Lloyd v. Fulton, 91 U. S. 479, 23 L. ed. 363; Caylor v. Roe, 99 Ind. 1; Chambers v. Sallie, 29 Ark. 407; Wood v. Savage, 2 Dougl. (Mich.) 316; Manning v. Riley, 52 N. J. Eq. 39, 27 Atl. 810; Finch v. Finch, 10 Ohio St. 501; Henry v. Henry, 27 Ohio St. 121; Flenner v. Flenner, 29 Ind. 564; Brenner v. Brenner, 48 Ind. 262; Brown v. Conger, 8 Hun, 625; Eck v. Hatcher, 58 Mo. 235; McAnulty v. McAnulty, 120 Ill. 28, 60 Am. Rep. 552, 11 N. E. 400; Deshon v. Wood, 148 Mass. 133, 1 L.R.A. 518, 19 N. E. 1; Reville v. Dubach, 60 Kan. 572, 57 Pac. 522.

Messrs. Walter T. Matson and Dempster O. Potts, for appellee:

An oral antenuptial agreement which has been fully executed is not thereafter affected by the statute of frauds.

Weld v. Weld, 71 Kan. 622, 114 Am. St. Rep. 517, 81 Pac. 183; 20 Cyc. Law & Proc. p. 304; Larsen v. Johnson, 78 Wis. 300, 23 Am. St. Rep. 404, 47 N. W. 615; Dates v. Babcock, 95 Cal. 479, 16 L.R.A. 745, 29 Am. St. Rep. 133, 30 Pac. 605; Bibb v. Allen, 149 U. S. 481, 37 L. ed. 819, 13 Sup. Ct. Rep. 950; Roberts v. Roberts, 22 Wend. 140; Andrews v. Jones, 10 Ala. 400; Satterthwaite v. Emley, 4 N. J. Eq. 489, 43 Am. Dec. 618; Hussey v. Castle, 41 Cal. 239; Earl v. Champion, 65 Pa. 191; Crane v. Gough, 4 Md. 316; Matney v. Linn, 59 Kan. 619, 54 Pac. 668.

There are conditions when insured cannot change the beneficiary.

McGrew v. McGrew, 190 Ill. 604, 60 N. E. 861; Leaf v. Leaf, 92 Ky. 166, 17 S. W. 355, 854; Curtis v. Tracy, 169 Ill. 233, 61 Am. St. Rep. 168, 48 N. E. 400; 29 Cyc. Law & Proc. p. 128; Jory v. Supreme Council A. L. H. 105 Cal. 20, 26 L.R.A. 733, 45 Am. St. Rep. 17, 38 Pac. 524. 33 L.R.A. (N.S.)

Smith, J., delivered the opinion of the court:

The Supreme Lodge of the Knights of Pythias, a fraternal insurance corporation, commenced this action, and in its petition alleged that one George Ferrell, deceased, was at the time of his death a member in good standing of the organization; that he had a benefit certificate for \$3,000; that the amount was due upon the certificate, and that the corporation was ready to pay, but that there was a dispute as to who among the parties whom it made defendants in the action, namely, Lloyd B. Ferrell, Edith M. Stanley (formerly Ferrell, (Adele C. Ferrell, and Paul H. Ferrell, was entitled to receive payment. Lloyd B. Ferrell answered and alleged that he was entitled to the entire sum of \$3,000 under the certificate. Edith M. Stanley answered, and alleged that she was entitled to the sum of \$1,000 of the amount of the certificate. The defendants Adele C. Ferrell and Paul H. Ferrell did not appear.

The undisputed facts are that about May, 1885, George Ferrell became a member of the association, and took out a certificate for \$3,000 payable to his wife, Mary E. Ferrell; that some time prior to the 14th day of June, 1899, Mary E. Ferrell died, leaving two children, Adele C. Ferrell and Paul H. Ferrell; that on June 14, 1899, George Ferrell surrendered the certificate and took out a new one, naming his two children as the beneficiaries; that on the 10th day of January, 1901, he surrendered the second certificate and took out a new one for the same amount, payable to Edith M. Ferrell, his then wife, and to his two children, in the sum of \$1,000 to each; and that the last-named certificate remained in force until about the 5th of December, 1907, when George Ferrell surrendered it and took out a new certificate for the same amount, making Lloyd B. Ferrell, his brother, the sole beneficiary, and that shortly thereafter, and before the commencement of this action, George Ferrell died.

In her answer, Edith M. Stanley alleges that, prior to her marriage to George Ferrell, and at a time when his two children stood as the beneficiaries of the certificate, George Ferrell proposed to her that, if she would marry him and care for his children, he would provide her a home and care for her, and would have the certificate changed so that she should receive \$1,000 from the benefit certificate and each of the children \$1,000, in case of his death before her death; that, in consideration of such promise, she consented to marry him and did marry him, and that he executed the antenuptial contract by surrendering the old certificate, and procuring a new one to

be issued in accordance with the terms of his agreement; and that the subsequent change of the certificate, making it payable entirely to Lloyd B. Ferrell, was without her consent, and in violation of her rights under the contract. This claim Lloyd B. Ferrell denied, and a trial of the issue thus formed was had to the court and a jury. Until Edith M. Stanley had offered her evidence, Lloyd B. Ferrell had demurred thereto, and the court had overruled the demurrer, whereupon the parties agreed that the jury should be discharged and the case decided by the court, Lloyd B. Ferrell reserving his exceptions to the ruling on the demurrer to the evidence. The court rendered judgment in favor of Edith M. Stanley as to the amount claimed. To reverse this judgment, Lloyd B. Ferrell brings the case here.

Edith M. Stanley, being called as a witness in her own behalf, was asked to relate the conversation by which the alleged antenuptial contract was made. An objection was made thereto on the grounds that the contract, not being in writing, was void. The objection was overruled and the ruling is assigned as an error. Section 3838, Gen. Stat. 1909 (Laws 1905, chap. 266, § 1), being a portion of the statutes to prevent frauds and perjuries, reads in part: "No action shall be brought whereby . . . to charge any person upon any agreement made upon a consideration of marriage." It is urged that this provision makes the contract absolutely void, and for that reason proof of it should not be allowed. The statute does not render the contract void, but, to prevent the perpetration of frauds and perjuries, to which the nature of the transaction lends great inducement and facility, it is provided that no action shall be maintained on such a contract unless it is in writing. The reason that the statutory provision fails where the antenuptial contract has been fully executed is that proof of the rights of the parties under the contract no longer rests upon the testimony of the party asserting it, or upon the statements of others who may have heard it or claimed to have heard it. Where the contract has been fully executed, as this antenuptial agreement is claimed to have been the action is not upon the original contract, but is usually to retain the benefits which have accrued therefrom. The original contract in such an action is immaterial, except to explain the consideration for which the benefits were received. In some states it has been held that an antenuptial contract is no consideration for a marriage, but that has never been held by this court. *Hafer v. Neddo*, 33 Kan. 449, 6 Pac. 537; *Neddo v. Neddo*, 56 Kan. 607, 44 Pac. 1.

In *Weld v. Weld*, 71 Kan. 622, 114 Am. 33 L.R.A. (N.S.)

St. Rep. 517, 81 Pac. 183, it was said: "An oral agreement made in consideration of marriage, that after the marriage a debt of one of the contracting parties to the other shall be mutually regarded as paid, is fully performed when the marriage takes place, and is not thereafter affected by the statute of frauds." (Syllabus.) In the opinion it is said: "The statute of frauds does not render void the verbal contracts to which it refers. They are valid for all purposes except that of suit. *Stout v. Ennis*, 28 Kan. 706. The parties may perform them if they desire, and when performed the statute has no application to them. 29 Am. & Eng. Enc. Law, pp. 829, 941." The objection was properly overruled.

It is contended that the court erred in permitting this witness to testify, referring to her husband and the policy that "he gave it to me." It is contended that this was a transaction between the witness and her husband during the time that the marriage relation existed, and that the opposing party, Lloyd B. Ferrell, was the legal representative of the deceased. The provision of the statute invoked to sustain this objection is a part of § 5914, Gen. Stat. 1909, and reads: "No party shall be allowed to testify in his own behalf in respect to any transaction or communication had personally by such party with a deceased person, when the adverse party is the executor, administrator, heir at law, next of kin, surviving partner, or assignee of such deceased person, where they have acquired title to the cause of action immediately from such deceased person." On the other hand, it is contended that Lloyd B. Ferrell did not acquire title to the cause of action immediately from the deceased; that the deceased had no title to the certificate, and could derive no benefit therefrom; that he had only the naked power under the certificate of designating or appointing the beneficiary under the rules of the corporation; that the certificate did not pass from the deceased to Lloyd B. Ferrell by assignment, or for any consideration paid or agreed to be paid therefor by Lloyd B. Ferrell. We are inclined in favor of the latter contention, but regard this controversy as quite immaterial. The objection that the witness should not have been allowed to testify to this statement, on the ground that she was the wife of the deceased at the time it is said to have been made, should probably have been sustained, but, if it was erroneous to allow the statement, it was likewise immaterial. If the deceased contracted in consideration of marriage to change the certificate as claimed, and Edith M. Stanley performed her part of the contract relying upon such agreement, and thereafter her husband performed his part of the contract,

by having the certificate changed as he agreed to do, the contract thereby became fully executed, and the wife had a vested interest in that policy of which her husband could not divest her without her consent. *Stronge v. Supreme Lodge*, K. P. 189 N. Y. 346, 12 L.R.A. (N.S.) 1206, case note; *Bunnell v. Shilling*, 17 Can. Law Times Occ. N. 121. It is immaterial whether he gave her the policy or whether she ever saw it. Probably three fourths of the beneficiaries in insurance policies never even see, much less have in their possession, the policies which are made for their benefit. Indeed, under the circumstances of that case, it was held in *Weld v. Weld*, supra, in substance, that where an antenuptial contract is made, and the marriage is celebrated in reliance thereon, that the marriage *ipso facto* discharges the previously existing indebtedness between the contracting parties in accordance with the antenuptial agreement.

In this case Edith M. Stanley produced in court and introduced in evidence the certificate which she claimed was made in execution of the contract, and which designated herself and the two children as beneficiaries. How she came by that certificate is quite immaterial. The presumption would probably be that she came by it lawfully. But, as before stated, the material fact in determining whether George Ferrell executed the antenuptial contract on his part is whether he procured the issuance of the certificate in accordance with the terms of the contract. The marriage on her part, and the procuring of the certificate in accordance with the terms of the agreement by him, executed the contract entirely.

The order of the court overruling the demurrer to the evidence of Edith M. Stanley is also assigned as error, but it follows from what we have said that no error can be predicated thereon.

We find no prejudicial error in the proceedings, and the judgment is affirmed.

All the Justices concur.

MICHIGAN SUPREME COURT.

KNIGHTS OF THE MODERN MACCA-
BEES

v.

MELINDA SHARP, Appt.,
and

JOHN L. CLINK, Guardian *ad Litem* of
Lena Sharp et al.

(163 Mich. 449, 128 N. W. 786.)

Insurance — contract to maintain policy — right of beneficiary to enforce.

Children cannot enforce a contract be-
33 L.R.A. (N.S.)

tween their parents upon mutually insuring their lives for the benefit of each other, that the survivor will continue the insurance for the benefit of the children, so as to prevent the survivor from changing the beneficiary at his pleasure.

(December 7, 1910.)

APPEAL by defendant Sharp from a decree of the Circuit Court for St. Clair County, in Chancery, in an interpleader proceeding to determine the beneficiaries in an insurance policy. Reversed.

The facts are stated in the opinion.

Mr. William E. Brown for appellant.

Mr. Frank T. Wolcott, for appellees
Lena Sharp et al.

In equity the husband should be held estopped from defeating the mutual agreement which he had made with his wife, and which became by her death fully executed on her part.

Buchanan v. Tilden, 158 N. Y. 109, 44 L.R.A. 170, 70 Am. St. Rep. 454, 52 N. E. 724.

A person for whose benefit a promise is made may enforce it in his own name.

9 Cyc. Law & Proc. p. 315; *Palmer v. Bray*, 136 Mich. 88, 98 N. W. 849; *Corning v. Burton*, 102 Mich. 95, 62 N. W. 1040; *Linneman v. Moross*, 98 Mich. 178, 39 Am. St. Rep. 528, 57 N. W. 103; *Jefferson v. Asch*, 25 L.R.A. 257, & note, 53 Minn. 446, 39 Am. St. Rep. 618, 55 N. W. 604; *McGrew v. McGrew*, 190 Ill. 604, 60 N. E. 861.

When a beneficiary has become designated in accordance with a binding contract, as these children did by the death of their mother, the assured is then estopped to exercise his rights to a change of beneficiaries.

Vance, Ins. p. 400; 29 Am. & Eng. Enc. Law, 2d ed. p. 1047; *Smith v. National Ben. Soc.* 123 N. Y. 85, 9 L.R.A. 616, 25 N. E. 197; *Benard v. Grand Lodge*, A. O. U. W. 13 S. D. 132, 82 N. W. 404, *Supreme Council Catholic Benev. Legion v. Murphy*, 65 N. J. Eq. 60, 55 Atl. 497; *Maynard v. Vanderwerker*, 30 Abb. N. C. 134, 24 N. Y. Supp. 932; 2 Joyce, Ins. § 742; *Jory v. Supreme Council*, A. L. H. 105 Cal. 20, 26 L.R.A. 733, 45 Am. St. Rep. 17, 38 Pac. 524; *Anderson v. Groesbeck*, 26 Colo. 3, 55 Pac. 1086; *Supreme Council Royal Ar-*

Note. — No other case has been discovered involving the precise point covered by the foregoing headnote. The general question of the effect of consideration moving from the beneficiary originally named in a certificate issued by a mutual benefit association, upon the right of the member to change beneficiaries, is discussed in the note to *Savage v. Modern Woodmen*, ante, 773.

canum v. Tracy 169 Ill. 123, 48 N. E. 401; Swift v. Railway Pass. & F. C. Mut. Aid & Ben. Asso. 96 Ill. 309; Barton v. Provident Mut. Relief Asso. 63 N. H. 535, 3 Atl. 627; Mason Mut. Ben. Soc. v. Burkhart, 110 Ind. 189, 10 N. E. 79, 11 N. E. 449; Mulderick v. Grand Lodge, A. O. U. W. 155 Pa. 505, 26 Atl. 663; The Sailors v. Woelfe, 118 Tenn. 755, 12 L.R.A.(N.S.) 882, 102 S. W. 1109.

Mr. John B. McIlwain for appellee insurance company.

Ostrander, J., delivered the opinion of the court:

The issues raised by the answers to complainant's bill of interpleader are sufficiently indicated in the opinion of the learned trial judge as follows: "On July 23, 1896, Asa B. Sharp and his first wife, Minnie D. Sharp, lived in the village of Yale, St. Clair county, Michigan. At that time he was thirty years of age and his wife twenty-eight. They had five small children. He was a laboring man, and his family was dependent on his earnings for support. Some time prior to the above-named date, the husband and wife entered into a contract by the terms of which he agreed he would take out a policy of insurance in complainant order, in which his wife should be named as beneficiary and so remain during her life and his, and, in case his wife should die before he did, that their children should always remain the beneficiaries; the wife agreed she would take out a policy of insurance in the Ladies of the Maccabees, a woman's fraternal benefit association, in which her husband should be named as beneficiary, and so remain during his life and hers, and, in case her husband should die before she did, that their children should always remain the beneficiaries. The consideration for this agreement on the part of each was the promise made by the other. The object of this mutual agreement was the protection of the children. The testimony of one witness, Grace O'Dell, goes to the extent of tending to show the existence of this contract prior to the time the policies were issued to the husband and wife, as hereinafter stated, while three other witnesses testify to having heard the husband and wife, in the presence of each other, state what their contract in this regard had been, after or about the time of the issuance of the policies. On July 23, 1896, a policy for \$1,000 was issued by complainant association to Asa B. Sharp, in which his wife was named as beneficiary, and on the same date a policy of like amount was issued by the Ladies of the Maccabees to Minnie D. Sharp, in which her husband was named as beneficiary. Af-

ter these policies were taken out, Asa B. Sharp was laid up for a time with sickness, and was unable to earn money to support his family and to keep up his assessments or his wife's assessments, on these policies of insurance. It appears from the testimony, that during this time, Minnie D. Sharp, relying on the agreement with her husband, as heretofore recited, went out washing, housecleaning, and doing other work, in order to obtain money to support the family and to keep up the assessments on these policies, and it appears that she did for a time, at least, pay some of the assessments on her husband's policy. On January 1, 1902, Minnie D. Sharp deceased, and the proceeds of her policy in the Ladies of the Maccabees were paid to her husband, Asa B. Sharp, who had remained the beneficiary in her certificate since the time it was issued. On August 17, 1904, Asa B. Sharp married Melinda Sharp, now his widow. At this time she was a widow with several children, living on her own farm in Lapeer county, Michigan. On April 19, 1906, Asa B. Sharp signed a paper revoking his former designation of beneficiary in his policy, and designated Melinda Sharp, his wife, as the new beneficiary. At the time he did this, he was sufficiently sound in his mind to know who was his former beneficiary, to know to whom payments of benefits would be made in case of his death without any change in his certificate, to know and keep in mind his minor children, who were dependent upon him. He had been sick before this date, and had not fully recovered his physical strength, and, perhaps, not his normal mental powers, but he was sufficiently strong and sound mentally to transact and understand ordinary business affairs. Asa B. Sharp surrendered his first certificate, and on May 8, 1906, a new one was issued to him by complainant association, in which claimant, Melinda Sharp, was named as beneficiary, and she remained as such designated beneficiary up to the time of her husband's death." He concludes that each of said mutual promises was good consideration for the other, and that on the death of Minnie D. Sharp the agreement became fully executed on her part, and the husband concluded from changing the beneficiary in his policy.

Two questions are presented, being, first, whether the parol agreement alleged to have been made by and between Asa B. Sharp and his first wife, Minnie, was in fact made; and, second, whether, if made, Asa was thereby precluded from making a change of beneficiary.

1. As to the question of fact, it is to be considered that the certificates issued by

complainant have no value during the life of the assured except the value of the right to keep them in force. There is no cash or other surrender value, and default in the payment of the assessments which are levied avoids the contract. An agreement by the assured that he will never change the beneficiary named in his certificate is of no value to anyone, unless the assessments are paid to the time of his death. The evidence relied upon to prove a mutual agreement between Asa Sharp and his wife Minnie, that neither would ever change the beneficiaries named in their respective certificates, is exceedingly vague and unsatisfactory, and is found in the testimony of witnesses who attempt to tell of conversations and statements made in their presence by one or both of the contracting parties. The desire of both the husband and wife to make some provision for each other and, directly or indirectly, for their children, is manifested by their becoming members of complainant, taking out the certificates and paying assessments. The statements and conversations related by the witnesses evidence little, if anything, more than this. It is true that one or more witnesses testify to a conclusion that an agreement existed between the husband and wife that the certificate held by the survivor of them should be payable to the children. For example, a witness testified: "Mr. and Mrs. Sharp agreed before me, in my presence, that they should take out insurance in the Maccabees, his drawn to her, and hers to him, as long as they lived, and after her death his should run to the children, and after his death hers should run to the children, and never should be changed." But when they detail what was said, it amounts to little more than the statement of facts already related, namely, that by the terms of the certificates and the laws of complainant, the certificates, if in force at the death of either, would benefit either the survivor or the children and, if the survivor, then, indirectly, the children also. The testimony gains no extended meaning from the fact that either paid assessments levied upon the other at the cost of personal labor and inconvenience. In doing so, especially during the sickness of one of them, only ordinary self-interest was served. It is a fair, if not a necessary, inference from the testimony, that the husband paid the assessments upon both certificates except upon occasion or occasions when he was ill, when his wife Minnie, paid them. Nor does the testimony acquire any extended or peculiar meaning from the fact that, upon the death of Minnie, Asa received the benefit of the fund payable according to her certificate. He was the bene-

ficiary named in the certificate. In other words, there is nothing peculiar in the facts that a husband and wife each took out a certificate payable to the other, that either paid assessments upon both certificates, and that the husband, after the death of the wife, received what her certificate promised him, the death benefit. They are material facts here only upon the theory that they occurred in the carrying out of mutual promises, the making of which must be otherwise established. It seems that in the contest made before the complainant's tribunal, the minors asserted, as reason for refusing payment to the beneficiary named in the policy, that their father, the assured, was not mentally competent to make a change of beneficiaries, and they asserted no other reason. This, also, was one of the issues of fact raised by the answer. This was an issue the children could rightfully raise, since, after the death of their mother, they were, by the rules of complainant, the contract beneficiaries. *Grand Lodge, A. O. U. W. v. McGrath*, 133 Mich. 626, 95 N. W. 739; *Grand Lodge, A. O. U. W. v. Frank*, 133 Mich. 232, 94 N. W. 731. It is significant that both grounds for contest were not asserted before the suit was begun.

2. Assuming the mutual promises never to change beneficiaries to have been made as is claimed, upon what theory may the children enforce the contract? No promise was made to them or any of them, no consideration for the promise moved from them. The agreement related to no fund in existence. No trust was created. I find no reason for thinking that the parties were not at liberty, at any time, to revoke their promises. It is true that after the death of the mother there could be no mutual revocation, but, unless some legal interest in the performance of the promise vested in the children when the promise of the father was made, such interest never vested.

It is the general rule in England that a third person cannot become entitled, by the contract itself, to demand the performance of any duty under the contract. *Pollock, Contr.* 7th ed. 199. The rule, contracts creating trusts aside, is the same whether such enforcement is attempted at law or in equity. *Id.* 213. In this state the English rule has been followed when the attempted enforcement of the contract by a third person was at law. *Pipp v. Reynolds*, 20 Mich. 88; *Turner v. McCarty*, 22 Mich. 265; *Hicks v. McGarry*, 38 Mich. 667; *Hunt v. Strew*, 39 Mich. 368; *Hidden v. Chappel*, 48 Mich. 527, 12 N. W. 687; *Edwards v. Clements*, 81 Mich. 513, 45 N. W. 1107; *Linneman v. Moross*, 98 Mich. 178, 39 Am.

St. Rep. 528, 57 N. W. 103. There is a well-recognized exception to the rule in England, as to the provisions contained in a settlement made upon and in consideration of marriage, for the benefit of children to be born of the marriage. Whether there is, in that jurisdiction, any other or further exception, may be doubted. *Tweddle v. Atkinson*, 1 Best & S. 303, 30 L. J. Q. B. N. S. 265, 8 Jur. N. S. 332, 4 L. T. N. S. 468, 9 Week. Rep. 781. See also *Exchange Bank v. Rice*, 107 Mass. 37, 9 Am. Rep. 1; *Marston v. Bigelow*, 150 Mass. 45, 5 L.R.A. 43, 22 N. E. 71, and, generally, *Pollock, Contr.* 7th ed. chap. 5; *Harriman, Contr.* 2d ed. pp. 212-216; 9 Cyc. Law & Proc. pp. 374-385. The contention of appellees is that the principle underlying the English exception to the rule should be extended, at least in equity, so as to support the enforcement by children of contracts made by their father or mother, with each other or with strangers, for their benefit, and *Buchanan v. Tilden*, 158 N. Y. 109, 44 L.R.A. 170, 70 Am. St. Rep. 454, 52 N. E. 724, is cited and relied upon. The courts of New York do not follow the English rule. In the case cited, a woman was permitted to recover in an action at law a sum of money which defendant had promised her husband to pay to her upon a consideration moving from the husband and others to the defendant and others. The sum of money promised to be paid to the wife was \$50,000. The trial court gave her judgment. The appellate division of the supreme court reversed the judgment, and the court of appeals reversed the appellate division by a vote of four to three of the judges. It will be discovered from the opinion that the points involved, and concerning which the judges disagreed, were whether the promise made by the defendant to the third person was upon a valid consideration, and whether the promisee had a legal interest that the contract be performed in favor of the plaintiff. If these things appeared, then, under the rule laid down in *Lawrence v. Fox*, 20 N. Y. 268, and *Durnherr v. Rau*, 135 N. Y. 219, 32 N. E. 49, plaintiff was entitled to enforce the contract at law. The majority opinion concludes with the statement, that "the case at bar is decided upon its peculiar facts. We do not hold that the mere relation of husband and wife alone constituted a sufficient consideration to enable the plaintiff to maintain this action. We deem it unnecessary to decide that question at this time. What we do hold is that the equities of the plaintiff [her interest as an adopted child, who, in conscience and equity, but not legally, was entitled to a share of the fund sought to be recovered, and 33 L.R.A.(N.S.)

which was recovered by defendant with the aid of plaintiff's husband] were such that, when considered in connection with the duty of her husband to provide for her future, and with that purpose in view the money was procured for the defendant to institute and pursue the necessary litigation to secure the fund to which her equities related, all taken together, were sufficient to sustain the plaintiff's action."

It cannot be said that the decision sustains appellee's contention, and we are referred to none in which the general rule in force here is recognized which does sustain it. The general rule in this state is regarded as settled. I see no reason for saying that it is not the same in proceedings at law and in equity. To what extent and under what circumstances an exception to the rule should be recognized in favor of the enforcement by children of contracts (other than those creating trusts) made for their direct or indirect benefit, by persons nearly related to them or by those sustaining the duty to provide for them, is a subject which needs to be considered no further than this, that the mutual promises of a father and mother who each hold the certificate of a beneficial association in which the other is named as beneficiary, never to change the beneficiaries so named, create no legal or equitable interest of the children in the fund derived on the death of the surviving parent, although, if no such change had been made, they would have been the legal beneficiaries, and although the mutual promises of the parents contemplated that in such case they should be the legal beneficiaries.

The case presented is ruled precisely as it would be ruled if the children, in the lifetime of the father, were seeking specific performance of the alleged contract, or an injunction to restrain a threatened change of beneficiaries. It may be added, although the suggestion relates rather to the facts than to the law, that the children, appellees, appear to have no particular claim, as against the appellant, to equitable consideration. It is not claimed that appellant knew of any arrangement between her husband and his former wife about life insurance. His relation to her is a sufficient reason for insuring his life for her benefit. If, instead of pursuing the method of substituting one beneficiary for another, he had refused to pay assessments, thus permitting the original certificate to lapse, and procured one in which appellant was named as beneficiary, it is clear that her right to any fund derived therefrom, and from his death, would be unassailable.

The decree below, except as to the provision for costs to complainant, is reversed,

and a decree will be entered in this court for the payment of the fund to the appellant, who will recover of the appellees the costs of both courts.

the municipality, whose duty is to keep the highway safe.

(Werner, Hiscock, and Chase, JJ., dissent.)

(February 14, 1911.)

NEW YORK COURT OF APPEALS.

SALATHIEL MASTIN, Resp't.,

v.

CITY OF NEW YORK, Appt.

(201 N. Y. 81, 94 N. E. 611.)

Highway — taking picture in — using focusing cloth — negligence.

One who, for the purpose of taking a picture, stands on the curb of a public street, and, after satisfying himself that the only vehicle in sight is standing still 100 to 150 feet away, covers his head with the focusing cloth, and keeps it so covered for five minutes, is guilty of such negligence that he cannot hold the owner of the vehicle liable for injury caused by its running against him, although the owner of the vehicle is

APPEAL by defendant from a judgment entered in the office of the Clerk of Kings County upon an order of the Appellate Division of the Supreme Court, Second Department, affirming a judgment of a Trial Term in favor of plaintiff, and from an order denying defendant's motion for new trial, in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Mr. James D. Bell, with Mr. Archibald R. Watson, for appellant:

There was an entire failure of proof on the part of the plaintiff to show defendant's negligence or his own freedom from contributory negligence, and the judgment en-

Note. — Voluntary obstruction of view while on highway as contributory negligence.

There appears to be no case directly in point with *MASTIN v. New York*, which holds a photographer guilty of negligence in covering his head with a focusing cloth on a highway, as a consequence of which he is struck by a city ash cart. However, the following cases are set out for the purpose of showing the attitude of the court in somewhat similar instances:

In *Undhejem v. Hastings*, 38 Minn. 485, 38 N. W. 488, it was held a question for the jury whether plaintiff, who was struck and injured by a buggy, was guilty of negligence in going along the street picking up articles he had dropped, without looking to see if any vehicle might be coming along the street behind him.

And in *Nead v. Roscoe Lumber Co.* 54 App. Div. 621, 66 N. Y. Supp. 419, the question of defendant's negligence and plaintiff's contributory negligence was for the jury, where plaintiff was struck and injured by a passing wagon while his horse was at a watering trough, and he stood three or four minutes engaged in tightening the cover at the rear of his cart, without looking about him.

So, in *Jones v. Swift & Co.* 30 Wash. 462, 70 Pac. 1109, where one, while working in an excavation in the street, was injured by barriers guarding the pit being knocked down upon him by a passing wagon, it was held a question for the jury whether he was negligent in going into the pit with the barrels and boards surrounding the pit unsecurely fastened. "It does not necessarily follow," said the court, "that because these barrels and boards were placed loosely around the pit, respondent must be held to know that they were likely to be knocked

into the pit. They were placed on top of an embankment which was from 2 to 3 feet high, and which of itself was sufficient to lead one to suppose that teams would in daytime avoid it. The barrels and boards were out of the reach of ordinary travel upon the street, and one would naturally suppose that no one would drive upon or ordinarily go upon the embankment so as to interfere therewith. If the barrels and boards were so placed as to lead an ordinarily reasonable person to believe that no one would knock them down, it was not negligence for the plaintiff to go into the pit with the barrels and boards so placed."

And in *Anselment v. Daniell*, 4 Misc. 144, 23 N. Y. Supp. 875, plaintiff was held not guilty of contributory negligence where, while paving a street near a railroad track, he suddenly turned to readjust a paving block without looking for approaching vehicles, and was struck by the hub of a wagon driven rapidly along the track. "Plaintiff," said the court, "was lawfully and necessarily in the roadway, engaged in the performance of duty. He was absolutely safe from all risk of injury by passing vehicles, excepting only such as would arise from the negligence of the drivers of those vehicles,—a risk which was avoidable by the drivers with the exercise of ordinary care. Upon their exercise of such care, plaintiff had a right to rely. He was not obliged to anticipate their wanton and reckless conduct, unless, indeed, it may be successfully claimed that greater vigilance is required to escape the imputation of contributory negligence than to avoid a just charge of negligence; that extraordinary care is required to avoid being injured, and ordinary care only to avoid doing injury. Plaintiff's occupation imperatively demanded his attention and the use of his eyes. The noise of approaching vehicles was unavoidably inaudible to him.

tered upon the verdict cannot be sustained.

Hartfield v. Roper, 21 Wend. 615, 34 Am. Dec. 273; Brownell v. Flagler, 5 Hill, 282; Smith v. Bailey, 14 App. Div. 283, 43 N. Y. Supp. 856; Lyons v. Avis, 5 App. Div. 193, 38 N. Y. Supp. 1104; Anselment v. Daniell, 4 Misc. 144, 23 N. Y. Supp. 875; Campbell v. North American Brewing Co. 22 App. Div. 414, 47 N. Y. Supp. 992; Kuebler v. New York, 15 N. Y. Supp. 187; Campbell v. Wood, 22 App. Div. 599, 48 N. Y. Supp. 46; Tonawanda R. Co. v. Munger, 5 Denio, 266, 49 Am. Dec. 239; Weston v. Troy, 139 N. Y. 281, 34 N. E. 780; Whalen v. Citizens' Gaslight Co. 151 N. Y. 73, 45 N. E. 363; Henry v. New York, 119 App. Div. 432, 104 N. Y. Supp. 440; Barker v. Savage, 45 N. Y. 194, 6 Am. Rep. 66; Davenport v. Brooklyn City R. Co. 100 N. Y. 632, 3 N. E. 305.

Mr. Martin T. Manton, for respondent:

The question of plaintiff's contributory negligence was a question of fact for the

jury, and their verdict is in accord with the weight of evidence, and should stand.

Shaw v. New York, 83 App. Div. 212, 82 N. Y. Supp. 44; Shane v. National Biscuit Co. 102 App. Div. 189, 92 N. Y. Supp. 637; Hinman v. Clarke, 121 App. Div. 106, 105 N. Y. Supp. 725; Smith v. Bailey, 14 App. Div. 283, 43 N. Y. Supp. 856; Schaffer v. Baker Transfer Co. 29 App. Div. 459, 51 N. Y. Supp. 1092; Murphy v. Weidmann Co. 1 App. Div. 283, 37 N. Y. Supp. 151; Stapf v. V. Loewer's Gambrinus Brewing Co. 1 App. Div. 405, 37 N. Y. Supp. 256; Anselment v. Daniell, 4 Misc. 144, 23 N. Y. Supp. 875; Norton v. Webber, 69 App. Div. 130, 74 N. Y. Supp. 524; McDermott v. Straus, 123 App. Div. 303, 108 N. Y. Supp. 5; Wagner v. New York Condensed Milk Co. 21 Misc. 62, 46 N. Y. Supp. 939; Johnson v. Parker, 7 Misc. 685, 28 N. Y. Supp. 146; Shaw v. New York, 83 App. Div. 212, 82 N. Y. Supp. 44; Malizia v. Brooklyn Heights R. Co. 127 App. Div. 202, 110 N. Y. Supp. 1003; Campbell v. Wood, 22 App.

His person was plainly visible to the drivers of approaching vehicles,—a fact in itself sufficient to excite the caution of an ordinarily prudent person. To hold him, employed as he was, to the exercise of constant vigilance, to avoid injury from the want of ordinary care on the part of the drivers of vehicles incessantly passing on a public thoroughfare, means either that he must expose himself and his fellow workmen to the risk of injury from inattentive performance of his work, or that he must abandon his work altogether. We are unable to see wherein plaintiff was at fault, and without fault he cannot be said to have been guilty of contributory negligence."

In Menger v. Laur, 55 N. J. L. 205, 20 L.R.A. 61, 26 Atl. 180, where a surveyor's instrument was injured by a passing vehicle, and plaintiffs were held guilty of contributory negligence in exposing the instrument to danger by leaving it standing in the public highway, the court said, "Set up in the roadway, the person in charge of the instrument knew that it was liable to injury from passing vehicles driven with the utmost care. He left the instrument exposed to injury without anyone to look after its safety, or to warn persons of its presence. His negligence was an immediate concurring and co-operative cause of the injury, within the rule which debars a plaintiff from recovering damages for the injury sustained."

In Lyons v. Avis, 5 App. Div. 193, 38 N. Y. Supp. 1104, an action by one who was run over by a truck while stooping over in the street mixing mortar, it was held correct to charge that "it is the duty of one using the street for the purpose of mixing mortar or filling the same into a hod, to use diligence in avoiding danger, especially in looking out for teams, and if the jury believe from the evidence that the plaintiff did not

use such diligence, and by reason whereof met with this accident, he cannot recover from this defendant."

In Wheeler v. Gibbon, 126 N. C. 811, 36 S. E. 277, plaintiff, who was injured by being struck by a rapidly approaching buggy, was held guilty of contributory negligence in crossing the street in a violent storm with his head hid behind an umbrella.

And in Evans v. Adams Exp. Co. 122 Ind. 362, 7 L.R.A. 678, 23 N. E. 1039, it is held that to stand in the carriage way of a public street at night engaged in conversation, heedless of horses and vehicles that are passing, is such negligence as will prevent recovery for injuries resulting from being thrown down by a wagon, the driver of which did not see the person injured, although the driver also was negligent. The court said: "It cannot be said as a matter of law that standing in the carriageway of a public street in a city in the dark, and engaging in conversation, without using sufficient vigilance to discover a slowly approaching horse and vehicle, may not preclude the recovery of damages for injuries resulting from the inattention of the driver. The degree of vigilance must always be in proportion to the danger which is reasonably to be apprehended from the situation in which one voluntarily places himself, and if a footman selects the carriage way of a public street as a place at which to hold converse with his friends after nightfall, he may know that the situation and occasion are such as to demand more than ordinary vigilance, to avoid contact with vehicles in the charge of inattentive drivers who are not looking out to avoid footmen standing in the way."

As to care required from one of defective sight in using streets, see note in 16 L.R.A. (N.S.) 648.

J. D. C.

Div. 599, 48 N. Y. Supp. 46; *Collender v. Reardon*, 138 App. Div. 738, 123 N. Y. Supp. 587; *Cohn v. Palmer*, 78 App. Div. 506, 79 N. Y. Supp. 762.

Willard Bartlett, J., delivered the opinion of the court:

Unless the rule which requires affirmative proof of the absence of contributory negligence on the part of the plaintiff is to be ignored in actions to recover damages for personal injuries, it seems to me that this judgment must be reversed. As I view the evidence, not only was there a failure to furnish affirmative proof that the plaintiff was not himself at fault, as in the case of *Whalen v. Citizens' Gaslight Co.* 151 N. Y. 70, 45 N. E. 363, but the plaintiff's own testimony demonstrates his contributory negligence, as in the case of *Dolfini v. Erie R. Co.* 178 N. Y. 1, 70 N. E. 68.

The plaintiff, who was a photographer, was injured on Washington street, in the borough of Brooklyn, while engaged in taking a photograph of a building on that street. He was struck by a wagon belonging to the street cleaning department of the city of New York. The accident occurred between half past 1 and 2 o'clock in the afternoon, on December 27, 1906. In order to take the picture, the plaintiff placed his camera, which was supported by a tripod, on the sidewalk near the curb. The only vehicle which he then saw was the city ash cart which subsequently struck him. This was standing about 100 or 150 feet down the street. The plaintiff stood right at the edge of the curb,—he is not certain that one foot may not have projected over the curb into the highway,—and covered his face with a dark cloth in order to focus the instrument. While his vision was thus obscured, the cart came along, and some portion of the vehicle struck his hip, and knocked him down into the gutter. From the time when he thus covered his head with the dark cloth until the ash cart collided with his body a period of five minutes elapsed, during which he was practically blind to what was going on in the highway; and it is the fact that he voluntarily thus blinded himself for such a length of time in such a situation, which seems to me conclusive evidence that he was guilty of contributory negligence as matter of law. To affirm this judgment would be to hold that it can be regarded as the act of a reasonably careful person to shut one's eyes and stand on the edge of a sidewalk in a busily traveled public street in a great city for five minutes at a time. I do not think that any court has heretofore gone so far as to pronounce such conduct prudent.

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I fix the time during which the plaintiff stood at the curb with the cloth over his head as five minutes, because the plaintiff repeatedly testified to that period as his best judgment. When he was asked by his own counsel how long he was under the cloth focusing the camera before the wagon struck him, he answered: "Well, it takes from three to five minutes to focus on a building of that size. I couldn't tell exactly the time." He was then asked to give his best judgment, and said: "Well, it was not over five minutes. It was the same ash cart that struck me that I saw down the street. There was no person on the wagon at all at the time." Again, upon cross-examination he testified in reference to this matter of time as follows:

Q. Mr. Mastin, in this attitude, with your camera pointing toward the store the picture of which you were taking, as you were standing as you have stated, not remembering or not knowing, recalling at this time whether you were bending or whether one foot was or was not beyond the curb and in the street, and the cloth over your head and face,—how long a time did that last, taking those things together?

A. Well, it takes, as I said, from three to five minutes to focus. I couldn't tell you exactly the minute. I am quite sure that it was not any longer than that. I saw the wagon standing perhaps 100 to 150 feet down the street, as near as I could judge.

And still further on in the course of his cross-examination he repeated that it was not over five minutes during which he had the cloth over his head before he was struck. These repeated references to five minutes justify, and I think require us to accept, that estimate of time as the period which really elapsed during which the plaintiff's head was covered with his camera cloth; and, as I have already intimated, it seems to me too clear for argument that it was contributory negligence as matter of law to assume such a position in such a place under such circumstances for such a length of time.

My Brother Werner's suggestion in the dissenting opinion, that the question of contributory negligence should be deemed a question of fact for the jury, instead of being decided against him as a question of law, because a majority of all the judges who have considered the case have entertained that view, would preclude us from ever reversing a judgment of this character for contributory negligence, when there were three dissents in this court. He concedes that instances may arise where persons engaged in lawful street occupations are so affirmatively careless as to preclude them, as matter of law, from recover-

ing for injuries which they sustain through the negligence of others, but declares that the case at bar does not belong in that category. This is the precise point upon which we differ. He would be entirely right if the element of time could properly be disregarded; but we think that the time during which the plaintiff voluntarily blinded himself was too long to be excusable, upon any reasonable theory of prudent conduct.

In the course of the development of the law of imputed negligence as applied to municipalities, the courts have gone very far in the direction of charging the defendants with a pretty strict and rigorous degree of liability in the maintenance of the public streets in a safe condition for travel. Surely, it is not requisite for the protection of the public to extend this liability so as to make a city responsible for an accident which befalls a person who is imprudent enough to do what the plaintiff did in this case.

The judgment should be reversed, and a new trial granted, costs to abide the event.

Cullen, Ch. J., and Gray and Collin, JJ., concur.

Werner, J., dissenting:

Although I have always been consistently opposed to the writing and publication of dissenting opinions which cannot influence decisions, I am constrained by the peculiar circumstances of this case to record the reasons for my dissent from the decision about to be made.

The action was brought to recover damages for personal injuries sustained by the plaintiff. Upon pleadings which fairly state the issues of defendant's alleged negligence, and the plaintiff's alleged contributory negligence, the case was brought to trial. At the close of the evidence for the plaintiff, the learned counsel for the defendant moved to dismiss the complaint upon the grounds that the plaintiff had failed to establish the defendant's negligence and his own freedom from contributory negligence. The court reserved its decision until the close of all the evidence, when the motion was renewed and denied. The case went to the jury, and the plaintiff was given a verdict. From the judgment entered, there was an appeal to the appellate division, which resulted in an affirmance with one dissenting vote. The case is now before us upon the defendant's appeal, and the sole question to be decided is whether the evidence bearing upon the defendant's alleged negligence and the plaintiff's alleged contributory negligence presented issues of fact for submission to a jury, or issues of law to be decided by the court.

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Thus far five judges have held that the evidence presents questions of fact for the arbitrament of a jury. Three judges of this court are of the same opinion. When the decision of this court goes down, therefore, eight judges will have held that the case was properly submitted to a jury, and four will have decided that the evidence of defendant's negligence is so weak, and the evidence of plaintiff's contributory negligence is so strong, that both of these issues should be decided against the plaintiff as matter of law. While this disparity in number does not create a presumption that the majority are right, it does emphasize the fact that judges, who of all men are supposed to be intelligent and reasonable, are sharply disagreeing over the question whether certain evidence presents a state of facts from which intelligent and reasonable laymen can draw divergent conclusions. That is a situation which furnishes the precise test which, in actions of this class, has always been applied in differentiating a case for the jury from one for the court. We have often said that, when reasonable and intelligent men may differ as to what facts have been established, or may draw antagonistic inferences from undisputed facts, the case is one for a jury. *Smith v. New York C. & H. R. R. Co.* 177 N. Y. 224, 229, 69 N. E. 427, and cases there cited. For the purpose of demonstrating that this case was properly for the jury, I shall briefly refer to the controlling facts.

The plaintiff, a photographer, was engaged in taking a picture of a building in Washington street in the city of New York. He placed his camera on the edge of the sidewalk so that, in looking through the lens to get the proper focus, he stood upon the curb with both feet or with one foot in the gutter. Before covering his head with the cloth or mantle which is a familiar part of a photographer's outfit, he looked about him and saw a city ash cart standing at distance of 100 feet or 150 feet from the point where his camera was planted. The driver of the cart and another city employee stood by the cart engaged in conversation. The plaintiff covered his head and proceeded to focus his camera. While thus engaged, he was struck by some portion of the wheel of the ash cart, and sustained the injuries of which he complains. The horse drawing the ash cart was unattended by the driver, and it is undisputed that the horse was started by the driver. The only conflict of evidence was whether the horse was thus started from a point 100 or 150 feet distant from the plaintiff's camera, or only 50 feet distant therefrom, and whether the driver was then actually engaged in gathering ashes from houses in

that part of the street, or permitted his horse to move unattended from the place where the driver and another city employee are said to have been engaged in conversation.

Upon these facts the first question is whether there was evidence upon which a jury could base a finding of negligence against the defendant. As the plaintiff is entitled to the most favorable view which the jury might have taken of the evidence, the question whether the defendant was negligent or not must be considered upon the assumption that the ash cart stood 100 or 150 feet from the plaintiff's camera, and that the horse attached to the cart was permitted by the driver to move unattended and unguided along the street to the place where the plaintiff was struck. One can easily imagine circumstances in which such conduct on the part of a driver would be negligence as a matter of law. It may be conceded that the facts of this case would not warrant such a conclusion, but I think the evidence as to the defendant's negligence clearly presented a question for the jury.

It is argued, however, that the plaintiff was guilty of contributory negligence, and I suppose that is to be the ground upon which the judgment of the appellate division is to be reversed. In considering that question we must, of course, ascertain what the plaintiff did or omitted to do that constitutes negligence on his part. No one will deny that he was lawfully upon the sidewalk for a lawful purpose. He had the right to be employed by the owner of the building for the purpose of making a photograph, and that included the right to do whatever was necessary and proper in the completion of his task. It is said that he was negligent in covering his head with the cloth which was an indispensable part of his equipment. It would be just as reasonable to argue that a surveyor, engaged in his lawful work, would be guilty of negligence in turning his back upon a portion of a street while he was looking through his instrument in the opposite direction; or that a lineman employed in stringing wires would be negligent because he pulled backward instead of turning around and pulling forward; or that a person engaged in moving a push cart in the street would be guilty of negligence because he was facing the direction in which he was pushing the cart, instead of walking backwards. There may be instances, of course, in which persons engaged in lawful street occupation may be so affirmatively careless as to preclude them, as matter of law, from recovering for injuries which they sustain through the negligence of others. The case at bar does not belong in that category.

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Here the question is whether it was negligence *per se* for the plaintiff to plant his camera on the edge of the sidewalk, and cover his head which he was getting a proper focus for a picture. When he did that, he looked and saw the defendant's ash cart at least 100 feet away, with the driver in a position which gave the plaintiff the right to assume that the horse would not be started except under proper guidance and control. In these circumstances, I submit, it was a question for the jury whether the plaintiff was guilty of negligence which contributed to the accident that caused his injuries.

The judgment of the appellate division should be affirmed, with costs.

Hiscock and Chase, JJ., concur with Werner, J.

IOWA SUPREME COURT.

STATE OF IOWA

v.

O'NEIL, Appt.

(147 Iowa, 513, 126 N. W. 454.)

Intoxicating liquor — illegal sale — change of court ruling — effect.

One cannot be punished for selling intoxicating liquor at a time when the prohibitory law is, by decision of the highest court of the state, unconstitutional, although that court subsequently changes its opinion and holds the law to be valid.

(May 16, 1910.)

Note. — Criminal responsibility for violation of a statute after a judicial ruling that it was unconstitutional, and before that ruling had been changed.

No case directly in point has been discovered. Perhaps, the case most nearly in point is *Ingersoll v. State*, 11 Ind. 464. In that case the defendant was convicted of selling liquor by retail without a license pursuant to the liquor act of 1853, the prosecution having been commenced after the liquor law of 1855 went into force, which law expressly repealed all former laws in conflict with it. It appeared that for three years after the passage of the act of 1855, the court was equally divided as to the constitutionality of that portion of it inhibiting the retail of liquors, thus leaving that portion in force during that time. Subsequently, however, the act of 1855 was held unconstitutional and void. The conviction was reversed upon the ground that under the circumstances it would be unjust and in violation of principle of right to hold that the act of 1853 was all the time in force and the people incurring its penal-

APPEAL by defendant from a judgment of the District Court for Wayne County affirming a judgment of a Justice's Court convicting him of soliciting and taking orders for the purchase, sale, and shipment of intoxicating liquors in violation of law. Reversed.

Statement by McClain, J.:

Defendant was accused before a justice of the peace of the crime of soliciting, taking, and accepting orders for the purchase, sale, and shipment of intoxicating liquors. The case was tried on an agreed statement of facts, and resulted in defendant's conviction. He thereupon appealed to the district court, where the defendant filed a motion for judgment upon the agreed facts.

ties. The court remarked that to so hold would make the law a concealed trap to catch victims. From the suggestion in the opinion that legislative action was necessary to provide a remedy for the evil, it may be inferred that the court meant that the act of 1853 was not revived at all, either as to transactions prior to the declaration of the unconstitutionality of the act of 1855, or as to those subsequent thereto. If so, the case is hardly a precedent for *STATE v. O'NEIL*, as that case assumes that the statute is in force, at least as to transactions occurring subsequently to the change of decisions; and it is that assumption which raises the difficulty of taking prior transactions out of its operation.

In *People v. Tiphaine*, 3 Park. Crim. Rep. 241, it was held that an act in relation to intemperance being unconstitutional, the provisions of the Revised Statute on the subject were left in full force, notwithstanding that the act purported to repeal all previous statutes inconsistent with its provisions. While it appears that the unconstitutionality of the repealing statute had been declared prior to the decision in the *Tiphaine Case*, it does not appear whether the offense in question was committed before or after such declaration, and there is no discussion or even recognition of the question under annotation. In fact, it does not appear in this case that there had ever been any judicial declaration that the repealing statute was constitutional. There is an obvious distinction between a transaction occurring before any judicial decision with respect to a statute, and one occurring after such a decision and before that decision has been changed.

In *Rex v. Younger*, 5 T. R. 450, a prosecution of a baker for violating the Sunday law, Lord Kenyon said that thirty-four years had passed since a decision giving the public notice that all bakers had a right to do what was imputed to the defendant in the case at bar as an offense, and added: "This circumstance alone ought to have some weight in the determination of this case. It would be cruel not only to the defendant, but also to those in a similar 33 L.R.A. (N.S.)

This motion was overruled, and defendant, pleading guilty after the overruling of his motion, was again convicted for the offense charged. He then appealed to this court.

Messrs. Porter & Greenleaf for appellant.

Messrs. H. W. Byers, Attorney General, and Charles W. Lyon for the State.

McClain, J., delivered the opinion of the court:

An agreed statement of facts filed on the trial before the justice of the peace was the basis of the finding of the district court, that defendant in October, 1908, solicited, accepted, and took from various persons

situation with him, if we were now to punish him for doing that which this court publicly declared so many years ago might be done with impunity." The court was not convinced, however, that the former decision was wrong, and did not announce any change of decision even as to subsequent offenses, and the case therefore cannot be regarded as an authority on the question.

In *State v. Bell*, 136 N. C. 674, 49 S. E. 163, the court, while overruling a previous decision that a tenant indicted for removal of crops without giving the landlord notice might show in defense that he had sustained damages in amount more than rents and advancements in consequence of the landlord's failure to comply with the contract, and declaring that the contrary should be the rule for future cases, nevertheless, in view of the possibility that the defendant in the case at bar may have acted upon the advice of counsel based upon the decision in the earlier case, directed a new trial to allow him an opportunity to establish his defense in accordance with the doctrine of the earlier case. The opinion by Connor, J., admits that no authority directly in point had been found.

In *State v. Fulton*, 149 N. C. 485, 68 S. E. 145, a ruling of the trial court quashing an indictment against a husband for malicious slander of his wife was affirmed by a majority of the court. Two of the justices were of the opinion that an earlier decision that the statute relating to the malicious slander of a woman does not apply to a slander by the husband was correct. One of the justices, though of a contrary opinion as to the proper construction of the statute, concurred in the result upon the principle laid down in *State v. Bell*, supra. The chief justice and Connor, J., however, were not only of the opinion that the earlier decision was wrong, and that the statute should be construed to cover a slander by the husband, but also that the new rule of construction should be applied in the case at bar, notwithstanding the earlier decision. The chief justice remarked on this point: "The misconception of the statute in *State v. Edens*, 95 N. C. 693, 59

orders for the purchase by them, and sale and shipment to them, of intoxicating liquors from and by a certain brewing company in Kansas City, Missouri, said orders being subject to the approval of said company; and that the liquors so ordered were to be shipped directly to the persons named from the place of business of said company. Defendant's motion for judgment in his favor, which was overruled, recited that the acts charged were not criminal under the law of this state at the time of their commission, and, further, that the statute of the state making such acts criminal is in violation of the Constitution of the United States as an interference with the clause thereof relating to interstate commerce, and statutes on that subject passed by Congress. The acts with which defend-

ant was charged were in violation of the provisions of Code, § 2382, as amended by Acts 28th Gen. Assem. chap. 74 (Code Supp. § 2382), prohibiting any person from soliciting, taking, or accepting "any order for the purchase, sale, shipment, or delivery of any (intoxicating) liquor." In the case of *State v. Hanaphy*, 117 Iowa, 15, 90 N. W. 601, followed in *State v. Bernstein*, 129 Iowa, 520, 105 N. W. 1015, decided, respectively, in 1902 and 1906, this statute was held unconstitutional, as in violation of the interstate commerce clause of the Federal Constitution. In 1909 this court, relying upon the decision of the Supreme Court of the United States in the case of *Delamater v. South Dakota*, 205 U. S. 93, 51 L. ed. 724, 27 Sup. Ct. Rep. 447, 10 A. & E. Ann. Cas. 733, decided in

Am. Rep. 294, did not repeal it, or give the defendant a vested right to slander his wife. Should he be convicted, and the judge find that the defendant would not have wantonly and maliciously attempted to destroy his wife's reputation by falsely charging her with adultery, but for his knowledge of *State v. Edens*, and therefore supposing that he was immune from punishment, the judge can give that fact such weight as he thinks proper in imposing sentence, or the governor can do so in passing upon a petition for pardon or commutation. But what we now declare the meaning of the statute to be is a declaration of what it meant when passed. The defendant Edens is the only person entitled to be protected by the erroneous construction placed on the statute in this case."

Connor, J., who wrote the opinion in the Bell Case, said in the Fulton Case: "While I do not think that the question decided in *State v. Bell*, supra, is presented here, I deem it proper to say that, having written the opinion in that case, upon further consideration, I do not think that the decision is consistent with, or sustained by, reason or the best-considered authorities. It seemed probable that, in view of the peculiar facts of that case, and the evident hardship imposed upon the defendant by reason of a misunderstanding of his rights under the contract with his landlord, he was misled by the decision in *State v. Neal*, 129 N. C. 692, 40 S. E. 205. I do not care to enter into further discussion of that question at this time, and only mention it in deference to the opinion of Mr. Justice Walker, and because I think frankness makes it proper to say this much. It was one of those hard cases which are said to be the 'quicksands of the law.' I do not think it should be extended or applied to the wanton and malicious slander, with intent to destroy the reputation of an innocent woman."

Notwithstanding this disavowal by the judge who wrote the opinion in the Bell Case, his position in that case has been referred to with apparent approval in a number of later cases in North Carolina, involving a departure from *stare decisis* in civil cases. See *Hill v. Atlantic & N. C. R. Co.* 143 N. C. 539, 9 L.R.A.(N.S.) 606, 55 S. E. 854; *Volivar v. Richmond Cedar Works*, 152 N. C. 656, 68 S. E. 200; *Mason v. A. E. Nelson Cotton Co.* 148 N. C. 492, 18 L.R.A.(N.S.) 1221, 123 Am. St. Rep. 635, 62 S. E. 625; *Hill v. Brown*, 144 N. C. 117, 56 S. E. 693.

In *Lanier v. State*, 57 Miss. 102, the court said that the doctrine of *stare decisis* in criminal cases cannot be carried to the extent of allowing violators of law a vested interest in rules which have been previously sanctioned. It appears in this case, however, that the expressions in the earlier opinions which were overruled were *obiter*, or at least went further than the facts of the case in which they were uttered warranted; and the court remarked that it did not consider that the earlier case, when construed with reference to its facts, laid down any different rule than was announced in the Lanier Case. The Lanier Case, therefore, cannot be regarded as an authority against the decision in the O'NEIL Case.

In New York it is expressly provided by statute (Code Civ. Proc. § 1961) that whenever, by the decision of the appellate division of the supreme court, a construction is given to a statute, an act done in good faith and in conformity to that construction after the decision was made, and before reversal thereof by the court of appeals, is so far valid that a party doing it is not liable to any penalty or forfeiture for an act that was adjudged lawful by such decision. It will be observed, however, that this does not provide for the contingency of the court of appeals departing from the rule *stare decisis*, and overruling a previous decision.

All of the members of the court in the O'NEIL Case recognized the injustice of plying the statute to a transaction which took place before the decision of the Federal Supreme Court or of the state court upholding the constitutionality of the statute.

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1907, reached the conclusion that its previous holding that the statute was in violation of the Federal Constitution was erroneous, and expressly overruled the two cases in which that conclusion had been announced, and sustained a judgment enjoining the maintenance of a place for carrying on the business of soliciting, taking, and accepting orders for the purchase, sale, and shipment of intoxicating liquors, for and on behalf of a corporation located and doing business in another state, as a nuisance. *McCollum v. McConaughy*, 141 Iowa, 172, 119 N. W. 539.

It will be noticed that the acts charged as against this defendant (and in fact also the filing of the information before the justice of the peace) were after the supreme court of this state had held the stat-

ute to be unconstitutional, and also after the decision of the Supreme Court of the United States in a somewhat similar case from South Dakota, sustaining the validity of such a statute as against the contention that it was in violation of the Federal Constitution, but prior to the action of this court in reversing its prior decisions in reliance on the later decision of the Supreme Court of the United States. The contention for defendant is that the decision of this court sustaining the constitutionality of the statute should not be given a retroactive effect, and defendant should not be punished for acts which, according to the prior decisions of the supreme court of this state, were lawful.

It is, of course, well settled that a statute which has been held unconstitutional,

ute; but, as is apparent from the different theories advanced in the several opinions, considerable difficulty was experienced in reconciling the reversal of the conviction with the theory that, despite the decisions to the contrary in the earlier cases, the statute was constitutional from the beginning. It appears that the Iowa supreme court, in the previous case of *McCollum v. McConaughy*, 141 Iowa, 172, 119 N. W. 539, had decided, upon the authority of the Federal Supreme Court case, that the statute was constitutional, and overruled the earlier decisions to the contrary, though that was a civil, and not a criminal, case. If the *O'NEIL CASE* had been the first one following the decision of the Federal Supreme Court to present to the state court the question of the constitutionality of the statute, it would seem that the court might have avoided the difficulty by disposing of the case upon the principle of *stare decisis*; at the same time, however, expressing its conviction that the earlier cases were erroneously decided, and intimating that it would not feel bound to adhere to the same as to subsequent offenses. In other words, the court, although convinced that the earlier decisions were erroneous, might defer its departure from the rule *stare decisis* until a proper occasion arose, viz., a case presenting a subsequent offense. Upon this theory it would seem that the justice who wrote the opinion in the *Bell Case* might have reconciled it with his opinion in the *Fulton Case*. The offense in the *Bell Case* being somewhat technical and involving no moral turpitude, in other words, being *malum prohibitum*, and not *malum in se*, an immediate departure from the rule *stare decisis* would be unjust, and such a departure might be properly deferred until a case involving a subsequent offense should arise, notice being given by the opinion in the meantime that the court had become convinced that the earlier decisions were erroneous on principle, and would not be adhered to in subsequent cases. While, upon this theory, such a declaration would be in the nature of an *obiter dictum*, it 33 L.R.A. (N.S.)

would doubtless be sufficient to justify the departure from the rule *stare decisis* as to subsequent offenses, if the court still remained of the opinion that the earlier cases were erroneously decided. Upon the other hand, the offense in the *Fulton Case* being *malum in se*, and not merely *malum prohibitum*, the court might properly conclude that there would be no injustice in an immediate departure from the rule *stare decisis*.

As intimated, however, this theory is hardly adequate to the exigency presented in the *O'NEIL CASE*, in view of the previous announcement in the *McCollum Case* of the change of decision as to the constitutionality of the statute. That decision put the court in the position of having already departed from the rule *stare decisis*.

As suggested in the note to *Crigler v. Shepler*, 23 L.R.A. (N.S.) 509, dealing with the effect of a change of judicial decision to impair the obligation of a contract, a court which has deemed it proper in a particular case to depart from the principle of *stare decisis* might deem another departure justified, in order to do justice as between parties to a transaction which occurred before the first departure. It is true that such a second departure would be subject to the objection not applicable to the first, that it was not intended to establish a permanent general rule, but was temporary, and designed only to cover a particular class of cases. It would seem, however, that such class of cases is so exceptional, and from the circumstances makes such a peculiar appeal for exclusion from the general rule adopted upon the first departure, as to justify a second departure from the rule *stare decisis*, even if temporary and partial. At all events, the justice of the result in the *O'NEIL CASE* is apparent, however difficult it may be to reconcile it with accepted theories as to the effect of a change of judicial decisions, and as to the operation and effect of statutes erroneously declared unconstitutional.

G. H. P.

either *in toto* or as applied to a particular class of cases, is valid and enforceable without re-enactment, when the supposed constitutional objection has been removed, or has been found not to exist. That was the holding in *McCullum v. McConaughy*, *supra*, and is not now questioned. See also *Pierce v. Pierce*, 46 Ind. 86. And the conviction below was proper, unless some benefit is to be given to defendant of the fact that, when the acts were committed, the latest announced decision of this court was to the effect that the statute was unconstitutional, and therefore not enforceable. It is only by analogy, applying the rule of precedent, and not of adjudication, that the decision in one case becomes in any sense the law in another case. The analogy may be so complete that the reasoning of the one case necessarily points out the conclusions to be reached in the other, and, if so, the court feels bound to bow to its previous decision, unless it is made to appear that it is so manifestly erroneous that it should be overruled. If overruled, its force as a precedent ceases, and the later decision becomes a precedent. The analogy, however, may be incomplete, and then it is for the court to determine in the subsequent case whether the reasoning of the prior case is applicable under circumstances in some of which the cases are similar, and in others dissimilar. It is not the function of a court to lay down the law for future cases, but to announce the law for the case which it is deciding. It is an important function of an appellate court to so announce its reasons for decision that they may be understood and applied with reference to subsequent cases which are likely to arise, but no court can attempt to anticipate by announcement what the law will be found to be in a case in some respects dissimilar, which may subsequently arise. Therefore, as has often been said, there is no vested right in the decisions of a court, and, under the clause in the Federal Constitution prohibiting any state from passing any law impairing the obligation of contracts, the Supreme Court of the United States has uniformly held that the change of decisions of a state court does not constitute the passing of a law, although the effect of such change is to impair the validity of a contract made in reliance on prior decisions. *National Mut. Bldg. & L. Assn. v. Brahan*, 193 U. S. 635, 48 L. ed. 823, 24 Sup. Ct. Rep. 532; *Central Land Co. v. Laidley*, 159 U. S. 103, 40 L. ed. 91, 16 Sup. Ct. Rep. 80. And see *Storrie v. Cortes*, 90 Tex. 283, 35 L.R.A. 666, 38 S. W. 154; *Swanson v. Ottumwa*, 131 Iowa, 540, 5 L.R.A.(N.S.) 860, 106 N. W. 9, 9 A. & E. Ann. Cas. 1117; *Lanier v.* 33 L.R.A.(N.S.)

State, 57 Miss. 102. It is also quite clear that the change in the decisions of a court of a state does not violate the prohibition found in the same clause of the Federal Constitution against the making of *ex post facto* laws.

From the conclusion that, in a constitutional sense, there is no vested right in reliance on decisions of the court as precedent, and that one who is brought into court for a violation of law cannot sustain himself on the mere plea that, in some other case which he thought to be analogous, the court rendered a decision which, if applied as he thought it would be applied, would result in exculpating him from wrong, it does not necessarily follow that the court cannot take into account, as a controlling consideration in reaching the conclusion as to the justice of a case, that the party charged with wrongful conduct relied reasonably and in good faith upon decisions of the courts in determining whether a wrong was committed. The Supreme Court of the United States, while recognizing its general obligation to follow the decisions of the courts of the state in which a contract is made in determining its validity, has held that it will not recognize a change of rule in a state made by judicial decision, where the effect of such change is to render invalid contracts which, according to the views previously expressed by the state courts at the time the contracts were made, were valid. *Gelpcke v. Dubuque*, 1 Wall. 175, 17 L. ed. 520; *Thomson v. Lee County*, 3 Wall. 331, 18 L. ed. 178; *Douglass v. Pike County*, 101 U. S. 677, 25 L. ed. 968; *Center School Twp. v. State*, 150 Ind. 168, 49 N. E. 961. In *Muhler v. New York & H. R. Co.* 197 U. S. 544, 49 L. ed. 872, 25 Sup. Ct. Rep. 522, the judges whose views on this point are expressed in the opinions filed were equally divided on the question whether one acquiring property in reliance on decisions of the courts of the state, relating to his rights in an abutting street, had a vested right as against a subsequent change of decision in the state courts. These cases are cited, not as indicating any constitutional duty on the part of the courts of a state to protect a litigant in rights which he in good faith supposed he had already acquired by reason of previous decisions of the same court in other cases, but for the purpose of illustrating the extent to which a court may properly go in administering the law for the purpose of effectuating justice; that is, for the purpose of rendering such decision as shall appeal to intelligent and fair-minded people as right and proper. Courts have always taken such considerations into account in the enforcement of

legislative enactments. Before there was any separate equity jurisdiction, and when the term "equity" was used as a mere synonym of equality and justice, the courts interpreted statutes with a view to their equity, and not merely in accordance with their strict terms; so that the case might be within the equity of a statute, although not expressly covered by it, and, *vice versa*, the statute might be held not applicable in its equity, although its strict terms covered the case. The term "equity of a statute" has fallen into disuse since the establishment of a system of equity jurisprudence, but the courts have not ceased in either branch of their jurisdiction to give consideration to the general purpose of the law-maker, as furnishing a guide to interpretation. See Dr. Hammond's note in his edition of Lieber's *Hermeneutics*, p. 283. This again is but an illustration of the effort the court will properly make to do justice in a broad sense. In criminal cases, where the life or liberty of an individual is involved on one side, and the enforcement of law in the interest of the public welfare on the other, no private right of contract or property being imperiled by liberality of construction, the courts go further than in civil cases to recognize the common judgment of humanity as to what is right and just, and they allow many exceptions to statutory definitions of what shall constitute a crime. For instance, in this state, although there is no statutory recognition of a coverture as a defense on the part of a married woman for a crime committed in the presence of her husband, we have said that the common-law exception in that respect is applicable. *State v. Fitzgerald*, 49 Iowa, 260, 31 Am. Rep. 148, 3 Am. Crim. Rep. 1; *State v. Kelly*, 74 Iowa, 589, 38 N. W. 503; *State v. Harvey*, 130 Iowa, 394, 106 N. W. 938. And it is the general rule in all the states of the Union, even those in which the criminal law is codified, to recognize infancy and insanity as relieving from the punishment prescribed by statute for criminal offenses, as they were recognized at common law, although such defenses are not allowed under any express statutory provision. The assumption is that even the statutory criminal law is to be administered in accordance with the general principles of right and justice recognized in the common-law system. 1 Bishop, *New Crim. Law*, § 35. In the determination of the criminality of an act, even under the statutory definition the intent is a material consideration. It is the absence of criminal intent which constitutes the basis of the defenses of infancy, insanity, and coverture. Ignorance and mistake are also recognized as in the same category, 33 L.R.A. (N.S.)

but here enters a question of public policy. One who is bound to obey the law ought not to be allowed to say that he was ignorant of it. He may show as a defense that he was mistaken as to a fact which, if it had been as he supposed it to be, would have rendered his act lawful; but he cannot say that if the law had been as he supposed it to be, his act would have been lawful, and he should not be punished. This principle of public policy has become crystallized into the maxim, "Ignorance of the law excuses no one," and, as applied to the present case, it might well be said, if we followed this maxim, that defendant is not to be excused because he did not know the law, that is, did not know that the previous decisions of this court holding the statute which he was violating to be unconstitutional were wrong, and the statute was in fact valid and operative. As between conflicting rights, we might well refuse to allow any impairment of so well settled a principle, and hold that parties act at their peril as to what the law shall be decided to be. But, as already indicated, in a criminal case there is no such imperative obligation, for after all the punishment of crime is a matter of public concern only, and we think that it would strike any reasonable and fair person as manifestly unjust that one should be adjudged criminal in having done an act not morally wrong, but only wrong because prohibited by statute, that is, an act *malum prohibitum*, and not one *malum in se*, relying upon the decisions of the highest court in the state holding such statute to be wholly invalid because in excess of the power of the legislature to enact it.

In this connection it is to be noticed that the decisions of courts as to the constitutionality of a statute stand on somewhat different ground than those relating to the common law or the interpretation of statutes, as applied to particular cases. The function of determining whether a statute is invalid because in excess of the legislative power is one peculiar to our system of government, and unknown in other jurisdictions in which the common law prevails. It is true that such an adjudication is made in a particular case. Although the power to be investigated is that of the legislative department itself, which cannot be a party so as to be bound by any judicial decision, nevertheless the courts discuss such question when it arises, and decide the matter, not only for the purpose of determining the rights of particular parties, but with reference to the effect of the decision upon the law of the state. A statute unconstitutional properly remains on the statute books as a part of the written law, but

those who are bound to obey the law may, we think, reasonably take into account the decisions rendered by the courts in the exercise of their peculiar function of passing upon the constitutionality of the statutes, in determining what the law of the state really is. To the ordinary mind, it would smack of absurdity to say that defendant ought to have known that the statute was constitutional, and would, in case he violated it, be enforced against him, although the supreme court of the state had fully considered the validity of the statute as against the claim that it was unconstitutional, and had unanimously held that it was in excess of state legislative power as to its entire subject-matter, and therefore invalid. Under such circumstances, it is plain that there should be some relief to defendant from punishment, for the very purpose of punishment is defeated, if unreasonably and arbitrarily imposed. Respect for law, which is the most cogent force in prompting orderly conduct in a civilized community, is weakened, if men are punished for acts which, according to the general consensus of opinion, they were justified in believing to be morally right and in accordance with law. If we should sustain the conviction, we would do so in the belief that the case was one in which executive clemency ought to be exercised. But is it quite fair to throw upon the executive the responsibility of relieving from punishment on account of the very nature of the act committed which is made apparent to this court, and its nature as being innocent or guilty appears to depend upon the effect to be given to the decisions of this court? We think we would be shirking our responsibility if we should leave it to the executive to do what we believe to be manifest justice in this case, and should stigmatize the defendant with a conviction for crime, when, as it appears, he was innocent of any real wrong. We think the real question as to the guilt of defendant is to be settled by referring to the doctrine of criminal intent, which has always been held to be of the essence of a crime. 1 Bishop, New Crim. Law, §§ 205, 285-291b. And justifiable ignorance or mistake has always been taken into account in determining the criminality of the act. 4 Bl. Com. 27; 1 Bishop, New Crim. Law, §§ 292-312; Reg. v. Prince, L. R. 2 C. C. 154, 44 L. J. Mag. Cas. N. S. 122, 32 L. T. N. S. 700, 24 Week. Rep. 76, 13 Cox C. C. 138, 1 Am. Crim. Rep. 1. For reasons already pointed out, mere ignorance of law does not excuse, and even ignorance of fact which the statute, expressly or impliedly, makes it the duty of one acting in reference to the subject-matter regulated by the statute to know, and with reference to which he is required to act 33 L.R.A.(N.S.)

at his peril, will not excuse him. But even as to these strict rules there are necessary exceptions. If a mistake of fact is due to mistake of law, so that it appears that there is no guilty mind, punishment should not be imposed. *Rex v. Hall*, 3 Car. & P. 409; *Reg. v. Reed*, Car. & M. 306; *People v. Powell*, 63 N. Y. 88; *People v. Husband*, 36 Mich. 306; 2 Am. Crim. Rep. 111; *Com. v. Stebbins*, 8 Gray. 492. And no matter how stringently the statute may impose the duty of knowing the facts on which the defendant has relied in a course of conduct that is prohibited, save under certain prescribed conditions, the common-law exceptions which relieve on account of lack of criminal intent, due to infancy, insanity, coverture, or necessity, are recognized. *Cutter v. State*, 36 N. J. L. 125; *The William Gray* (U. S. C. C.) 1 Paine, 16, Fed. Cas. No. 17,694. These cases are cited not as directly in point for the solution of our present difficulty, but as illustrations of the fact that courts must, especially in the administration of the criminal law, make exceptions in the interest of justice and public policy, to rules which it is very essential to maintain in ordinary cases. An exception to the rule that everyone is required to know the law is justified, we believe, when, as to the validity of a statute on constitutional grounds, a person has relied upon the expressed decisions of the highest court in his state. We do not believe such exception to be against public interest, but rather in the furtherance of justice. This question seems not to have often arisen, so as to have been considered in courts of last resort, but we have support in the conclusion we have reached in the cases of *State v. Bell*, 136 N. C. 674, 49 S. E. 163, and *State v. Fulton*, 149 N. C. 485, 63 S. E. 145.

That our conclusion in this case may not be misapprehended, and relied upon in support of propositions to which we have no disposition to yield consent, we desire to emphasize the following controlling conditions. This is a criminal case, and therefore involves no conflicting claims as to contractual or property rights. The defendant may be presumed to have acted with knowledge of the fact that the statute now invoked as rendering illegal an act not otherwise wrongful or immoral had been expressly held by this court, in cases prosecuted under public authority, to be unconstitutional because in excess of legislative power.

The judgment of the trial court is reversed.

Deemer, Ch. J., concurring:

While concurring in the result reached, the case is so peculiar in its facts, and the

principles upon which it is decided by the majority opinion so important, that I deem it my duty to express my views thereon in a separate opinion. I am constrained to do this largely because of the fact that it is an illustration of the truth of Lord Campbell's exclamation of many years ago, that "hard cases must not make bad law." Some things are said in the majority opinion with which I fully agree, but there are other statements therein which I cannot approve, and which I think will rise to plague us in the future if they be adopted without dissent. The majority make the decision turn, as I understand it, upon the thought that defendant had no criminal intent, and for that reason should not be punished for his violation of a statute which to my mind involves no question of intent, other than the doing of the prohibited act. I do not believe that this is sound.

Again, the opinion seems to proceed upon the theory that there is an implied exception in this statute, which the courts should recognize. I do not believe that this is true.

Moreover, ignorance or mistake of law seems to be thought of some merit in deciding the question before us. I fear that the introduction of this principle into the case at bar is fraught with much danger. I must especially dissent from the statement in the opinion that the real question as to the guilt of the defendant is to be settled by referring to the doctrine of criminal intent. The statement in the opinion that "if a mistake of fact is due to a mistake of law, so that it appears there is no guilty mind, punishment should not be imposed." I cannot agree to this unless the statute in question in some way makes intent, either general or specific, an element of the offense.

I do not like that part of the discussion in the opinion which treats of the effect to be given judicial opinions, particularly where they involve constitutional questions, or relate to the construction of statutory enactments. I think the case may be decided and properly bottomed upon two well-settled principles. The first one is that a change of judicial decision involving the constitutionality of an act or construing an act of the legislature should, like an act emanating from the lawmaking power, be given a prospective rather than a retrospective or retroactive operation; second, the Constitution provides that "excessive fines shall not be imposed, and cruel and unusual punishment shall not be inflicted." See § 17, art. 1. My own convictions regarding the effect of a change in judicial decisions, as applied to contracts, are fully

expressed in the case of *Swanson v. Ottumwa*, 131 Iowa, 540, 5 L.R.A.(N.S.) 860, 106 N. W. 9, 9 A. & E. Ann. Cas. 1117, and need not be elaborated here. I need only quote the following from that opinion: "We are inclined to the view there is nothing in the Constitution which forbids a change of judicial opinion, except it be with reference to a particular statute, although we must confess that there are some strong cases to the contrary. As supporting our view, see *Storrie v. Cortes*, 90 Tex. 283, 35 L.R.A. 666, 38 S. W. 154; *Center School Twp. v. State*, 150 Ind. 168, 49 N. E. 961; *Shepherd's Point Land Co. v. Atlantic Hotel*, 134 N. C. 397, 46 S. E. 748." It will be noticed from this extract that, if the decision be with reference to a particular statute, there may be a violation of the constitutional limitation, if the change of judicial opinion be with reference to that particular statute. It is quite fundamental, I think, that the judicial construction of a statute becomes a part of it, and, as to rights which accrue afterwards, it should be adhered to for the protection of those rights. As said in *Sutherland on Statutory Construction*, § 319: "To devest them by a change of the construction is to legislate retroactively. The constitutional barrier to legislation impairing the obligation of contracts applies also to decisions altering the law as previously expounded, so as to affect the obligations of existing contracts made on the faith of the earlier adjudications." As further supporting this view, see *Green v. Neal*, 6 Pet. 291, 8 L. ed. 402; *Shelby v. Guy*, 11 Wheat. 368, 6 L. ed. 497. In the case of *Ohio L. Ins. & T. Co. v. Debolt*, 16 How. 432, 14 L. ed. 1003, Chief Justice Taney said that "the sound and true rule is that, if the contract when made was valid by the laws of the state as then expounded by all the departments of its government, and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent act of the legislature . . . or decision of its courts altering the construction of the law." In *Douglass v. Pike County*, 101 U. S. 677, 25 L. ed. 968, it was held that "the true rule is to give a change of judicial construction in respect to a statute the same effect in its operation on contracts and existing contract rights that would be given to a legislative amendment; that is to say, make it prospective, but not retroactive. After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decision is, to all intents and purposes, the same in

its effect on contracts as an amendment of the law by means of a legislative enactment." The following cases also support this doctrine: *Green County v. Conness*, 109 U. S. 104, 27 L. ed. 872, 3 Sup. Ct. Rep. 69; *Olcott v. Fond du Lac County*, 16 Wall. 689, 21 L. ed. 386; *Fairfield v. Gallatin County*, 100 U. S. 52, 25 L. ed. 546; *Carroll County v. United States*, 18 Wall. 71, 21 L. ed. 771; *Gelpcke v. Dubuque*, 1 Wall. 206, 17 L. ed. 525. In *Endlich on Interpretation of Statutes*, § 363, it is said: "Judicial interpretation of a statute becomes a part of the statute law, and a change of it is, in practical effect, the same as a change of the statute." See also, as sustaining this doctrine, *Ray v. Natural Gas Co.* 138 Pa. 591, 12 L.R.A. 290, 21 Am. St. Rep. 927, 20 Atl. 1065; *Walker v. State*, 12 S. C. 271; *Lyon v. Richmond*, 2 Johns. Ch. 51; *Columbia County v. King*, 13 Fla. 463; *Edwards v. Darby*, 12 Wheat. 206, 6 L. ed. 603; *Stallcup v. Tacoma*, 13 Wash. 152, 52 Am. St. Rep. 32, 42 Pac. 541; *Ex parte Selma & G. R. Co.* 45 Ala. 730, 6 Am. Rep. 730; *Hall v. Wells*, 54 Miss. 301; *Herndon v. Moore*, 18 S. C. 354; *Wickersham v. Savage*, 58 Pa. 369; *State v. Comptoir National D'Escompte*, 51 La. Ann. 1272, 26 So. 94; *Vermont & C. R. Co. v. Vermont C. R. Co.* 63 Vt. 23, 10 L.R.A. 565, 3 Inters. Com. Rep. 488, 21 Atl. 262, 731; *Opinion of Justices*, 58 N. H. 625; *Muhler v. New York & H. R. Co.* 197 U. S. 573, 49 L. ed. 879, 25 Sup. Ct. Rep. 522. It must be remembered that I am not now discussing the effect of a decision relating to that great body of the law known as the unwritten, wherein, as I think, a different principle is to be applied. See further, as supporting these views, *Ryalls v. Mechanics' Mills*, 150 Mass. 190, 5 L.R.A. 667, 22 N. E. 766; *Philadelphia & E. R. Co. v. Catawissa R. Co.* 53 Pa. 20; *Packard v. Richardson*, 17 Mass. 122, 9 Am. Dec. 123. It is well settled, of course, that when the legislature adopts a statute of another state, it adopts with it the judicial construction of that statute as interpreted by the court from which the statute is borrowed. *Trabant v. Rummell*, 14 Or. 17, 12 Pac. 56; *Pratt v. American Bell Teleph. Co.* 141 Mass. 225, 55 Am. Rep. 465, 5 N. E. 307. There is much ground for holding that a change of decision with reference to the interpretation of a statute is to all intents and purposes the same in its effect as an amendment of the law by means of legislative enactment. That view finds express support in *Farrior v. New England Mortg. Security Co.* 92 Ala. 176, 12 L.R.A. 856, 9 So. 532; *Taylor v. Ypsilanti*, 105 U. S. 72, 26 L. ed. 1012; *Lane v. Watson*, 51

N. J. L. 186, 17 Atl. 117; *State v. Bell*, 136 N. C. 674, 49 S. E. 163; *Center School Twp. v. State*, 150 Ind. 168, 49 N. E. 961; *Lewis v. Symmes*, 61 Ohio St. 471, 76 Am. St. Rep. 428, 56 N. E. 194; *State v. Fulton*, 149 N. C. 485, 63 S. E. 145; *Haskett v. Maxey*, 134 Ind. 182, 19 L.R.A. 379, 33 N. E. 358; *Loeb v. Columbia Twp.* 179 U. S. 472, 45 L. ed. 280, 21 Sup. Ct. Rep. 174, and cases cited; *State ex rel. Clyde v. Bristol*, 109 Tenn. 315, 70 S. W. 1031; *Gross v. Whitley County*, 158 Ind. 537, 58 L.R.A. 394, 64 N. E. 25; *Harmon v. Auditor*, 123 Ill. 122, 5 Am. St. Rep. 510, 13 N. E. 161; *Mountain Grove Bank v. Douglas County*, 146 Mo. 42, 47 S. W. 946; *Stockton v. Dundee Mfg. Co.* 22 N. J. Eq. 56; *Richardson v. Marshall County*, 100 Tenn. 346, 45 S. W. 440; *Falconer v. Simmons*, 51 W. Va. 172, 41 S. E. 193.

In very many of these cases it is squarely held that a change of judicial opinion should be given the same effect as a subsequent enactment of the legislature, that is to say, a prospective operation, in order to avoid the objections which have just been pointed out. I shall not take the time to quote from all of these; but do wish to call attention to what is said to be a well-established and well-understood exception to the rule pointed out in the majority opinion. This exception, as stated in the *Haskett Case*, 134 Ind. 182, 19 L.R.A. 379, 33 N. E. 358, is as follows: "After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself; and a change of decision is to all intents and purposes the same in its effect on contracts as an amendment of the law by means of a legislative enactment." In *Douglas v. Pike County*, 101 U. S. 677, 25 L. ed. 968, it is said: "The true rule is to give a change of judicial construction in respect to a statute the same effect in its operation on contracts and existing contract rights that would be given to a legislative amendment, that is to say, making it prospective, but not retroactive." In the *Hawkins Case*, supra, it is said: "The true rule (affirmed by the authorities and the prevailing one) is to give a change of judicial construction in regard to a statute the same effect in its operation, so as not to disturb vested rights, as would be given to a legislative amendment, that is, apply the change made in the interpretation of the law so as to operate prospectively, and not retroactively." If this be the rule with reference to the interpretation of statutes in actions involving property or contract rights, and such seems to be the doctrine established by the weight

of judicial decisions, there is the more reason for holding it applicable to criminal cases, particularly where the court has once held the criminal statute void and of no effect, because contrary to some provision of the fundamental law. That it is within the power of the courts of this country to declare a statute inoperative and void because contrary to the Constitution is well established, and such decisions are binding, not only upon the parties immediately involved, but upon all departments of government; indeed, upon the state itself. An unconstitutional statute is absolutely void. It is, so to speak, as so much waste paper, and according to the uniform tenor of the authorities such a determination is conclusive on everyone until reversed or overruled. *People v. Briggs*, 114 N. Y. 63, 20 N. E. 820; *People v. Arensberg*, 105 N. Y. 123, 59 Am. Rep. 483, 11 N. E. 277; *People v. West*, 106 N. Y. 293, 60 Am. Rep. 452, 12 N. E. 610; *People v. Kibler*, 106 N. Y. 321, 12 N. E. 795; *Douglass v. Pike County*, *supra*. Such a statute may be vitalized or resuscitated by a decision overruling prior ones holding to the contrary, and this occurs although there be no re-enactment by the legislature. But, when once determined to be unconstitutional, the legislature itself cannot cure the defects in the law by declaring the act constitutional; nor has any other department of government any such power. As said, the decision is binding upon everyone save the court itself. If this be true, it is little short of an absurdity to say that a decision finally upholding the statute as a valid exercise of legislative power should be given retroactive effect, and that acts done at a time when the statute had been declared void by the highest tribunal of the state must be punished because that court took a new view of the constitutional provision. In a criminal case everyone is conclusively presumed to know the law, but he is not expected to know the law better than the courts, or to know what the law will be at some future day. A decision holding a statute unconstitutional is the law until overruled or reversed, and that decision, as we have observed, is binding upon everyone. To hold that one may not do what an unconstitutional statute forbids him doing, because the court may change its mind, is to say that, although declared null and void by the only tribunal having that power, such decision is of no effect, and cannot be made a rule of human conduct, because the court may change its mind, is in effect to deprive the court of its power to annul a statute because of its unconstitutionality. As already intimated, there is a wide distinction between cases involving the valid-

ity and interpretation of statutes, and those which have to deal with the common or unwritten law, for the reason that the judicial construction of a statute is a part of the law itself. Exposition of a statute is a part of the statute. There is every reason, therefore, for holding that a decision holding a criminal statute constitutional, which had theretofore been held unconstitutional, should not be given retroactive effect. Until the decision in the *McCullum Case*, cited in the majority opinion, the statute was absolutely of no effect. In *State v. Fulton*, 149 N. C. 485, 63 S. E. 146, it is said: "The judicial interpretation of a statute becomes, as it were, a part of the statute," and, if that 'interpretation' is afterwards changed or modified, the defendant should be tried under the law as it had been declared to be at the time the alleged offense was committed, simply because it was the law at that time. The defendant, it is true, has no vested right in a decision of this court, but it does not follow that we should reverse our decisions, and then declare that to be criminal which we had decided was not so at the time of the commission of the alleged offense." Judge Cooley, in his work on *Constitutional Limitations*, says at page 188 of the third edition: "When a statute is adjudged to be unconstitutional, it is as if it had never been. Rights cannot be built up under it. Contracts which depend upon it for their consideration are void. It constitutes a protection to no one who has acted under it, and no one can be punished for having refused obedience to it before the decision was made." I see no good reason for not holding that this case comes within the provision of § 21 of article 1 of the Bill of Rights, which prohibits the passage of *ex post facto* laws. An *ex post facto* law is one which makes an act innocent when done a crime. *States v. Squires*, 26 Iowa, 340. Strictly speaking, perhaps, this refers only to laws passed by the legislature, but there is every reason for holding that it also applies to a change of judicial decisions. Decisions of courts construing statutes or declaring them unconstitutional are as much a part of the law of the land as legislative enactments. They become a part of the body of the law itself, and are not merely the evidences thereof, as are decisions relating to the unwritten or common law.

2. I am very clearly of the opinion that no other basis is needed for the conclusion which everyone desires to reach in this case, than the constitutional provision against cruel and unusual punishment. These terms had a well-defined significance in England, where there is no written Constitution; and in interpreting our written

Constitution; we are not only justified, but it is our duty, to look for the meaning of these terms as found in the decision of courts and the works of commentators published before the adoption of the Constitution. Sir William Blackstone, in treating of the nature of the laws of England (vol. 1, p. 46), said: "There is still a more unreasonable method than this, which is called making of laws *ex post facto*, when after an action (indifferent in itself) is committed, the legislator then for the first time declares it to have been a crime, and inflicts a punishment upon the person who has committed it. Here it is impossible that the party could foresee that an action, innocent when it was done, should be afterwards converted to guilt by a subsequent law. He had therefore no cause to abstain from it, and all punishment for not abstaining must of consequence be cruel and unjust." Such legislation was regarded as invalid in England, where they have no Constitution, on the ground that the punishment was cruel and unjust. The article of the Constitution referred to does not relate to laws passed by the legislature. The broad statement is that cruel and unusual punishment shall not be inflicted. Reading this in the light of the rule as stated by Blackstone, which is well fortified by authority, there seems to be no difficulty in holding that to punish defendant for acts which were innocent when done would be both cruel and unjust. Other reasons might be given, but I believe those already suggested are sound, and should rule the decision.

I think the majority do not give sufficient weight to the decisions of courts interpreting statutes or declaring them unconstitutional; and, in an endeavor to do justice, have announced rules which are unsound in principle, and not sustained by authority. The analogy between the defenses of insanity and infancy and the defense interposed here is not apparent.

I concur in reversal of the judgment for the reasons indicated.

Sherwin, J.:

I concur in the views expressed in the first division of this opinion.

Weaver, J., concurring:

If the majority had announced the conclusion that, under our peculiar system of government, it is an implied term or condition in every statute defining crime that its penalties are not to be enforced for an act done after an authoritative judicial decision declaring the enactment unconstitutional, and before a later decision by which the former is overruled and the valid—
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ity of such law judicially affirmed, I should not burden the record with any expression of my individual views. The authority of a court to say that a statute is not applicable to every case apparently included within its general terms is a delicate, if not dangerous, one, which in the hands of a reckless judiciary would be productive of the gravest abuses; but it is nevertheless a necessary authority, and one to which the most eminent courts of the country have at times resorted. General statutes are necessarily stated in general terms to effect certain general or specific results, and it not infrequently happens that we find a case which is embraced within the literal general terms of the law, but which, we are morally certain, is not within its intent, and, when such appears to be the case, the enforcement of such law is restricted accordingly. In line with this thought I quote the following: "Acts of Parliament are to be so construed as no man that is innocent or free from injury or wrong be, by a literal construction, punished or endamaged." *Margate Pier Co. v. Hannam*, 3 Barn. & Ald. 266, 22 Revised Rep. 378. "If a literal construction of the words of a statute be absurd, the act must be so construed as to avoid the absurdity." *State v. Clark*, 29 N. J. L. 96. "All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language which would avoid results of this character. The reason of the law in such cases should prevail over its letter." *United States v. Kirby*, 7 Wall. 482, 19 L. ed. 278. See also *United States v. Palmer*, 3 Wheat. 631, 4 L. ed. 477. "It is a familiar rule that a thing may be within the letter of the statute, and yet not within the statute, because not within its spirit nor within the intention of its makers. . . . This is not the substitution of the will of the judge for that of the legislator, for frequently words of general meaning are used in a statute, words broad enough to include the act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislature intended to include the particular act." *Church of the Holy Trinity v. United States*, 143 U. S. 457, 36 L. ed. 226, 12 Sup. Ct. Rep. 511. "A thing which is within the letter of a statute is not within the statute unless it be within the intention of the makers." *Jackson ex dem. Scofield v. Collins*, 3 Cow.

89. See also *Ryegate v. Wardsboro*, 30 Vt. 746; *Murray v. Hobson*, 10 Colo. 66, 13 Pac. 921; *Com. v. Kimball*, 24 Pick. 366; *Whitney v. Whitney*, 14 Mass. 88; *Pierce v. Emery*, 32 N. H. 508; *Austin v. State*, 22 Ind. App. 221, 53 N. E. 481. It is a fair deduction from these authorities that the very absurdity, to say nothing of the essential injustice, involved in punishing as criminal the violation of a statute of the state which we, as the court of last resort in that state, were then solemnly assuring the people was unconstitutional and void, and not entitled to their obedience, is sufficient reason for saying that the legislature could not have intended any such application of its enactment. The road by which this result is reached is not wholly unlike the one pursued in the opinion prepared by Mr. Justice McClain. It differs, however, in this somewhat material respect, in that he emphasizes the lack of criminal intent upon the part of the appellant in doing the act, while I have emphasized the absence of legislative intent to include such acts within the penalty of the statute. The latter view appeals to me as being sound, and it avoids the otherwise formidable objection raised by Mr. Chief Justice Deemer, that we cannot make the absence of criminal intent a controlling consideration without creating confusion in our decisions, and unsettling or weakening the authority of the precedents to which he refers. The argument by analogy from the rule which obtains where the accused is shown to be an insane person or an irresponsible infant is hardly applicable, for in such cases crime is not imputed,—not so much from the want of criminal intent as from the incapacity of the accused to know or appreciate the quality of the act with which he is charged. On the other hand, I cannot agree with the concurring opinion by the chief justice, in holding that a change in judicial interpretation of a statute becomes a part of the statute, or that a change in such interpretation is the “same in effect as an amendment of the law by means of legislative enactment.” Whatever may have been their practice in borderline cases, our courts have always been quick to deny the charge of magnifying their authority or indulging in judicial legislation, and I think we should carefully avoid any pronouncement which may give color to criticism of that character. The rule which sometimes obtains in civil actions involving contract rights would in my judgment have a very misleading application in criminal cases, for in the former the party is relieved from the effect of the change of decision not because the erroneous holding becomes a part of the law (though 33 L.R.A. (N.S.)

that expression is often used), but because the parties are presumed to have contracted with reference to such decision, which is thereby made in effect a term or condition of the agreement itself.

I am also firmly persuaded that the constitutional inhibition of cruel and inhuman punishments is not available to the appellant in this case. To make it applicable, we must assume the guilt of the accused, but hold the punishment prescribed is objectionable because it is cruel, inhuman, or one out of all reasonable proportion to the nature and quality of the offense. But, assuming guilt, a punishment is not obnoxious to the constitutional provision merely because it is severe. Fine and imprisonment are substantially the only practicable penalties which the state can impose upon offenders, and except in extreme case showing gross abuse of such authority, the courts will not, or at least ought not, assume to say that a statute imposing them is void. The penalty which the statute imposes for the offense charged against the appellant is a fine of not less than \$50 nor more than \$100 for the first offense, with alternative of imprisonment not exceeding thirty days in case the fine be not paid. Code, §§ 2382, 2383. Assuming that appellant was punishable at all, and as I have said we must so assume before raising the constitutional objection, it is to me inconceivable that such punishment is excessive or cruel, or inhuman or unreasonable, within the meaning of that provision. The books will be searched in vain for a precedent to justify that holding. To the contrary, see *State v. Teeters*, 97 Iowa, 453, 66 N. W. 754; *Martin v. Blattner*, 68 Iowa, 286, 25 N. W. 131, 27 N. W. 244, 6 Am. Crim. Rep. 148; *State v. Huff*, 76 Iowa, 204, 40 N. W. 720; *Fisher v. McDaniel*, 9 Wyo. 457, 87 Am. St. Rep. 981, 64 Pac. 1056; *Luton v. Circuit Judge*, 69 Mich. 610, 37 N. W. 701; *Com. v. Hitchings*, 5 Gray, 482; *Blydenburgh v. Miles*, 39 Conn. 484; *Com. v. Murphy*, 165 Mass. 66, 30 L.R.A. 734, 52 Am. St. Rep. 496, 42 N. E. 504, 10 Am. Crim. Rep. 67; *Ex parte Keeler*, 45 S. C. 537, 31 L.R.A. 678, 55 Am. St. Rep. 785, 23 S. E. 865; *State v. Nelson*, 10 Idaho, 522, 67 L.R.A. 808, 109 Am. St. Rep. 226, 79 Pac. 79, 3 A. & E. Ann. Cas. 322; *Ex parte Swann*, 96 Mo. 44, 9 S. W. 10; *Pervear v. Massachusetts*, 5 Wall. 475, 18 L. ed. 608; *McLaughlin v. State*, 45 Ind. 338; *State ex rel. Larabee v. Barnes*, 3 N. D. 319, 55 N. W. 883; *Harper v. Com.* 93 Ky. 290, 19 S. W. 737; *State v. DeLano*, 80 Wis. 259, 49 N. W. 808; *State v. Rodman*, 58 Minn. 393, 59 N. W. 1098.

In fact as I view it, there is but one tenable ground on which we can interfere with

the judgment of the trial court in this case, and that is to say that the act with which the defendant is charged, though within the letter of the prohibition of the statute, is not within its purpose, reason, or intent, and is therefore not punishable. On that ground alone I would reverse.

**UNITED STATES CIRCUIT COURT
OF APPEALS, EIGHTH CIRCUIT.**

FRED D. WARREN, Plff. in Err.,

v.

UNITED STATES.

(106 C. C. A. 156, 183 Fed. 718.)

Postoffice — unmailable matter — freedom of speech.

1. No unconstitutional interference with liberty or freedom of speech is effected by forbidding the placing of scurrilous matter on packages placed in the mail.

Same — offering reward — permissibility.

2. The placing by a private citizen of a package in the mail bearing an inscription offering a reward for the return of a certain

Note. — Placing scurrilous or defamatory matter upon outside covering of mail as offense against postal laws.

Constitutionality.

The constitutional power of Congress to determine what shall be excluded from the mails, as is affirmed in *WARREN v. UNITED STATES*, would seem to admit of no question. In *Ex parte Jackson*, 96 U. S. 727, 24 L. ed. 877, a case arising under the act prohibiting the mailing of lottery circulars, it was said: "The power possessed by Congress embraces the regulation of the entire postal system of the country. The right to designate what shall be carried necessarily involves the right to determine what shall be excluded." (Quoted in *United States v. Burnell*, 75 Fed. 824.) The court said, further, that in cases where the object is exposed, and shows unmistakably that it is prohibited, as in the case of an obscene picture or print "no difficulty arises, and no principle is violated, in excluding the prohibited articles, or refusing to forward them;" and the court refers to the act of March 3, 1873, against the mailing of cards or envelopes with indecent or scurrilous epithets, etc.

In *Re Rapier*, 143 U. S. 110, 36 L. ed. 93, 12 Sup. Ct. Rep. 374, where the petitioner was convicted of mailing a newspaper with an advertisement of a lottery, the court, in dismissing his writ of habeas corpus, said: "In *Ex parte Jackson*, supra, it was held that the power vested in Congress to establish postoffices and post roads embraced the regulation of the entire postal

system of the country, and that under it Congress may designate what may be carried in the mail and what excluded; that in excluding various articles from the mails the object of Congress is not to interfere with the freedom of the press or with any other rights of the people, but to refuse the facilities for the distribution of matter deemed injurious, by Congress, to the public morals; and that the transportation in any other way of matters excluded from the mails would not be forbidden. Unless we are prepared to overrule that decision, it is decisive of the question before us."

And in *Public Clearing House v. Coyne*, 194 U. S. 497, 48 L. ed. 1092, 24 Sup. Ct. Rep. 789, the court, in sustaining the order of the Postmaster General, in excluding from the mail registered letters addressed to a company engaged in a lottery, made under the empowering statute, said: "The constitutional principles underlying the administration of the Postoffice Department were discussed in the opinion of the court in *Ex parte Jackson*, supra, in which we held that the power vested in Congress to establish postoffices and post roads embraced the regulation of the entire postal system of the country; that Congress might designate what might be carried in the mails and what excluded, and that in the enforcement of such regulations a distinction was made between letters and sealed packages subject to letter postage, and such other packages as were open to inspection, such as newspapers, magazines, pamphlets, and other printed matter, and that the constitutional guaranty against unreasonable searches and seizures extended to letters, but did not ex-

(November 21, 1910.)

ERROR to the District Court of the United States for the District of Kansas to review a judgment convicting defendant of sending nonmailable matter through the mail in violation of a statute. Affirmed.

The facts are stated in the opinion.

Argued before Hook and Adams, Circuit Judges, and Reed, District Judge.

Messrs. Fred D. Warren, Clarence S. Darrow, Boyle & Howell, J. I. Shepard, and J. S. Brooks for plaintiff in error.

Messrs. J. S. West and Harry J. Bone for the United States.

Hook, Circuit Judge, delivered the opinion of the court:

The plaintiff in error was indicted for depositing in the postoffice of the United

States at Girard, Kansas, for mailing, non-mailable matter, contrary to the act of September 26, 1888 (act Sept. 26, 1888, chap. 1039, 25 Stat. at L. 496, U. S. Comp. Stat. 1901, p. 2661). Among other things the act prohibits the deposit for mailing of all matter, otherwise mailable, upon the envelope or outside cover or wrapper of which is written, printed, or otherwise impressed any language of a scurrilous, defamatory, or threatening character, or calculated by the terms or manner or style of display and obviously intended to reflect injuriously upon the character or conduct of another. The envelope described in the indictment was properly stamped and addressed to another, but on its face there was printed in large red characters the following: "\$1,000 reward will be paid to any person who kidnaps Ex-Gov. Taylor and returns him to Kentucky authorities."

The indictment also charged that the words so printed were of a scurrilous, defamatory, and threatening character, and were calculated and obviously intended to reflect injuriously upon the character and conduct of William S. Taylor, a former governor of the state of Kentucky. There was

tend to printed matter. . . . For more than thirty years not only has the transmission of obscene matter been prohibited, but it has been made a crime, punishable by fine or imprisonment, for a person to deposit such matter in the mails. The constitutionality of this law, we believe, has never been attacked."

In *United States v. Bott*, 11 Blatchf. 316, Fed. Cas. No. 14,626, a case under the provisions against mailing any article or thing intended for the procuring of abortion, etc., the court said: "Congress has exclusive jurisdiction over the mails, and may prohibit the use of the mails for the transmission of any article. Any article of any description, whether harmless or not, may therefore be declared contraband in the mail by act of Congress, and its deposit there be made a crime."

In *United States v. Burnell*, *infra*, where it was claimed that the statute as applied to the printed papers in question interfered with the freedom of the press, the court pointed out that the act did not exclude papers with scurrilous or defamatory matter unless exposed, and quoted *Ex parte Jackson*, *supra*, where the court disposed of this question with the statement that if Congress excluded printed matter from the mails it could not forbid its transportation in any other way.

In *Re Barber*, 75 Fed. 980, the court, while deciding that the matter in question was not within the statute, said of the power of Congress to protect against defamatory matter in the mails: "This protection concerning the mail service is clearly within the purview of Congress."

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a verdict of guilty as charged, and sentence followed.

When the case arose in this court, the accused appeared in his own behalf, dispensed with counsel who had filed a brief, asserted his right to use the mails in the way described in the indictment, and said the only question he desired considered was whether the printed indorsement on the envelope could make his conduct a public offense. But aside from this concession, an examination of the record and briefs discloses no other question that requires consideration. The other objections to the indictment urged in the brief are, we think, without merit. What purports to be a bill of exceptions in the record is not authenticated by the certificate of the trial judge, and the proceedings at the trial are therefore not open to review.

There is no substantial question of liberty or freedom of speech involved in this case. The unrestricted use of the mails is not one of the fundamental rights guaranteed by the Constitution. *Public Clearing House v. Coyne*, 194 U. S. 497, 48 L. ed. 1092, 24 Sup. Ct. Rep. 789. No one has a natural or constitutional right to send what

Matter prohibited.

The form of the statute has undergone some changes. It was held in 1875 that the clause of the statute (U. S. Rev. Stat. § 3893, U. S. Comp. Stat. 1901, p. 2658) prohibiting the mailing of postal cards with "indecent or scurrilous epithets" includes words not in themselves indecent or scurrilous, but expressing indecent or scurrilous ideas; so, where the writing imputed illicit connection between a woman and a negro. *United States v. Pratt*, Fed. Cas. No. 16,082.

A postal card describing the addressee as a "d—n scoundrel and rascal" does not contain "indecent and obscene epithets, terms, and language" within U. S. Rev. Stat. § 3893, as amended in 1876, as "indecent" means immodest, impure. *United States v. Smith*, 11 Fed. 663.

In *United States v. Olney* (1889) W. D. Tenn. reported in a note to *United States v. Davis*, 38 Fed. 328, the court left it to the jury to say whether the following writing was scurrilous: "Mr. Editor:—I thought that you was publishing a paper for the wheel, but I see nothing but rotten Democracy. I am a Republican, and a wheeler, and you can take your paper and Democracy, and go to hell with it."

It was held in 1887 that U. S. Rev. Stat. § 3893, prohibiting the mailing of envelopes or postal cards upon which indecent, lewd, obscene, or lascivious delineations, epithets, terms, or language may be written, does not exclude postal cards or envelopes indicating that the addressee is a "dead beat," from whom the sender is trying to collect an old bill. *Ex parte Doran*, 32 Fed. 76.

he pleases through the mails or to write anything he pleases upon the exterior cover of that which would otherwise be mailable. The power of Congress extends to the regulation of the entire postal system of the country. It may prescribe what can be carried in the mails and what shall be excluded. It may in its wisdom confine the use of the mails to sealed letters, excluding everything else, or it may extend it to papers, periodicals, and books, and to large packages of merchandise, as in the parcel post systems of other countries. It may even prescribe the size, shape, weight, and character of contents of every mailable packet, and limit the superscription to the bare name and address of the person for whom intended; and it may also declare a violation of its regulations a public offense and fix the punishment therefor. Its power over the particular subject is almost without limit except as respects unreasonable searches and seizures and the duty to treat all alike under the same circumstances and conditions. With this comprehensive control over the subject which Congress undoubtedly possesses, it is idle to say the liberty of the citizen and his freedom of

speech, in the proper sense of those terms, are denied or abridged by the statute forbidding the deposit in the mails of anything upon the exposed surface of which appears language scurrilous, defamatory, or threatening, or calculating and obviously intended to reflect injuriously upon the character or conduct of others. Liberty and freedom of speech under the Constitution do not mean the unrestrained right to do and say what one pleases at all times and under all circumstances, and certainly they do not mean that, contrary to the will of Congress, one may make of the postoffice establishment of the United States an agency for the publication of his views of the character and conduct of others, as distinguished from the carriage of the mails. The very idea of government implies some imposition of restraint in the interest of the general welfare, peace, and good order. The statute under consideration is a part of a body of legislation which is being gradually enlarged, and which is designed to exclude from the mails that which tends to debauch the morals of the people, or is contrived to despoil them of their property, or is an apparent, visible attack upon their

The act was later amended and enlarged to cover matter calculated or obviously intended to reflect injuriously upon the character or conduct of another. And under the act as amended September 26, 1888, 25 Stat. at L. 496, chap. 1039, U. S. Comp. Stat. 1901, p. 2661, making it criminal to deposit for mailing any postal card containing delineations, epithets, terms, or language of an indecent, lewd, lascivious, obscene, libelous, scurrilous, defamatory, or threatening character, or calculated by the terms or manner or style of display, and obviously intended, to reflect injuriously upon the character or conduct of another, "You are sharp, all of you are on the beat," is a criminal expression. And where the card concerned the return of a patent model, the expression, "Tell that radical to send my book back as he agreed," coupled with angry, profane, indecent, and scurrilous language, was also held criminal. *United States v. Davis*, 38 Fed. 326.

A superscription on the envelope after the name of the addressee, "Room 32, Pease House, Front St., City, The Notorious," was held not within the act of 1888, as not necessarily intended for anything but the hotel, and as not necessarily intended to reflect injuriously upon anyone. *United States v. Jarvis*, 59 Fed. 357.

There are a number of cases where the efforts of collectors of debts have been complained of under this statute. Where there were three counts on three dunning postal cards for a long past due debt, the last two of which named the amount \$1.80 and threatened collection, the last two were held within the act of 1888, but not the 33 L.R.A. (N.S.)

first. *United States v. Bayle*, 6 L.R.A. 742, 40 Fed. 664.

But in *United States v. Elliott*, 51 Fed. 807, it was held that a postal card was not within the statute, which was dated March 1, 1892, and stated: "Your rent was due Thursday, Feb'y 25th, 1892, and has not been paid. If the rent is not paid by Thursday, Mch. 3d, 1892, I will place the matter in the hands of an officer. Respectfully." The court distinguishes *United States v. Bayle*, supra, in the smallness of that debt and the succession of the cards.

The words "Excelsior Collection Agency," upon an envelope, in large letters separated from the return direction, and taking up more than half the envelope, are calculated to reflect injuriously upon the character and conduct of the person addressed, and are within the statute of 1888. *United States v. Brown*, 43 Fed. 135. See also *United States v. Dodge*, infra.

But in *Re Barber*, 75 Fed. 980, it was held that unsealed envelopes having upon the outside, "In five days return to E. L. Barber's Mercantile Protection and Collection Bureau, Green Bay, Wis.," printed in 10 points in long primer French Clarendon type, the most prominence in type being given to the name "E. L. Barber" and the place, were not within the statute.

In *United States v. Smith*, 69 Fed. 971, where the defendant had sent a postal card reading: "You must do something on your note. I wish you to pay the int. and one hundred dollars of the principal. You have been fighting time all along, and now at the end you remit nothing. If I do not hear from you, I must be around. I will

good names. The competency of Congress is beyond question, and the courts have uniformly upheld the legislation and applied it in the light of its evident purpose.

The verdict of the jury confirms the averment in the indictment that the accused deposited the envelope in the postoffice, or caused it to be done, which legally is the same thing, and that the printed indorsement on the face of the envelope was of the character charged, and referred to William S. Taylor, a former governor of Kentucky. Congress having ample power to enact the statute, the only question remaining is whether the indorsement described in the indictment could as matter of law be within its prohibitions. It has been frequently held the statute covers mail matter from creditors and collection agencies addressed to debtors, and bearing externally visible charges or imputations of habitual refusal to pay just debts, threats of suit, etc., not alone because of a threatening character, but because calculated and obviously intended to reflect injuriously upon the character and conduct of others. *United States v. Davis* (C. C.) 38 Fed. 326; *United States v. Bayle* (D. C.) 6 L.R.A.

742, 40 Fed. 664; *United States v. Brown* (C. C.) 43 Fed. 135; *United States v. Simmons* (D. C.) 61 Fed. 640; *United States v. Smith* (D. C.) 69 Fed. 971; *United States v. Dodge* (D. C.) 70 Fed. 235; *United States v. Burnell* (D. C.) 75 Fed. 825. Aside from the question whether the language employed by the accused is scurrilous, defamatory, or threatening, it was clearly calculated and obviously intended to reflect injuriously on the character and conduct of the person named. It was an offer of reward in prominent characters for the kidnapping and return of Mr. Taylor to the Kentucky authorities. The common understanding of men has its place in law as in the other affairs of life, and according to it the accused plainly asserted that Mr. Taylor was charged with crime, and was a fugitive from the justice of the state of Kentucky. It needs no discussion to show that such a charge is calculated to reflect injuriously upon one's character and conduct. And, as a prosecution under the statute does not proceed as one for libel, it is immaterial whether the objectionable language be true or false, or whether the accused was actuated by public spirit or pri-

garnishee and foreclose. But I do so dislike to do this if you will only be half white. Rep."—it was held that the clause about "half white" indicated dishonesty and lack of a spotless character, and was within the statute.

In *United States v. Simmons*, 61 Fed. 640, it was held of three postals sent by a collection attorney, that those merely dunning were not criminal, but the expression in one of them, "I see that you do not intend to pay any attention to your agreements," was within the statute of 1888. See also *United States v. Burnell*, *infra*.

—nature of article mailed.

Black envelopes addressed in white letters, well known by persons connected with the mails to be dunning letters of a certain collection agency, are within the expression "delineations" in the statute, as that includes representations by colors. *United States v. Dodge*, 70 Fed. 235.

In *United States v. Gee*, 45 Fed. 194, objectionable matter upon the outside pages of four page circulars, which had no separate wrapper or cover over them, but were folded twice in oblong shape, the postage stamps being placed on the circulars themselves, was held not to be on the "outside cover or wrapper" within the meaning of the statute.

But in *United States v. Burnell*, 75 Fed. 824, it was held that the outside of a printed paper was its outside cover within the statute, when there is no separate cover or wrapper. In this case circulars of an agency, containing on the front or exposed

page warnings against individuals as non-payers of their debts, were held within the statute.

Miscellaneous.

Where the statute (U. S. Rev. Stat. § 3893) prohibited the mailing, among other things, of "any article or thing" of a certain special character, and then made it a misdemeanor to deposit for mailing "any of the hereinbefore mentioned articles or things," the final clause was not limited to the "articles or things" of the certain special character first referred to, but included all articles or things in the prohibiting clause. *United States v. Pratt*, Fed. Cas No. 16,082.

In an action in a state court for malicious prosecution in falsely charging the plaintiff with an offense against the postal laws in sending a certain postal card, it appeared that the prosecution began before a United States commissioner, who bound the accused over to the United States grand jury, who found "no true bill," and the accused was discharged; in the state-court action it was held that the trial court erroneously permitted evidence to be given that the purpose of sending the card was harmless, and that there was a violation of the United States statute in mailing the card, which read: "My Dear Sir:—It is with regret that I once more ask you to take your choice. I will vindicate myself if I live. The truth, and the whole truth, must come out. Respectfully." *Griffin v. Pembroke*, 64 Mo. App. 263.

• B. B. B.

vate malice. The exterior surface of mail matter is not a lawful place for its publication. Were this not so, then everyone might with equal right bulletin upon the outside of his letters, etc., deposited in the mails such charges as "Mrs. A. is wanted by the customs officers of New York," or "Mr. B. has so far eluded the authorities of Illinois," and so on. Such a practice would be intolerable. Again, an injurious reflection on the character and conduct of Mr. Taylor naturally and necessarily followed from the indorsement on the envelope. It was an obvious, unavoidable consequence, and the accused is presumed to have intended it. It does not appear that the accused was a public officer charged with the enforcement of the laws and acting in the performance of his official duties. Nor were the words on the envelope designed to inform or assist the postal officials in the discharge of their functions. They had no relation whatever to the transmission of the envelope and contents through the mails, or their return to the sender if not delivered to the person addressed, nor to the business of the accused and its permissible advertisement. The indorsement was entirely foreign to the customary matter on envelopes, wrappers, etc., and nothing appears to deny or contradict the intention palpably evidenced by its context and manner of display. If there was an undisclosed and admissible purpose in the mind of the accused, as was argued at the hearing, an unlawful method was adopted to accomplish it.

The judgment is affirmed.

MISSISSIPPI SUPREME COURT.

YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY, Appt.,

v.

C. M. BROWN.

(— Miss. —, 54 So. 804.)

Water — restoration of stream to channel.

A railroad company into whose borrow pits a neighboring stream turned in time of flood may restore the same to its ancient channel without cleaning out such channel, even after the change has existed long enough to permit the old channel to be partially filled up so that restoration of the flow of water washes and injures riparian property, if the limitation period has not run.

(April 10, 1911.)

A PPEAL by defendant from a judgment of the Circuit Court for Wilkinson 33 L.R.A. (N.S.)

County in plaintiff's favor in an action brought to recover damages for injuries to his land alleged to have been caused by the construction of a dam by defendant. Reversed.

The facts are stated in the opinion.

Mr. C. N. Burch, with Messrs. Mayes & Longstreet, for appellant:

A riparian proprietor has the right, by erecting barriers, where a new channel has been formed on his land, to return the waters from the new channel to the old one, and he is not responsible for any damages done to his neighbor so long as his operations tend to confine the waters within their original channel.

30 Am. & Eng. Enc. Law, 2d ed. p. 364; Gould, Waters, 384; Jones, Easements, 735; Angell, Watercourses, §§ 333, 334; Washburn, Easements, chap. 3, § 3, ¶ 47; Tutthill v. Scott, 43 Vt. 525, 5 Am. Rep. 301; Slater v. Fox, 5 Hun, 544; Gulf, C. & S. F. R. Co. v. Clark, 41 C. C. A. 597, 101 Fed. 678; Pierce v. Kinney, 59 Barb. 56.

Messrs. J. M. Foreman and Shannon & Jones for appellee.

Anderson, J., delivered the opinion of the court:

The appellee, Brown, sued the appellant, the Yazoo & Mississippi Valley Railroad Company, for damages claimed to have been sustained by him through the inundation of his land, caused by a dam built by the appellant to divert Foster's creek from its new channel on appellant's right of way to

Note. — Right of riparian owner to restore stream which has changed its course by natural causes, to old channel.

The right of a riparian owner to restore the waters of a stream which has changed its course to the old channel is generally conceded. The decisions, at least in the case of a sudden change of channel due to unusual natural causes, are but applications of the maxim, *Aqua currit et debet currere ut currere solebat*. But where the changes are gradual and such as usually occur in natural streams, such principle would seem to warrant a conclusion to the contrary, and, as a matter of fact, the few decisions upon this phase of the question are conflicting.

Some conflict also arises as to the time within which the restoration must take place.

For cases expressly applying the maxim, *Aqua currit et debet currere ut currere solebat*, see Tutthill v. Scott, 43 Vt. 525, 5 Am. Rep. 301, and YAZOO & M. VALLEY R. Co. v. BROWN.

At the outset it may be stated, as a positive rule of law, that a riparian owner may restore to its former channel a stream which a flood has caused to flow in a new channel upon his land, provided he does so within

its old channel on the land of appellee. From a judgment in favor of the appellee for \$500, appellant prosecutes this appeal.

Appellee's land adjoins appellant's railroad right of way. Until some time in the spring of 1908, Foster's creek ran through appellee's land in the same general direction of, and only a short distance from, the railroad, being nearer at some points than at others. Appellant's road was constructed more than twenty years before the alleged injury complained of. In its construction, where it adjoins appellee's land, the railroad track is laid on an embankment or fill, which was made necessary on account of the land traversed being low. The building of this embankment necessitated excavations from the right of way on either side,

leaving depressions. During an overflow in the spring of 1908, the waters of Foster's creek left their old channel on appellee's land, and broke over into the depression so made on the west side of appellant's track, forming a new channel on its right of way, where it has since continued to flow. By the flow of its waters through this new channel, it soon began to cut into and undermine the embankment on which appellant's track is located. For the purpose of diverting the waters of this stream back into the old channel, the appellant, during the year 1908, built dams across it, which were washed away. In 1909, by driving down piling, a dam was finally constructed, which stood for a while and forced the water into the old channel. The gravamen of

a reasonable time after the new channel was formed. See *Jones v. Turner*, 46 Barb. 527; *Morton v. Oregon Short Line R. Co.* 48 Or. 444, 7 L.R.A. (N.S.) 341, 120 Am. St. Rep. 827, 87 Pac. 151, 1046. And that the waters of a stream which, because of a sudden rise, changed its channel, may be restored to the ancient channel, if done "promptly," see *dictum* in *Morningstar v. Young*, 2 Ohio Dec. Reprint, 294.

A much broader rule was laid down in *York County v. Rolls*, 27 Ont. App. Rep. 72, wherein it was held that where a stream suddenly changes its course, the riparian proprietor upon whose land the change takes place may, at any time before a prescriptive right to have the stream flow in its new channel is acquired by limitations, turn the stream back to its original channel, provided he has not, by his acts, worked an estoppel against himself.

But it has been held that an upper riparian proprietor is estopped from returning the waters of a stream to its natural channel to the detriment of other proprietors, where he has, by his acts, induced such other proprietors to believe that the change in the channel would be permanent. *Smith v. Musgrove*, 32 Mo. App. 241.

And, of course, an upper owner who acquiesces in the change for the prescriptive period cannot thereafter restore the stream to its ancient channel. *Ibid*.

And where the stream was changed by a flood, and the proprietor of the land on which the change took place acquiesced in the change for ten years, during which new rights accrued, it was held in *Woodbury v. Short*, 17 Vt. 387, 44 Am. Dec. 344, that he could not restore the water to its ancient channel. The court said: "We may, in this case, well apply the doctrine of acquiescence, which is made the ground of acquiring property in the soil which, by the immediate and manifest power of a stream of water, is suddenly taken from one man's estate and carried upon that of another. If it is permitted to remain upon the land where it is carried until it cements and coalesces with the soil, the property is changed, and there is no right to reclaim 33 L.R.A. (N.S.)

the soil which had been carried away. The defendant, in this case, having, as it must be supposed, acquiesced in the running of this stream in its new channel, and in the creation of new interests, must not now be permitted to disturb them."

And in *Morningstar v. Young*, *supra*, where a stream by a sudden rise changed its channel, and was allowed to run in its new channel for nine years, and until the old bed had filled up in part and had been cultivated, it was held that the riparian owner on whose land the change in channel occurred could not restore the stream to its old channel to the injury of the owner thereon. The decision was based in part, at least, on the authority of *Woodbury v. Short*, *supra*, it being said that the difference of one year in the lapse of time between the change and the restoration of the channel (the elapsed time between the change and the restoration of the channel having been ten years in the *Woodbury Case*) can make no difference in the application of the principle applied, and that the decision, as before stated, was upon the ground of acquiescence in the change.

A lower riparian proprietor has no right to go upon an upper owner's land without consent, and restore to the old channel waters which had been suddenly diverted by the act of God so as to flow elsewhere, it being argued that if this were not so, the riparian proprietor would hold all land above him in extraordinary and perpetual servitude. *Wholey v. Caldwell*, 108 Cal. 95, 30 L.R.A. 820, 49 Am. St. Rep. 64, 41 Pac. 31.

But one interested in the navigation of a stream may, with the consent of the riparian owner upon whose land a stream breaks its banks, repair such break, thereby restoring the stream to its accustomed channel, when such restoration is necessary for the proper navigation of the stream, though the effect is to cast the water against the bank of other riparian owners to their damage. *Slater v. Fox*, 5 Hun, 544.

And a stranger, with the consent of the riparian owner, may restore a stream which, because of a flood, has changed its course, see *Jones v. Turner*, 46 Barb. 527.

appellee's suit is that the appellant had no right to construct this dam, and divert the waters back to the old channel; that, if it had such a right, it could not be exercised unless the appellant first cleaned out the bed of the old channel, which had, since the creek changed its course, been filled up to some extent by the deposit of sand and gravel, causing the waters, when turned back, to wash and destroy his land. The appellant assigned as error the refusal of the court below to instruct the jury to return a verdict in its favor.

Where a stream has left its accustomed channel, and formed a new channel on the land of an adjoining riparian owner, the latter has the right, by the erection of barriers, to turn the waters of such stream back from the new to the old channel. The maxim, *Aqua currit et debet currere ut currere solebat*, applies. The waters of a stream ought to run in its old channel, and no one can justly complain that one who has the right to have them so run makes them run there. *Tuthill v. Scott*, 43 Vt. 525, 5 Am. Rep. 301; *Pierce v. Kinney*, 59 Barb. 56; *Gould, Waters*, 3d ed. § 204. And the riparian owner on whose land the new channel is formed may erect barriers and turn the waters of such stream back from the new to the old channel, without being required first to clean out such old channel, so as to restore it to the depth

and condition it was in before the stream changed its course. *Pierce v. Kinney*, supra. The reason is the change in the course of the stream is the fault of neither owner. It is from natural causes. It is true in this case the depressions along appellant's roadbed made in the construction of its road, in connection with the high waters of the creek, caused the stream to leave its old channel and form a new one. But this was not appellant's fault. By condemnation of or deed to its right of way, it acquired the right to make the necessary excavations to build its roadbed, and if, in properly constructing such roadbed, it resulted in the creek leaving its old channel, still appellant had the right to turn it from its new back to its old channel.

It is contended by appellee that he acquired a right, by prescription, to have the creek flow in the new channel; that the excavations which, in connection with the overflow, caused the new channel, were made more than twenty years before the bringing of this suit. There is no foundation in fact for such contention, for the testimony, without conflict, shows that the creek never left its old channel until the spring of 1908.

Appellee has no cause of action. The court should have directed a verdict for the appellant.

Reversed and remanded.

Where the change has been gradual there is, as before stated, a conflict of authority.

Thus, in *Holcomb v. Blair*, 25 Ky. L. Rep. 974, 76 S. W. 843, it was held that where a river had gradually and naturally changed its course, the owner of the land encroached on could not thereafter erect a wall where the river bank originally stood, so as to return the river to its original channel. The court said that in such case the thread of the stream in law follows the center of the channel as it changes, and distinguished the case from those where the change was violent and arose from a sudden natural cause.

And in *Withers v. Purchase*, 60 L. T. N. S. 819, it was held that where the channel of the stream has gradually filled, so that it has become altered, a riparian owner cannot, by removing the accretion, restore the stream to its ancient course.

But in *Farquharson v. Farquharson*, cited in *Menzies v. Breadalbane*, 3 Blight, N. R. 421, which is one of the early cases upon the question, it was held that a riparian proprietor may embank so as to restore a stream to its original course, from which it had gradually departed.

And in *Gulf, C. & S. F. R. Co. v. Clark*, 41 C. C. A. 597, 101 Fed. 678, it was held that a riparian owner upon a river which has gradually changed its channel so as to encroach upon his land may use the neces-

sary means to restore the stream to its original channel, and maintain his bank in its original condition, and to that extent, at least, protect his property from the incursions of the water.

Brymbo Water Co. v. Lester's Line Co. 8 Reports, 329, the report of which is not accessible, is cited in 30 Am. & Eng. Enc., Law, 2d ed. p. 364, to the general proposition that "where the channel of a water course is changed by natural causes, the riparian owner across whose land the new channel is formed may return the water to its old channel."

As to restoring the waters of a stream which has changed its course, where the old channel had become obstructed or filled, it is held that no duty rests upon the restoring riparian owner to open or clear the old channel.

Thus, in *Pierce v. Kinney*, 59 Barb. 56, it was held that a person on whose land the water of a stream leaves its banks and forms an old channel may erect barriers and return the stream to its new channel, without, at the same time, opening the original bed of the stream, which during the flood which caused the change had become filled with gravel and debris.

And that the one restoring the stream to its old channel need not first clean out its channel, see also *Yazoo & M. Valley R. Co. v. Brown*.

G. J. C.

**UNITED STATES CIRCUIT COURT
OF APPEALS, NINTH CIRCUIT.**

DAVID E. BURLEY, Plff. in Err.,
v.

UNITED STATES OF AMERICA et al.

(102 C. C. A. 429, 179 Fed. 1.)

Water — irrigation — government project — private land.

1. The act of Congress of June 17, 1902, to provide for the construction of irrigation works, permits the irrigation of lands held in private ownership, by providing for a charge upon the lands which may be irrigated with waters from an irrigation project, and limiting the size of tract held in private ownership for which water may be sold.

Note. — Eminent domain: for purposes of irrigation.

The earlier cases on this subject are collected in the note to *Nash v. Clark*, 1 L.R.A. (N.S.) 208, where it is pointed out that in *Nash v. Clark* the doctrine of the right of eminent domain for the benefit of a private individual for irrigation purposes had been pushed far.

In *State ex rel. Galbraith v. Superior Ct.* 59 Wash. 621, 110 Pac. 429, the court, considering a constitutional provision that "private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes, or ditches on or across the lands of others for agricultural, domestic, or sanitary purposes," said: "It is no strained construction of the provision to say that this includes ditches for irrigation purposes, in view of the vast extent of arid land within our state, and the benefits of irrigation thereto in the increase of its productiveness and value;" the Constitution further providing that "the use of the waters of this state for irrigation, mining, and manufacturing purposes shall be deemed public use." And it was held that a company might acquire a right of way for water, although for its own private use.

In *Schneider v. Schneider*, 36 Colo. 518, 86 Pac. 347, where the plaintiff sought to condemn a right of way for a ditch extending from the lower end of a certain irrigating ditch upon the defendant's premises to the plaintiff's premises, it was held that all that was necessary to show in the condemnation proceeding was the necessity for the use of the water, that there was water being wasted which the plaintiff might obtain, and the amount of damages; and that the defendant could not raise rights of third persons as to whether there could be an appropriation of water not directly from the stream.

In *Portneuf Irrigating Co. v. Budge*, 16 Idaho, 116, 100 Pac. 1046, 18 A. & E. Ann. Cas. 674, where P., the plaintiff corporation owning an irrigating canal conveying water for irrigation of about 2,500 acres, applied 33 L.R.A. (N.S.)

Eminent domain — irrigation — private lands.

2. The right of the Federal government to exercise the power of eminent domain to secure land within a state for the irrigation of public land which it owns there is not affected in a particular case by the fact that it intends to supply water from its plant for the irrigation of land which has passed into private ownership, at least where, under the laws of the state, such private owners might have secured property necessary for the irrigation of their lands by right of eminent domain.

United States — power to construct irrigation works.

3. The Federal government has the constitutional power to make available, for the reclamation of arid land by irrigation, the waste waters of rivers within its bor-

der for a writ of prohibition against a judge before whom was pending an action by another corporation, M., to condemn sufficient of P.'s canal and right of way by enlargement to carry sufficient water to irrigate 20,000 acres more lying under its canals, M. having contracted to irrigate these lands, it was conceded that the use was a public one, and the writ was refused.

Where the statute charges the recipient of power with duties to the public, or a right of use is secured to the public, as where water is to be supplied to the neighboring public generally, the use is public. *Borden v. Trespalacios Rice & Irrig. Co.* 98 Tex. 494, 107 Am. St. Rep. 640, 86 S. W. 11, affirmed in 204 U. S. 667, 51 L. ed. 671, 27 Sup. Ct. Rep. 785, without opinion further than to cite *Strickley v. Highland Boy Gold Min. Co.* 200 U. S. 527, 50 L. ed. 581, 26 Sup. Ct. Rep. 301, 4 A. & E. Ann. Cas. 1174, and *Clark v. Nash*, 198 U. S. 361, 49 L. ed. 1085, 25 Sup. Ct. Rep. 676, 4 A. & E. Ann. Cas. 1171. In this case the court said, as to the claim that the enabling statute was indefinite as to territory: "It is next urged that the act is void because of the indefiniteness of the designation of the territory in which it is to operate, the supposed designation being of 'those portions of the state of Texas in which, by reason of the insufficient rainfall or by reason of the irregularity of the rainfall, irrigation is beneficial for agricultural purposes.' We do not understand that it was the purpose of the legislature to designate any part of the state as a territory to which the act is to be restricted in its effect. It is to operate throughout the state wherever the conditions prescribed may exist. We do not know that this, of itself, invades any constitutional right of the citizens. The citizen's property cannot be taken except for public use, nor without compensation. The conditions under which this may be done must exist to justify a taking as for a public use, and, where they do exist, we do not see that the additional requirement that irrigation be beneficial to agriculture, because of the insufficient rainfall, prejudices the property owner."

ders, through the construction of works to impound and distribute such water.

(July 5, 1910.)

ERROR to the Circuit Court of the United States for the Central Division of the District of Idaho to review a judgment directing condemnation of certain lands of defendant for reservoir purposes. Affirmed.

Statement by **Morrow**, Circuit Judge:

This action was brought in the circuit court of the United States for the district of Idaho, by authority of the Attorney General of the United States, on behalf of the United States, pursuant to an application made therefor by the Secretary of the Interior, proceeding under § 7 of the act of June 17, 1902, chap. 1093, § 7, 32 Stat. at L. 388, U. S. Comp. Stat. Supp. 1909, p. 600, entitled, "An Act Appropriating the Receipts from the Sale and Disposal of Public Lands in Certain States and Territories to the Construction of Irrigation Works for the Reclamation of Arid Lands." The state of Idaho is one of the states made subject to the provisions of this act. Section 7 provides as follows: "That where, in carrying out the provisions of this act, it becomes necessary to acquire any rights or property, the Secretary of the Interior is hereby authorized to acquire the same for the United States by purchase or by condemnation under judicial process, and to pay from the reclamation fund the sums which may be needed for that purpose, and it shall be the duty of the Attorney General of the United States upon every application of the Secretary of the Interior under this act, to cause proceedings to be commenced for condemnation within thirty days from the receipt of the application at the department of justice."

The flooding of lands of others for the purpose of furnishing and selling to the public generally electrical power and water for irrigation of lands and other beneficial uses, is a public use under a Constitution providing: "The use of all water now appropriated, or that may hereafter be appropriated, for sale, rental, distribution, or other beneficial use, and the right of way over the lands of others for all ditches, drains, flumes, canals, and aqueducts necessarily used in connection therewith, as well as the sites for reservoirs necessary for collecting and storing the same, shall be held to be a public use," and under a statute enumerating among public uses "sites for reservoirs necessary for collecting and storing water, . . . electric power lines." *Helena Power Transmission Co. v. Spratt*, 35 Mont. 108, 8 L.R.A. (N.S.) 567, 88 Pac. 773, 10 A. & E. Ann. Cas. 1055, where, however,

It is alleged in the amended complaint that the Secretary of the Interior had caused to be surveyed and located a certain irrigation project in the state of Idaho, known as the "Payette-Boise project," and had determined that the same was practicable, and had let the contracts for the construction thereof; that the said irrigation project included as a part thereof the construction of a reservoir in Canyon county, Idaho, commonly known and designated as the "Deer Flat reservoir;" that the site of the reservoir included two certain described tracts of land in Canyon county, Idaho, containing in the aggregate 296 acres, the title to which stood in the name of the defendant, Burley, who was capable of conveying title in fee to said premises free and clear of all encumbrances, except the interest therein of the county of Canyon, Idaho; that the county of Canyon claimed some interest, estate, or title in said premises; that the reservoir was, at the time of the filing of the complaint, in the actual course of construction, and when completed the water impounded by said reservoir would completely overflow the lands described in the complaint; that it had become necessary that the United States acquire title to the lands described in the complaint for use as a part of said reservoir site, and for such purpose the United States, acting through the Secretary of the Interior, had been and was desirous of purchasing and acquiring title in fee to said tract of land for that purpose; that the Secretary of the Interior was authorized by law to acquire said lands by condemnation, and in his opinion it was necessary and advantageous to the government that the said lands should be so acquired; that said irrigation project was being primarily constructed for the purpose of supplying water for irrigation to arid lands in Ada and

ever, it was held that a foreign corporation could not take property by eminent domain.

In *Spratt v. Helena Power Transmission Co.* 37 Mont. 60, 94 Pac. 631, practically the same case came on again, with the exception that meantime the legislature had passed an act empowering corporations of the United States or of another state, authorized to engage in business in Montana, and so engaged, to acquire real property as if domestic; and it was held that this was a valid statute.

As stated in *BURLEY V. UNITED STATES*, the constitutionality of the U. S. act of June 17, 1902, was sustained in *United States v. Hanson*, 93 C. C. A. 371, 167 Fed. 881, where it was held that a settler on land withdrawn (from entry), for reclamation purposes, might be ejected by the United States without compensation.

B. B. B.

Canyon counties, in the state of Idaho, which were public lands of the United States, and that more than 50,000 acres of the public lands of the United States would be supplied with water for irrigation and reclamation from the said project by means of said Deer Flat reservoir; that the land described, the title to which was in the defendant, and which was included in said reservoir site, was absolutely necessary for the use of the government in the construction of said reservoir; that the reasonable value of said land did not exceed \$10 per acre, amounting to \$2,960, and the United States offered to purchase said lands at said valuation; that a disagreement had occurred and then existed between the defendant and the United States, concerning the purchase of said tracts of land by the United States, to wit, that the United States and defendant were unable to agree upon a price for the land which the United States considered to be reasonable; and that the defendant asked and demanded therefor a price which, in the opinion of the United States, was more than said land was worth. The United States prayed for judgment that it should be adjudged that the public use required the condemnation of the land described, and that the United States should be entitled to take and hold title in fee to said land for the public use specified, upon making compensation therefor, and that the court proceed to determine, in the manner prescribed by law, compensation to be paid by the United States for the said property.

To this amended complaint the defendant interposed a demurrer on various grounds of uncertainty, among others, that it did not appear therefrom whether it was the purpose of the United States to devote said irrigation project wholly and entirely to the irrigation of lands owned or possessed by the United States, or whether its purpose was to devote said reservoir and project in part or otherwise to furnishing water for the purpose of irrigating lands in which the United States had no title or possession, but which were owned and possessed by other persons. The demurrer upon the ground mentioned was overruled, and thereupon the defendant answered, in which he admitted, among other things, the allegation in the amended complaint that a disagreement had occurred and then existed between the defendant and the United States, concerning the purchase of said tracts of land by the United States, that is to say, the disagreement was as to the purchase price; but the defendant denied that he demanded or asked a price for said lands in excess of their worth. The defendant, further answering, and as a further de-

fense to the cause of action, alleged that he was informed and believed, and therefore averred the fact to be, that it was the design, intention, and purpose of the United States to construct the irrigation project mentioned and described in said amended complaint, for the purpose of supplying water to lands not owned or possessed by the United States, or in which the United States had any interest of any kind of character, but which were owned and possessed by, and in which private individuals alone were interested, and that the proceeding was instituted for the purpose of, and it was the design and intention of the United States, if successful therein, to devote said land of defendant to said purposes, in order to enable the United States to irrigate such lands, the title to which was reposed in private ownership, and to further the interests of the owners thereof, and to use and devote defendant's lands in aid of private enterprises in the improvement of lands not owned, possessed, or controlled in any wise by the United States, or in which it had any right, title, interest, or possession of any kind or character whatsoever, of a public or governmental nature.

Upon the issues thus presented, the case was tried before the court and a jury, upon a stipulation between the parties to the action that all issues except that of the value of the land sought to be condemned should be heard before the court without a jury, and that the question of the value of the land should be submitted to the jury. Thereupon a jury was impaneled, and, the court having announced its decision upon the issues submitted to it, the jury, under the instructions, returned a verdict for the amount agreed upon by counsel for the respective parties, to wit, the sum of \$5,920. The findings of the court upon the issues submitted to it were as follows:

"(1) That this action is brought by the authority of the Attorney General of the United States, on behalf of the United States, pursuant to an application made therefor by the honorable Secretary of the Interior of the United States, proceeding under the provisions of an act of Congress entitled, 'An Act Appropriating the Receipts from the Sale and Disposal of Public Lands in Certain States and Territories for the Construction of Irrigation Works for the Reclamation of Arid Lands,' approved June 17, 1902. 32 Stat. at L. 338, chap. 1093.

"(2) That long prior to the commencement of this action, the honorable Secretary of the Interior, proceeding under authority of said act, caused to be surveyed and located a certain irrigation project in the state of Idaho, known as the 'Pavette-

Boise project,' and determined that the same was practicable, and let contracts for the construction thereof; said project being situate in the counties of Ada and Canyon. That said project includes, as a part thereof, the construction of a reservoir in Canyon county, Idaho, commonly known and designated as the 'Deer Flat reservoir,' the site of which is a natural basin comprising approximately 10,000 acres of land. That the land described in the amended complaint as belonging to the defendant, the title to which the plaintiff seeks by this action to acquire, is situate within said basin, and will, if said basin is used as a reservoir site, be covered with water. That said reservoir was, at the time of the commencement of this action, in the actual course of construction. That both the lands embraced in said reservoir site and those in the vicinity thereof are arid in character, and cannot be profitably farmed without artificial irrigation. That, of the lands embraced within the reservoir site, the plaintiff owned only a small portion, but of the lands adjacent thereto and in the vicinity thereof, and susceptible of irrigation therefrom, the plaintiff was the owner of approximately 45,000 acres and approximately the same amount of lands had passed to patent and were in private ownership. That at the time said project was surveyed and its feasibility considered, all the natural flow of Boise river, the only available source of supply for the irrigation of said and other lands during a large portion of the irrigating season, had been appropriated, and was being diverted by private corporations for the irrigation of agricultural lands, and no considerable additional area could be irrigated, except by storing and conserving waters flowing in the river during the winter months, or during the high-water season. The project as finally decided upon by the honorable Secretary of the Interior contemplated the taking over of an existing canal, called the 'New York canal,' which was to be improved, enlarged, and extended, and through which water was to be carried to said reservoir for the supply thereof during the seasons of the year when there was an adequate supply of water in the river for such purpose, and for delivering water to parties who already had the right to receive water from said canal by reason of existing contracts, and also to furnish water for the irrigation of lands belonging to the plaintiff which were susceptible of irrigation from said canal, and for the irrigation of unclaimed lands belonging to private individuals, but the entire project was for the irrigation and reclamation of arid lands. That, after the government had made some investigation

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but before said project was decided upon, property owners and citizens of said counties of Ada and Canyon entered upon a systematic agitation of the project, and certain individuals, acting upon behalf of the public, and complying with the laws of the state of Idaho relative to securing permits for the appropriation of water, secured permits for such appropriation from the Boise river, and assigned the same to the United States, and the owners of arid lands, for the irrigation of which there was no available water, proffered to the government their co-operation and assistance, agreeing that if the government would undertake the project, and thereby furnish water for the irrigation of their lands, they would bear their proportion of the expense thereof. That, in consideration of the large tract of public land to be irrigated and reclaimed by means of said project, and such co-operation and assistance from private owners, the honorable Secretary of the Interior adopted said project and entered upon its construction. That, in order to irrigate some of the public lands lying in the vicinity of said reservoir, it is necessary to maintain the water in said reservoir at such a level as will cause the same to overflow the defendant's land. That, at the time said project was being investigated, the public lands lying in the vicinity of said reservoir site, and susceptible to irrigation from said reservoir, were withdrawn from entry under the public land laws, and since said withdrawal substantially all of said lands have been entered under and subject to the conditions of said reclamation act.

"(3) That the honorable Secretary of the Interior entered upon said project of the construction of said reservoir primarily for the purpose of irrigating public lands of the United States, and that the United States has a large and substantial interest in the successful execution of that project, in that thereby water will be rendered available for the irrigation of large tracts of its own lands, thus rendering them marketable; and that, for the purpose of carrying out said irrigation project, it is necessary that the plaintiff acquire the title to the defendant's lands, as the same are described in the amended complaint, in order that it may use them for a part of said reservoir site.

"(4) That the defendant, David E. Burley, is the sole owner of said lands, and the county of Canyon has no title thereto or interest therein.

"(5) That the plaintiff and the defendant, David E. Burley, were unable to agree upon the value of said lands, or the price to be paid therefor by the plaintiff.

"And, as conclusions of law from the foregoing facts, it is found that the plaintiff seeks to condemn said lands and to acquire title thereto for a lawful purpose, and that the honorable Secretary of the Interior, in entering upon said project, did not exceed the authority conferred upon him by the provisions of said act of June 17, 1902, and that said lands are necessary to such purpose, and that the plaintiff is entitled to expropriate them and acquire title thereto upon the payment to the defendant of a just compensation therefor, namely, the amount found by the jury."

The compensation agreed upon and found by the jury having been paid into court, the judgment and order of condemnation was made. The case comes here upon writ of error from the judgment.

Argued before Gilbert, Ross, and Morrow, Circuit Judges.

Mr. John G. Willis for plaintiff in error.

Messrs. C. H. Lingenfelter and B. E. Stoutemyer for defendants in error.

Morrow, Circuit Judge, delivered the opinion of the court:

The allegation of the amended complaint that a disagreement had occurred and existed between the defendant and the United States concerning the purchase price of the land sought to be condemned, in this, that the parties were unable to agree upon a price for said land, the admission of the answer that this allegation was true, except that the defendant denied that he demanded or asked a price for the land in excess of its worth, the stipulation of the parties at the trial that the question of value of the land should be submitted to a jury, and the fact that the amount for which the jury was asked to render a verdict was agreed upon by counsel for the respective parties and paid into court, have the appearance of stating a single original subject of controversy, and come very nearly rendering other questions in the case feigned issues. But this feature of the proceeding was evidently not so intended, and will not be so considered. It will be treated, however, as showing conclusively that there is no claim on the part of the defendant that the United States is seeking to appropriate defendant's land without just and adequate compensation. A just and adequate compensation has been agreed upon and paid into court, and the defendant is not required to surrender his title or any rights that he may have therein without just and adequate compensation being first paid to him by the United States, as provided by law.

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It is contended by the defendant that the demurrer to the complaint should have been sustained because of the insufficiency of the complaint and uncertainty of the allegation as to the purpose of the United States in acquiring title to defendant's property; that is to say, it is uncertain, because it does not appear whether it was the purpose of the United States to devote the proposed irrigation project wholly and entirely to irrigation of lands owned or possessed by the United States, or whether it was proposed to devote said reservoir and project, in part or otherwise, to furnishing water for the purpose of irrigating lands in which the United States had no title, interest, or possession, but which were owned and possessed by other persons.

The specific objection to the complaint is that it is uncertain, because it alleges "that said irrigation project is being primarily constructed for the purpose of supplying water for irrigation," etc., and that a statement as to secondary and other purposes is withheld, giving birth to a suspicion that the United States has a purpose which it does not disclose, lest such disclosure should work a failure of the proceeding. It appears from the opinion of the learned judge in the court below (*United States v. Burley* [C. C.] 172 Fed. 615, 618) that the original complaint was silent as to the ownership of the lands to be irrigated from the reservoir. A demurrer to the complaint was accordingly sustained by the court upon that ground, and, complying with the suggestion of the court, the attorney for the United States in the amended complaint alleged that the "project was being primarily constructed for the purpose of supplying water for irrigation to arid lands in Ada and Canyon counties, in the state of Idaho, which are public lands of the United States." There was a demurrer to this amended complaint on the ground of uncertainty, and the objection renewed that the allegation as to the "primary" purpose of the United States in appropriating this land was not sufficient. The demurrer was overruled, and the allegation of the complaint denied in defendant's answer; and upon the issue thus joined evidence was taken, a finding made, and judgment of condemnation entered in favor of the United States.

We need not stop to discuss the various meanings of the word "primarily." It will be sufficient to assign to it a meaning having reference to the subject-matter and the surrounding circumstances. This rule of interpretation permits us to refer to the findings of fact in this case, based upon the evidence admitted in support of the allegation concerning the primary purpose

of the irrigation project described in the complaint. It was there found that the entire project was for the irrigation and reclamation of arid lands. It contemplated the taking over of an existing canal, called the "New York canal," which was to be improved, enlarged, and extended, and through which water was to be carried to a reservoir for the supply thereof during the seasons of the year when there was an adequate supply of water in the river for such purpose. The project so far appears to be entirely in accord with the act of June 17, 1902, which provides in § 1 that certain money received from the sale and disposal of public lands in certain states and territories, including the state of Idaho, shall be "reserved, set aside, and appropriated as a special fund in the treasury, to be known as the 'reclamation fund,' to be used in the examination and survey for, and the construction and maintenance of, irrigation works for the storage, diversion, and development of waters for the reclamation of arid and semiarid lands in the said states and territories" named. [32 Stat. at L. 388, chap. 1093, U. S. Comp. Stat. Supp. 1909, p. 600.]

But the findings go further, and find that the project contemplated: (1) The delivery of water to parties who already had the right to receive water from said canal by reason of existing contracts. (2) To furnish water for the irrigation of lands belonging to the United States which were susceptible of irrigation from said canal. (3) For the irrigation of unreclaimed lands belonging to private individuals. It was found, further, that the project of the construction of said reservoir was entered upon "primarily" for the purpose of irrigating public lands of the United States, and that the United States had a large and substantial interest in the successful execution of that project, in that thereby water would be rendered available for the irrigation of large tracts of its own land, thus rendering them marketable, and that, for the purpose of carrying out said irrigation project, it was necessary that the United States should acquire the title to the defendant's lands, as the same were described in the amended complaint, in order that it might use them for a part of said reservoir site.

We now have a clear understanding of the meaning of the word "primarily" as used in the complaint. It means that the entire project is for the irrigation and reclamation of arid lands, and that the dominating purpose of the United States is to store and supply water for the irrigation and reclamation of its own arid lands. But the use of the word "primarily" in describing the project and the dominating purpose

concerning such lands admits the existence of a secondary or concomitant purpose, to deliver water to parties who already had the right to receive water from the existing canal, and also to furnish water for the irrigation of unreclaimed arid lands belonging to private individuals. The defendant contends that the United States has no right to take his property for a purpose which includes such secondary or concomitant purpose, and because the complaint has been framed in view of this construction, he contends that it is open to his demurrer for insufficiency and uncertainty.

In determining this question our first inquiry must be whether the irrigation of private lands of an arid character is authorized by the act of June 17, 1902. The title of the act is: "An Act Appropriating the Receipts from the Sale and Disposal of Public Lands in Certain States and Territories to the Construction of Irrigation Works for the Reclamation of Arid Lands."

In § 1 of that act there is a provision for the formation of a "reclamation fund" with the money received from the sale of public lands in certain states and territories. In § 3 the Secretary of the Interior is authorized to withdraw from public entry the lands required for irrigation works contemplated by the act, and also lands believed to be susceptible of irrigation from said works, and, upon the completion of surveys of such lands and of the necessary maps, plans, and estimates of cost, the Secretary of the Interior is required to determine whether or not the project is practicable and advisable, and, if found to be so, the public lands which it is proposed to irrigate by means of the contemplated works shall be subject to entry only under the homestead laws, in tracts of not less than 40 nor more than 160 acres, and shall be subject to the limitations, charges, terms, and conditions in the act provided. In § 4 an irrigation project determined by the Secretary of the Interior to be practicable may be constructed by contract, provided there are the necessary funds in the "reclamation fund" available for that purpose. If there is, the Secretary of the Interior is then required to give notice of the lands irrigable under such project, and, among other things, the charges which shall be made per acre upon the entries made under the provisions of the act, and "upon lands in private ownership which may be irrigated by the waters of the said irrigation project." In § 5 it is further provided that "no right to the use of water for land in private ownership shall be sold for a tract exceeding one hundred and sixty acres to any one landowner." The act clearly provides for the irrigation

of private lands under the conditions therein specified, where such lands are arid and within the limits of an irrigation project deemed by the Secretary of the Interior to be practicable and advisable. We are therefore of the opinion that the complaint is not open to the defendant's demurrer on the ground of insufficiency or uncertainty, under the provisions of the act of Congress.

We come now to the consideration of the real question in this case, which is presented as a constitutional question, and may be stated in the following terms: Can the United States, owning arid lands within a state, organize and maintain a scheme or project whereby it will associate with itself other owners of arid lands for the purpose of reclaiming and improving such lands, and in that behalf exercise the right of eminent domain against another landowner for the purpose of obtaining the title and possession of land absolutely necessary in carrying the proposed scheme or project into effect?

It is contended by the defendant that this cannot be done, and the case of *Kansas v. Colorado*, 206 U. S. 46, 92, 51 L. ed. 956, 972, 27 Sup. Ct. Rep. 655, 665, is cited as authority for such a limitation upon the power and authority of Congress. It is said that the court, referring to the statute under consideration, held in substance that article 4, § 3, of the Constitution of the United States, providing that "Congress shall have power to dispose of, and make all needful rules and regulations respecting, the territory and other property belonging to the United States," did not authorize Congress to provide an irrigation project to be carried out within a state, for the reclamation of arid lands not the property of the United States. The controversy in that case was between the states of Kansas and Colorado, concerning the diversion of the waters of the Arkansas river for the irrigation of lands in Colorado. It was alleged that such diversion damaged certain riparian proprietors in Kansas, through which state the river flows. The case was decided against the state of Kansas, on the ground that the detriment to Kansas in the diminution of the flow of water by the diversion in Colorado, while substantial, was not so great as to make the appropriation of the water in Colorado an inequitable apportionment between the states. The United States intervened in the case for its interest, contending that the determination of the rights of the two states *inter sese*, in regard to the flow of water in the Arkansas river, was subordinate to the superior right on the part of the national government to control the whole system of reclamation of arid lands within the 33 L.R.A. (N.S.)

states. It was in answer to this contention that the court expressed the opinion, the substance of which has been stated. But the court said further concerning the national control of the arid regions: "It does not follow that the national government is entirely powerless in respect to this matter. These arid lands are largely within the territories, and over them, by virtue of the second paragraph of § 3 of article 4 heretofore quoted, or by virtue of the power vested in the national government to acquire territory by treaties, Congress has full power of legislation, subject to no restrictions other than those expressly named in the Constitution, and therefore it may legislate in respect to all arid lands within their limits. As to those lands within the limits of the states, at least of the western states, the national government is the most considerable owner, and has power to dispose of, and make all needful rules and regulations respecting, its property. We do not mean that its legislation can override state laws in respect to the general subject of reclamation. While arid lands are to be found mainly, if not only, in the western and newer states, yet the powers of the national government within the limits of those states are the same (no greater and no less) than those within the limits of the original thirteen, and it would be strange if, in the absence of a definite grant of power, the national government could enter the territory of the states along the Atlantic, and legislate in respect to improving by irrigation or otherwise the lands within their borders. Nor do we understand that hitherto Congress has acted in disregard to this limitation."

That is to say, it would be strange if the national government could enter the territory of a state where there were no public lands of the United States requiring irrigation, and no public lands through which water flows necessary for the irrigation of arid lands, and by legislation provide a system of irrigation for the private lands within the state and control its administration. It would indeed be a strange proceeding, and obviously wholly outside of the authority of Congress. But in this case the United States is the owner of large tracts of land within the states named in the act of June 17, 1902. The public welfare requires that these lands, as well as those held in private ownership, should be reclaimed and made productive. To do this effectively and economically with the available water supply, large tracts must be brought into relation with a single system or project. These states having arid lands have accordingly acted upon the subject, and, in the state of Idaho, where the land is located

in this case, it has been provided in § 14 of article 1 of the Constitution that "the necessary use of lands for the construction of reservoirs or storage basins for the purpose of irrigation, or for rights of way for the construction of canals, ditches, flumes, or pipes to convey water to the place of use, for any useful, beneficial, or necessary purpose, or for drainage, or for the drainage of mines, etc., is hereby declared to be a public use, and subject to the regulation and control of the state. Private property may be taken for public use, but not until a just compensation, to be ascertained in a manner prescribed by law, shall be paid therefor."

The act of June 17, 1902, not only recognizes the Constitution and laws of the state providing for the appropriation of its waters and the reclamation of its arid lands, but it requires that the Secretary of the Interior, in carrying out the provisions of the act, shall proceed in conformity with such laws. In what respect does such a proceeding contravene the Constitution of the United States? Has not the United States as a landowner the same rights within the state that any other landowner has? And when the land is of such a character that, to be useful, it must be irrigated and reclaimed in large tracts, may not the United States, co-operating with such other landowners, organize and establish an effective and economical system or project for such irrigation and reclamation? And, finally, if the necessary use of lands for such a purpose is made a public use by the state, is there any reason why the United States should not exercise its right of eminent domain to acquire title to lands absolutely necessary to such public use? We can think of no constitutional objection to such a proceeding, when it is clearly established that, with respect to surrounding circumstances and conditions, the use is a public use; and, while it has been held that the law of the state is not conclusive upon this subject, the Supreme Court of the United States in numerous cases has determined that such a use as here described in the project under consideration is a public use.

In *Fallbrook Irrig. Dist. v. Bradley*, 164 U. S. 112, 160, 41 L. ed. 369, 389, 17 Sup. Ct. Rep. 56, 64, the Supreme Court had under consideration the validity of the law of the state of California providing for the organization and government of irrigation districts. It was contended that the proceedings under the act, with respect to an assessment upon certain land within the district, if upheld as constitutional, would result in the taking of the property of one person or class of persons, and giving it to

another,—“an act,” it was said, “of pure spoliation.” It has been held by the supreme court of the state of California that the use of water for irrigation purposes, under the provision of the state act, was a public use, and a corporation organized by virtue of the act, for the purpose of irrigation, would be a municipal corporation, and organized for the promotion of the prosperity and welfare of the people. The Supreme Court of the United States, reviewing the provisions of the act and the considerations for its enactment, said: “Viewing the subject for ourselves and in the light of these considerations, we have very little difficulty in coming to the same conclusion reached by the courts of California. The use must be regarded as a public use, or else it would seem to follow that no general scheme of irrigation can be formed or carried into effect. In general, the water to be used must be carried for some distance and over or through private property, which cannot be taken *in invitum* if the use to which it is to be put be not public, and if there be no power to take property by condemnation, it may be impossible to acquire it at all. The use for which private property is to be taken must be a public one, whether the taking be by the exercise of the right of eminent domain or by that of taxation. *Cole v. La Grange*, 113 U. S. 1, 28 L. ed. 896, 5 Sup. St. Rep. 416. A private company or corporation without the power to acquire the land *in invitum* would be of no real benefit, and at any rate the cost of the undertaking would be so greatly enhanced by the knowledge that the land must be acquired by purchase, that it would be practically impossible to build the works or obtain the water. Individual enterprise would be equally ineffectual; no one owner would find it possible to construct and maintain waterworks and canals any better than private corporations or companies, and, unless they had the power of eminent domain, they could accomplish nothing. If that power could be conferred upon them, it could only be upon the ground that the property they took was to be taken for a public purpose. While the consideration that the work of irrigation must be abandoned if the use of the water may not be held to be or constitute a public use is not to be regarded as conclusive in favor of such use, yet that fact is in this case a most important consideration. Millions of acres of land otherwise cultivable must be left in their present arid and worthless condition, and an effectual obstacle will therefore remain in the way of the advance of a large portion of the state in material wealth and prosperity. To irrigate, and

thus to bring into possible cultivation, these large masses of otherwise worthless lands, would seem to be a public purpose and a matter of public interest, not confined to the landowners, or even to any one section of the state."

The conditions referred to in that case are almost identical with the conditions in the present case, and the opinion of the court is peculiarly applicable to the question under consideration.

In *Clark v. Nash*, 198 U. S. 361, 49 L. ed. 1085, 25 Sup. Ct. Rep. 676, 4 A. & E. Ann. Cas. 1171, the action was brought in the state court of Utah by an individual landowner as plaintiff, to condemn a right of way to enable the plaintiff to enlarge a ditch belonging to the defendants, for the conveying of water across the land of the defendants for the purpose of irrigating plaintiff's land. The trial court found the facts to be that plaintiff's land was arid land, and would not produce without artificial irrigation, but that with artificial irrigation the same would produce abundantly of grain, vegetables, fruits, and hay; that the use of the surplus waters of a certain creek, which it was proposed to convey to plaintiff's land by the enlarged ditch, was a public use; and that the plaintiff was entitled to a decree condemning a right of way across defendants' land for the purpose of carrying such surplus waters to the plaintiff's land. The case was taken to the Supreme Court of the United States as involving a constitutional question in the taking of defendants' land for a private use. Upon the facts stated in the findings of the trial court, and having reference to the conditions stated, it was held that the proceedings did not in any way violate the Constitution of the United States.

In *Strickley v. Highland Boy Min. Co.* 200 U. S. 527, 50 L. ed. 581, 20 Sup. Ct. Rep. 301, 4 A. & E. Ann. Cas. 1174, the action was also brought in a state court of Utah to condemn a right of way, under a statute of the state, for an aerial bucket line across defendant's placer mining claim. It was objected that the right of way was solely for private use, and that the taking of the land for that purpose was in violation of the Constitution of the United States. The statute was held to be constitutional, and the proceeding upheld by the supreme court of the state, and the decision affirmed by the Supreme Court of the United States.

In the case of *Bacon v. Walker*, 204 U. S. 311, 316, 51 L. ed. 499, 501, 27 Sup. Ct. Rep. 280, 290, it was said, with respect to the last-named case, that it "was the recognition of the power of the state to work out from the conditions existing in

a mining region the largest welfare of the inhabitants." This is the theory upon which the laws relating to the irrigation and reclamation of arid lands are based, and justifies the laws of the states upon the subject, and the co-operation of the United States under the act of June 17, 1902.

The objection that the United States has no constitutional authority to enter into such co-operation, and engage in the business of organizing and maintaining irrigation and reclamation projects of the character provided by the act of June 17, 1902, is equally untenable. The act was held constitutional by this court in *United States v. Hanson*, 93 C. C. A. 371, 167 Fed. 881, and we can add but little to what was said in that case. But, considering the provisions of the act in view of the specific objections against its constitutionality in this case, we must say that our opinion is not shaken as to the correctness of that decision. The policy of reclaiming the arid region of the West for a beneficial use, open to all the people of the United States, is as much a national policy as the preservation of rivers and harbors for the benefit of navigation. President Roosevelt, in his message to Congress in 1901, in urging the legislation which resulted in the passage of the reclamation act, made use of language applicable here. He said: "It is as right for the national government to make the streams and rivers of the arid region useful by engineering works for water storage, as to make useful the rivers and harbors of the humid region by engineering works of another kind. The storing of the floods in reservoirs at the head waters of our rivers is but an enlargement of our present policy of river control, under which levees are built on the lower reaches of the same streams."

Again he says in the same message: "The reclamation and settlement of the arid lands will enrich every portion of our country, just as the settlement of the Ohio and Mississippi valleys brought prosperity to the Atlantic states. The increased demand for manufactured articles will stimulate industrial production, while wider home markets and the trade of Asia will consume the larger food supplies, and effectually prevent western competition with eastern agriculture. Indeed, the products of irrigation will be consumed chiefly in upbuilding local centers of mining and other industries, which would not otherwise come into existence at all. Our people as a whole will profit, for successful home making is but another name for the upbuilding of the nation."

That the United States may, where the

circumstances and conditions require it, reserve the waters of a river flowing through its public lands, for a particular, beneficial purpose, was held by this court in *Winters v. United States*, 74 C. C. A. 666, 143 Fed. 740, and 78 C. C. A. 546, 148 Fed. 684. This decision was affirmed by the Supreme Court of the United States in *Winters v. United States*, 207 U. S. 564, 577, 52 L. ed. 340, 346, 28 Sup. Ct. Rep. 207, 212, where the court said: "The power of the government to reserve the waters and exempt them from appropriation under the state laws is not denied, and could not be. *United States v. Rio Grande Dam & Irrig. Co.* 174 U. S. 690, 702, 43 L. ed. 1136, 1141, 19 Sup. Ct. Rep. 770; *United States v. Winans*, 198 U. S. 371, 49 L. ed. 1089, 25 Sup. Ct. Rep. 662." To the same effect was the decision of this court in *Conrad Inv. Co. v. United States*, 88 C. C. A. 647, 161 Fed. 829, 831.

The authority of the United States to reserve the waters of its streams in the arid region for a beneficial purpose has been recently extended to the settlement of a long-standing controversy between the United States and Mexico, respecting the use of the waters of the Rio Grande. By the act Feb. 25, 1905, chap. 798 (33 Stat. at L. 814), the provisions of the reclamation act of June 17, 1902, were extended to the portion of the state of Texas bordering upon the Rio Grande which could be irrigated from a dam constructed near Engle, in the territory of New Mexico. This act was passed for the purpose of enabling the United States to carry into effect the terms of a proposed treaty or convention with Mexico, which was afterwards signed on May 21, 1906 (34 Stat. at L. 2953). This treaty or convention provided that "after the completion of the proposed storage dam near Engle, New Mexico, and the distributing system auxiliary thereto, and as soon as water shall be available in said system for the purpose, the United States shall deliver to Mexico a total of 60,000 acre-feet of water annually, in the bed of the Rio Grande at the point where the head works of the Acequia Madre, known as the Old Mexican canal, now exist above the city of Juarez, Mexico."

By the act March 4, 1907, chap. 2918 (34 Stat. at L. 1357), an appropriation of \$1,000,000 was made available as needed, and to be expended, under the direction of the Secretary of the Interior, for the construction of the above-mentioned dam in connection with the irrigation project on the Rio Grande. By the act June 12, 1906, chap. 3288, 34 Stat. at L. 259, U. S. Comp. Stat. Supp. 1909, p. 603, the provisions of the reclamation act were extended

so as to include and apply to the state of Texas, where there never has been any public lands of the United States, but where such streams as the Pecos and the Rio Grande, rising in New Mexico, a territory of the United States, and flowing into Texas, have become important factors in the irrigation and reclamation of the arid lands of that state.

This legislation illustrates the scope of the reclamation act and its purpose in preserving the waters and reclaiming the arid lands of the Western states, where, as said in *Kansas v. Colorado*, 206 U. S. 46, 91, 51 L. ed. 956, 972, 27 Sup. Ct. Rep. 655, 665, "The national government is the most considerable owner, and has power to dispose of, and make all needful rules and regulations respecting, its property."

The judgment of the Circuit Court is affirmed.

NEW YORK COURT OF APPEALS.

SALLY MEEKER, Resp't.,

v.

JENNIE DRAFFEN, Appt.,

and

NELLIE MEEKER, Resp't.

(201 N. Y. 205, 94 N. E. 626.)

Will — devise to widow of married man — construction.

A devise to the widow of a man who is married at the time the will is made is not limited to the wife then living, but belongs to the one who eventually becomes his widow as the result of death of the wife and remarriage of the man.

(March 14, 1911.)

Note. — Who takes under gift to "husband," "wife," or "widow."

Stated more particularly, the question which forms the subject of this note is as to which of two or more persons who have at different times answered, or might have answered, to the description of "husband," "wife," or "widow," and who are not designated otherwise than by such relationship, is to be taken as the intended beneficiary of a testamentary gift, or of an insurance policy or benefit certificate. The note, therefore, does not include cases in which the beneficiary is definitely named and the relationship is mentioned by way of description; nor cases in which the ultimate question is as to whether the gift is conditioned upon the lawfulness or continuance of the relation. Certain aspects of the latter question are treated in a note in 69 L.R.A. 940, on "Effect of divorce to revoke gift by will;" a note in 50 L.R.A. 552, on "Divorce as affecting wife's right to insurance upon her husband's life," and a note in

A PPEAL by defendant from an order of the Appellate Division of the Supreme Court, Third Department, modifying and affirming an interlocutory judgment of a Trial Term for Delaware County in plaintiff's favor and from a final judgment of a special term in an action brought to partition certain real estate. Affirmed.

Statement by Vann, J.:

By her complaint in this action the plaintiff alleged that herself and the "defendant Jennie Draffen are each seised and entitled in fee simple absolute to one undivided half" of certain premises in the county of Delaware, and the relief demanded is a partition of the same in the usual form. The defendant Nellie Meeker,

by her answer, alleged that she is "the owner in fee simple absolute of an undivided fourth interest in" said premises, and she demanded judgment accordingly. The defendant Jennie Draffen by her answer to the complaint, "and to the claim of Nellie Meeker herein and in her answer set forth, denies that the said Nellie Meeker is the owner of any interest in the real estate described in the complaint." Each party in her pleading alleged facts tending to support her claim.

The trial resulted in an interlocutory judgment for the plaintiff in accordance with the prayer of her complaint, and after a sale by the referee appointed for the purpose final judgment was entered, directing distribution of the fund accordingly. Upon

3 L.R.A. (N.S.) 478, on "Effect of divorce on rights of beneficiary in insurance policy."

Mr. Jarman, in attempting to formulate general propositions with reference to this subject, has said: "The distinctions upon the subject deducible from general principles, and the authorities just referred to, appear to be the following: First, that a devise or bequest to the wife of A, who has a wife at the date of the will, relates to that person, notwithstanding any change of circumstances which may render the description inapplicable at a subsequent period, and, by parity of reasoning, is under all circumstances confined to her; but that, secondly, if A have no wife at the date of the will, the gift embraces the individual sustaining that character at the death of the testator; and, thirdly, if there be no such person either at the date of the will or at the death of the testator, it applies to the woman who shall first answer the description of wife, at any subsequent period. There seems to be no ground, upon principle, for varying the construction where the gift to the wife is by way of remainder after the death of the husband; the rule being that the devise of an estate in remainder, to a person in a certain character, and by reference simply and exclusively to that character, vests in the person sustaining it at the death of the testator. The consequence would be that in case the person who was wife at the death of the testator, or who subsequently became such, died in the lifetime of her husband, the tenant for life, no after-taken wife surviving him would be entitled under the devise; since it would be impossible, consistently with the principle in question, to hold that it remained contingent until the death of the husband, or that it shifted from time to time to the several persons upon whom the character of wife successively devolved." 1 Jarman, Wills, *303.

The rules thus laid down, while doubtless as correct as generalizations upon the question of the construction of wills can be, are so likely to be superseded by a context containing indications of a different meaning, as to be of little practical value.

33 L.R.A. (N.S.)

The same remark may be made upon the generalization attempted in the case reported as to the effect to be attributed to the employment of the word "widow." That its use is not alone sufficient to overcome the presumption that an existing wife is referred to, is shown by the cases of *Beers v. Narramore*, 61 Conn. 13, 22 Atl. 1061; *Anshutz v. Miller*, 81 Pa. 212; *Re Coley* [1903] 2 Ch. 102, 72 L. J. Ch. N. S. 502; 88 L. T. N. S. 517, hereinafter set forth.

It has been held in some cases, the chief of which is *Re Lyne*, L. R. 8 Eq. 65, 38 L. J. Ch. N. S. 471, 20 L. T. N. S. 735, 17 Week. Rep. 840, that the fact that a gift to the wife of a certain person is connected with a gift to his children, which is so expressed as to include his children by any wife, is sufficient to show that a future wife is intended to be benefited; but the weight of authority, especially in the more recent cases, is to the effect that such fact is not sufficient to overcome the presumption that an existing wife is intended.

From what has been said it will be perceived that the chief use of the cases is not as authorities by which the construction of any particular instrument may be determined, but to show the considerations which have proved effective with the courts. As remarked in *Re Coley* [1903] 2 Ch. 102, 72 L. J. Ch. N. S. 502, 88 L. T. N. S. 517, it cannot be said there is a conflict of authority when in the case of one will a particular conclusion is reached, and in the case of another will, very like it, a different conclusion is attained, as each case depends *prima facie* upon the words of the particular will plus the surrounding facts in the particular case.

Where former relation terminated by death.

The fact that the question under discussion has arisen in connection with a testamentary gift to the widow of testator himself in but few instances is largely due to the fact that in many jurisdictions a will is revoked by operation of law, upon a subsequent marriage.

In *Garratt v. Niblock*, 1 Russ. & M. 629,

an appeal by Nellie Meeker from the final judgment, with notice of intent to bring up for review the interlocutory judgment, the appellate division modified the latter by striking therefrom the part "declaring that the defendant Nellie Meeker has no interest in the property, and inserting in the place thereof that she has an undivided one-quarter interest therein." The defendant Jennie Draffen appealed to this court.

Mr. C. L. Andrus, for appellant:

The legacy in the will of Hiram Meeker of one half of his real estate to "my son's widow and child or children," referred to the wife of the son then living, and not to a widow who should be a subsequent wife.

Borcham v. Bignall, 8 Hare, 131, 19 L. J.

Ch. N. S. 461, 14 Jur. 265; Beers v. Narramore, 61 Conn. 13, 22 Atl. 1061; Johnson v. Webber, 65 Conn. 501, 33 Atl. 506; Anshutz v. Miller, 81 Pa. 212; Van Brunt v. Van Brunt, 111 N. Y. 178, 19 N. E. 60.

Messrs. O'Connor & O'Connor, for respondent Nellie Meeker:

A devise or bequest to the widow of a certain person is held to have reference, not necessarily to the wife at the time of the making of the will but to the wife who might survive the person designated."

29 Am. & Eng. Enc. Law, p. 111; Bell v. Smalley, 45 N. J. Eq. 478, 18 Atl. 70; Schettler v. Smith, 41 N. Y. 337; Swallow v. Swallow, 27 N. J. Eq. 278.

The persons to whom and the event upon which the gift was limited to take effect

a bequest by a husband to his "beloved wife," not mentioning her by name in any part of the will, was construed as applying to his then wife, and not to his second wife, who survived him, although the effect of such construction was to leave the widow entirely unprovided for.

In Johnson v. Johnson, 1 Tenn. Ch. 621, a devise to testator's "dear wife," not mentioning her name, was construed as a devise to the person who was his wife at the time of making the will, and not to a subsequent wife, the will not having been republished after the second marriage; the court saying: "The original intent of the testator, everyone will concede at once, was to give the property devised to his then existing wife. The words 'my dear wife' point to a person then existing, the qualifying adjective necessarily implying affection for an individual; such affection being, of course, inconceivable of a person not then occupying the designated relation. To substitute another object of the testator's bounty would be to violate his intent and to make a will for him. In the absence of all authority, I should consider it too plain for argument that the will does effectually designate the wife existing at the date of the will as the object of the testator's bounty, as if she had been mentioned by her Christian name."

For cases as to whether a husband or wife from whom testator has been separated or divorced may be considered as the object of a testamentary provision, the beneficiary of which is designated merely as bearing such relationship, see under heading, "Where former relation terminated by divorce or separation," infra.

Where the beneficiary of a testamentary gift is designated only as the husband or wife or widow of a certain person, and such person is married at the time of making the will, the evident inclination of the courts is toward a construction of such provision as referring to the person who, at the time of the will was made, bore, or might have born, the designated relationship.

Thus, in Borcham v. Bignall, 8 Hare, 131, 19 L. J. Ch. N. S. 461, 14 Jur. 265, 33 L.R.A. (N.S.)

where a testator gave an annuity to his nephew, who was married at the date of the will and at testator's death, for life, or until his bankruptcy or insolvency, with remainder to the wife of the nephew during the joint lives of the nephew and his wife and the life of the survivor, for the support of herself, her husband, and his children, with a provision, in case they or either of them should attempt to alienate the annuity, for its application for the support of their children.—Vice Chancellor Wigram reluctantly came to the conclusion that, although the real intention of testator was to insure some provision to the nephew and his family, which would include any wife, the testator had failed to use terms broad enough to cover the contingency of the nephew's second marriage, upon the ground that the nephew's interest might, by an attempt to alien, have been terminated during the lifetime of his first wife, in which case the trustees would have had power to apply the annuity to the benefit of the children of the nephew by his first wife, but not even for the benefit of that wife, such construction being further strengthened by the use of the word "their" in describing the children for whose support the trustees had power to apply the annuity in the event mentioned in the will, which was regarded as showing that one wife only of the nephew was in contemplation of the testator, and that wife must have been the one living, at the date of the will.

In Re Bryan, 2 Sim. N. S. 103, 21 L. J. Ch. N. S. 7, where a testatrix after giving legacies to her daughters, describing them as the wives of certain husbands, gave certain bank stock to a daughter for life and after her death to be equally divided "between the husbands of my said daughters, and my son, or such of them as may be living at the time of her decease," it was held that as testatrix had designated her son as a person who was to share in the gift with the husbands of the daughters, and as it was evident that she meant not any son of hers that might survive the tenant for life, but her son whom she had before

remained uncertain until the death of the testator's son, and "my son's widow" could not be ascertained until the death of the son.

Clark v. Cammann, 160 N. Y. 316; 54 N. E. 709; Nathan v. Hendricks, 87 Hun, 483, 34 N. Y. Supp. 1016; Delaney v. McCormack, 88 N. Y. 174; Robinson v. Martin, 138 App. Div. 310, 123 N. Y. Supp. 146.

Vann, J., delivered the opinion of the court:

This appeal depends on the construction of the fifth clause in the will of Hiram Meeker, who died on the 22d of March, 1889, leaving him surviving the plaintiff, his widow, Jennie Draffen, a granddaughter and his only heir at law, and Nellie Meeker,

the widow of his deceased son. Charles G. Meeker. The will, which was promptly admitted to probate, bears the date of February 11, 1887, and, as the trial court found, "at the time of the execution thereof, said Hiram Meeker resided on the premises described in the complaint with his wife, Sally Meeker, the plaintiff herein, his son, Charles G. Meeker, and his wife, Isabella Meeker, and their daughter, Jennie, now Jennie Draffen, one of the defendants herein. In or about the year 1902 Isabella Meeker, the wife of Charles G. Meeker, died, and thereafter, and on or about January 26, 1906, said Charles G. Meeker was married to the defendant Nellie Meeker. Charles G. Meeker died on the 23d of March, 1908, leaving him surviving the de-

named, the necessary inference was that by the words, "husbands of my said daughters," she meant the persons whom she had before named and described as such, and whom she knew and was probably attached to; and therefore that a second husband of one of the daughters was not entitled to participate in the provision.

In Franks v. Brooker, 27 Beav. 635, 29 L. J. Ch. S. N. 292, 6 Jur. N. S. 87, 8 Week. Rep. 205, testator gave a life interest in certain legacies to his five daughters, referring to each as the wife of a designated person, and after the decease of each or any of them during the life time of her or their husbands leaving issue surviving, "unto such husband or husbands for the term of his or their natural life or lives," with remainder to the children of such daughter, "either by the present or any future husband respectively." He further gave to each daughter, in the event of her dying without issue living, power to dispose of the property by will, subject to the life estate of their respective husbands, and, in default of such disposition, "to the use of the husband or husbands of any such daughter or daughters respectively so dying without issue as aforesaid, or their or his legal personal representative respectively." It was held that the testator's real meaning was to confine the gift of life interests to the then existing husbands, the reasoning adduced in support of such conclusion being that the testator mentioned all the husbands by name; and when he intended to refer to future husbands he expressed it, as in the gift to the children "either by the present or any future husband;" and that in making the ultimate gift to the legal personal representatives of the husbands, it cannot be supposed that he intended a share to be divided between the legal personal representatives of two husbands of a deceased daughter.

In Re Burrow, 10 L. T. N. S. 184, where a testator, after giving his brother a life estate in his property with remainder to his children, further directed: "If the wife of my aforesaid brother . . . shall him, my said brother, survive, she shall receive 33 L.R.A. (N.S.)

the rents, issues, and profits" arising from the property bequeathed during her natural life, Kindersley, V. C., without particularly stating the reasons for his conclusions, said that he felt no doubt that the gift to the wife of testator's brother was to the wife who was then living, and not to any wife with whom the brother might at any time afterward intermarry.

In Firth v. Fielden, 22 Week. Rep. 622, a gift to the wife of a certain person contained in a devise upon trust to pay the income to such person for life, and after his death leaving his wife him surviving to pay the rents to such wife for life, was held to be confined to the particular wife who was alive at the date of the will and at testator's death.

In Re Hancock [1896] 2 Ch. 173, 65 L. J. Ch. N. S. 690, 74 L. T. N. S. 658, 44 Week. Rep. 545, a husband settled certain funds upon trust to pay the income to himself until his death or bankruptcy or attempt to alienate or encumber such income, with power to appoint the fund after the determination of his own interest therein amongst his children, subject to a proviso empowering him by deed or will to appoint one fourth of the income to "his wife" for her life. During the lifetime of his first wife he irrevocably appointed one fourth of the income in her favor and for her life, and subject to the trust in her favor therebefore limited, if the same should take effect, he appointed the fund amongst his children without reserving any power to appoint to a subsequent wife. The court, although expressing the opinion that the power to appoint to his wife was only a power to appoint to his then wife, placed its decision that an appointment in favor of a subsequent wife was invalid upon the ground that the power had been exhausted by its first exercise.

In Re Coley [1903] 2 Ch. 102, a testatrix gave residuary estate to trustees to pay the income to her son for life, "and from and after his decease to pay the same into the proper hands of his wife for her life, if she shall continue his widow, . . . and from and after her decease or second mar-

fendants Nellie Meeker, his widow, and Jennie Draffen, his only child."

The fifth clause of said will is as follows: "I do further provide that in case my son, Charles G. Meeker, should die before my wife, then and in that case it is my will that the property, real and personal, hereinafore devised and bequeathed to my said son in the third paragraph hereof, shall be equally divided between my said wife and my son's widow and child or children; that is, my wife to have one half thereof and my son's widow and child or children, the other one half, and then the legacy of \$1,000 to my daughter Mary, the annuity of \$100 to my wife, and the provision for her support, are all to be void and of no effect, but in case my son Charles survives

his mother, then this fifth paragraph is of no effect." In construing this clause the trial court held that the devise to the widow of Charles G. Meeker "referred to and was intended to designate his son's then wife, Isabella Meeker, and not any subsequent wife." The appellate division, on the other hand, held that "it would be doing violence to the language of the testator to hold that no widow of Charles except Isabella could take the devise provided by the will."

We think the testator intended to provide for the widow of Charles, whoever she might be, simply because she was his widow and, being deprived of his support, would need something to live on. The provision took the place of a right of dower in the premises in question devised to Charles by

riage, whichever shall first happen, I direct the trustees and trustee for the time being hereof to divide the said principal moneys and all other, if any, my residuary estate unto and among such of his children as shall live to attain the age of twenty-one years," and, in default of issue, "after the decease or second marriage of his said widow," to divide such estate among nephews and nieces. Power was also given to the trustees "after the decease or second marriage of any legatee entitled for life or during widowhood" and during the minority of any grandchild, nephew, or niece, to apply the interest of his or her presumptive share towards his or her maintenance and education. It was held that the phraseology, "if she shall continue his widow," "after the decease or second marriage of his said widow," the power of maintenance, and the fact that testatrix clearly included in the ultimate gift the children of her son by any wife, were not sufficient to overcome the presumption that testatrix meant to describe the particular person who was the wife of her son both at the date of the will and at her death, and not anyone else who might stand in such relation. With respect to the argument based upon the fact that the gift of the corpus in remainder is not limited to children of the existing wife, but extends to the children of any wife, *Romer, L. J.*, said: "I cannot see why a testator should not wish to give a life interest to an existing person merely as the wife of another person, at the same time giving the corpus, after the death of that wife, to the children of that person by that or any other wife. To my mind, the two gifts are perfectly consistent one with the other, and there is no reason for giving to the word 'wife' in the first gift any meaning different from its *prima facie* meaning."

In *Beers v. Narramore*, 61 Conn. 13, 22 Atl. 1061, an objection having been raised to a testamentary provision for the widow of testator's son, upon the ground that if by that expression testator intended any person who at the death of the son sustained to him the relation of wife, and thereby became his widow, the statute 33 L.R.A. (N.S.)

against perpetuities would be offended, as such person might be someone not born, and whose father and mother were not born, at the death of the testator, the court in overruling such objection held that, as there was at the time of the making of the will and at testator's death a person who would fully answer the description should she survive the son, such person must be understood as intended, especially as it was quite evident from the whole will that the testator was all along and throughout thinking of living persons, whenever expressing any specific purpose.

So, also, in *Johnson v. Webber*, 65 Conn. 501, 33 Atl. 506, where the same objection was made to a provision that if either of the granddaughters of testatrix, for whom she had previously provided in her will, should die leaving a husband surviving, such husband should receive during his life one half of the income which his wife would have received if living, it was held that the supposition that testatrix meant any husbands which the granddaughters might have was a very violent one, and should not be adopted if a more reasonable meaning may be given; and that as when she wrote the will the husbands had been married to her granddaughters for some years, and were doubtless well known to her and regarded by her with affection, the provision must be taken, in the light of such circumstances, as intending the then husbands of the granddaughters.

In *Wolfe v. Hatheway*, 81 Conn. 181, 70 Atl. 645, in which a testamentary provision was not directly, but only inferentially, for the benefit of the wives of testatrix's sons, it is said that the wives thus designated as beneficiaries would be only those women who occupied that position at the death of testatrix, and not any woman or women who since that time may have come into that position.

In *Van Syckel v. Van Syckel*, 51 N. J. Eq. 194, 26 Atl. 156, it was held that a provision giving certain property after the death of testator's son "to the children and wife of my said son" was for the benefit of the son's wife at the date of the will and

the third clause of the will, which she would have had if the fifth clause had not gone into effect. When describing his own wife, the testator called her his wife, not his widow. Five times in the fifth clause he referred to her as "my wife," "my said wife," or as the mother of Charles. He did not speak of Charles's wife, which would have properly described Isabella, who was the wife of Charles at the date of the will, but of his widow, with nothing in either text or context to fasten the term to any particular person, but simply to the one who should be the widow of his son at the time of his son's death. The appellant relies on the situation at the date of the will; but the testator apparently did not have that in mind, as he wrote the clause in

question for the future, and with reference to a particular date to be fixed by an event to happen in the future, by providing that on the death of his son prior to that of his mother, his son's widow should share in the devise. His language, according to its ordinary and natural meaning, includes the defendant Nellie, and excludes the deceased Isabella. He had in mind children who might be born to Charles in the future, and, as any child by the second wife would take under the words "my son's . . . child or children," why should not the second wife take under the words "my son's widow," occurring in the same sentence? If he meant Isabella, and no one else, why did he not refer to her by name or by some words of description? The fifth clause was

of testator's death, and did not extend to a subsequent wife.

The question under discussion also arose, in connection with the inquiry whether the provision was void as unlawfully suspending the power of alienation, in *Van Brunt v. Van Brunt*, 111 N. Y. 178, 19 N. E. 60. There testatrix gave her residuary estate in trust for her children, seven of the eight whom she left being married at the time of her decease, for and during each of their natural lives, "and after their decease to their respective wives or husbands during their lives or until they remarry," adding: "If any of my said children should die without issue and without leaving a husband or wife him or her surviving, then I give, devise, and bequeath his or her share to the survivor or survivors of them share and share alike. If he or she leave a husband or wife him or her surviving then I give, devise, and bequeath his or her share to the survivor or survivors of my said children share and share alike after the decease or remarriage of the said husband or wife." It was contended that the portion of the testamentary provision last quoted evinced a purpose to postpone the vesting of the remainder in possession until the death or remarriage of any husband or wife who might survive, and not the husband or wife in being at the decease of testatrix. Finch, J., in rendering the opinion of the court overruling such contention, after remarking that the words "husband and wife" as first used in the testamentary provision under construction would naturally and ordinarily refer to a husband and wife living at the death of testatrix, and that such meaning and the purpose evidenced by it ought not to be surrendered and changed, with the consequence of a destruction of the trust, unless other language of the will clearly and unmistakably points to a different meaning and establishes a different intention, said: "The use of the indefinite article, and the expression, 'a husband or wife,' does not necessarily, or even fairly indicate an intention to provide a second life interest in a wife or husband becoming such after the death of the testatrix. The phrase

is not any husband or wife, but a husband or wife living at the death of the first tenant for life, and should be taken to refer to the same husband or wife provided for in the previous limitation. Seven such husbands and wives were in fact living when the will was made, and when the testatrix died, and it was for them that the devise was made; and if the testatrix had intended a formal provision for their possible successors after her death, we should expect to find some definite disclosure of that purpose, and not one dependent upon a mere inference from a form of expression which might very well not have been so intended. For the use of the indefinite article in the phrase, 'a husband or wife,' was occasioned by the existence of several such persons answering the description, to any one of whom the provision was intended to apply. It means, therefore, any one of the seven in being at testator's death, who might be living at a child's death, or leave issue upon his or her decease, and should not be held to include some husband or wife becoming such after the testatrix's death."

In *Anshutz v. Miller*, 81 Pa. 212, where testator, after giving the husband of his niece the income of his estate for life, continued, "And after his death his widow is entitled to said income; after her death it shall be distributed to" certain others,—it was held that the phrase "his widow" had reference to the niece, and not to any wife which her husband might have, where throughout the will it was the manifest intention of the testator to provide for individuals within the circle of his sister's family, and all the other successive devisees were indicated with individual distinctness, and there was no attempt at classification, and no direction as to them that the gift should be dependent on any relations which they bore to testator or to each other. The court said: "Where an estate is given to a person described by relation either to the testator or to other devisees, on a contingency that may or may not happen, and a person is in being at the time of the execution of the will, to whom, on the happening of the contingency, the description

to take effect only in case Charles should die before his mother, and in that event it was to a great extent to be substituted in place of the preceding provisions of the will. It cannot be read as of the date of the will, because the devise therein could take effect only upon the occurrence of an uncertain event, which might never happen, and unless it happened, and not until it happened, could the persons described as widow and child or children become definitely known. The sole question is, Who, then, answered the description of "my son's widow?" Isabella did not, for she never became a widow by surviving her husband. Nellie did, for she was married to Charles, and was living when he died.

We agree with the learned counsel for the appellant that the precise question here involved has not been determined in this state, but we think the cases tend to establish the rule laid down by the appellate division (137 App. Div. 537, 539, 121 N. Y. Supp. 1051, 1053), as follows: "Unless there be something in a will indicating the contrary, a gift to the 'wife' of a designated married man is a gift to the wife existing at the time of the making of the will, and not to one whom he may subsequently marry. *Van Brunt v. Van Brunt*, 111 N. Y. 178, 19 N. E. 60; *Van Syckel v. Van Syckel*, 51 N. J. Eq. 194, 26 Atl. 150. A gift to the 'widow' of a designated person, however, has a broader application, and includes such

would apply, it is a safe general rule to hold such person as intended to be the devisee."

The presumption that an existing person is intended may, however, be overcome by indications, to be derived from the context of the will read in the light of surrounding circumstances, of an intention to benefit any husband or wife.

That it was testator's intention to benefit any wife, rather than the particular person answering the description at the time the will was made, was held by V. C. Malins in *Re Lyne*, L. R. 8 Eq. 65, 38 L. J. Ch. N. S. 471, 20 L. T. N. S. 735, 17 Week. Rep. 840, where testator bequeathed a sum of money upon trust to pay the income thereof to his son for life, and after his death, upon trust to pay and transfer the said sum unto and equally between and amongst the wife of his son (in case she should happen to survive him); and all and every child and children of his said son lawfully begotten, share and share alike. The reasoning on which this conclusion is based was, that the bequest being after the death of testator's son to the wife of his son and to the children of the son, not by his then wife but by any wife he might have, was therefore a bequest to the wife and the children as a class, including any children who might come into *esse* during the life of the son; that as the class could not be ascertained until the death of the son, that period was also to be the time when it should be ascertained whether the class was to be increased by one,—that is, by a surviving wife,—or not; and that as the second wife might have been the mother of his son's children who were to take, and would equally require a provision for her support whether she was the wife existing at the date of the will or a future wife, the provision was equally as consistent with an intention to benefit a future wife as with an intention to benefit a wife who was known to the testator.

This decision, however, has failed to meet with general approval, and has since been definitely repudiated by the English courts. See *Re Griffiths* [1903] 1 Ch. 739, 72 L. J. Ch. N. S. 330, 88 L. T. N. S. 547; *Re Coley* 33 L.R.A. (N.S.)

[1903] 2 Ch. 102, 72 L. J. Ch. N. S. 502, 88 L. T. N. S. 517. It has been followed in *Wilmot v. DeMill*, 32 N. B. 8; and disapproved in *Van Syckel v. Van Syckel*, 51 N. J. Eq. 194, 26 Atl. 156.

In *Longworth v. Bellamy*, 40 L. J. Ch. N. S. 513, where testator left property in trust for each of his children for life with remainder to their issue, and with a gift over of the share of any child dying without issue to the other children and their issue; and further declared that if any of his sons should become bankrupt, his life estate should cease, and during the remainder of his life the trustees should apply the income to which he would otherwise have been entitled for the benefit of the wife and children of such son, in such manner as they should think fit,—it was held that the trust in favor of the wife and children of a son married at the time of testator's death, whose wife subsequently deceased revived in favor of a subsequent wife and children. Of this case it is remarked in *Re Drew* [1899] 1 Ch. 336, 68 L. J. Ch. N. S. 157, 47 Week. Rep. 265, 79 L. T. N. S. 656, that there were some legatees who were unmarried.

The presumption that where the wife of a person is spoken of by a testator, and that person is married at the date of the will, the wife existing at the date of the will is the person intended to take, was held in *Re Drew*, *supra*, to be overcome by the context of a will by which testator gave a share of his residuary estate upon trust to pay the income to a son for life, and after his decease "unto the wife of my said son for and during her natural life," and after her decease upon trust for the children of the son living at his decease; and further provided for the determination of the son's interest in the event of alienation or bankruptcy, in which event the trustees were to apply the income of the "share hereinbefore directed to be invested for my said son [name] and his family and every part thereof for the purpose of applying the same in or towards the maintenance and support of my said son [name] his wife and children," the court particularly relying upon the mode in which the testator

wife as may survive him. *Schettler v. Smith*, 41 N. Y. 328; *Swallow v. Swallow*, 27 N. J. Eq. 278." Ordinarily the use of the word "wife" in a will means the person who, at the date thereof, is the wife of the man named. An existing fact is referred to, for the relation has already been created, and, as only one person sustained that relation, she is pointed out as well as if designated by name. The use of the word "widow," however, involves no fact in existence at the date of the will, and no fact which necessarily will ever come into existence. The relation of widow had not then been created, and might never be created; for the man might never leave a widow.

provided that the income should be dealt with during the lifetime of the son in case of attempted alienation by him.

In *Wilmot v. DeMill*, 32 N. B. 8, a will created certain trusts for the use and benefit of the nephew of testatrix "and his wife, and for the use and benefit of the survivor of them during their several natural lives, or during the widowhood of the wife of the said . . . [nephew] in case she shall survive her said husband, and at their decease or upon the second marriage of his said widow I give and devise the same to the children of the said . . . [nephew] or such of them as shall be living," etc. At the time the will was made the nephew had a wife and children living. The wife predeceased the testatrix, so that when the will took effect the nephew had no wife to whom the bequest could apply. It was held that the gift to the wife was not a gift to the particular individual answering the description at the time the will was made, but that the limitations over after the nephew's decease were to persons of a class then to be ascertained, and that as a child of the second marriage was entitled to share in the gift, there was no good reason for excluding the nephew's second wife, who survived him, from the benefit of the trust for the wife of the nephew.

A distinction between the use of the words "wife" and "widow" is taken in *Swallow v. Swallow*, 27 N. J. Eq. 278, in which a provision by which testator directed that if either of his sons should die without leaving lawful issue, the widow of the decedent should receive one third of the rents of the real estate devised to him by the will, so long as she should remain his widow, was construed as intending not the person who was the son's wife at the time of the making of the will and at testator's death, but the person who should answer the description at the death of the son, the court saying: "The testator, having given to his sons real estate in fee, directs that in case of the death of either of them without leaving lawful issue, the widow of the decedent shall have one third of the rents of the real estate devised to him, and that after her death the property shall be equally divided among the testator's

Hence the person meant could not be known until further events pointed her out.

It is difficult to formulate a general rule upon the subject, for "no will has a brother," and the language of every testator must be studied by itself in order to learn his intention. We think the rule announced by the appellate division, however, applies to this case, and affirm the judgment appealed from, with costs to the respondent Nellie Meeker, payable out of the proceeds of the sale.

Cullen, Ch. J., and Gray, Werner, Willard Bartlett, and Chase, JJ., concur. Haight, J., absent.

children then living. He evidently intended to provide by the devise in question, that the decedent's widow should have an equivalent to dower, notwithstanding the limitation over. It could not, of course, be ascertained until the death should have occurred, who would answer the description,—who would be the widow. The provision is not declared to be in favor of any person living at the date of the will; nor is the language employed, to be so construed. The gift is not to the wife of the decedent, but to his widow,—the person who should be his wife at the time of his death."

But, as hereinbefore pointed out, the use of the word "widow" is not invariably sufficient to overcome the presumption that an existing wife is intended. See for example *Beers v. Narramore*, 61 Conn. 13, 22 Atl. 1061; *Anshutz v. Miller*, 81 Pa. 212; *Re Coley* [1903] 2 Ch. 102, 72 L. J. Ch. N. S. 502, 88 L. T. N. S. 517; hereinbefore set forth.

In *Schettler v. Smith*, 41 N. Y. 328, in which the ultimate question was whether the provision was void for remoteness, a testator created a trust to pay the income to a son who had a wife living and issue living at the time of making the will and also at the death of the testator, "during his natural life; and on his decease, to pay said rents, issues, profits, and income to his wife, during her natural life, and on her decease, if he leave a widow; or if he leave no widow, then, on his decease, to convey" to his issue, etc. It was held that the son having a wife at the time of making the will and also at the death of testator, the gift to his wife would have been confined to his then wife had there not been added to the bequest the words, "and on her decease, if he leave a widow, or if he leave no widow, then, on his decease, to convey," to his issue, etc.; such direction to convey to the issue not being limited to the death of the son's then wife, but to the decease of his widow, if he left a widow, plainly including any wife that might survive him. The court also points out in support of its conclusion that the testator in another clause of the will made provision for the wife of a son not married.

In *Cogan v. McCabe*, 23 Misc. 739, 52 N.

Y. Supp. 48, a will the general scheme of which was that testator's real estate should be kept intact during his widow's life, and the rents applied to her support, and upon her death the proceeds thereof should be divided into as many shares as the testator had children, contained the following provision as to one of such shares: "To invest the remaining share or fourth part of said net proceeds of said sale, and to apply and pay the net income thereof towards the support and maintenance of the wife and children of my son Henry Cogan, free from his control or interference, until his youngest child shall have attained the age of twenty-one years, when the said one-fourth part is to be divided equally between the children of said Henry." At the time the will was made Henry had a wife and child, both of whom died in testator's lifetime. Prior to testator's death Henry had married again. It was held that whatever embarrassment under the earlier cases and text-books might be found in the way of holding the second wife of the son Henry to have been substituted by the force of her marriage, as a legatee under the testator's will, in the place of the first wife living at the time of its execution, any doubt was removed by the fact that as under the provisions of the will the children of the second wife were undoubtedly entitled to take, their taking must involve the sharing with their mother also in testator's provision for the support of the family during their minority.

Where the person in favor of whose husband or wife a testamentary provision is made is unmarried at the time the will is made, it is Mr. Jarman's contention that the first person answering the description should take. The cases, however, seem equally to lend themselves to the generalization that ordinarily, in the absence of special considerations which would induce the court to give such provision a different construction, any future wife or husband may be taken as having been intended.

In *Peppin v. Bickford*, 3 Ves. Jr. 570, a testamentary provision by which a nephew, then unmarried and whose marriage was not in immediate contemplation, was given a sum of money which testator directed should not be paid or payable until the date of the lawful solemnization of his marriage, when it was to be laid out in lands which should be settled upon such nephew and his assigns for life, and from and after his decease then to be for the "wife" of the nephew for life, with remainders in tail to the sons and daughters of the nephew by such wife, was held to give a life estate to a second wife, the Lord Chancellor saying: "If the wife had died within a month after the marriage there could have been no issue to take the provision, and the legacy of £8,000, except as to the life interest of the nephew, would in effect have elapsed. It is impossible to ascribe such an intention to the testator."

This case is admitted by Mr. Jarman to be apparently counter to his general statement that if there should be no person sustaining 33 L.R.A. (N.S.)

the character of wife of a designated person either at the date of the will, or at the death of testator, it applies to the woman who shall first answer such description at any subsequent period; but is explained by him as referable to the special circumstance of the trust being executory, which authorized the court to give it a liberal construction, and to the argument that by restricting the trust in favor of the wife to the first person standing in that relation, the limitation to the issue would have been restricted to *her* children, which could hardly be the intention of testator, who was the husband's relation. 1 Jarman, Wills, *305.

In *Radford v. Willis*, L. R. 12 Eq. 105, a testator having two daughters, both unmarried, gave his estate upon trust for them during their lives, and from and after their respective decease to convey to their respective husbands, further providing that if either should happen to depart this life unmarried, her share should go to the survivor for life, with remainder to her husband. One of the daughters having died leaving a husband, and the other having survived her husband, who by his will devised to her whatever interest he might have in her father's estate, the question arose as to whether the surviving daughter and her sister's husband could give a title such as a purchaser might be required to accept. Wickens, V. C., expressed the opinion that the rule stated in Jarman on Wills, that a devise to an unmarried person for life, with remainder to the husband or wife of such person, gives an absolute interest to the first person answering the description, is not supported by authority; and that as in the present case the testator had directed a conveyance to be made at a future time to a person answering a description which may at or before that time have perfectly attached to numerous persons, directing it in terms which showed that he was contemplating a person living at the time of conveyance, it was not unreasonable to hold that as between the several persons who might equally answer the character of his daughter's husband, the testator meant the trustees to convey to the living one, if there should be a living one; but that owing to the form in which the question was presented, it was necessary only to hold that the title which the surviving daughter could give was not such as a purchaser could be compelled to take.

In *Re Sharon*, 12 Ont. L. Rep. 605, it was held that under a devise to a son for life and, if he should marry, after his decease to his surviving wife, and on the demise of such wife to their children, the son being unmarried at the date of the will, that any person answering the description at the son's death would be entitled to a life estate, the reasoning of the court being that the son being unmarried at the date of the will, the testator must have referred to a future wife, and there was nothing to show that he did not mean any future wife.

In *Jossey v. Brown*, 119 Ga. 758, 47 S. E. 350, a testator devised property in trust for

a daughter, who was then unmarried, for life, with remainder to her children, if any, and if none, or those born should die before reaching maturity, then over to any man with whom the daughter might intermarry. The daughter soon after married, and although surviving her husband did not marry again. It was contended that as there was an uncertainty as to who the husband should be, the case was within the rule in Civil Code 1895, § 3101, which provides that if the contingency be as to the person, and that person be not *in case* at the time when the contingency happens, his heirs are not entitled. It was held that the first person answering to the description of testator's husband was to be considered to have been intended by the testator as the recipient of his bounty.

In *Dean v. Mumford*, 102 Mich. 510, 61 N. W. 7, where a testator directed that property given to his sons should be held in trust for such sons, their wives and children, during the lives of the said sons and their wives, and upon their death to become the property of their children, it was suggested that as one of the sons was unmarried at the time the will took effect, it should be construed to relate to any wife whom he might in the future marry, and so construed, the estate would not vest in the children or heirs until after the expiration of two lives in being. It was held that the will was not open to this construction, but was intended to mean any wife of the son living at the time of the decease of testator.

—insurance cases.

In *Re Browne* [1903] 1 Ch. 188, 72 L. J. Ch. N. S. 85, 51 Week. Rep. 364, 87 L. T. N. S. 588, 19 Times L. R. 98, where a man having a wife and children effected a policy of assurance on his life, expressed to be "for the benefit of his wife and children," it was held that the presumption that a married man speaking of his wife intends his wife at that time, and does not contemplate one whom he may marry after her death, loses weight in construing an instrument intended to make provision for a wife after the husband's death, and is countervailed by the presumption that he in all probability intended to provide for her who *survives* and for that reason stood in need of the provision; that a similar line of reasoning points to the conclusion that he intended to benefit all the children, which is strengthened by the reflection that he cannot reasonably be supposed to have intended to benefit only the children living at the date of the policy, to the exclusion of afterborn children by the then existing wife, and therefore that a second wife and her child were entitled to participate jointly with the children of the first marriage.

So, also, in *Re Parker* [1906] 1 Ch. 526, 75 L. J. Ch. N. S. 297, 54 Week. Rep. 329, 94 L. T. N. S. 477, 22 Times L. R. 259, it was held that the word "widow" in a policy of assurance designating as the beneficiaries the "widow, or widow and children, or some-

one or more of them" as insured should appoint, did not refer to the then wife of the insured should she survive him, but to the person who at his death should become his widow.

The *Browne* Case is distinguished in *Re Griffiths* [1903] 1 Ch. 739, 72 L. J. Ch. N. S. 330, 88 L. T. N. S. 547, where a man having a wife and children effected insurance expressed to be "for the benefit of his wife, or, if she be dead, between his children in equal proportions," upon the ground that the policy in the *Browne* Case was expressed to be for the benefit of wife and children, and not as in the case under construction, for the benefit of wife or children. It was held that the presumption above referred to was strengthened by the words "if she be dead," which seem to point to the wife who was living when the policy was effected; and consequently that a subsequent wife was not entitled to take.

In *Day v. Case*, 43 Hun, 179, 5 N. Y. S. R. 397, the designation of the beneficiary in a certificate of benefit insurance obtained by one H. M. Case, providing that "all payments or benefits that may accrue or become due to the heirs of the persons insured, by virtue of his policy, will be payable to Mrs. H. M. Case, or lawful heirs," was held to refer to the wife of the insured at the time the certificate was issued, and not to the person who was his wife at the time of his death.

In *Given v. Wisconsin Odd Fellows' Mut. L. Ins. Co.* 71 Wis. 547, 37 N. W. 817, it was held that insurance in a mutual benefit association the by-laws of which provided that on the death of a member "the person designated before death, or his widow, child, or children, mother, sister, or sisters," etc., "as the case may be and in the order named," should receive the insurance, was payable to the widow of the insured, although when the certificate was issued, in the lifetime of a former wife, the insured had directed that the insurance be paid to her, her appointment as beneficiary being held to have been revoked by her death.

So, also, in *Riley v. Riley*, 75 Wis. 464, 44 N. W. 112, it was held that the word "widow" in the by-laws of a benefit association by which it was provided that the business and object of the association should be to afford financial aid and benefit to the widows, orphans, and heirs of deceased members, or such other persons as might be designated by the insured member, and that at the death of a member his widow or designated heirs should receive the specified sum,—does not refer to the wife of the member at the time he obtained his certificate of insurance, if she survive her husband, but that it means the person who was his widow at the time of his death.

And see also *Masonic Mut. Relief Asso. v. McAuley*, 2 Mackey, 70, in which the person who was the widow of a member of a benefit association the by-laws of which provided that on the death of the member "his widow, orphan, heir, assignee, or legatee shall be entitled to receive as many dollars

as there are members in the association at the time of death," was held entitled to the benefit as against the administrators of the first wife, who was the original beneficiary, and the husband's estate.

Where former relation terminated by divorce or separation.

It seems to be generally held that where a testamentary provision is in favor of "husband" or "wife" or "widow" of the person making such provision, such terms will be taken as having been used in their colloquial sense as applying to the person then sustaining such relationship, although there may be a former husband or wife in existence whom the maker of the will has deserted or divorced.

Thus, in *Re Howe*, 33 Week. Rep. 48, 48 J. P. 743, where a testator, who had separated from his wife by mutual consent and in her lifetime had gone through the ceremony of marriage with another woman whom he always treated as his wife, gave certain property to "my wife for her own use, to bring up the children," directing it to be divided between the children after her death, it was held that the second wife was the person intended.

And in *Hardy v. Smith*, 136 Mass. 328, where a testatrix by a will in which she described herself as the wife of a certain person, though she was not his lawful wife, her divorce from her former husband being invalid, gave to her "husband" personal property, and authorized her "husband" to remain in possession of her house for three months after her death, and further appointed her "husband" and sister executors, it was held that there was no conclusive and irrebuttable presumption that by the word "husband" in her will the testatrix meant her lawful husband, but that it was a question of the intention of the testatrix, and that the will itself showed clearly that she did not intend to designate the man who was her lawful husband by the use of such word in her will.

So, also, in *Pastene v. Bonini*, 166 Mass. 85, 44 N. E. 246, it was held that, taking the attendant circumstances in connection with the will, there was no doubt that testator intended by the words "my wife" to designate as the beneficiary of certain provisions made therein the woman to whom he had been married and with whom he had lived for thirty-five years down to the time of his death, and whom he had held out to the world as his wife, and not his lawful wife, whom he had deserted in Italy forty years before he died, where the person mentioned by him in the will as his stepdaughter was the daughter of the woman with whom he lived, by a former husband, and the will gave to his wife, among other things, "provisions and consumable stores," and made a provision for children by his lawful wife, who were described as "my only children by my first wife,"—notwithstanding the statement, "said provisions in favor of my wife are made to her in lieu of her 33 L.R.A.(N.S.)

legal rights," as the testator must have supposed that the woman whom he had married and who had been held out to the world as his wife had some legal rights in his property.

In *Powers v. McEachern*, 7 S. C. 290, a testator who had legitimate children by a wife from whom he had been separated many years, and a family of illegitimate children by a woman with whom he was cohabiting at the time he made his will, directed that his estate should be kept together until his youngest living son should attain the age of twenty-one, that until that event should happen his "wife" and all his children be permitted to live upon his plantation, and that when his youngest living child should attain the age of twenty-one his estate should be divided among his "wife" and all of his then living children equally. It was held that extrinsic evidence was admissible as to the identity of the persons designated as testator's wife and children; and that even if it was not, an intention to designate the woman with whom he was living and her children was manifest by the provisions of the will that the wife and children should continue to live upon his plantation, and that division of the property should be postponed until the youngest child should attain twenty-one, where the youngest child of the first marriage must have attained that age long before the execution of the will.

In *Marks v. Marks*, 40 Can. S. C. 210, 12 A. & E. Ann. Cas. 751, testator gave an annuity to his wife, describing the legatee merely by the words "my wife" and "my said wife." Twenty-six years before the making of his will he had formed some sort of a matrimonial alliance, but about five years later left his alleged wife finally, and never saw her again, although he entered into correspondence with her about the time he made his will. In the meantime he wandered out West, and ten years before making his will married another woman, with whom he lived up to the time of his death. His former wife, about ten years after he left her, was supposed to have married another man, with whom she lived for many years as his wife, receiving his property after his death and retaining his name. In the correspondence between testator and his former wife, he addressed her as "dear friend," while about the same time he addressed his then wife in his letters to her as "dear wife." It was held by *Idington, J.*, that the court was not bound in law to apply the description of "wife" to the one who should prove to have been testator's lawful wife, but that they were at liberty to ascertain his intention from the facts and surrounding circumstances; that there was ample ground for testator supposing that if he had ever married the alleged former wife she had obtained a divorce and become the lawful wife of another, and was no longer his wife; and that he should not be held to have intended the words "my wife," when used in his will, to designate any other than the one who then sustained that relation

to him. It should be noted, however, that this cannot be regarded as a decision of the court, the chief justice concurring in the result without stating the grounds for his conclusion, and another justice concurring in the result upon the ground that the first marriage was not sufficiently proved. The two justices who dissented from the result did so on the ground that the first marriage was sufficiently proved, and that no evidence was admissible to show that the expressions "my wife" and "my said wife," contained in the will as descriptive of the legatee, meant any other person than her who was testator's legal wife.

No generalization appears to be possible as to the construction of a testamentary provision where the "husband," "wife," or "widow" of some third person who before the vesting of the gift in possession has been divorced, as there appears to be but one decision upon this phase of the question. This is the case of *Davis v. Kerr*, 3 App. Div. 322, 38 N. Y. Supp. 387, where a will provided for the payment of an income to a son for life, and, in case he should die "leaving his wife surviving him," for the payment of such income "to the widow of my said son for the benefit of herself and her children as long as she shall live and remain the widow of my said son," and in which it was held that there was nothing in the language of the will anywhere to suggest that the testatrix ever contemplated that her son might enter into any other marriage than that which then existed, and since to construe the word "widow" as applicable to any widow would be to invalidate the testamentary provision, which was perfectly good if it applied only to the first wife, the words "his wife" and "his widow" referred to the woman who occupied that relation at the time the will was made and at the time of testatrix's death, notwithstanding she was subsequently divorced and the son has married another woman, who survived him. The case of *Schettler v. Smith*, 41 N. Y. 328, elsewhere set forth, is distinguished upon the ground that the words "a widow" and "no widow" used therein are much more general in their scope than the expression, "the widow of my said son" in the will under construction, and upon the further ground that in the will under construction in the *Schettler* Case there was also a clause making provision for the wife of a son not yet married, which indicated an intention to make the direction to convey dependent upon the death of any person who might become the son's widow.

—insurance cases.

The cases appear to support the statement that the lawful husband or wife, and not the one with whom the insured was living at the time of obtaining the insurance, is entitled to the benefits of insurance in favor of the "husband," "wife," or "widow" of the insured.

Thus, it has been held that the lawful 33 L.R.A. (N.S.)

widow, and not a person with whom the member of a mutual benefit association has gone through the form of marriage, is entitled to the benefit which under the by-laws of the association is "payable to the widow of the deceased member," although at the time of his joining the association the member may be living with his so-called second wife. *Bolton v. Bolton*, 73 Me. 299, in which the conclusion is reached by holding that the terms of the contract are not sufficiently ambiguous to warrant the admission of extrinsic evidence as to who was intended by the designation of the word "widow."

The same conclusion was reached upon a similar state of facts in *Tutt v. Jackson*, 87 Miss. 207, 39 So. 420, in which the benefit certificate was payable, upon the death of the member, to his "widow or other heirs;" and in *Grand Lodge, O. H. S. v. Elsner*, 26 Mo. App. 108, in which the laws of the order provided for the payment to the member's "widow who has lived with him in lawful union."

And in *Rice v. Rice*, 23 Ky. L. Rep. 635, 63 S. W. 586, it was held that under a policy of insurance providing: "In case of the death of the insured, the company may pay the amount due under the policy to either the executor or administrator, husband or wife, or any relation by blood, or lawful beneficiary of the insured," a wife from whom the insured had never been legally divorced, and not the woman with whom he was living as his wife at the time of effecting the insurance, was entitled thereto, although the latter was designated as the beneficiary in an application which, not being attached to the policy, formed no part of it.

But see *Woodson v. Colored Grand Lodge, K. H.* — Miss. —, 52 So. 457, in which the first wife was held estopped by her conduct in acquiescing in the remarriage of her husband and by forming a second matrimonial alliance herself, to claim as his widow the benefits of insurance payable to his "widow or heir," which was effected twenty-four years after the separation from the first wife and nineteen years after his marriage with his second wife, and while he was living with the second wife.

E. S. O.

OKLAHOMA CRIMINAL COURT OF APPEALS.

E. P. JAMES et al., Appts.,

v.

STATE OF OKLAHOMA.

(— Okla. Crim. Rep. —, 113 Pac. 226.)

Gaming — statute — purpose.

1. It was the purpose of the legislature in adopting § 2422, Snyder's Comp. Laws (Okla.) 1909, to effectually suppress the keeping of every kind of public gaming

Headnotes by FURMAN, P. J.

house, room, or place in the state of Oklahoma; not only those then in existence, but also those that might subsequently be devised and practised.

Same — construction of statute — “any device.”

2. The words “or any device,” used in said section, include every scheme, plan, or conception by which the person who conducts such house, room, or place for betting, induces and enables the public to bet or lay wagers upon any kind of game whatsoever.

Same — definition.

3. The word “gaming” has no technical meaning, but includes every contrivance or institution which has for its object any sport, recreation, or amusement for the public upon which money or any other article of value can be won or lost by the result of such contrivance or institution.

Same — bets or wagers.

4. “Gaming” includes bets or wagers made upon any physical contest, whether of

man or beast, when practised for the purpose of deciding such bets or wagers.

Same — betting on horse race.

5. Betting on a horse race is gaming within the meaning of the law. If any person opens or conducts a house, room, or place where the public are invited to assemble and by means of any plan, device, or scheme bet or lay wagers upon the results of horse racing, such persons are guilty of violating § 242z, Snyder's Comp. Laws (Okla.) 1909.

Same — punishment.

6. Section 2422, Snyder's Comp. Laws (Okla.) 1909, does not provide for the punishment of those who bet or lay wagers upon any game or device for gaming; but its penalties are alone for those who open and conduct places where the public can assemble, and where they are invited and afforded an opportunity to bet and lay wagers upon any game or gaming device.

(December 14, 1910.)

Note. — Horse racing as a game within gambling statutes.

This subject was treated in the note to State v. Vaughan, 7 L.R.A. (N.S.) 899, to which the present note is supplementary.

A note on oral betting as a violation of statute against bookmaking is to be found appended to People ex rel. Lichtenstein v. Langan, 25 L.R.A. (N.S.) 479.

And the power of the state to prohibit or regulate horse racing is discussed in a note to State Racing Commission v. Latonia Agri. Asso. 25 L.R.A. (N.S.) 905.

“We do not think,” said Mr. Chief Justice English, in State v. Rorie, 23 Ark. 726, “that the legislature intended to embrace horse racing by the words, ‘any game of hazard or skill,’ ‘played,’ etc., however vicious betting at such sports may be.”

But in McLain v. Huffman, 30 Ark. 428, it was held that one could not recover money won on a horse race, because a later statute (Gantt's Dig. § 2987) renders all gaming and wagering contracts void.

In State v. Lemon, 46 Mo. 375, it was held that horse racing is not a gambling device within the meaning of the statute.

A house or place kept for the purpose of enabling persons to place bets or wagers upon horse races is a common gambling house and a nuisance *per se*. James v. State, — Okla. Crim. Rep. —, — L.R.A. (N.S.) —, 112 Pac. 944.

In State v. Shanklin, 51 Wash. 35, 97 Pac. 969, it was held that one who keeps a place where selling of pools upon horse races is conducted maintains a place “where gambling is carried on or permitted” as defined by statute. It was said: “The terms ‘gaming’ and ‘gambling’ in the administration and interpretation of criminal laws are usually regarded as synonymous.”

To be guilty of violating § 2422, Snyder's Comp. Laws (Okla.) 1909, said the court, in James v. State, *supra*, the accused must deal, play, carry on, open, or conduct the 33 L.R.A. (N.S.)

game upon which money or other representative of value is wagered, and the game which he so deals, plays, carries on, opens, or conducts must be one of those specially mentioned in said section, or some banking or percentage game played with dice, cards, or some other device, and therefore a conviction cannot be had upon proof that the accused conducted a “turf exchange” where his patrons congregated and bet upon horse races run at another place. Richardson, J., said: “The authorities [among them JAMES v. STATE] are to the effect that running a horse race is a game, but in this case the games were not played at the turf exchange, and were not conducted by plaintiffs in error. They did not conduct the races, and therefore did not conduct the game. Neither was the game played by means of the devices alleged in the information [a blackboard and telegraph connections, together with tickets with the names of the supposed horses and the amounts wagered on them, for money, checks, etc.]; that is, the races upon which the money, checks, credits, or representatives of value were wagered and were won or lost were not run in any sense by means of telegraph wires, telegraph instruments, blackboards, or tickets. The game—the horse race—was run and played by means of horses. All that was done in the turf exchange was to make bets upon the result of the races. The tickets given the gamblers were only memoranda of their bets, and the telegraph wire and instrument and the blackboard were merely means of showing what horses were to run, the odds placed, and of making known the result of the race. They furnished advance information in regard to the game, and made known the result as determined upon the track.”

So, the decision in James v. State, 63 Md. 242, seems to be in accord with the preceding case.

It has been uniformly held that the conducting of a turf exchange or the selling of

APPEAL by defendants from a decree of the Canadian County Court convicting them of carrying on a gambling game in violation of a statute. Affirmed.

The facts are stated in the opinion.

Messrs. Libbey & Gillett for appellants.

Messrs. Charles West, Attorney General, and Smith C. Matson, for the State:

The intention was not to restrict the crime to such games as are played with devices used solely for gambling.

Jones v. Territory, 5 Okla. 540, 49 Pac. 934; State v. Purdon, 3 Mo. 114; State v. Bates, 10 Mo. 166; Eubanks v. State, 5 Mo. 450; State v. Herryford, 19 Mo. 377; Miller v. United States, 6 App. D. C. 10.

Whether the game or contest upon which the wager is made be a horse race, foot

race, baseball game, or what else, it is quite immaterial, if the thing or contest upon which the bet or wager is made by a game of chance.

Goodburn v. Marley, 2 Strange, 1159; Blaxton v. Pye, 2 Wils. 309; Grace v. M'Elroy, 1 Allen, 563; Lynall v. Longbotham, 2 Wils. 36; People v. Weithoff, 51 Mich. 203, 47 Am. Rep. 557, 16 N. W. 442; Tollett v. Thomas, L. R. 6 Q. B. 515, 40 L. J. Mag. Cas. N. S. 209, 24 L. T. N. S. 508, 19 Week. Rep. 890; Joseph v. Miller, 1 N. M. 621; Shropshire v. Glascock, 4 Mo. 536, 31 Am. Dec. 189.

Furman, P. J., delivered the opinion of the court:

In this case appellants filed a demurrer

to pools upon races in the manner shown in James v. State, — Okla. Crim. Rep. —, — L.R.A.(N.S.) —, 112 Pac. 944, is not a violation of such a statute as is therein referred to, or of a similar statute.

Thus it is said in State v. Hayden, 31 Mo. 35: "It is a great perversion of language to call a horse race a gambling device. If the legislature desire to prohibit horse races, it is easy for them to say so in plain terms. No one would even suppose that penalties inflicted upon keepers of faro banks and tables and such like gaming devices were intended to apply to horse races or foot races or boat races. A criminal code cannot be so loosely interpreted." And in this case it was said that Shropshire v. Glascock, 4 Mo. 536, 31 Am. Dec. 189 [cited and set out fully in note in 7 L.R.A.(N.S.) 899] was not applicable.

The same question was before the supreme court of New York in the case of People v. Engeman, 129 App. Div. 462, 114 N. Y. Supp. 174. Here it was held that a sheet of paper called "Advanced Information," and which contained "information as to the horses entered [in certain races], the names of the jockeys who were to ride them, and names of the horses which had been withdrawn, the length of the race to be run, and its number," but "which contained no scheme for gambling upon its face, and which gave no directions where gambling could be done," did not constitute a "device or apparatus for gambling" within § 344 of the Penal Code. In the body of the opinion it was said: "This is the test, whether the implement or device is used in determining who shall win or lose, whether it is an integral part of the actual gambling. A gambling device is defined (20 Cyc. Law & Proc. p. 871) as an invention often used to determine the question as to who wins and who loses, that risk their money on a contest or chance of any kind; anything which is used as a means of playing for money or other thing of value, so that the result depends more largely on chance than skill; and again (14 Am. & Eng. Enc. Law, 2d ed. p. 684), it is defined as 'any invention 33 L.R.A.(N.S.)

or contrivance to determine who wins or loses money on a contest of chance. It will include only such instruments or contrivances as are intended for the purpose of gaming and such as are used to determine the result of the contest on which the wager is laid.' An apparatus is defined as being 'implements; an equipment of things provided and adapted as a means to some end; any complex instrument or appliance for a specific action or operation.' (2 Cyc. Law & Proc. p. 473). Certainly this slip of paper, with the information which it contained, was not a device or apparatus for gambling in any possible sense. It did not on its face pretend to relate to gambling; it was such a slip as any individual might make out for his own information or for the information of those who were interested in the races, and the mere fact that it might afford facts which would be useful to the man of sporting proclivities in making up his mind how he desired to place his wager does not constitute it a device for gambling under any of the definitions which we have been able to find." And this decision was affirmed by the court of appeals of New York in 195 N. Y. 591, 89 N. E. 1107.

In State v. Stripling, 113 Ala. 120, 36 L.R.A. 81, 21 So. 409, pool selling on a horse race was held to be clearly within the title of an act for the better suppression of gambling.

The question may arise under statutes providing for the recovery of money or property bet and lost on games.

But in Deaver v. Bennett, 29 Neb. 812, 26 Am. St. Rep. 415, 46 N. W. 161, where the plaintiff insisted that he was entitled to recover his money under a certain statute, claiming that horse racing is a "game of hazard," the court did not decide the case under the statute, because there was a proviso therein within which the case at bar did not come.

In McQuesten v. Steinmetz, 73 N. H. 9, 111 Am. St. Rep. 592, 58 Atl. 876, it was said: "It is conceded that this action [for rent of premises] cannot be maintained if the defendant, with the plaintiff's knowl-

to the information upon two grounds: First, that the information did not state facts sufficient to constitute the crime charged; second, that the allegations of the information show that the crime attempted to be charged is not a crime under the statutes of Oklahoma.

The information is as follows:

The State of Oklahoma } ss.:
Canadian County }

In County Court, before H. L. Fogg,
County Judge in and for said County and
State.

The State of Oklahoma

v.

E. P. James, Ollie James, C. E. Hilswick,
and Gale Pendleton.

Now comes John W. Clark, county attorney, who prosecutes on behalf of the state, and gives the court to know and be informed that one E. P. James, Ollie James, C. E. Hilswick, and Gale Pendleton late of the county of Canadian and state of Oklahoma, on or about the 30th day of March in the year of our Lord one thousand nine hundred and eight, at and within the said

edge and consent, carried on a gambling business upon the leased premises; and that a bet or wager on a horse race is a gambling contract within the meaning of our statute."

And since a horse race is gaming in Illinois it has been held that one cannot recover for services rendered in training a horse for the purpose of gaming, i. e., a race. *Mosher v. Griffin*, 51 Ill. 184, 99 Am. Dec. 541.

In *Haley v. Cridge*, 1 N. Y. City Ct. Rep. 433, bookmaking was declared to be only another name for gambling, and one was not permitted to recover for certain services rendered on the race courses in "ascertaining from the owners and others the condition of the horses about to enter upon the race, so that the defendant might regulate his book and his betting upon the result."

Betting money on a horse race is gaming, and in violation of law, and a contract in aid of the offense of gaming, which is prohibited by statute, is void, and cannot be recovered upon. *Shaffner v. Pinchback*, 133 Ill. 410, 23 Am. St. Rep. 624, 24 N. E. 867.

As the word "gaming" as used in the statute of Charles included betting on horse races, and as the statute of Anne was passed for the purpose of better preventing the evils of gaming, such betting, and the giving of notes for money thereby lost, have been held to be embraced within the general words "other game or games" as therein used. *Blaxton v. Pye*, 2 Wils. 309; *Goodburn v. Marley*, 2 Strange, 1159.

Sometimes the question comes up under statutes making obligations void when given for money lost at gaming.

Thus in *Corson v. Neatheny*, 9 Colo. 212, 33 L.R.A. (N.S.)

county and state, did then and there, maintain and conduct a gambling house in the manner and form as follows: That the said defendants E. P. James, Ollie James, C. E. Hilswick, and Gale Pendleton, did then and there unlawfully conduct as owners and for hire a certain banking and percentage game, played with and by means of a certain device, to wit, a blackboard and telegraph connections, together with tickets with the names of the supposed horses and the amount wagered on them, or money, checks, and other representatives of value. And the said defendants above named, did then and there conduct said gambling device in the manner and form aforesaid for money, checks, and other representatives of value, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state.

John W. Clark, County Attorney.

This information was based on § 2422, Snyder's Comp. Laws (Okla.) 1909, which is as follows: "That every person who deals, plays, or carries on, or opens or causes to be opened, or who conducts, either as owner or employee, whether for hire or not, any game of faro, monte, poker,

11 Pac. 82, it was held that since horse racing is gaming within the statute, it followed that a wager upon a horse race is a gaming contract, and "utterly void and of no effect."

But in *Bailey v. McDuffee*, 18 N. B. 26, it was held that a statute rendering void "all notes, bill, etc., given . . . for money or goods won by gambling, or betting on persons gambling, or to repay any money lent or advanced for gambling or betting," did not apply to betting on a horse race, and that a bill of sale of a horse by way of mortgage to secure money used in betting was not void.

In *McDevitt v. Thomas*, 130 Ky. 805, 114 S. W. 273, it was held that betting on a horse race is not gaming, within the meaning of the statute (Ky. Stat. 1903, § 1955), which provides that "every contract . . . for the consideration of money, property, or other thing lent or advanced for the purpose of gaming . . . shall be void." The court said: "The word 'gaming,' as used in the statute, has a rather restricted meaning, and applies only to betting upon the result of some game played with cards, dice, machine, wheel, or other contrivance." But since the action was one for the recovery of money bet on horse races, and another inhibition of the statute, supra, provided that every contract for the consideration of money lent or advanced at the time of any betting or gaming or wagering, etc., was wholly void, a recovery was not permitted, because the words "betting" and "wagering" have a much broader and more comprehensive meaning than the word "gaming."

E. M. S.

roulette, craps, or any banking or percentage game played with dice, cards, or any device, for money, checks, credit, or any representative of value, is guilty of a misdemeanor, and is punishable by fine of not less than \$100 nor more than \$1,000, and by imprisonment in the county jail for a term of not less than thirty days nor more than six months." This section was included in a bill entitled, "An Act Declaring Gaming Illegal, and Providing Penalties for Violation thereof, and Repealing Article 35 of Chapter 25 of the Statutes of Oklahoma Entitled 'Gaming,'" which was passed by the legislature of Oklahoma territory in 1893. Sections 2426 and 2427, Snyder's Comp. Laws (Okla.) 1909, under the article of "Gaming," are as follows:

"Sec. 2426. Every person who shall permit any gaming table, bank, or gaming device prohibited by § 2422 and 2424 of this act, to be set up or used for the purpose of gambling in any house, building, shed, shelter, booth, lot, or other premises to him belonging, or by him occupied, or of which he hath, at the time, possession or control, shall be, on conviction thereof, adjudged guilty of a misdemeanor and punished by a fine not exceeding \$200, nor less than \$100, or by imprisonment in the county jail for a term not exceeding six months nor less than thirty days, or by both such fine and imprisonment in the discretion of the court.

"Sec. 2427. Every person who shall knowingly lease or rent to another any house, building, or premises for the purpose of setting up or keeping therein, any of the gambling devices prohibited by the preceding provisions of this act is guilty of a misdemeanor."

Under the common-law doctrine of a strict construction of penal statutes, no act would constitute an offense unless it was necessarily included within the express letter of the statute, although it might be clearly contrary to the spirit of the statute. In other words, to construe a statute strictly was to construe it according to its letter, rather than according to its spirit. The doctrine of a liberal construction of penal statutes requires the courts, where it can be reasonably done, to place such a construction upon them as will enable the law to reach and destroy the mischief at which it was aimed. In other words, the court must look to the spirit rather than to the letter of the law. This is in harmony with the Divine law which declares, "For the letter killeth, but the spirit giveth life." In the second edition of Lewis's Sutherland, Statutory Construction (vol. 2, p. 1077), when speaking of the doctrine of a liberal construction of statutes, the author says: "The courts follow the reason and spirit of 33 L.R.A. (N.S.)

such statutes till they overtake and destroy the mischief which the legislature intended to suppress. In doing so they go far beyond the letter of the statute."

Under § 6489, Snyder's Comp. Laws (Okla.) 1909, we are forbidden to apply the common-law rule of a strict construction to the penal statutes of this state, and are required to construe such statutes liberally for the purpose of promoting their objects and in furtherance of justice. It is therefore our duty to determine, if we can, the intention of the legislature in enacting § 2422, Snyder's Comp. Laws (Okla.) 1909. If we can reasonably do so, we must place such a construction upon this statute as will reach and destroy the mischief at which it was aimed. To our minds it is clear that it was the purpose of the legislature, in enacting this section of our statutes, to make it an offense for any person to open and conduct a house or place where any kind of public gaming whatsoever was carried on. If there was any doubt upon this subject, when we consider the other portions of the act, this doubt will be removed. By reading §§ 2426 and 2427 it will be seen that it was clearly the intention of the legislature not to allow any gaming table, bank, or gaming device to be opened and conducted within the state.

Mr. Webster defines a "device" as follows: "That which is devised, or formed by design; a contrivance; an invention; a project; a scheme; often, a scheme to deceive; a stratagem; an artifice."

The information alleged, that the defendants conducted a certain banking or percentage game, played with and by means of a certain device, to wit, a blackboard and telegraph connections, together with tickets with the name of the supposed horses and the amounts wagered on them, for money, checks, and other representatives of value. The substance of this information is that the blackboard and telegraph connections, together with tickets with the name of the supposed horses and the amounts wagered on them, constituted a device; that is, a plan or scheme which enabled people to bet or wager money upon such supposed horse races.

Counsel for the defendants say that there is no law in Oklahoma making it a crime to bet on horse races. They might with equal propriety have said that there is no law in Oklahoma subjecting a person who may purchase intoxicating liquors to punishment for such purchase. But this would be no defense to the seller of such liquor. There is no penalty for visiting a house of prostitution, but that does not exempt the keeper of such house from punishment. The mere fact that the law

has not imposed a penalty for betting on horse races will not make it legal for any person to open and conduct a banking or percentage game, played by means of any device, scheme, or plan, by which the public can assemble and bet on such horse races. In other words, while betting on horse races may not subject persons who make such bets to punishment, yet the opening of a house or place where the public can assemble for the purpose of such betting may be criminal. At common law gaming in and of itself was not a crime, but a common gaming house was looked upon as a nuisance in the eye of the law on account of the great temptation which it offered to the public for idleness, and because such houses were calculated to draw together great numbers of disorderly persons, which could not be other than an inconvenience to the neighborhood, and demoralizing to society and good morals. Owing to the pernicious and destructive consequences following excessive gaming, the common law looked with abhorrence upon gaming houses, and held them to be a nuisance, although no penalty was imposed upon the persons who might bet on the game therein exhibited. See Bacon's Abr. title "Gaming," p. 451, and *United States v. Willis*, 1 Cranch, C. C. 511, Fed. Cas. No. 16,728. The word "gaming" has no technical meaning. It means any contrivance or institution which has for its object any sport, recreation, or amusement for the public, and upon which money or other articles of value are wagered, which will be won or lost by such contrivance or institution. One of the necessary elements of gaming is a contest or event upon which a bet or wager is laid. A game is any sport or amusement, public or private. It includes any physical contest, whether of man or beast, and, when practised for the purpose of deciding bets or wagers, such bets or wagers become gaming. Sec. 20 Cyc. Law & Proc. pp. 880, 881. According to the weight of authorities, a horse race is a game within the meaning of the law. See 20 Cyc. Law & Proc. p. 884.

The supreme court of Illinois declares that horse racing is gaming, and that selling pools, or making books upon the result of a horse race, is gaming, because it is betting on a game, and is unlawful, although the game itself is not unlawful. See *Swigart v. People*, 50 Ill. App. 181.

The sale of a pool on a horse race run upon a track outside of the state is gaming. *Edwards v. State*, 8 Lea, 411.

"The word 'gambling' is a word of very general application, and is not restricted to wagering upon the result of any particular game or games of chance. In the

adjudicated cases on this subject, we find that judges often have applied this word indiscriminately to wagering of all kinds. We are unable to discover any distinction in general principle between the various methods that may be adopted for determining by chance who is the winner and who the loser of a bet,—whether it be by throwing dice, flipping a copper, turning a card, or running a race. In either case it is gambling. This is the popular understanding of the term 'gambling device,' and does not exclude any scheme, plan, or contrivance for determining by chance which of the parties has won and which has lost a valuable stake. That a horse race, when adopted for such a purpose, is a 'gambling device,' there can be no doubt. *Shropshire v. Glascock*, 4 Mo. 536, 31 Am. Dec. 189, and cases there referred to." *Joseph v. Miller*, 1 N. M. 626.

In the case of *Jones v. Territory*, 5 Okla. 537, 49 Pac. 934, Judge Tarsney, speaking for the court, held that a table adapted to the use, and necessarily used, in carrying on any game upon which bets or wagers were laid, is a gambling device in contemplation of law, although such table may have been originally designed for and ordinarily adapted for lawful uses.

We might continue to cite authorities to the same effect; but do not deem it necessary to do so. We think that by the use of the words "or any device" in § 2422, Snyder's Comp. Laws (Okla.) 1909, the legislature meant to include every scheme or plan or conception by which the person who opened or conducted a house, room, or place for betting, induced and enabled persons to bet or lay wagers upon any kind of game whatsoever; and that the charge contained in the information constituted a violation of this section of our law; and that the purpose of this statute was not aimed exclusively at any particular game or species of games, but was intended more effectually to suppress every kind of public gaming in the state of Oklahoma, not only those then in existence, but also those that might subsequently be devised and practised. The great evil and vice aimed at was not the horse races, but the seductive allurements held out to the people, young and old, to frequent gaming tables and indulge in excessive gaming, and thereby become the victims of the professional gambler. The keeping of such a house or place of resort is clearly contrary to public policy. Its object and purpose is to induce men to gather there and gamble. Its tendency is to tempt men to gamble, destroy fortunes, ruin characters, and wreck lives. Establishments of this kind often ripen into crime. They are hotbeds, and

bring about infinite loss and demoralization to those who frequent them. We cannot escape the conclusion that it was to protect the public against such establishments as that described in the information, as well as against the keepers of games of faro, monte, poker, roulette, craps, or any other games played with dice and cards, that § 2422 was passed by the legislature. It is therefore our plain duty to so declare the law.

Our views are clearly and fully expressed in the case of *Miller v. United States*, 6 App. D. C. 11. The court of appeals of the District of Columbia there said:

"The act of Congress under which this indictment is framed is the act of January 31st, 1883, and is entitled, 'An Act More Effectually to Suppress Gaming in the District of Columbia. [22 Stat. at L. 411, chap. 40.] By its 1st section it is provided 'that every person who shall, in the District of Columbia, set up or keep any gaming table, or any house, vessel, or place, on land or water, for the purpose of gaming, of gambling device, commonly known as A. B. C., faro bank, E. O., roulette, equality, keno, thimbles, or "little joker," or any kind of gambling table or gambling device, adapted, devised, and designed for the purpose of playing any game of chance for money or property, or who shall induce, entice, or permit any person to bet or play, at or upon any such gaming table or gambling device, or on the side or against the keeper thereof, shall, on conviction, be adjudged.' etc. The 2d section is directed against any person who shall permit any gaming table, bank, or device to be set up or used for purposes of gaming; and the 3d section is directed against persons practicing certain swindling games therein mentioned. And by the 4th section it is declared 'that all games, devices, or contrivances at which money or any other thing shall be bet or wagered, shall be deemed a gaming table within the meaning of this act.' The demurrer was entered to the indictment generally, and is to be taken as a concession of the truth of all the facts properly alleged. And, if either of the counts be sufficient, the court below was not in error in overruling the demurrer, as the indictment may be good in part, though defective or insufficient in other parts of it. 1 *Chitty, Crim. Law*, 443; *Wheeler v. State*, 42 Md. 563, 566.

"The defendant insists that the court below erred: First, in holding that there was any law in force in the District of Columbia upon which the indictment could be founded; second, in holding that either of the counts of the indictment charged an indictable offense; and, third, in holding

that bookmaking, as charged in the indictment, is unlawful in the District of Columbia.

"1. With respect to the first count in the indictment, charging, as we have seen, the offense of setting up and keeping a gaming table, two questions are presented: First, what constitutes a gaming table within the meaning of the act of Congress of 1883? And, second, whether bookmaking on a horse race is a game of chance, within the meaning of the statute. In regard to the first of these questions, it is unnecessary to go to other authority for definition than to the statute itself. Any games, devices, or contrivances set up or kept for the purpose of gaming, or any gambling device, so set up and kept, adapted, devised, and designed for the purpose of playing any game of chance for money or property, and to which the public may resort to bet or wager money, is a gaming table within the meaning of the statute. The definition of a gaming table under the statute does not involve the ordinary mechanical definition of a table, but depends for its statutory meaning upon the means or contrivances adopted for playing the game. If any doubt could arise upon the construction of the terms of the 1st section of the act of 1883, that doubt would seem to be entirely and completely removed by the very explicit terms of the 4th section of the act, which was inserted *ex industria* for the manifest purpose of repelling ingenious attempts to evade the real scope and policy of the act, by subtle and refined distinctions and definitions. The 4th section declares 'that all games, devices, or contrivances at which money or any other thing shall be bet or wagered, shall be deemed a gaming table within the meaning of this act; and the courts shall construe the preceding sections liberally, so as to prevent the mischief intended to be guarded against.' This section must, of course, be construed in connection with the 1st section of the act, and, being so construed, any device, scheme, or contrivance set up or kept for the purpose of gaming, at which any person may bet or play for money, is a gaming table, and the party so setting up or keeping the same is liable under the statute. It is wholly immaterial to the offense under this statute of 1883, whether the party setting up or keeping the gaming table, or house or other place for gaming, plays or bets at the games or not; it is for keeping the table, or place for gambling, that he incurs the penalty of the statute, and not for the act of betting at such table or place. Seeing, then, what constitutes a gaming table within the meaning of the statute, the next question is whether book-

making on a horse race is a game of chance, or gambling device, or contrivance within the purview of the statute.

"This statute of 1883 was not aimed exclusively at any particular game or species of device for gaming, but was intended, as its title and its broad comprehensive provisions declare, more effectually to suppress gaming in this district. The reason and policy of the law, as well as its comprehensive language, apply as well to all games and devices then existing, as to all that might be subsequently devised and practised. That being the object to be accomplished, what could be more grossly obnoxious to the provisions of the statute, or more demoralizing to the community, than the existence of places for the making and selling of books and pools upon horse races, baseball games, foot races, dog fights, cock fights, and all other conceivable contents upon which money may be bet or wagered? The great evil and vice of the thing is not in the horse race, the foot race, or the baseball game, but in the seductive allurements held out to people, young and old, to frequent the gaming table, or the gambling device, and to indulge in excessive betting, and thereby become the victims of the wily and scheming professional gambler. Whether the game or contest upon which the wager is made be a horse race, foot race, baseball game, or what else, it is quite immaterial, if the thing or contests upon which the bet or wager is made be a game of chance. It has from an early time been held that a horse race is a game of chance, and so is a game of baseball, and so a foot race, where wagers have been made upon them. *Goodburn v. Marley*, 2 *Strange*, 1159; *Blaxton v. Pye*, 2 *Wils.* 309; *Grace v. McElroy*, 1 *Allen*, 563; *Lynall v. Longbothom*, 2 *Wils.* 36; *People v. Weithoff*, 51 *Mich.* 203, 47 *Am. Rep.* 557, 16 *N. W.* 442. And a horse race being a game, within the meaning of the *Stat. Anne*, chap. 14, against gaming, though not specially mentioned, but being embraced in the general words, 'other game or games' (2 *Wils.* 309), there can be no reason for excluding horse races from the games contemplated or fairly embraced by the terms of the act of 1883. The pooling or bookmaking schemes are only particular methods of making the bets or wagers on the result of the race. They all contemplate putting money at stake upon the issue of the race or game. In the case of *Scollans v. Flynn*, 120 *Mass.* 271, the court, in speaking of pool selling, said: 'The selling of pools is admitted to be an illegal and gaming transaction;' and it has been held in several cases, and by eminent judges, that the pooling scheme is to be considered a game, and hence it 33 L.R.A.(N.S.)

is within the very letter of the statute. It was so held by the court of Queen's bench, in *Tollett v. Thomas*, L. R. 6 Q. B. 515, 40 L. J. Mag. Cas. N. S. 209, 24 L. T. N. S. 508, 19 *Week. Rep.* 890, and also in the case of *Edwards v. State*, 8 *Lea*, 411. And the whole subject has been most carefully considered by Mr. Justice Cooley, concurred in by his able associates, in the case of *People v. Weithoff*, 51 *Mich.* 203, 47 *Am. Rep.* 557, 16 *N. W.* 442. In that case the question turned upon the meaning of the word 'gaming room' as used in the statute; and it was held, upon review of all the previous cases upon the subject, that pools on horse races or baseball games are 'games' within the statute against gaming. In view, therefore, of the authorities to which we have referred, and especially of the strong and comprehensive language employed in the statute, we are of opinion that there is no sufficient ground for demurrer to the first count in the indictment."

We think that the case of *Thrower v. State*, 117 *Ga.* 753, 45 *S. E.* 126, 15 *Am. Crim. Rep.* 315, is directly in point, and is applicable not only to the information in this case, but also to the testimony which we find in the record. That court said:

"The defendant was indicted under the Penal Code 1895, § 398, for 'keeping a gaming house,' and upon the trial was found guilty. It appears that he was the proprietor of what is called a 'turf exchange,' at which large numbers of persons daily congregated for the purpose of betting on horse races, run in distant states, but reported at the exchange by telegraphic despatches. The odds against every horse in any race were posted on a blackboard in the room. While not given in detail, we understand, from what is stated as to the method of posting, that the following would illustrate what is placed on the board: 2 to 1 against horse A. 2 to 1 against horse B. 3 to 1 against horse C. 3 to 1 against horse D. 4 to 1 against horse E. Persons desiring to bet would select a horse, pay \$1, and receive a ticket showing the sum to which he would be entitled in case that horse won. The proprietor was in effect a bookmaker, and backed the field, being bound to win if he could get takers enough to make the book on each race, and could keep the amount of his heaviest odds less than the total stakes put up by the individual betters in each race. 3 *Enc. Britannica*, 518. The details would be changed because single 'books' were not made; but the principle would be the same where money bets were made or tickets sold. In the instance above given he received \$5; his heaviest loss could be only \$4, and he

might lose only \$2. At any rate, one of the witnesses lost \$7,000 at this exchange, and many other smaller amounts. The evidence is that many attended, and the betting was constant, those backing the successful horse winning in each race often heavy odds, but the greater number, of course, being bound to lose, and the exchange to gain; these gains being sure and certain if only takers enough were to be had and all the odds sold. This being an element of uncertainty against the proprietor, it was desirable to have a clearing house or place in which to gather a crowd, and the 'turf exchange' is the modern expedient to secure that result. But the plaintiff in error insists that he was not keeping a gaming house, because no game was played; the races occurred in distant states; and, betting on a horse race not being itself a criminal offense, it cannot be an offense to maintain a place where such betting is allowed.

"The act as published in Cobb's Dig. p. 815, and in Code 1863, § 4423, is subdivided by a semicolon, and makes even clearer what is apparent upon an investigation of the statute as now published in the Penal Code 1895, § 398. It creates three separate offenses: (1) Whoever keeps a gaming house is guilty of a misdemeanor. (2) If he does not keep and control the house, but merely permits it to be used by other persons as a place where betting on games or devices is carried on, he is guilty of a misdemeanor. (3) If he knowingly rents the house to be used for such purpose, he is guilty of a misdemeanor. And in § 392 it is further provided that, if he keeps a house to the encouragement of gaming, he is guilty. Keeping a gaming house is a separate, well-defined offense, and entirely independent of the criminality of the betting carried on therein. The statute is aimed at the place, not at the players, nor at the game, nor at the subject-matter of the wager. At common law keeping a gaming house was an offense before any sort of game was prohibited, and was punished when gaming was not even against public policy, when the courts recognized such contracts, and by solemn judgment made the loser pay his bet. But to maintain a place for the purpose of inducing men to gather and game was a common nuisance, because of its tendency to corrupt morals and ruin fortunes. *United States v. Dixon*, 4 Cranch, C. C. 107, Fed. Cas. No. 14,970. The game might be harmless, or, if in private, only the immediate actors would be affected; but when the public were invited, when there were always present those ready and anxious to stake, when the gains of one excited others to par-

ticipate, when the pride of public success stimulated the winner, and the loser attempted to hide the mortification of defeat by a bold front until the last coin was gone, the law was bound to interfere. The English rule and our own statute are both based on the recognition of the cumulative evil which may inhere in a multiplicity of acts not themselves criminal. Idleness is not a crime, but an aggression of innocent idleness may culminate in the crime of vagrancy. Penal Code, § 453. To allow liquor to be drunk on one's premises on Sunday is not made an offense, but to keep a place where persons may congregate for that purpose is to convert the building into a tippling house. The noncriminality of the drinking does not save the housekeeper. Penal Code, § 390. A single act of noise may be innocent, but continued too long the harmless disorder makes the owner the keeper of a disorderly house. Penal Code, § 392. Betting on a game or an event not made penal is not an offense, but to keep a house for that very purpose will ripen into a crime. Keeping a gaming house, a tippling house, or a disorderly house are all made offenses by the Penal Code, because, while acts done therein are not crimes, they lead to crime. Such places are hotbeds; and the maintenance thereof is prohibited in pursuance of the preventive policy of the law, in an endeavor to save the idle and dissolute from themselves, and to prevent the misery and loss which wait on those who frequent such places. The wholesale gaming and the evil consequences arising from the keeping of a 'turf exchange' are as great, if not greater, than those flowing from maintenance of any other gaming place; and the proprietor can only escape the consequences by showing that his is not a gaming house within the meaning of the statute.

"The words 'wagering,' 'playing,' 'gaming,' and 'betting,' though each having a meaning more or less different from the other, are often used one for the other. The statute in prohibiting gaming does not intend to prohibit amusement, sport, recreation, or diversion, but is aimed at the hazarding of money on certain prohibited games and devices. In prohibiting a gaming house it is intended to prevent the maintenance of a place at which persons come together for the purpose of hazarding and betting money, whether the subject-matter of a single bet is or is not made equal. There is a difference between gambling and gaming. In defining gaming contracts the Code refers to contracts in which money has been wagered, although there may be no sport, no skill, no element of contest between those betting; and therefore, while some

few courts rule that betting on a horse race is not even gaming, most others (14 Am. & Eng. Enc. Law, 2d ed. p. 682, note 1, 2) decide it to be gaming, and our own court has held that 'betting on a horse race is gaming in the sense of the Code.' Dyer v. Benson, 69 Ga. 609. It may not be gambling, but it is gaming; and, if so, a person who maintains a place where such betting is carried on as a business is keeping a gaming house. The gaming or betting goes on therein although the race itself may be conducted elsewhere. No one will deny that the young man who lost his \$7,000 could have recovered it had he sued in time under the provisions of Civ. Code, § 3671, even though it were lost in gaming on races run in New York, Saratoga, or Sheepshead. It was gaming, and gaming in this very house, and the owner was keeping a gaming house even if betting on a horse race is not itself punished under the Penal Code. To the decisions cited by counsel may be added that of State v. Savannah, T. U. P. Charlt. (Ga.) 238, 4 Am. Dec. 708, decided in 1809, from which it appears that, long before our first Penal Code, 'keeping a gaming house' was recognized as 'a nuisance and an offense against the public police, and a part of that law which our ancestors brought from England, and not impaired by our fundamental laws.' It is true that since 1833 we have had only statutory offenses. White v. State, 51 Ga. 288. But where the common-law crime has been adopted, and common-law terms used in its definition, the construction previously placed thereon by the English courts becomes by intendment a part of the adopting statute. Penal Code, §§ 1, 4 (9). It would seem clear, therefore, that when the legislature, in concise but comprehensive language, declared that 'keeping a gaming house is a misdemeanor,' it had in mind the English law on the same subject, under which the crime was committed when the house was kept for the purpose of gaming, regardless of the criminality or character of game, wagering, or betting carried on therein."

We deem it useless to make further argument or cite additional authorities in support of our views. We therefore hold that the court did not err in overruling the demurrer to the information. The evidence overwhelmingly sustains every allegation contained in the information, and the instructions given to the jury are in harmony with the views herein contained.

The judgment of the lower court is therefore affirmed, with directions to the County Court of Canadian County to proceed 33 L.R.A. (N.S.)

with the execution of the judgment and sentence of the court.

Doyle and Richardson, JJ., concur.

WISCONSIN SUPREME COURT.

J. M. LEPLEY, Respt.,
v.

A. N. ANDERSEN, Appt.

(142 Wis. 668, 125 N. W. 433.)

Evidence — parol to explain contract.

1. Parol evidence is admissible to show that a writing purporting to fix compensation for collecting a debt was in fact made to aid the collection of the debt by concealing the creditor's interest in the recovery, and that the collector was attempting to use the instrument for the dishonest purpose of retaining an amount in excess of the compensation to which he was entitled.

Contract — writing — parol control — evidence.

2. To establish fraud which will permit the controlling of a written contract by a contemporaneous parol agreement, the evidence must be clear and satisfactory.

Appeal — reversal — instructions — failure to request.

3. A reversal may be had to prevent injustice because of insufficient instructions to the jury, although the losing party did not except to those given, or request others.

(February 23, 1910.)

Note. — Degree of certainty necessary to establish fraud in a civil action.

This note is limited to setting out the forms of expression used by the courts to describe the degree of proof required to establish fraud in civil actions. The question whether or not the evidence produced in particular cases was sufficient to establish fraud is not considered.

While the degree of proof required to establish fraud is affected by the nature of the action in some of the cases, a large part of them seem to treat the question from the standpoint of fraud alone. To attempt to set out the nature of the action in each case treated would, therefore, be confusing, and in many cases misleading, and for that reason it is deemed advisable to merely collect the cases and group them according to the particular form of expression used to describe the degree of proof required to establish fraud.

Cases in which, though the proof of fraud was involved, it appears that the discussion of the degree of proof required turned upon other considerations, as, for instance, the fact that a crime was charged, rather than upon the proof of fraud, have not been included.

In the arrangement of the note, while

APPEAL by defendant from a judgment of the Circuit Court for Rusk County in plaintiff's favor in an action brought to recover certain moneys alleged to have been collected by defendant for plaintiff. Reversed.

Statement by Marshall, J.:

Action to recover \$500, money had and received. Complaint in the usual form. The defendant answered admitting receipt of the money, but claiming that it was received as collecting agent under an agreement that he should have half for making the collection and the right to apply the other half on a claim he had for collection for another party against the plaintiff.

Defendant established his defense, *prima*

facie, by introducing in evidence a written contract between himself and a former partner, on one side, and plaintiff, on the other, to the effect that in case the former should collect the \$500 claim of one Arnold the proceeds should be disposed of as stated in the answer. Plaintiff was permitted to rebut that by evidence that the claim was put into the hands of defendant and his partner for collection upon the usual terms, and that, some time thereafter, plaintiff was induced to sign the written contract by representations made by defendant that it would be used only to prevent Arnold from collecting a judgment he had charge of against the plaintiff, and to avoid Arnold's disinclination to pay the claim so that any of the proceeds would go to enrich

cases using similar expressions have been grouped together under appropriate headings, care has been taken to cite together only cases using the exact or substantially exact expression which they are cited to support.

Not to be presumed, but must be proved, etc.

Expressions to the general effect that fraud is not to be presumed, but must be proved, have been used or approved by the courts as follows:

—not presumed, but must be proved. *Ferguson v. Little Rock Trust Co.* — Ark. —, 137 S. W. 555; *Mears v. Waples*, 3 Houst. (Del.) 581; *Ruby v. Jamison*, 143 Ky. 486, 136 S. W. 909; *Western Horse & Cattle Ins. Co. v. Putnam*, 20 Neb. 331, 30 N. W. 246; *Buchanan v. Buchanan*, 73 N. J. Eq. 544, 68 Atl. 780, reverse on other grounds in 75 N. J. Eq. 274, 22 L.R.A. (N.S.) 454, 71 Atl. 745; *Shultz v. Hoagland*, 85 N. Y. 467;

—not inferred, but must be proved. *Wright v. Grover*, 27 Ill. 426; *Long v. West*, 31 Kan. 298, 1 Pac. 545;

—must be distinctly alleged and proved. *Bailey v. Litten*, 52 Ala. 282;

—must be averred with certainty, and proved as averred. *Manning v. Pippen*, 95 Ala. 537, 11 So. 56;

—must be proved, and not found on mere suspicion. *Redpath Bros v. Lawrence*, 48 Mo. App. 427; *Braddock v. Louchheim*, 87 Fed. 287;

—must be proved, but may be proved by presumptive evidence. *Kaine v. Weigley*, 22 Pa. 179;

—not presumed, but must be proved, though it may be inferred from circumstances. *Renney v. Williams*, 89 Mo. 139, 1 S. W. 227; *Colquitt v. Thomas*, 8 Ga. 258;

—must be proven with some degree of certainty, and cannot be inferred or presumed from ambiguous evidence. *Denoyer v. First Nat. Acci. Co.* 145 Wis. 450, 130 N. W. 475;

—must be proved, and not conjectured. 33 L.R.A. (N.S.)

Priest v. Way, 87 Mo. 16; *Mapes v. Burns*, 72 Mo. App. 411.

However, in *Kendall v. Hughes*, 7 B. Mon. 368, it was held that to instruct that fraud will not be presumed, but must be proven, is misleading, as it may be presumed if there is sufficient evidence of other facts to justify the inference of fraud.

In *Pickitt v. Pipkin*, 64 Ala. 520, the court said: "Courts, while not indulging presumptions that it is imputable, cannot refuse to draw from uncontroverted facts the inferences flowing from them logically and naturally."

In *McDaniel v. Baca*, 2 Cal. 326, 56 Am. Dec. 339, it is held that express proof is not required, but may be inferred from strong presumptive circumstances.

And in *Lowry v. Beckner*, 5 B. Mon. 41, the court said: "Fraud may be presumed, as well as other higher offenses, from facts and circumstances proven."

While in *Denton v. McKenzie*, 1 Desauss. Eq. 289, 1 Am. Dec. 664, the court held that fraud may be presumed in equity, and need not be proved as at law.

By a preponderance of testimony, etc.

A large number of cases show approval of some form of expression indicating the sufficiency of a preponderance of evidence to establish fraud. Thus it may be proved:

—by a preponderance of the evidence. *Ford v. Chambers*, 19 Cal. 143; *Bullard v. His Creditors*, 56 Cal. 600; *Allen v. Elrick*, 29 Colo. 118, 66 Pac. 891; *Eames v. Morgan*, 37 Ill. 260; *Hewett v. Johnson*, 72 Ill. 513; *Schroeder v. Walsh*, 120 Ill. 403, 11 N. E. 70; *Kingman v. Reinemer*, 166 Ill. 208, 46 N. E. 786; *Prentice v. Crane*, 234 Ill. 302, 84 N. E. 916; *Hughes v. Lockington*, 221 Ill. 571, 77 N. E. 1105; *Geneser v. Telgman*, 37 Ill. App. 374; *Means v. Flanagan*, 79 Ill. App. 296; *Smith v. Edelstein*, 92 Ill. App. 38; *Haberer v. Walzer*, 109 Ill. App. 371; *American Hoist & Derrick Co. v. Hall*, 110 Ill. App. 463, affirmed in 208 Ill. 597, 70 N. E. 581; *Crane v. Schaefer*, 140 Ill. App. 647; *Continental Ins. Co. v. Jachnichen*, 110 Ind. 59, 59 Am. Rep. 194, 10

plaintiff. There was further proof on the part of plaintiff as to the services rendered in collecting the claim. The evidence as to the oral understanding that the writing should not be used according to its tenor was contradicted by evidence on defendant's part. There was also evidence in his behalf that the claim he had for collection was stale and of a class permitting 50 per cent as a customary fee. The evidence was all one way, that one half of the \$500 collected was actually applied on the claim defendant and his partner had for collection against plaintiff. There was evidence tending to show that the writing corresponded to the verbal understanding. Exceptions were saved to the ruling permitting proof of

the contemporaneous or prior verbal contract.

The jury, considering the case as submitted by the court, allowed defendant 10 per cent of the \$500, for his services as collector, and found for plaintiff in the sum of \$200. Judgment was rendered accordingly, with costs.

Messrs. Andersen & Leahy, J. W. Soderberg, and Richmond, Jackman, & Swansen, for appellant:

In the absence of fraud or mistake, proof of antecedent or contemporaneous verbal agreements between contracting parties cannot be received to alter or control a written agreement.

Hubbard v. Marshall, 50 Wis. 322, 6 N.

N. E. 636; Baltimore, O. & C. R. Co. v. Scholes, 14 Ind. App. 524, 56 Am. St. Rep. 307, 43 N. E. 156; Turner v. Hardin, 80 Iowa, 691, 45 N. W. 758; Long v. Davis, 136 Iowa, 734, 114 N. W. 197; Baker v. Mathew, 137 Iowa, 410, 115 N. W. 15; Tanton v. Martin, 80 Kan. 22, 101 Pac. 461; Allison v. Ward, 63 Mich. 128, 29 N. W. 528; Gay v. Gillilan, 92 Mo. 250, 1 Am. St. Rep. 712, 5 S. W. 7; Bauer Grocery Co. v. Sanders, 74 Mo. App. 657; Gehlert v. Quinn, 35 Mont. 451, 119 Am. St. Rep. 864, 90 Pac. 168; Bentley v. Woolson Spice Co. 1 Neb. (Unof.) 558, 95 N. W. 803; Hitchcock v. Gothenburg Water Power & Irrig. Co. 4 Neb. (Unof.) 620, 95 N. W. 638; McKibbin v. Day, 74 Neb. 424, 104 N. W. 752; Schorr v. Gewirz, 39 Misc. 186, 79 N. Y. Supp. 134; Phoenix Iron Co. v. The Hopatcong & Musconetcong, 127 N. Y. 206, 27 N. E. 841; Tuttle v. Tuttle, 146 N. C. 484, 125 Am. St. Rep. 481, 59 S. E. 1008; Strader v. Mullane, 17 Ohio St. 624; Jones, S. & Co. v. Greaves, 26 Ohio St. 2, 20 Am. Rep. 752; Catasaqua Mfg. Co. v. Hopkins, 141 Pa. 30, 21 Atl. 638; Meyers v. Meyers, 24 Pa. Super. Ct. 603; Davidson v. Wheeler, 17 R. I. 433, 22 Atl. 1022; Johnson v. Franklin, 58 S. C. 394, 36 S. E. 664; Carson v. Houssels, — Tex. Civ. App. —, 51 S. W. 290; Colston v. Bean, 78 Vt. 283, 62 Atl. 1015; Fleming v. Kerns, 37 W. Va. 494, 16 S. E. 600;

—by a fair preponderance of evidence Lillie v. McMillan, 52 Iowa, 463, 3 N. W. 601; Sunberg v. Babcock, 66 Iowa, 519, 24 N. W. 19; Brown v. Herr, 21 Neb. 113, 31 N. W. 246;

—by a fair balance of evidence. Cutter v. Adams, 15 Vt. 237;

—by a clear preponderance of the testimony. Bradford v. Bradford, 60 Iowa, 201, 14 N. W. 254; Patrick v. Leach, 8 Neb. 530, 1 N. W. 853.

However, in *Bowe v. Gage*, 127 Wis. 245, 115 Am. St. Rep. 1010, 106 N. W. 1074, and *Lalone v. United States*, 164 U. S. 255, 41 L. ed. 425, 17 Sup. Ct. Rep. 74, it was held that a mere preponderance of evidence was insufficient to establish fraud.
33 L.R.A. (N.S.)

Clear, satisfactory, etc.

In a large number of cases coming under this general head, the courts have indicated the degree of proof required to establish fraud, by the following expressions:

—must be clearly proved. *Wallace v. Mattice*, 118 Ind. 59, 20 N. E. 497; *Stewart v. English*, 6 Ind. 176; *Campau v. Lafferty*, 50 Mich. 114, 15 N. W. 40; *Bumpus v. Bumpus*, 59 Mich. 95, 26 N. W. 410; *Clark v. Tennant*, 5 Neb. 549; *Carter v. Eastman-Gardner Co.* 95 Mich. 651, 48 So. 615; *Dallam v. Renshaw*, 26 Mo. 533; *Davidson v. Crosby*, 49 Neb. 60, 68 N. W. 338; *Gray v. Richmond Bicycle Co.* 26 Misc. 165, 55 N. Y. Supp. 787, affirmed in 40 App. Div. 506, 58 N. Y. Supp. 182; *Morton v. Weaver*, 99 Pa. 47; *Mead v. Conroe*, 113 Pa. 220, 8 Atl. 374; *Jones v. Lewis*, 148 Pa. 234, 23 Atl. 985; *Fitzgerald v. Frankel*, 109 Va. 603, 64 S. E. 941; *Deepwater Council No. 40*, O. U. A. M. v. Renick, 59 W. Va. 343, 53 S. E. 552; *Shaw v. Gilbert*, 111 Wis. 165, 86 N. W. 188; *Vanbibber v. Beirne*, 6 W. Va. 168;

—must be clearly established. *Howle v. North Birmingham Land Co.* 95 Ala. 389, 11 So. 15; *Freeman v. Topkis*, 1 Marv. (Del.) 174, 40 Atl. 948; *Terry v. Platt*, 1 Penn. (Del.) 185, 40 Atl. 243; *Wood v. Staudenmayer*, 56 Kan. 399, 43 Pac. 760; *Pioneer Iron Co. v. Negaunee*, 116 Mich. 430, 74 N. W. 700; *Oberlin College v. Blair*, 45 W. Va. 812, 32 S. E. 203; *Sansom v. Wolford*, 60 W. Va. 380, 55 S. E. 1020;

—clear and convincing. *Johnson v. Rogers*, 112 Ala. 576, 20 So. 929; *Dean v. Oliver*, 131 Ala. 637, 30 So. 865; *Union Nat. Bank v. State Nat. Bank*, 168 Ill. 256, 48 N. E. 169; *Pickle v. Lincoln County State Bank*. — Wash. —, 112 Pac. 654; *Johnson v. Conner*, 48 Wash. 431, 93 Pac. 914;

—clear, unequivocal, and convincing. *Maxwell Land Grant Case*, 121 U. S. 325, 30 L. ed. 949, 7 Sup. Ct. Rep. 1015; *Colorado Coal & I. Co. v. United States*, 123 U. S. 307, 31 L. ed. 182, 8 Sup. Ct. Rep. 131; *United States v. San Jacinto Tin Co.* 125 U. S. 273, 31 L. ed. 747, 8 Sup. Ct. Rep. 850;

W. 497; *Hooker v. Hyde*, 61 Wis. 208, 21 N. W. 52; *Bailey v. Wells*, 8 Wis. 141, 76 Am. Dec. 233.

To escape liability upon the contract, mistake or fraud in its execution must be both alleged and shown.

Armstrong v. Grand Trunk R. Co. 18 N. B. 445; *Louisville N. R. Co. v. Brownlee*, 9 Cent. L. J. 101; *Kirkland v. Dinmore*, 62 N. Y. 179, 20 Am. Rep. 475; *Richards v. Day*, 137 N. Y. 183, 23 L.R.A. 801, 33 Am. St. Rep. 704, 33 N. E. 146; *Bishop v. Stevens*, 31 Neb. 786, 48 N. W. 827; *People ex rel. Fleming v. Niagara C. P.* 12 Wend. 246; *Swope v. Fair*, 18 Ind. 300; *Dubois v. Hermance*, 56 N. Y. 673; *Hunting v. Downer*, 151 Mass. 275, 23 N. E. 832; *Champlain v. Detroit Stamping Co.* 68 Mich. 238,

36 N. W. 57; *American Oak Extract Co. v. Ryan*, 112 Ala. 337, 20 So. 644; *Finley v. Quirk*, 9 Minn. 194, Gil. 179, 86 Am. Dec. 93.

Messrs. Thomas & Carow, for respondent:

An allegation of new matter in an answer is to be deemed controverted by the adverse party, as upon a direct denial or avoidance as the case may require.

Roy v. Lull, 9 Wis. 324; *Gunn v. Madigan*, 28 Wis. 158; *Payne v. Payne*, 129 Wis. 460, 109 N. W. 105; *Canfield v. Watertown F. Ins. Co.* 55 Wis. 419, 13 N. W. 252.

Courts of law and equity scrutinize most closely all transactions between an attorney and his client.

United States v. Iron Silver Min. Co. 128 U. S. 673, 32 L. ed. 571, 9 Sup. Ct. Rep. 195; *United States v. Hancock*, 133 U. S. 193, 33 L. ed. 601, 10 Sup. Ct. Rep. 264; *United States v. Budd*, 144 U. S. 154, 36 L. ed. 384, 12 Sup. Ct. Rep. 575; *Chicago, St. P. M. & O. R. Co. v. Belliwith*, 28 C. C. A. 358, 55 U. S. App. 113, 83 Fed. 437; *Mastin v. Noble*, 85 C. C. A. 98, 157 Fed. 506;

—clear, cogent, and convincing. *Griffin v. Roanoke R. & Lumber Co.* 140 N. C. 514, 6 L.R.A.(N.S.) 463, 53 S. E. 307;

—strong, clear, positive, and convincing. *Walton v. Blackman*, — Tenn. —, 36 S. W. 195;

—clear, precise, and indubitable. *American Nat. Bank v. Supplee*, 52 C. C. A. 293, 115 Fed. 657; *Martin v. Berens*, 67 Pa. 459; *Pennsylvania R. Co. v. Shay*, 82 Pa. 198; *Cummins v. Hurlbutt*, 92 Pa. 165; *Bierer's Appeal*, 92 Pa. 265; *DeDouglas v. Union Traction Co.* 198 Pa. 430, 48 Atl. 262; *Sulkin v. Gilbert*, 218 Pa. 255, 67 Atl. 415; *Sacks v. Schimmel*, 3 Pa. Super. Ct. 426; *Stine v. Sherk*, 1 Watts & S. 195;

—conclusive. *Christmas v. Spink*, 15 Ohio, 600;

—explicit, clear, and conclusive. *Kingley v. Brooklyn*, 78 N. Y. 215;

—clear and decided proof. *Cannon v. Jackson*, 40 Ark. 417;

—clear, distinct, and certain. *Holton v. Davis*, 47 C. C. A. 246, 108 Fed. 138;

—must clearly appear. *Atlantic Delaine Co. v. James*, 94 U. S. 207, 24 L. ed. 112;

—must be clearly shown. *Holt v. Moore*, 37 Ark. 145;

—a clear case should be made out. *Kincaid v. Price*, 82 Ark. 20, 100 S. W. 76;

—must be clearly and fully established. *Sanborn v. Stetson*, 2 Story, 481, Fed. Cas. No. 12,291;

—must be clearly and distinctly proved. *Hollister v. Loud*, 2 Mich. 309; *Engleby v. Harvey*, 93 Va. 440, 25 S. E. 225; *Alsop v. Catlett*, 97 Va. 364, 34 S. E. 48; *Virginia-Carolina Chemical Co. v. Carpenter*, 99 Va. 292, 38 S. E. 143; *Hord v. Colbert*, 28 Gratt. 49; *Armstrong v. Bailey*, 43 W. Va. 778, 28 S. E. 766; *Beatty v. Neelon*, 12 Ont. App. Rep. 50; 33 L.R.A.(N.S.)

—must be distinctly proven. *White v. Perry*, 14 W. Va. 66; *Wheby v. Moir*, 102 Va. 878, 47 S. E. 1005;

—must be clearly proved by circumstances which clearly lead the mind of the court to the conclusion that a fraud has been perpetrated. *Babbitt v. Dotten*, 14 Fed. 19;

—clear and conclusive. *Collier v. Parish*, 147 Ala. 526, 41 So. 772; *Massey v. Stout*, 4 Del. Ch. 274; *Hill v. Reifsnider*, 46 Md. 555; *Hickman v. Trout*, 83 Va. 478, 3 S. E. 131;

—clear and positive. *Doctor v. Gilmar-tin*, 14 Daly, 206, 6 N. Y. S. R. 296;

—clear and satisfactory. *Russell v. Brooks*, 92 Ark. 509, 122 S. W. 649; *Edwards v. Story*, 105 Ill. App. 433; *Lynn v. Baltimore & O. R. Co.* 60 Md. 404, 45 Am. Rep. 741; *Hampton v. Webster*, 56 Neb. 628, 77 N. W. 50; *Nelson v. Steen*, 192 Pa. 581, 44 Atl. 247; *Sebring v. Brickley*, 7 Pa. Super. Ct. 198; *New York L. Ins. Co. v. Davis*, 96 Va. 737, 44 L.R.A. 305, 32 S. E. 475; *Herring v. Wickham*, 29 Gratt. 628, 26 Am. Rep. 405; *Fick v. Mulholland*, 48 Wis. 310, 4 N. W. 527; *Lavassar v. Washburne*, 50 Wis. 200, 6 N. W. 516; *Rice v. Jerenson*, 54 Wis. 248, 11 N. W. 549; *F. Dohmen Co. v. Niagara F. Ins. Co.* 96 Wis. 38, 71 N. W. 69; *Burnham v. Burnham*, 119 Wis. 509, 100 Am. St. Rep. 895, 97 N. W. 176; *Harrigan v. Gilchrist*, 121 Wis. 127, 99 N. W. 909; *Hubbard v. McLean*, 122 Wis. 75, 99 N. W. 465; *Miles v. Pike Min. Co.* 124 Wis. 278, 102 N. W. 555; *Bowe v. Gage*, 127 Wis. 245, 115 Am. St. Rep. 1010, 106 N. W. 1074; *Paulus v. O'Neill*, 131 Wis. 69, 111 N. W. 333;

—clear, satisfactory, and persuasive. *Maxwell v. McWilliams*, 145 Ill. App. 155;

—clear, satisfactory, and conclusive. *Bigelow v. Wilson*, 99 Iowa, 456, 68 N. W. 798;

—by clear and satisfactory evidence, and the more serious the nature of the fraud charged the more rigidly should that rule be applied. *Maldaner v. Smith*, 102 Wis. 30, 78 N. W. 140; *Neacy v. Milwaukee County*, 144 Wis. 210, 128 N. W. 1063;

—by satisfactory proof. *Jones v. Simpson*, 116 U. S. 609, 29 L. ed. 742, 6 Sup.

4 Cyc. Law & Proc. p. 960, and cases cited; *Allard v. Lamirande*, 29 Wis. 502.

The general rule as to the degree of proof when fraud is alleged does not apply to dealings between attorney and client.

Phipps v. Willis, 53 Or. 190, 96 Pac. 866, 99 Pac. 935, 18 A. & E. Ann. Cas. 119.

Agreements between attorneys and clients regarding compensation will be construed most favorably to the interests of the clients.

4 Cyc. Law & Proc. pp. 988, 989; *Cotzhausen v. Central Trust Co.* 79 Wis. 613, 49 N. W. 158; *Newman v. Freitas*, 129 Cal. 283, 50 L.R.A. 548, 61 Pac. 907; *Allard v. Lamirande*, 29 Wis. 502; *Dockery v. McLellan*, 93 Wis. 381, 67 N. W. 733; *Ryan v. Martin*, 18 Wis. 673.

Ct. Rep. 538; *McClanahan v. McKinley*, 52 Iowa, 222, 2 N. W. 1101;

—clear and convincing so as to satisfy the jury by a preponderance of evidence. *Hanscom v. Drullard*, 79 Cal. 234, 21 Pac. 736;

—strong and decisive. *Bryan v. Ramirez*, 6 Cal. 462, 68 Am. Dec. 340;

—the testimony must be of the strongest and most cogent character, and the case a clear one. *Walker v. Hough*, 59 Ill. 375.

—expressions disapproved.

In a number of cases, however, too high a degree of proof has been held to be required by expressions similar to those above, as follows:

—must be clearly and distinctly proven. *Gehlert v. Quinn*, 35 Mont. 451, 119 Am. St. Rep. 864, 90 Pac. 168;

—clear and conclusive. *Watkins v. Wallace*, 19 Mich. 57;

—clear proof, and hearty conviction. *Gumberg v. Treuach*, 103 Mich. 543, 61 N. W. 872;

—clear and convincing. *Smith v. Edelstein*, 92 Ill. App. 38; *Dare County v. Smith Constr. Co.* 152 N. C. 23, 67 S. E. 37;

—clear and undisputed proof. *Abbey v. Dewey*, 25 Pa. 413;

—clear, precise, and indubitable. *Meyers v. Meyers*, 24 Pa. Super. Ct. 603;

—clearly proved. *Doe ex dem. Rice v. Dignowitty*, 4 Smedes & M. 57; *Bauer Grocery Co. v. Sanders*, 74 Mo. App. 657;

—clear and satisfactory evidence. *Walsh v. Taft*, 142 Mich. 127, 105 N. W. 544; *Rider v. Hunt*, 6 Tex. Civ. App. 238, 25 S. W. 314; *Ross v. Cleveland*, — Tex. Civ. App. —, 133 S. W. 315;

Like any other fact.

In some of the cases the courts say that fraud must be proved like any other material fact: *Mears v. Waples*, 3 Houst. (Del.) 581; *Carter v. Gunnels*, 67 Ill. 270; *Brady v. Cole*, 164 Ill. 116, 45 N. E. 438; *Ruby v. Jamison*, 143 Ky. 486, 136 S. W. 909; *Kline v. Baker*, 106 Mass. 61; *O'Donnell v. Segar*, 25 Mich. 367; *Ferris v. McQueen*, 94 Mich. 367, 54 N. W. 164; *McNaughton v. 33 L.R.A. (N.S.)*

If the transaction presents even a suggestion of unfair dealing, the burden is on the attorney to prove honesty and good faith, and that the transaction was entered into by the client fairly and voluntarily.

United States Oil & Land Co. v. Bell, 153 Cal. 781, 96 Pac. 901; *Phipps v. Willis*, 53 Or. 190, 96 Pac. 866, 99 Pac. 935, 18 A. & E. Ann. Cas. 119; *Crocheron v. Savage*, 74 N. J. Eq. 629, 70 Atl. 353.

When an attorney has acted in bad faith to secure personal advantage to the prejudice of his client, he may be properly denied any compensation for his services.

Davis v. Swedish-American Nat. Bank, 136 Iowa, 650, 78 Minn. 409, 79 Am. St. Rep. 409, 80 N. W. 953, 81 N. W. 210;

Smith, 136 Mich. 368, 99 N. W. 382; *State ex rel. Erhardt v. Estel*, 6 Mo. App. 6; *Douglass v. Mitchell*, 35 Pa. 440; *Young v. Edwards*, 72 Pa. 257; *Sparks v. Dawson*, 47 Tex. 138;

Beyond reasonable doubt.

Proof of fraud beyond a reasonable doubt has been held to be too high a degree in: *Sweeney v. Devens*, 72 Mich. 301, 40 N. W. 454; *Burr v. Willson*, 22 Minn. 206; *Dare County v. Smith Constr. Co.* 152 N. C. 23, 67 S. E. 37; *McComihe v. Sawyer*, 12 N. H. 396; *United States Home & Dower Asso. v. Reams*, 8 Ohio Dec. Reprint, 272.

But in *Weissenfels v. Cable*, 208 Mo. 515, 106 S. W. 1028, proof beyond reasonable doubt was required.

And in *Mayberry v. Nichol*, — Tenn. —, 39 S. W. 881, the court used the phrase, "beyond a reasonable controversy," as describing the proper degree of proof.

Consistent with honest purpose.

In the following cases the courts have said that fraud should not be found when the facts and circumstances proven may as well consist with honesty of purpose. *Smith v. Branch Bank*, 21 Ala. 125; *Alabama Life Ins. & T. Co. v. Pettway*, 24 Ala. 544; *Stiles v. Lightfoot*, 26 Ala. 443; *Thames v. Rembert*, 63 Ala. 561; *Cromelin v. McCauley*, 67 Ala. 542; *Phoenix Ins. Co. v. Moog*, 81 Ala. 335, 1 So. 108; *Lyman v. Cessford*, 15 Iowa. 229; *Schofield v. Blind*, 33 Iowa, 175; *Drummond v. Couse*, 39 Iowa, 442; *Raymond v. Morrison*, 59 Iowa, 371, 13 N. W. 332; *Ley v. Metropolitan L. Ins. Co.* 120 Iowa, 203, 94 N. W. 568; *Connors v. Chingren*, 111 Iowa, 437, 82 N. W. 934; *Pierce v. Pierce*, 55 Mich. 629, 22 N. W. 81, 15 Mor. Min. Rep. 675; *Morris v. Talcott*, 96 N. Y. 100; *Baird v. New York*, 96 N. Y. 567; *Postal v. Cohn*, 83 App. Div. 27, 81 N. Y. Supp. 1089; *Roberts v. Washington Nat. Bank*, 11 Wash. 559, 40 Pac. 225;

In *State Sav. Bank v. Emge*, — Iowa, —, 108 N. W. 530, it was held that fraud should not be inferred unless the showing is so

Donaldson v. Eaton, 14 L.R.A. (N.S.) 1168, 125 Am. St. Rep. 275, 114 N. W. 19.

A presumption of undue influence arises when attorney and client enter into a contract for compensation, unless the contract was entered into before the relation began.

Dockery v. McLellan, 93 Wis. 381, 67 N. W. 733, 4 Cyc. Law & Proc. p. 961.

Marshall, J., delivered the opinion of the court:

The principal point made on the appeal is that the rule permitting respondent to testify to the verbal agreement, contradicting the writing which purported to fix the rights of the parties regarding appellant's compensation, was erroneous, since by a familiar principle, a written contract

clear as to exclude all reasonable hypothesis of good faith.

In Shinnabarger v. Shelton, 41 Mo. App. 147, the court said that if the evidence comports as well with honesty as dishonesty, so that there is a reasonable doubt as to which preponderates, the doubt should be resolved in favor of the party charged with fraud.

And in Alter v. Bank of Stockham, 53 Neb. 223, 73 N. W. 667, the court said that if from the entire evidence good faith, or an honest mistake even, may be as rationally and reasonably inferred as fraud, then the law leans to the side of innocence.

But in Adams v. Thornton, 78 Ala. 489, 56 Am. Rep. 49, a rule adopted in Steele v. Kinkle, 3 Ala. 352, and Tompkins v. Nichols, 53 Ala. 197, that to establish fraud the facts must be such as are not explicable on any other reasonable hypothesis, was expressly disapproved as requiring too high a degree of proof, and it was held that when a party shows facts which are not fairly or reasonably reconcilable with fair dealing and honesty of purpose he is entitled to judgment.

—presumption of innocence.

The courts presume that a man acts honestly in his dealings with his fellow man, and to establish fraud it is necessary that the evidence be strong enough to overcome this presumption. Marksburly v. Taylor, 10 Bush, 519; S. Rose Co. v. Hasenzahl, 141 Ky. 676, 133 S. W. 547; Hatch v. Bayley, 12 Cush. 27; Fort v. Metayer, 10 Mort. (La.) 436; Cobb v. Fogelman, 23 N. C. (1 Ired. L.) 440; Virginia F. & M. Ins. Co. v. Hogue, 105 Va. 355, 54 S. E. 8:

To the satisfaction of the jury or court.

Various expressions involving the idea of requiring that fraud be proved to the satisfaction of the jury or the judge have been used as follows:

—to the satisfaction of the jury. Harding v. Long, 103 N. C. 1, 14 Am. St. Rep. 775, 9 S. E. 445;

—by a preponderance of the evidence to 33 L.R.A. (N.S.)

cannot be varied or contradicted by evidence of verbal communications prior to the making thereof or contemporaneous therewith.

The rule invoked by counsel, like most judicial rules, is subject to exceptions. One is this: Where there is a distinct oral agreement which, under ordinary circumstances, cannot be efficiently established in the face of a written one covering the subject, or which is inconsistent therewith, for the purpose of giving effect to the former notwithstanding the latter, it may be, in an action between the parties, as a matter of defense to a claim under the writing, in case of the adverse party seeking to use such writing for a dishonest purpose. Corbett v. Joannes, 125 Wis. 370, 388, 104

the satisfaction of the jury. Moses v. Katzenberger, 84 Ala. 95, 4 So. 237; Supreme Conclave, K. D. v. Wood, 120 Ga. 328, 47 S. E. 940; Dare County v. Smith Constr. Co. 152 N. C. 23, 67 S. E. 37;

—by a preponderance of evidence, sufficient to reasonably satisfy the minds of the jury. Golden v. Parmalee, 15 Gray, 413; Hitchcock v. Baughan, 36 Mo. App. 216;

—a fair preponderance of evidence, sufficient to satisfy the minds of the jurors. Bixby v. Carskaddon, 55 Iowa, 533, 8 N. W. 354;

—must be sufficient to satisfy the jury, by a fair and reasonable preponderance of evidence. O'Connell v. Supreme Conclave, K. D. 102 Ga. 143, 66 Am. St. Rep. 159, 28 S. E. 282;

—clearly and conclusively established to the satisfaction of the jury. Boyce v. Cannon, 5 Houst. (Del.) 409;

—by satisfactory proof, i. e., proof to the satisfaction of the jury. Walker v. Collins, 8 C. C. A. 1, 19 U. S. App. 307, 59 Fed. 70, reversed on other grounds in 167 U. S. 57, 42 L. ed. 76, 17 Sup. Ct. Rep. 738;

—sufficient if all the facts proven satisfy the jury that fraud existed. Reed v. Noxon, 48 Ill. 323;

—any evidence which will satisfy the jury that there was fraud. Hoffman v. Western M. & F. Ins. Co. 1 La. Ann. 216;

—the jury must be satisfied of fraudulent intent. Painter v. Drum, 40 Pa. 467;

—sufficient to satisfy the minds and consciences of the jury. Linn v. Wright, 18 Tex. 317, 70 Am. Dec. 282;

—only such proof as will convince the jury of the truth of the allegation. Doe ex dem. Rice v. Dignowitty, 4 Smedes & M. 57;

—such evidence as the jury could reasonably and safely rest their consciences upon. Abbey v. Dewey, 25 Pa. 413;

—sufficient if the evidence creates in the mind of the jury, a belief that the allegation is true. Lee v. Pearce, 68 N. C. 76;

—not to be inferred from slight circumstances, but such as to satisfy the jury that fraud exists. Walsh v. Taft, 142 Mich. 127, 105 N. W. 544;

—must satisfy the conscience of the

N. W. 69; *Julliard v. Chaffee*, 92 N. Y. 529. That is a very valuable principle in the administration of justice, yet its use is so fraught with danger of rendering written agreements less certain of fixing the rights of parties than in general they are designed to be, and danger of promoting attempts to commit fraud by varying or abrogating written contracts by verbal communications which, in contemplation of law, are merged in the former, it should not be applied except in a clear case, and the claim of fraud should not be allowed to prevail unless established by clear and satisfactory evidence. In this respect the familiar rule applies that he who alleges fraud in a civil action, to prevail, must establish his claim with more than that ordinary degree of certainty which suffices as to the party on whom the burden of proof rests in a civil case. That degree of certainty is something less than beyond a reasonable doubt, as in a criminal case, yet something more than mere reasonable certainty which may be grounded on a bare preponderance of the evidence; that degree which is contemplated by an instruction that the party on whom the burden of proof rests must establish the truth of his claim by a preponderance of the evidence. The distinction may be a little shadowy, yet it is believed to be substantial. At any rate, it is firmly

grounded in our jurisprudence and is characterized as that degree of certainty which is produced by clear and satisfactory evidence. *Maldaner v. Smith*, 102 Wis. 30, 78 N. W. 140; *Lockwood v. Allen*, 113 Wis. 474, 89 N. W. 492; *Bowe v. Gage*, 127 Wis. 245, 115 Am. St. Rep. 1010, 106 N. W. 1074.

In the last case cited the court said, in effect, notwithstanding a mere preponderance of evidence, which, ordinarily, is sufficient upon which to base a finding of fact in favor of the party upon whom the burden of proof rests, not so when to lift that burden fraud must be established. Then the finding should not be made unless the jury are satisfied by evidence which is clear, satisfactory, and convincing. A court in submitting the issue of fact to a jury does not perform its duty without making that distinction. In respect to an instruction, as in this case, the court added: "The instruction given would correctly enough have defined the jury's duty upon an ordinary issue of fact; . . . but it was incomplete as a guide in passing upon fraud."

We should say, in passing, to avoid confusion because of variations in stating the rule referred to, "clear and satisfactory evidence" being used in some instances, and "clear, satisfactory, and convincing evidence" in others, it is not understood here that the latter goes any further than the

court. *Armstrong v. Lachman*, 84 Va. 726, 6 S. E. 129;

—so strong and clear as to satisfy the conscience of the chancellor. *Saunders v. Parrish*, 86 Va. 592, 10 S. E. 748;

—clear and convincing and such as to satisfy the conscience of the chancellor. *Redwood v. Rogers*, 105 Va. 155, 53 S. E. 6.

However, in *Granrud v. Rea*, 24 Tex. Civ. Rep. 299, 59 S. W. 841, proof of fraud to the satisfaction of jury was held to be too high a standard.

And in *American Hoist & Derrick Co. v. Hall*, 110 Ill. App. 463, affirmed in 208 Ill. 597, 70 N. E. 581, the same was held as to proof to the satisfaction of the court.

Sufficient to satisfy the mind, etc.

In the following cases it is held that the proof of fraud must be:

—strong and cogent, such as to satisfy a man of sound judgment of the truth of the allegation. *Henry v. Henry*, 8 Barb. 588;

—such that it satisfies the mind. *Evans v. Mansur & T. Implement Co.* 30 C. C. A. 640, 58 U. S. App. 261, 87 Fed. 275;

—such as will satisfy a reasonable mind. *Shegog v. Shegog*, *Riley*, L. 270; *Williams v. Harris*, 4 S. D. 22, 46 Am. St. Rep. 753, 54 N. W. 926;

—so clear and conclusive as to leave no rational doubt upon the mind as to its ex-

istence. *Buck v. Sherman*, 2 Dougl. (Mich.) 176;

—of such a character as to lead a fair-minded man to the conclusion that fraud exists. *Lockhard v. Beckley*, 10 W. Va. 87; *Hunter v. Hunter*, 10 W. Va. 321.

But in *Carter v. Gunnels*, 67 Ill. 270, it was held that a statement that fraud must be proved directly, or by such facts and circumstances as would make the conclusion reasonable and irresistible in the mind of a fair-minded and reasonable person, was erroneous as requiring too high a degree of proof.

Miscellaneous cases.

In the following cases, which do not fall within any of the above group, the courts have held that the evidence to establish fraud:

—may be presumptive, though such evidence might not be sufficient in courts of law. *Hempstead v. Johnston*, 18 Ark. 123, 65 Am. Dec. 458; *Lester v. Mahan*, 25 Ala. 445, 60 Am. Dec. 530;

—is sufficient if it agrees with and supports the hypothesis which it is adduced to prove. *Seligman v. Kalkman*, 8 Cal. 207; *Phelan v. Dalson*, 14 Ark. 79;

—need not be sufficient to prove any one of the essentials of the claim beyond doubt. *Wollner v. Lehman*, 85 Ala. 274, 4 So. 643;

—must be such as generates a belief, not merely raises a suspicion. *Lewin v. Thurber*, 62 Ga. 25;

former. That is, to tell the jury the claim of fraud, in order to prevail, must be established by clear and satisfactory evidence, is all-sufficient, though it may be that the more emphatic expression, "clear, satisfactory, and convincing evidence" would be more likely than the somewhat milder expression,—especially where fraud is claimed to avoid a written contract unquestionably executed with knowledge of its contents and with all usual formalities,—to challenge the minds of jurors to the distinction between the two degrees of certainty, and the importance of holding to the higher one as the safest way of reaching a right result with the greatest practicable certainty.

The case, from the standpoint of the respondent, involved, very plainly, the conditions requiring the rule in *Corbett v. Joannes*, supra, to be considered. On the one side there was a written contract, in plain terms, fixing the rights of the parties. On the other, there was the claim that the writing was not made for the purpose its terms would indicate; that the real contract relating to compensation for doing the work, apparently fixed by the writing, rested in parol, and that the attempt to use the writing for a purpose not within the contemplation of the parties when it was made was dishonest. The adversaries only testified on the subject. Each apparently testi-

fied as positively to his claim, as the other. Neither seems to have been corroborated by any other witness or circumstance, except appellant had the advantage of the writing. That gave him the benefit of the rule casting upon respondent the burden of satisfying the jury by "clear and satisfactory evidence," or "clear, satisfactory, and convincing evidence," of the truth of his claim. The rule was peculiarly important, in that the case had to turn solely upon the question of which of the two interested parties testified to the truth. There was no opportunity for conflict consistent with good faith. One or the other must necessarily have told the truth, and the other testified wilfully false. The presumption against perjury was in favor of one as much as the other. So the jury had only differentiation between the reasonableness of the two stories and the manner of the two parties in giving their testimony. The jury had the benefit of the latter element, and so did the trial court in approving of their finding as being warranted by some reasonable view of the evidence, under all the circumstances.

The manner of witnesses while testifying before a jury sometimes is a valuable guide in solving conflicts. That guide, in the every nature of things, an appellate court cannot have the benefit of, hence the rule

—is sufficient if the inference of fraud is natural and irresistible. *Bullock v. Narrott*, 49 Ill. 62;

—is sufficient when the circumstances are so strong as to produce conviction of the truth of the charge, although there may remain some doubt. *Bryant v. Simoneau*, 51 Ill. 324;

—if fairly tending to prove fraud, is sufficient to require its submission to the jury. *Lindauer v. Gray*, 18 Ill. App. 209;

—need not be conclusive, but only such as will produce a rational belief. *Watkins v. Wallace*, 19 Mich. 57;

—need not be positive, but is sufficient if it consists of circumstances from which the inference of fraud might be drawn. *Freedman v. Campfield*, 92 Mich. 118, 52 N. W. 630;

—is sufficient if it creates a belief that a fraud has been perpetrated. *Gumberg v. Treusch*, 103 Mich. 543, 61 N. W. 872;

—need not establish all of the false representations alleged. *Pinch v. Hotaling*, 142 Mich. 521, 106 N. W. 69;

—must, if circumstantial, be such as to raise strong presumptions of the actual existence of the fraud imputed. *Bryan v. Hitchcock*, 43 Mo. 527;

—should consist of tangible facts from which a legitimate inference of a fraudulent intent can be drawn. *Jaeger v. Kelley*, 52 N. Y. 274;

—need only establish it by facts necessarily

ly tending to establish probability of guilt, although a crime was imputed. *Sommer v. Oppenheim*, 19 Misc. 605, 44 N. Y. Supp. 396;

—will not prevail over the presumption of honesty, unless established by irresistible evidence of double dealings. *Snow v. Wathen*, 127 App. Div. 948, 112 N. Y. Supp. 41;

—should do so to a reasonable degree of certainty. *Darling v. Klock*, 33 App. Div. 270, 53 N. Y. Supp. 593, Affirmed in 165 N. Y. 623, 59 N. E. 1121;

—must necessarily tend to establish the probability of guilt. *Hatch v. Spooner*, 37 N. Y. S. R. 151, 13 N. Y. Supp. 642; *Morris v. Talcott*, 96 N. Y. 100;

—need not amount to positive and express proofs of fraud. *Buchanan v. Buchanan*, 73 N. J. Eq. 544, 68 Atl. 780, reversed on other grounds in 75 N. J. Eq. 274, 22 L.R.A. (N.S.) 454, 71 Atl. 745;

—may be circumstantial if the circumstances are strong and pregnant, from which no other reasonable conclusion could be drawn. *Paxton v. Boyce*, 1 Tex. 317;

—need only show circumstances from which the inference of fraud is natural and irresistible. *Tacoma v. Tacoma Light & Water Co.* 16 Wash. 288, 47 Pac. 738;

—need not be express and positive, but must amount to more than a mere suspicion. *Waddingham v. Loker*, 44 Mo. 132, 100 Am. Dec. 260.

R. L. S.

that the finding of a jury, approved by the trial court, will not be disturbed on appeal unless it appears to be unwarranted in any reasonable view of the evidence, giving due weight in its favor to those circumstances which are legitimate aids to the jury and judge in discovering truth, but are not to the reviewing court.

From the foregoing it will be seen that the rulings on the objections to evidence as to a verbal agreement having been made which was inconsistent with the writing, tending to show that the writing was put forward for a fraudulent purpose, were proper. Was the evidence to prove such purpose sufficient to warrant the jury in finding in favor of the claim of fraud? That is the serious question.

Looking at the printed record alone, it does not seem that the evidence of respondent was sufficient to outweigh the equally positive, and so far as appears, equally credible, evidence of appellant and the writing besides, so as to establish clearly and satisfactorily, or in other words, clearly, satisfactorily, and convincingly, that appellant's use of the writing was dishonest. It may possibly be, as we have seen, that circumstances existed which were entitled to weight by the jury, but which we cannot have the benefit of; and which were sufficient, as the jury so thought, to point to the requisite degree of certainty of the truth to justify finding in respondent's favor. Had the jury been carefully instructed in respect to the matter, it may be that they would not have found as they did. It seems quite probable that they would not. Had they done so with an appreciation of the rule as to establishing fraud, it may be that the verdict could not be disturbed here, though that is not clear.

Neither counsel for the plaintiff, nor counsel for the defendant, nor the circuit judge, seems to have appreciated the distinction between proving fraud and proving any ordinary fact in issue in a civil case. The judge in the instruction, phrased by himself, informed the jury that the burden was upon plaintiff to establish his claim of fraud to their satisfaction by a fair preponderance of the evidence, instead of making it plain that he should establish it to such satisfaction by clear and satisfactory evidence.

Instructions given at the request of appellant, so far as they touched the subject at all, were in harmony with the main instruction. The court said to the jury, at the request of counsel for appellant, in effect, that the claim of fraud could not prevail unless proved with a reasonable degree of certainty.

True, counsel for appellant did not ex-
33 L.R.A. (N.S.)

cept to the instructions given on the subject we have discussed, nor request any different instruction in respect to the matter, but on the contrary, as we have seen, requested and obtained somewhat similar instructions. So appellant is in no position to complain of errors in that respect, but, in the absence of a finding, in effect that the claim of fraud was established by clear and satisfactory evidence, and there is none here, especially without evidence of some convincing evidentiary circumstance stronger than it seems probable there could have been, which could not be spread upon the record, but which must have been before the jury,—it is considered that it is too probable injustice may have been done appellant, to allow the verdict to stand. So, it is the opinion of the court that, on the record as it stands, the evidence does not warrant the verdict, giving due weight, reasonably, to the manner of adversaries before the jury, which may have, to some extent, influenced them, nor does the verdict support the judgment.

In view of the foregoing, many questions discussed by counsel are immaterial. The case as it should be tried and submitted to a jury, if submitted at all, is a very simple one.

The judgment is reversed, and the cause remanded for a new trial.

Petition for rehearing denied May 24, 1910.

MISSISSIPPI SUPREME COURT.

VICKSBURG WATERWORKS COMPANY
et al., Appts.,

v.

MAYOR AND ALDERMEN OF VICKSBURG.

(— Miss. —, 54 So. 852.)

Injunction — against municipality — bond — dissolution — liability for counsel fees.

1. That a municipal corporation employs regular counsel on salary does not prevent its employing special counsel to assist in the defense of an injunction suit against it so as to relieve the bond conditioned to

Note. — Recovery on injunction bond of attorneys' fees necessarily expended in dissolving the injunction.

This note is supplemental to the note to Littleton v. Burgess, 16 L.R.A. (N.S.) 40, where the earlier cases are collected.

Conflict in the courts.

As shown by the authorities in the earlier note, the rule in the Federal and territorial courts does not permit the recovery of at-

satisfy all costs and damages wrongfully resulting from the suing out of the injunction from liability for the compensation of such counsel if the injunction suit is dismissed.

Action — on injunction bond — when accrues.

2. Dissolution of an injunction on motion does not mature a right of action on the injunction bond if the suit is still pending, although the statute provides that, in case of dissolution of an injunction, the complaint shall be dismissed of course unless sufficient cause be shown against its dismissal at the next succeeding term of court.

(April 17, 1911.)

APPEAL by defendants from a judgment of the Circuit Court for Warren County in plaintiff's favor in an action to re-

torneys' fees as part of the damages occasioned by an injunction.

And such fees not being recoverable in an action upon an injunction bond given in a United States court and sued upon there, they cannot be recovered in an action on such bond in a state court, although recoverable if the bond had been given in an action in the state court. *National Soc. U. S. D. 1812 v. American Surety Co. 56 Misc. 627, 107 N. Y. Supp. 820.*

So, where an injunction bond had been filed in a territorial court of the Indian territory before the admission of Oklahoma, it was held that the United States rule would be followed, and that the services of attorneys were not a proper element of damage under the old territorial statute, as construed by the Arkansas courts, and under the Federal rule, although there was an Oklahoma statute allowing them as part of the damages. *Revell v. Smith, — Okla. —, 106 Pac. 863.*

As is shown in the earlier note, the rule in Texas is similar to that of the Federal courts. Thus, in *Carpenter v. First Nat. Bank, — Tex. Civ. App. —, 114 S. W. 904*, the court said: "It is well settled that attorneys' fees in defending an injunction suit are not recoverable as damages upon the dissolution of the injunction, either by cross action in the injunction suit, or by suit subsequently brought on injunction bond." In the *Carpenter Case* judgment debtors brought an action to restrain the sale of land on execution, and procured an injunction, giving a bond conditioned, among other things, that they would abide the decision in the suit. The injunction being dissolved, they did not appeal, but brought a new action for the same purpose, in which they were defeated, and this decision was sustained on appeal. In an action on the bond given in the first injunction suit, it being sought to recover for the services of the judgment creditor's attorneys in defending the second injunction suit both in the lower court and on the appeal, it 33 L.R.A. (N.S.)

cover damages for the alleged wrongful suing out of an injunction, Reversed.

The facts are stated in the opinion.

Messrs. J. C. Bryson and Hirsh, Dent, & Landau, for appellants:

No right of action on the injunction bond had accrued.

Penny v. Holberg, 53 Miss. 567; High, Inj. ¶ 981; Gray v. Veirs, 33 Md. 159; Goodbar v. Dunn, 61 Miss. 624; Yazoo & M. Valley R. Co. v. Adams, 78 Miss. 977, 30 So. 44; Cohn v. Lehman, 93 Mo. 574, 6 S. W. 267; 22 Cyc. Law & Proc. p. 1045; 10 Enc. Pl. & Pr. p. 1121; Lacey v. Davis, 128 Iowa, 675, 102 N. W. 535; Brown v. Galena Min. & Smelting Co. 32 Kan. 528, 4 Pac. 1013; Johnson v. Boughton, 56 Neb. 626, 77 N. W. 57.

The city, having regular counsel, paid a fixed salary, was not entitled to damages by

was held that the condition could not be construed as an obligation on the part of the obligors not to pursue any further legal remedy which they might have to prevent the sale of their property, and that they were only bound by the bond to pay damages awarded against them in the suit in which it was given.

In most jurisdictions, however, the reasonable attorneys' fees incurred in obtaining the dissolution of the injunction are recoverable in a suit upon the injunction bond. See *Fidelity & D. Co. v. Walker, 158 Ala. 129, 48 So. 600; Princeton v. Gustavson, 241 Ill. 566, 89 N. E. 653; Augur v. Gulfport Land Improv. Co. 95 Miss. 292, 48 So. 722.* See also cases cited *infra*.

Preliminary work.

The counsel fees recoverable are limited to those for dissolution of the injunction, and it is error to include preliminary matters. *Dictum in Baldwin Star Coal Co. v. Quinn, 46 Colo. 590, 105 Pac. 1101, affirming 19 Colo. App. 497, 76 Pac. 552.*

Where the bond is conditioned that the obligor should "pay all damages which may be adjudged against him by reason of said injunction or restraining order," it does not include services by attorneys, rendered before the bond was given. *Chicago. A. & N. R. Co. v. Whitney, 143 Iowa, 506, 121 N. W. 1043.*

Where a restraining order was issued which contained an order to show cause why a temporary injunction should not issue *pendente lite*, and on the return, defendant simply sought to prevent the issue of such injunction, and the services thereafter were upon the trial of the issue in the main case, which resulted merely incidentally in the dissolution of the injunction, it was held that, as there were no services by reason of the injunction, separate and distinct from the other issues in the case, nothing could be recovered as damages for attorneys' fees. *Collins v. Huffman, 48 Wash, 184, 93 Pac. 220.*

way of attorneys' fees under any circumstances; and if entitled to attorneys' fees for associated counsel, necessity must be shown for the employment of such counsel; and whether such necessity existed is a question of fact for the jury.

Nixon v. Biloxi, 76 Miss. 810, 25 So. 664; *Wilson v. Weber*, 3 Ill. App. 125, affirmed in 90 Ill. 454; *Littleton v. Burgess*, 16 L.R.A. (N.S.) 75, note; *Uhrig v. St. Louis*, 47 Mo. 528.

Messrs. Catchings & Catchings, Anderson, Voller, & Foster, and Brunini & Hirsch for appellee:

Mayes, Ch. J., delivered the opinion of the court:

On the 15th day of December, 1909, the

But where a preliminary injunction was issued directing the defendant to show cause why it should not continue during the action, and the motion for an injunction *pendente lite* was denied, and the preliminary injunction dissolved, it was held that the services of counsel on the motion upon the return of the order to show cause were proper elements of damages, the court distinguishing the case where the original order was limited to expire on the hearing and determination of the motion to continue, as in that case no motion to dissolve the preliminary injunction was necessary. *Reeves v. Sullivan*, 117 App. Div. 814, 102 N. Y. Supp. 1003.

Restriction to services in dissolving injunction.

Recovery for attorney's services is limited to those in dissolving the injunction. *Lanum v. Patterson*, 143 Ill. App. 255. On a further appeal the damages for services had been so limited and the decree was affirmed. *Lanum v. Patterson*, 151 Ill. App. 143.

Conversely, where services of counsel have been rendered exclusively upon the trial of the case on the merits, counsel fees for dissolving the injunction are not recoverable. *Lee Lumber Co. v. Hotard*, 122 La. 850, 129 Am. St. Rep. 368, 48 So. 286.

Services only in dissolving the injunction are allowable, but in some cases it is impossible to separate such services with absolute exactness from the other services rendered; in which cases all that can be done is to try to separate the services as fairly as possible. *Akin v. Rice*, 137 Mo. App. 147, 117 S. W. 655.

In some of the courts where injunctive relief is the sole or chief object of the action, the reasonable amount of counsel fees in defending it are recoverable as damages; but where the injunction is merely ancillary, the recovery for counsel fees is limited to those for services in dissolving the injunction. See *State ex rel. Tully v. Taylor*, 67 W. Va. 585, 68 S. E. 379, where it was held that "when counsel fees and personal expenses are sought to be recovered

Vicksburg Waterworks Company applied for and obtained an injunction against the city of Vicksburg, enjoining the city from opening the fire hydrants located in the city and belonging to the waterworks company, and from taking therefrom water for the purpose of cleaning and flushing the new sanitary sewers then being installed in the city. At the time the injunction was issued the waterworks company executed an injunction bond in the sum of \$1,000, with the Empire State Security Company as security thereon; the condition of same being: "In case the said injunction shall be dissolved, shall within thirty days thereafter well and truly pay and satisfy all such costs and damages as shall wrongfully result from suing out this injunction, and

as damages on an injunction bond, it is incumbent on the plaintiff to show either that injunction was the sole relief to which the suit pertained, or that the fees and expenses were paid out solely for the purpose of procuring a dissolution of the injunction, as distinguished from expenditures for the hearing of the principal issues involved in the case."

Thus, where a bill purely for injunctive relief was dismissed on complainant's own motion after defendant's answer, the defendant was held entitled on the bond to his counsel fees for defending against it. *East Lake v. DeVore*, — Ala. —, 53 So. 1018.

And where the plaintiff sued a corporation to restrain it from collecting the unpaid balance of his subscription to its capital stock, and incidentally to recover certain sums claimed for rent and salary, and an injunction *pendente lite* was granted, it was held that the defendant was forced to trial to get rid of the injunction, and that therefore the counsel fees for services generally in the action were recoverable as damages. *Brooks v. Racich Asbestos Mfg. Co.* 137 App. Div. 280, 121 N. Y. Supp. 850.

In *Chicago, A. & N. Co. v. Whitney*, 143 Iowa, 506, 121 N. W. 1043, the court said: "It is the rule of this court that, when an injunction is asked and granted in an action, auxiliary to other relief, attorneys' fees and expenses in defending the action are not recoverable. But where the injunction is the only relief sought, and dissolution is procured upon final hearing, necessary costs and expenses in procuring the dissolution are recoverable. The test laid down by this court is this: Strike the prayer and the allegations upon which it is asked from the petition, and unless there is a completed cause of action left, the injunction is the main case." And it was held that as the defendant in the injunction must have appeared on the plaintiff's appeal, there was no further burden on account of the injunction, or restraining order issued in aid of the appeal from the order dissolving the injunction.

Where, in an action for a divorce, an injunction was issued against the defendant's

shall abide by and perform the decree of said chancery court, then this obligation shall be void; otherwise, the same shall remain in full force and virtue." In due time an answer was filed on the 31st day of December, 1909, a motion was made to dissolve the injunction, and accompanying the motion notice was filed that \$3,500 damages would be claimed for the wrongful suing out of the injunction. On the 21st day of March, 1910, the motion to dissolve the injunction was heard, and the court decreed that the injunction stand dissolved, and made this further order, *viz.*: "It is further ordered that the claim for damages on account of the wrongful suing out of the said injunction, interposed by the defendants hereto, be and it is hereby passed for

hearing at a future time." On the 25th day of March the matter of the allowance of damage seems to have been taken up again by the court, and on that day the waterworks company, by way of answer to the application for the allowance of damage for the wrongful suing out of the injunction, stated in a written pleading, filed and sworn to by counsel for the waterworks company, substantially that the only authority of the court to allow damage is to be found in § 624 of the Code of 1906, and that under that section of the Code the damage must be allowed, if at all, on the motion to dissolve, and not afterwards; that, if damage is not awarded at the time the injunction is dissolved, it cannot afterwards be done, except at the final hearing

disposing of certain property, it was held that the injunction being merely ancillary to the divorce, all that could be recovered for attorneys' services in an action on the bond was for services rendered in dissolving the injunction. *Darling v. McBride*, 86 Neb. 481, 125 N. W. 1088 (following *Trester v. Pike*, 60 Neb. 510, 83 N. W. 676).

Rule in Kentucky.

As shown in the earlier note, in Kentucky, if the injunction is merely ancillary, counsel fees in dissolving it are recoverable; but where it is the sole object of the action, they are not recoverable.

Thus, in an action brought by a remainderman against the life tenant and his lessee, to recover the land, on the ground that the life estate was forfeited by waste, and also to recover treble damages for the waste, it was held that an injunction against further waste was merely auxiliary, and therefore that, on its dissolution, attorneys' fees for services in securing such dissolution were recoverable in an action on the injunction bond. *Green v. Quisenberry*, 133 Ky. 561, 118 S. W. 361.

Where the action is to recover possession of land and to quiet title and to recover cut timber, in which an injunction is issued restraining the removal of such timber, the injunction is auxiliary, and counsel fees in dissolving it are recoverable as damages in an action on the bond. *Bartram v. Ohio & B. S. R. Co.* 141 Ky. 100, 132 S. W. 188.

In *Citizens' Trust & G. Co. v. Ohio Valley Tie Co.* 138 Ky. 421, 128 S. W. 317, the court, in laying down rules for a new trial, said: "The allowance must be confined to the services rendered in defending the injunction; and only the fair value, not exceeding the amount paid, is to be allowed. If the injunction was the relief sought in the former action, and in fact gave the relief if sustained, an attorney's fee cannot be recovered in an action on the injunction bond. *Tyler v. Hamilton*, 108 Ky. 120, 55 S. W. 920. Whether the attorneys' fee may be recovered is a question of law for the court, and is to be determined ordinarily from the record of the former suit. 33 L.R.A. (N.S.)

What is a reasonable attorneys' fee is a question for the jury."

Services by regular officials and gratuitous.

In *VICKSBURG WATERWORKS CO. v. VICKSBURG* it will be observed that the court held that the fact that a municipal corporation had a regular salaried counsel did not prevent it from recovering the amount of counsel fees of special counsel for services in dissolving the injunction.

So, where the bond was given in an action to enjoin the collection of a tax, the court said: "It is also insisted that some of these defendants were county officials, and, as it was the duty of the state's attorney to appear for them, it was not lawful to allow solicitors' fees to counsel here in question. While it is true the statute makes it the duty of the state's attorney to appear for county officials, there is no law precluding the employment of other counsel." *Howard v. Burke*, 248 Ill. 224, 93 N. E. 775.

In a suit against the county clerk and county treasurer to enjoin them from making a payment ordered by the board of supervisors, the defendants hired two solicitors, and their fees were allowed as damages on dissolving the injunction, they not having been paid. To an objection that the state's attorney should have defended, the court, while not deciding that question, stated that there was no proof that he could have done so, as he might have been ill, or interested in sustaining the injunction. *Fordham v. Thompson*, 144 Ill. App. 342.

Where an injunction against the police jury and the school board was dissolved, the court allowed the defendants an attorneys' fee as damages, and said: "True, the police jury and the school board have their counsel. For that reason, we are not inclined to hold that the defendants ought to be treated differently than the client in other cases who has regular retained counsel. In either case, it is evident that services have been rendered for which defendants in injunction are entitled to recover,

of the cause. Other reasons were given in the answer as to why the court should not take up the question of damage at that time, even though the reasons already assigned were not sufficient; but the latter reasons are predicated on certain facts stated and not necessary to be here repeated.

if not for the attorneys, for themselves. It is sufficient if the services have been rendered for which there should be compensation. *Luchini v. Police Jury*, 126 La. 972, 53 So. 68, where, however, it is not entirely clear whether the regular counsel appeared or not.

Where the bond was conditioned to pay the defendants all damages and costs which any person might sustain by the suing out of the injunction, in an action by all the obligees under the bond, for the use of R. (one of them), it was held that the court properly refused to instruct the jury that if the same counsel acted for both R. and M. of the obligees in the same service, and acted gratuitously for the latter, that only the amount of one half of a reasonable fee could be recovered. *Babcock v. Reeves*, 149 Ala. 665, 43 So. 21.

Final decree as prerequisite.

It is held in *VICKSBURG WATERWORKS Co. v. VICKSBURG* that an action will not lie upon the bond until a final decree in the suit in which it was given.

So, in *Jewel Tea Co. v. Stewart*, 142 Iowa, 353, 120 N. W. 962, the court said: "No action can be maintained upon the injunction bond for attorney fees until the final disposition of the main case. If, upon a final hearing on the merits, the trial court should find that the plaintiff was entitled to an injunction at the time it brought its action, such finding would be a defense to an action on the injunction bond for attorney fees, notwithstanding the dissolution of the temporary injunction. *Bank of Monroe v. Gifford*, 65 Iowa, 648, 22 N. W. 913."

But where the damages are allowed in the action in which the bond is filed, it has been held that the court may enter a decree for damages for the fees of solicitors and counsel prior to the final hearing on the merits. *Chicago Wire Chair Co. v. Kennedy & W. Co.* 141 Ill. App. 196. The same was held in *Sanganois Club v. Lane*, 145 Ill. App. 475, the court saying the fees were for services solely on the motion to dissolve.

Miscellaneous.

The right to recover as part of the damages counsel fees for services upon a reference to ascertain damages is well settled in New York. *Brooks v. Racich Asbestos Mfg. Co.* 137 App. Div. 280, 121 N. Y. Supp. 850.

Where "instead of hearing evidence as to the amount of the damages, a stipulation was filed by which it was agreed that the evidence, if heard, would show that the 33 L.R.A. (N.S.)

On the same day—that is, on March 25th—by consent of the parties it was ordered that the application for the fixation of damage by the court should be continued until April 15, 1910. In April there seems to have been a decree made by the chancellor, though the decree is unsigned, dismissing

damages for the defendants, by reason of solicitors' fees, etc., would be in the sum of \$250," it was held that this was equivalent to evidence on the question of damages. *Howard v. Burke*, supra.

Where the statute requires the court on dissolving an injunction against a money judgment, to aggregate principal, interest, and costs, and on the total sum to give damages at 10 per cent per annum from the time the injunction took effect until its dissolution, "in lieu of interest," such allowance of damages does not prevent further damages being allowed for counsel fees in dissolving the injunction. *State ex rel. Citizens' Nat. Bank v. Graham*, — W. Va. —, 69 S. E. 301, where it was also held that services on the appeal are allowed for as well as those in the lower court.

In *State ex rel. Citizens' Nat. Bank v. Graham*, supra, it was held that the fact that the amount of a judgment collected by execution from the judgment debtor, exceeds the penalty of a bond given under an injunction against the judgment will not preclude the recovery of counsel fees for services in procuring a dissolution of the injunction in an action on such bond.

In Louisiana the judge is directed by the statute, on the dissolution of an injunction against the execution of a judgment for money, to condemn the plaintiff and his surety to pay to the defendant "not more than 20 per cent" as damages, unless damages to a greater amount be proved. Code Prac. art. 304. Where damages are claimed for attorney fees, the judge may allow the same without proof, to an amount not exceeding 20 per cent upon the judgment enjoined. *Rivet v. George M. Murrell Planting & Mfg. Co.* 121 La. 201, 126 Am. St. Rep. 320, 46 So. 210.

In *Schwann v. Sanders*, 121 La. 461, 46 So. 573, the court, in holding that there was error in allowing \$250 attorneys' fees by way of damages, in addition to the 20 per cent statutory damages, said: "Damages of any kind over and above the 20 per cent are allowed only where 'damages to a greater amount are proved.' There was proof of the attorneys' fees, but there was no proof of the defendant in injunction having suffered damages in the amount of these attorneys' fees over and above the amount of the 20 per cent statutory damages."

It was held in *Howcott v. Smart*, 125 La. 50, 51 So. 64, that the statutory attorney fees and penalties provided by § 56, act, No. 170, p. 373, of 1898, on the dissolution of an injunction restraining the collection of taxes, are recoverable on parish as well as state taxes. B. B. B.

the application for damages, "without prejudice to the rights of said defendants to sue for such damage as they have sustained because of the wrongful suing out of the said injunction, at law upon the injunction bond."

It appears from the proceedings set out above that, although the injunction had been dissolved, the bill had not been dismissed, nor had the court undertaken to allow damage on the bond at the time the decree dissolving the injunction was made, as was done in the case of *Derdeyn v. Donovan*, 81 Miss. 696, 33 So. 652. In this condition of the chancery suit, with the bill still pending and not finally dismissed, and on the 26th day of March, 1910, the city of Vicksburg, through its proper officers, instituted a suit in the circuit court of Warren county on the bond executed by the waterworks company, with the Empire State Security Company as security thereon, seeking to recover the sum of \$3,500 as damage for the wrongful suing out of the injunction. The declaration substantially alleges that on a certain day the Vicksburg Waterworks Company wrongfully procured an injunction restraining the city of Vicksburg from using water from the hydrants of the waterworks company for the purpose of testing a certain sewerage system then being installed; that the injunction so wrongfully issued was dissolved by the chancery court on the 21st day of March, 1910; that at the time the injunction was procured the waterworks company gave a bond payable to the city of Vicksburg, conditioned for the payment of all damages occurring by the wrongful suing out of the injunction. The declaration avers the dissolution of the injunction by the chancery court and the accrual of the right thereby to sue on the bond. The bond is made an exhibit to the bill. The declaration nowhere alleges a final disposition of the injunction suit, or dismissal of the bill, nor is any such disposition shown in any of the exhibits or pleadings in the case. When the declaration was filed, appellants filed a demurrer, setting up substantially that the declaration did not allege that the decree dissolving the injunction was a final decree, or that the injunction suit had been finally disposed of. The demurrer was overruled by the court, and at a subsequent date during the same term of court the appellants filed several pleas to the declaration. We shall not set out all the pleas, but give the substance of all. The first plea denied the dissolution of the injunction; the second plea denied that the decree of dissolution was a final decree, and alleged that the injunction suit was still pending in the chancery court; the third

and fourth pleas put in issue the question of the alleged damage; the fifth plea denies the right of the city to claim any counsel fees as damages, because of the fact that the city had regular retained salaried counsel. Proof was taken on the issue thus raised, and the cause tried, resulting in a verdict in favor of the city of Vicksburg for the sum of \$1,000, and from this judgment an appeal is prosecuted.

The appellants asked for and were refused a request for a peremptory instruction. The errors assigned in this court are, first, that the court erred in overruling the demurrer; second, that the court erred in holding that the suit on the injunction bond could be maintained before final decree dissolving the injunction; and, third, that the court erred in refusing a peremptory instruction for defendant. There are other errors assigned, but the whole of this case is comprehended under the above assignments of error.

The first contention of counsel for appellants that we will notice is the contention that, because the city had regularly employed counsel on a salary, it could not employ any additional counsel to assist in this cause, so as to make the bond liable for such counsel fees. In support of this contention the case of *Nixon v. Biloxi*, 76 Miss. 810, 25 So. 664, is cited, as also other authorities which we shall advert to later. A city has the same power to protect its civil rights that an individual has. A city may make a valid contract to employ associate counsel to assist its regularly retained counsel, in any case where, in the wisdom of its authorities, it deems it necessary. Individuals do this, and we can see no reason why a city may not do the same thing. In cases of sufficient gravity different firms of lawyers are employed in the same case and to represent the same cause; in cases of serious illness, consulting physicians are called to the same patient. Each is entitled to his pay, and in every such case the necessity of so doing must be left to the discretion of the party or authority calling in the help. Of course, if bad faith is shown, no liability would attach; but the city is not charged with bad faith, nor does the proof in the case even hint at that. The case of *Nixon v. Biloxi*, supra, and all other authorities cited on this point by appellants, have no application under the facts of this case. The authorities cited merely hold that where there is a dissolution of the injunction, and the services rendered are by a salaried officer, and no additional fees are actually paid, but the service is rendered in the official capacity of the person rendering same and as a part of his duty, there can be no re-

covery on the injunction bond for counsel fees for such service. But the facts of this case do not bring it within the rule declared by the cases cited. See cases cited in the note on page 75 of 16 L.R.A. (N.S.) in the case of *Littleton v. Burgess*. In the case of *Warren County v. Booth*, 81 Miss. 267, 32 So. 1000, this court held that boards of supervisors may employ other counsel in cases in which the county is interested, even though the board have regular counsel employed at an annual salary.

We can perceive no good reason why it should be held that either a county or a municipality must in all cases rely for its prosecution or defense on its retained counsel, and not be allowed to employ associate counsel when, in their judgment, the necessity arises. If they can employ such additional counsel in any case, they may do so in an injunction suit as well as in any other, and the injunction bond can be made to respond in damages to any reasonable amount necessary to compensate the additional counsel so employed. An inspection of this record convinces us that the city of Vicksburg had employed associate counsel under a valid contract, and that under this contract of employment, as shown in the record, if this injunction suit is finally dismissed, the bond given in that suit is liable for a reasonable attorneys' fee as compensation to the associate counsel. The city attorney seems not to have rendered any service in this suit, and is certainly not claiming any fees on account of any service rendered by him. The city attorney states that at the time this suit arose he was so busy that it was necessary for associate counsel to be employed, and, as stated by counsel for appellee, "there is not a suggestion in the record that additional counsel was employed merely for the purpose of aggravating the damage."

In setting out the appellants' assignments of error in a former part of this opinion, it will be noted that one of the arguments made here is that the court below erred in overruling the demurrer to the declaration. Appellee insists that this argument cannot be insisted upon in this court, because it is claimed that any right to object to the judgment of the court was waived by appellants when they pleaded to the declaration after the demurrer was overruled. Appellee says: "When a demurrer to a declaration is overruled, two courses are open to the defendant. He can either stand on his demurrer, and let judgment be entered in favor of the plaintiff, and rely upon reversing the judgment on appeal, or he can plead to the merits, in 33 L.R.A. (N.S.)

which case he can usually present the same questions by plea which were decided adversely to him on demurrer. Should he pursue this course, he cannot assign as error in the appellate court the action of the trial court in overruling his demurrer. By pleading over he is held to have waived his demurrer, and can only complain of errors committed in the determination of the issues presented by his pleas." Again, counsel for appellee state that "it is contended by appellants that the present action, having been brought, as is claimed, before the rendition of a final decree in the chancery cause, was premature."

We have quoted from brief of counsel for appellee for the purpose of emphasizing the contention made in the case. Before proceeding to discuss the questions involved on the authorities which we shall call attention to a little later, we will say that our view of the contention made by counsel for appellants is not that the suit instituted on the bond was merely prematurely brought, but that at the time of its institution no cause of action existed, because no final decree of dismissal had been made. It is quite true that in appellants' brief the question is asked: "Was the plaintiff's suit premature?" But further on in the brief counsel for appellants state: "We contend that no right of action on the injunction bond had accrued." But it can make no difference what appellants' counsel stated in the brief as to whether or not he challenged the declaration because premature, or because it failed, to state a cause of action. The court, in determining this question, will look to the pleading itself for an interpretation of its legal effect.

It appears from the record that the injunction suit was tried on a mere motion to dissolve the injunction. The cause was not set down for final hearing, and the decree of the court extended only to a dissolution of the injunction, and did not attempt to make any final disposition of the cause. Counsel for appellee makes no contention that there was any final judgment dismissing the bill. Section 621 of the Code of 1906 provides that "when, on motion, an injunction shall be wholly dissolved, the bill of complaint shall be dismissed of course with costs, unless sufficient cause be shown against its dismissal at the next succeeding term of the court." The statute has been practically the same since the Code of 1857. See Code of 1857, art. 69, p. 551. In the case of *Pickle v. Holland*, 24 Miss. 566, this court held that an order dissolving an injunction on motion for that purpose did not of itself dismiss the bill.

It might be argued, with some force, that since the only relief sought by the bill of complaint was an injunction, and since the court had denied that relief and dissolved the injunction, the court had the power to dismiss the bill, since the record shows that full proof was made, and no suggestion was made that further testimony was desired to be taken, or any improvement or addition desired to be made in the case by way of amendment. But the court did not dismiss the bill, as was done in the case of *Bass v. Nelms*, 56 Miss. 502, and the case of *Derdeyn v. Donovan*, 81 Miss. 696, 33 So. 652. In both of the cases just cited the court dissolved the injunction and dismissed the bill, but not so here.

In the case of *Penny v. Holberg*, 53 Miss. 567, this court held: "It is undoubtedly true, as insisted by counsel for the appellee, that a suit may be maintained, upon a partial dissolution of an injunction, for the recovery of such damages as were sustained by reason of its being sued out, to the extent that the same was wrongful, but that this cannot be done until there has been a final disposition of the suit in which the bond was given. Nor will it make any difference that the order of dissolution has been appealed from and affirmed, if the case has by the appellate court been remanded for further proceedings. The reason of this is obvious. So long as the suit remains in court undetermined, it is always possible, however improbable, that cause may be shown to reinstate and render perpetual the injunction in whole; and the lower court would not be deprived of the power to do this in a proper case, by the affirmance here of the partial dissolution. It follows, therefore, that, until there has been a final determination of the suit in which the injunction bond was executed, no action at law can be maintained upon it. *High, Inj. § 981; Gray v. Veirs*, 33 Md. 159; *Hanserd v. Gray*, 46 Miss. 75."

In the case of *Goodbar v. Dunn*, 61 Miss. 624, it was argued that the rule announced in *Penny v. Holberg*, 53 Miss. 567, was abrogated by the adoption of § 1919 of the Code of 1880, which section in the Code of 1880 is practically the same as § 624 of the Code of 1906; but the court said: "Section 1919 of the Code of 1880 does not change the rule announced in *Penny v. Holberg*, supra, that an action cannot be maintained on an injunction bond until the final determination of the case. The only purpose and effect of the last clause of the section was to exclude the conclusion that the remedy provided by the section was a denial of the right before recognized to sue on the bond."

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The rule announced in *Penny v. Holberg*, supra, is again redeclared in *Yazoo & M. Valley R. Co. v. Adams*, 78 Miss. 977, 30 So. 44, and in addition to redeclaring this rule the court says: "As we have seen, the right of the plaintiff to sue in this case is dependent upon the final determination of the suit in which the bond is given, . . . and it follows that at the time this suit was instituted no cause of action existed upon the bonds,"—it appearing in the above case that no final judgment or dismissal had been rendered. We thus see that we have a declaration of this court that until final judgment there is no cause of action; and this is as it should be, since, until final dismissal, the bill is subject to amendment, and a case warranting the injunction may be stated.

It is conceded by appellee that, if the declaration is so defective as that it fails to state a cause of action, a demurrer to the declaration is not waived, where there is a judgment overruling same, followed by pleading to the merits, and this is but a concession of what all the authorities hold. *Teal v. Walker*, 111 U. S. 242, 28 L. ed. 415, 4 Sup. Ct. Rep. 420; 31 Cyc. Law & Proc. p. 746. In the case of *Southern R. Co. v. Grace*, 95 Miss. 611, 49 So. 835, this court, speaking through Justice Smith, said: "Where a declaration fails to state a cause of action, as in the case at bar, the defect may be reached by a general demurrer, the ground of which is never waived. It can be raised at any time and in any place." We do not think it necessary to further protract the discussion in this case. The requirement that an injunction bond shall not be placed in suit until a final judgment dismissing the bill is based upon just and sound principles of law. The givers of the bond only agree that it shall become liable for damages in the event the person suing out the injunction shall wrongfully do so. Until there has been a final determination of the suit in which the bond is given, it cannot be definitely ascertained as to whether or not there is, or will be, any liability on the bond. Until liability has accrued on the bond, it is merely contingent on the part of the makers, and may never be a real liability. The mere giving of the bond creates no liability, and until there is a liability there is no cause of action, and any declaration failing to state sufficient facts to show liability fails to state a cause of action. The declaration must show the giving of the bond and the final determination of the injunction suit. See 22 Cyc. Law & Proc. p. 1045, note 35.

Reversed and remanded.

COLORADO SUPREME COURT.

BASSICK GOLD MINE COMPANY, Appt.,
v.
GEORGE B. BEARDSLEY.

(— Colo. —, 112 Pac. 770.)

Interest — monthly settlements — entire account.

1. Under a contract to pay on the 15th of each month for services and supplies furnished during the previous month, interest runs upon each month's items from the time payments for them become payable, and not merely from the time the last item is entered in the account, although the entire transaction becomes the subject of one book account.

Accord and satisfaction — accepting check — failure to include interest.

2. One who accepts in payment of overdue accounts upon which interest is due, which is not provided in the contract, checks containing a statement of the account, without interest, and bearing the announcement "in full payment of above account," waives his right subsequently to claim the interest, although he understands that the question of right to interest was left open, and as to the portion of the interest claimed so notified the one making the payment.

(January 3, 1911.)

APPEAL by defendant from a judgment of the District Court for Custer County in plaintiff's favor in an action on a book account for services and materials furnished to defendant by plaintiff and for interest upon the same. Modified and affirmed.

The facts are stated in the opinion.

Messrs. Cranston, Pitkin, & Moore, for appellant:

In the absence of a contract to pay interest, interest is recoverable only in the cases specifically enumerated in the statute.

Denver, S. P. & P. R. Co. v. Conway, 8 Colo. 1, 54 Am. Rep. 537, 5 Pac. 142; Corson v. Neatheny, 9 Colo. 212, 11 Pac. 82; DeRemer v. Parker, 19 Colo. 242, 34 Pac. 980; Dexter v. Collins, 21 Colo. 455, 42 Pac. 664; Hurlburt v. Dusenbery, 26 Colo. 240, 57 Pac. 860; Patten v. American Nat.

Note. — The question whether the acceptance of a remittance of part of the amount of an unliquidated or disputed claim, accompanied with the statement that it is "in full," or words of similar import, amounts to its receipt in full payment, is treated in the notes to Canadian Fish Co. v. McShane, 14 L.R.A. (N.S.) 443, and Barham v. Bank of Delight, 27 L.R.A. (N.S.) 439. And see later case, Seeds Grain & Hay Co. v. Conger, 32 L.R.A. (N.S.) 380. 33 L.R.A. (N.S.)

Bank, 15 Colo. App. 479, 53 L.R.A. 693, 63 Pac. 424.

Where interest is allowable under the statute upon an account, it may not be computed on the individual items of the account, but only upon the balance due, reckoning from the date of maturity of the last item.

DeRemer v. Parker, 19 Colo. 242, 34 Pac. 980; Florence & C. C. R. Co. v. Tennant, 32 Colo. 72, 75 Pac. 410.

The right to interest, if it ever existed, was extinguished when the principal was paid.

Stewart v. Barnes, 153 U. S. 456, 38 L. ed. 781, 14 Sup. Ct. Rep. 849; Southern R. Co. v. Dunlop Mills, 22 C. C. A. 302, 42 U. S. App. 169, 76 Fed. 505; Graves v. Saline County, 43 C. C. A. 414, 104 Fed. 61; Chandler v. People's Sav. Bank, 61 Cal. 401; Canfield v. Eleventh School Dist. 19 Conn. 529; Davis v. Harrington, 160 Mass. 278, 35 N. E. 771; American Bible Soc. v. Wells, 68 Me. 572, 28 Am. Rep. 82; King v. Phillips, 95 N. C. 245, 59 Am. Rep. 238; Cutter v. New York, 92 N. Y. 166; Arnold v. Sedalia Nat. Bank, 100 Mo. App. 474, 74 S. W. 1038; Ryan Drug Co. v. Hvambahl, 92 Wis. 62, 65 N. W. 873; 22 Cyc. Law & Proc. pp. 1572, 1573.

Messrs. John R. Smith and Karl E. Steinhauer, for appellee:

The question of when the money became due under the contract was not left open, but was definitely fixed, and must be considered to have been made in the light of the law, and that the law would be read into the contract.

Salazar v. Taylor, 18 Colo. 538, 33 Pac. 369; Hurlburt v. Dusenbery, 26 Colo. 240, 57 Pac. 860; Florence & C. C. R. Co. v. Tennant, 32 Colo. 71, 75 Pac. 410; Florence Oil & Ref. Co. v. McRae, 40 Colo. 303, 90 Pac. 507; Willard v. Mellor, 19 Colo. 538, 36 Pac. 148; 1 Sutherland, Damages, 596; Henderson Cotton Mfg. Co. v. Lowell Mach. Shops, 86 Ky. 668, 7 S. W. 145; Young v. Godbe, 15 Wall. 565, 21 L. ed. 251; Harding v. York Knitting Mills, 142 Fed. 229.

When an account is liquidated, it is, of course, no longer an open account, and interest runs from the date of liquidation.

Cooper v. Coates, 21 Wall. 105, 22 L. ed. 481; 22 Cyc. Law & Proc. p. 1542; Heiman v. Schroeder, 74 Ill. 158; Florence Oil & Ref. Co. v. McRae, 40 Colo. 303, 90 Pac. 507; Atlantic Phosphate Co. v. Grafflin, 114 U. S. 499, 29 L. ed. 223, 5 Sup. Ct. Rep. 967.

Where a creditor receives the principal without expressly or tacitly relinquishing his claim to the interest then due, he may sue for and recover the interest then due, as

if it were so much of the principal debt itself which he had suffered to remain in his debtor's hands.

Chase v. Manhardt, 1 Bland, Ch. 345; Kiddall v. Trimble, 1 Md. Ch. 148; Steiger v. Hillen, 5 Gill. & J. 128; Burr v. Burch, 5 Cranch, C. C. 506; Fed. Cas. No. 2,187; Snowden v. Thomas, 4 Harr. & J. 335; Marks v. Purdue University, 56 Ind. 288; National Bank v. Mechanics' Nat. Bank, 94 U. S. 440, 24 L. ed. 178.

Hill, J., delivered the opinion of the court:

The right to collect interest under certain conditions is the question involved. The action is upon a book account provided for by a written contract, by which it was agreed that the appellee should furnish certain supplies and perform certain services to and for the appellant at certain fixed prices and under certain conditions. In consideration therefor the appellant agreed and bound itself to pay, on or before the 15th day of each and every calendar month, the amount due and owing to the appellee for such supplies furnished and services rendered during the preceding month. Under this contract a large amount of coal was furnished and freight hauled during a period of about four years. Statements were regularly rendered upon the first of each month, and, with the exceptions of the last three or four, they were paid, but at periods considerably after the 15th of the month. This action was brought to recover the amount left unpaid in the aggregate of \$1,442.53, with interest, and also to recover interest upon the amounts included in all statements theretofore rendered from the 15th of each month, when they were due, until the date of payment. Judgment was for the amount claimed.

The appellant's first contention is that the transaction constitutes but one book account; that the suit was brought upon it as such; hence no interest could be charged until the date of the last item. We cannot accept this conclusion. The written contract provides that the bills for each month shall be paid upon the 15th of the following month; in default thereof under our statutes the appellee was entitled to interest on the amount then due. *Florence Oil & Ref. Co. v. McRae*, 40 Colo. 303, 90 Pac. 507.

The second assignment pertains to the interest allowed upon the monthly payments from the dates they were due until paid. These payments had all been made long prior to the bringing of this action, some of them nearly four years prior thereto. As we understand, the law governing such

cases, and which the appellant seeks to invoke, is, that where interest is due because the debtor has expressly agreed to pay it, the interest is considered as an integral part of the debt, and the right to recover it may remain, even after the principal has been paid. But where interest is claimed as damages by virtue of the nonpayment of a debt when due, and for that reason is allowed by law, it is then considered not an integral part of the debt, but merely as an incident to the debt, and in such cases, when the principal is paid and accepted without interest, the right to interest is extinguished. *Stewart v. Barnes*, 153 U. S. 456, 38 L. ed. 781, 14 Sup. Ct. Rep. 849; *Southern R. Co. v. Dunlop Mills*, 22 C. C. A. 302, 42 U. S. App. 169, 76 Fed. 505; *Chandler v. People's Sav. Bank*, 61 Cal. 401; *Canfield v. Eleventh School Dist.* 19 Conn. 529; *Davis v. Harrington*, 160 Mass. 278, 35 N. E. 771; *American Bible Soc. v. Wells*, 68 Me. 572, 28 Am. Rep. 82; *Arnold v. Sedalia Nat. Bank*, 100 Mo. App. 474, 74 S. W. 1038; *King v. Phillips*, 95 N. C. 245, 59 Am. Rep. 238. Some cases hold that a protest for the nonpayment of the interest does not change this rule. *Cutter v. New York*, 92 N. Y. 166; *Graves v. Saline County*, 43 C. C. A. 414, 104 Fed. 61, 22 Cyc. Law & Proc. p. 1573; 16 Am. & Eng. Enc. Law, 2d ed. pp. 1030-1033.

Counsel for the appellee contend that this interest can be recovered, provided there was, either before or after the supplies were furnished, an express agreement to pay it. We agree with this but do not think the record shows the existence of such an agreement. The only testimony concerning interest was given by the appellee, who admits that there was nothing said upon the subject at the time of the execution of the contract, and that the question was not mentioned for over two years thereafter, at which time the greater portion of the interest claimed had accrued, if at all. He also stated that he never made a claim for interest on the bills rendered, and that he never did present a bill to the company which contained an item of interest; that no items of interest were charged against the defendant upon his books of account. He stated the reason he did not carry this item of interest on the next bill rendered, etc., was, "Well, I had not been in the habit of doing that, and it was a matter of whether—I expected to collect the interest all in a bunch when I got through with them—if I could collect the interest." Another reason he gave for his delay in the presentations of bills for interest was that he was not so anxious to have the interest paid as to have the other items paid, as the others were larger.

The evidence shows that these statements were paid by voucher checks of the company, upon which was a copy of the original statement as rendered by the appellee. At the bottom of this voucher was a receipt which the appellee signed. They read: "Received [with date inserted] from the Bassick Gold Mine Co. [amount inserted] dollars, in full payment of above account." 'Tis true, the appellee testified that the matter of interest was left open, and he expected to collect it all at once, if he could collect it at all. He also stated that he spoke to the superintendent several times concerning the question of interest, and when this action was brought to recover the balance of the principal due upon this book account, he included the interest upon each of the items covered in the statements theretofore rendered, which items had been paid. He further said that during this time the question of their liability for interest was kept open between him and the defendant company. He says: "I asserted the right to get this interest two or three times to Mr. Radel. I made that claim a couple of years ago, probably earlier in this course of dealings. I cannot say that he understood that I was claiming this right to collect interest on these past due statements. I say I do not know whether he agreed to it or not. I told him that the interest up to such a date was so much money; he could not have misunderstood that the question of interest and my right to recover it was left open." Referring to his receipts, he said: "When I signed these voucher checks the question of this unpaid interest on these balances was an open matter between myself and the defendant. I think it was so to their knowledge, so far as I understood it." We do not think his testimony sufficient to overcome the rule laid down in the foregoing authorities, and his receipts, wherein he has said that it was "in full payment of above account."

A somewhat similar state of facts are those in the case of *Ryan Drug Co. v. Hvambzahl*, 92 Wis. 62, 65 N. W. 873, where goods were sold on sixty days' time, and statements rendered from time to time, in which no interest was included. These statements were kept by the vendee, and drafts were drawn upon him at intervals and paid. No other demand or payment was ever made. Later a certain amount was due, for which an action was brought. A verdict was directed to include interest on the monthly balances throughout the whole period of account. This ruling was held erroneous and the rule above quoted approved, and it was held that no interest should have been allowed, except upon the 33 L.R.A. (N.S.)

items of account included in the action, which were then unpaid.

It is true, the appellee claims that there were no settlements of this interest account, and the evidence shows that some two years after the account was started, and after a large portion of it had been made and paid, he made lead pencil memorandums concerning interest upon the margin of his books. We cannot agree that this or his statements disprove a settlement of these monthly accounts at the time of their payment. When one party presents to another a bill for a book account of a certain amount, and the other thereafter returns the bill with his check in payment, which is accepted, and the bill returned with the indorsement thereon that he receives the amount as payment in full of above account, we think this establishes a complete settlement of the account (barring fraud and mistakes). The fact that the appellee admits he never mentioned the question of interest to the officer of the appellant until two years after these accounts had been running and at least over half of them had been paid, which he now seeks to collect interest upon, to our minds, is conclusive that so far as the greater portion of this interest is concerned it was an afterthought, and was not intended to be charged or collected at the time the bills were paid.

In the case of *Chandler v. People's Sav. Bank*, 61 Cal., at page 403, that court said: "When parties themselves settle their accounts without charging each other with interest, it is not in accordance with law or equity to go behind such settlements for the purpose of allowing interest in favor of one party against the other. Such settlements are considered conclusive, unless impeachable for mistake or fraud. . . . Transactions anterior to them, and included in them, are not interest-bearing."

Referring to the cases above cited, which hold that even where the amount is accepted under protest, it is not sufficient to reserve the question; also to the following: *Chase v. Manhardt*, 1 Bland, Ch. 333; *Burr v. Burch*, 5 Cranch, C. C. 506, Fed. Cas. No. 2,187; *Snowden v. Thomas*, 4 Harr. & J. 335; *National Bank v. Mechanics' Nat. Bank*, 94 U. S. 437, 24 L. ed. 176,—which hold that where it is clearly established that the question is expressly reserved for future disposition, it can be thereafter litigated or adjusted,—it is unnecessary here for this court to approve or disapprove either ruling, and we express no opinion pertaining thereto, as it is only necessary to hold that in this action interest cannot be collected upon these paid items, unless there was an express contract to that effect;

and from our examination of the record we find no agreement of this kind, nor one which comes within the rule of the authorities last referred to,—that the question was expressly reserved for future disposition. The evidence is insufficient to support the contention that there was an agreement upon the question at all.

It follows that the findings and judgment of the court as to the items of the unpaid principal in the sum of \$1,442.53 and the interest thereon are right; the remainder of the findings and judgment, which was for interest upon that portion of the account which had been paid, is erroneous. The judgment should be modified. The cause will be remanded, with directions to modify the judgment in accordance with the views herein expressed, and, as so modified, it will stand affirmed. The appellant is entitled to recover its costs for this appeal.

Campbell, Ch. J., and Gabbert, J., concur.

ARKANSAS SUPREME COURT.

ST. LOUIS, IRON MOUNTAIN, & SOUTHERN RAILWAY COMPANY, Appt.,
v.

RUSH WOODS.

(— Ark. —, 131 S. W. 869.)

Railroads — unusual speed — negligence — matter of law.

1. The court cannot declare that a railroad company is negligent as matter of law in running a train into a station at an unusual speed, which results in striking an animal and throwing it against a person waiting to take a train, to his injury, where there is no limitation, by statute or ordinance, on the speed which trains may maintain.

Note. — Degree of care toward passenger at station.

If the drawing of meridians upon the "surface" of negligence was designed to facilitate the navigation of its turbulent seas, it was, to a large extent, unsuccessful. It is the writer's notion that the mere contention that the "care" which one must exercise in a certain relation to another can be divided into degrees so as to afford fixed criteria for the determination of the ultimate question of negligence in every case carries its own refutation; and that if there are degrees, standards, or kinds of care, they are as innumerable as the various and distinctive situations which call for the exercise of care. For, let it be supposed that "care" may, with propriety, be divided into two degrees which may be called "extraordinary" and "ordinary;" and that all instances of required duty may, with

Appeal — conflicting instructions — error.

2. The giving of an erroneous prejudicial instruction is not cured by a conflicting one which announces the correct rule, if the former is allowed to stand.

Trial — abstract instruction — prejudice.

3. In an action to hold a railroad company liable for striking an animal with its train and throwing it against a person waiting at its station to take the train, to his injury, an instruction that railroad companies are required to provide all things necessary to the security of passengers reasonably consistent with their business and appropriate to the means of conveyance employed is abstract and prejudicial.

Carrier — passenger on platform — care required.

4. A railroad company is not bound to use the utmost care and foresight to prevent injuring a person standing on its platform waiting to take a train, by striking an animal on the track with an engine and throwing it against him.

(October 31, 1910.)

A PPEAL by defendant from a judgment of the Circuit Court for Bradley County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by the negligence of defendant's servants. Reversed.

The facts are stated in the opinion.

Messrs. W. E. Hemingway, E. B. Kinsworthy, E. A. Bolton, and James H. Stevenson, for appellant:

A railway company is not held to the same high degree of care, in providing safe stations and places for passengers not actually on its trains, as in the case of passengers who are actually in transit on its trains; but its duty is discharged by the exercise of ordinary care.

equal propriety, be placed within the category of the one or the other. The result is merely that you have two thistles where one grew before. That is to say, the consideration which moved the courts in the first instance to resolve "care" into degrees,—namely, the principle that the acts which constitute an exercise of due care in one situation may be quite inadequate in another,—thrives with no less vigor under each division, for under each there must necessarily be numerous and varying situations calling for the exercise of care. Whether "extraordinary care" has been exercised must depend upon circumstances, and the same is true of "ordinary care."

Care is not the expenditure of a fixed measure of mental effort, nor the enlistment of a certain number of foot pounds of physical energy, in behalf of the safety of others. It is doing what a reasonably prudent man would do in like circumstan-

2 Hutchinson, Carr, §§ 935-937; St. Louis, I. M. & S. R. Co. v. Wilson, 70 Ark. 136, 91 Am. St. Rep. 74, 66 S. W. 661; 3 Thomp. Neg. § 2748; St. Louis, I. M. & S. R. Co. v. Barnett, 65 Ark. 255, 45 S. W. 550; Pennsylvania Co. v. Marion, 104 Ind. 242, 3 N. E. 874; Kelly v. Manhattan R. Co. 112 N. Y. 443, 3 L.R.A. 74, 20 N. E. 383; Pennsylvania Co. v. Marion, 104 Ind. 239, 3 N. E. 874; Georgia, C. & N. R. Co. v. Brown, 120 Ga. 380, 47 S. E. 942; Southern R. Co. v. Reeves, 116 Ga. 743, 42 S. E. 1015; Chicago & G. T. R. Co. v. Stewart, 77 Ill. App. 66; Hiatt v. Des Moines, N. & W. R. Co. 96 Iowa, 169, 64 N. W. 766; Maxfield v. Maine C. R. Co. 100 Me. 79, 60 Atl. 710; Moreland v. Boston & P. R. Corp. 141 Mass. 31, 6 N. E. 225; Exton v. Central R.

Co. 62 N. J. L. 7, 56 L.R.A. 508, 42 Atl. 486; McCormick v. Detroit G. H. & M. R. Co. 141 Mich. 17, 104 N. W. 390; Pittsburgh, C. C. & St. L. R. Co. v. Harria, 38 Ind. App. 77, 77 N. E. 1051; Gulf, C. & S. F. R. Co. v. Butcher, 83 Tex. 309, 18 S. W. 583; Crowe v. Michigan C. R. Co. 142 Mich. 692, 106 N. W. 395; 6 Cyc. Law & Proc. p. 608; 5 Am. & Eng. Enc. Law, p. 532.

It is not negligence, *per se*, for a railway company to run a train, even through a city, at a high rate of speed.

Elliott, Railroads, § 1160; Ford v. St. Louis, I. M. & S. R. Co. 66 Ark. 366, 50 S. W. 864; St. Louis, I. M. & S. R. Co. v. Kimberlain, 76 Ark. 100, 88 S. W. 599.

It is only in cases where it is apparent,

ces. Care falls between recklessness and impeccability, and it would seem that "a reasonably prudent man" is the man of average prudence. True it is that some men are much more prudent than the vast majority, and for this very reason it would seem manifestly unfair, in laying down rules against the carelessness of mankind in general, to impose obligations that are higher than the measure of average prudence. But it is said that in the operation of trains upon which passengers are being transported, the carrier shall exercise "extraordinary care." Of course, the operation of a train is attended by uncommon dangers,—is an extraordinary condition, let it be said. Does, then, the obligation to exercise "extraordinary care" require the doing of what a man of "extraordinary prudence" would do under "extraordinary conditions"? Obviously, that is imposing too high a standard. That it requires the doing of what a man of "extraordinary prudence" would do under "ordinary conditions" should scarcely be suggested in a serious discussion. What, then, can it require but the exercise of that care and vigilance which a man of reasonable, ordinary, or average prudence would exercise in such extraordinary circumstances? By the same token, what is "ordinary care," but doing what the same person would do under "ordinary conditions"?

In this connection, the court said in Bacon v. Casco Bay S. B. Co. 90 Me. 46, 37 Atl. 328: "The force of the distinction between common or ordinary care and extraordinary care, the highest degree of care, a distinction found in the civil law and adopted by English and American courts principally as applicable to the law of bailments, has been greatly diminished in modern times for the reason that extraordinary diligence is no more than an ordinary requirement in extreme situations and conditions. The tendency with many courts to call all cases of the kind simply cases of negligence, ignoring the ancient classification. In all cases the amount of care bestowed must be equal to the emergency, however the standard be denominated." 33 L.R.A. (N.S.)

ed. We do not mean to say that the distinction between ordinary and gross negligence, or between ordinary and extraordinary care, does not still exist, but, in reply to the suggestion made by the plaintiff's counsel that the same extreme degree of care should be exercised by the defendants when wharfingers, or tenants of a wharf used in conjunction with their boats, as is imposed on them while common carriers of passengers, we do mean to say that we perceive no reason for imposing so extreme an obligation upon the defendants when they have completed their trip and ceased to be longer performing the duties of common carriers; and the authorities do not support any such application of the rule of extraordinary care as is contended for. In fact, the tendency of decision is, as before intimated, more likely to be the other way, if there be any solid difference between negligence of one degree and negligence of another degree, or between reasonable care and extraordinary care." The precise position of the Maine court, that "ordinary care" measured by the requirements of special circumstances is the criterion in each case, is, perhaps, more clearly indicated in Maxfield v. Maine C. R. Co. 100 Me. 79, 60 Atl. 710, declaring that a very high degree of vigilance, foresight, and skill is required to fill the measure of ordinary care in the transportation of passengers, whereas, the requirement of ordinary care for the safety of passengers on station platforms is satisfied by the exercise of a lesser degree of skill and foresight, the court citing with approval the statement in 5 Am. & Eng. Enc. Law, p. 532, that with respect to station appointments the carrier is bound to exercise ordinary care in view of the danger to be apprehended.

It is not extravagant to say that the first impression left by a survey of the cases is that they disclose an almost hopeless condition of loose judicial utterances, which admit of no reconciliation or rationalization. The value of the cases lies in the clearness with which they show the necessity for the adoption of some rule capable of being understood and applied. Their net

or should in the exercise of reasonable prudence have been apparent, to those in charge of a train, that an animal beside or on the track will be struck or injured if the train is not stopped, that there can be said to be any duty to stop it.

Little Rock & Ft. S. R. Co. v. Trotter, 37 Ark. 593; Arkansas & L. R. Co. v. Sanders, 69 Ark. 619, 65 S. W. 428; Hot Springs R. Co. v. Newman, 36 Ark. 607; St. Louis, I. M. & S. R. Co. v. Bragg, 66 Ark. 248, 50 S. W. 273.

Messrs. R. W. Wilson, Joe T. Robinson, and Garland Streett, for appellee:

Whether or not the high rate of speed was negligence under the circumstances was a question for the jury.

Missouri, K. & T. R. Co. v. Snowden, 44

Tex. Civ. App. 509, 99 S. W. 866; Delaware, L. & W. R. Co. v. Smith, 3 Legal Gaz. 102; Massoth v. Delaware & H. Canal Co. 64 N. Y. 520; Galveston, H. & S. A. R. Co. v. Duelm, — Tex. Civ. App. —, 23 S. W. 596, 86 Tex. 450, 25 S. W. 406; Houston & T. C. R. Co. v. Goodman, 38 Tex. Civ. App. 175, 85 S. W. 493; Texas & P. R. Co. v. Harby, 28 Tex. Civ. App. 24, 67 S. W. 541; Texas & P. R. Co. v. Watkins, 88 Tex. 20, 29 S. W. 232; St. Louis, I. M. & S. R. Co. v. Stewart, 68 Ark. 606, 82 Am. St. Rep. 311, 61 S. W. 169; Little Rock & Ft. S. R. Co. v. Miles, 40 Ark. 298, 48 Am. Rep. 10; Eureka Springs Ry. Co. v. Timmons, 51 Ark. 459, 11 S. W. 690; St. Louis, I. M. & S. R. Co. v. Sweet, 57 Ark. 287, 21 S. W. 587, 60 Ark. 550, 31 S. W. 571; George v.

result, if they are held at arm's length and regarded as a whole, seems to be about the same as would have followed from an application of the rule that carriers of passengers must, at all times, exercise the care which a reasonably or ordinarily prudent man would exercise in like circumstances. By way of suggesting an additional reason why such is the proper rule, the opinion is hazarded that it comes very near defining the considerations which govern juries in reaching their verdicts, irrespective of what the courts may charge.

It will be understood that this note purports to deal only with the abstract question of the degree of care owed to a passenger at a station. More concrete questions as to the duty and liability of a carrier with respect to the safety of passengers in certain situations, or under enumerated conditions, have already been annotated in this work, and references to them may readily be found in the Indexes to L.R.A. Notes.

The cases involving the duty of the carrier in taking on, or setting down, passengers, seem so clearly to involve a condition that differs materially from what is ordinarily regarded as the situation of the passenger at the station, that they have been excluded from this note. Indeed, there are cases which declare that the high duty with which a carrier is charged in the actual transportation of passengers devolves upon it with respect to the safety of passengers getting on and off its cars. For a single example of such cases, reference may be had to Rearden v. St. Louis & S. F. R. Co. 215 Mo. 106, 114 S. W. 961, where it is pointed out that the duty of exercising extraordinary care is imposed by law on carriers of passengers, and begins when the contract of carriage takes effect, and continues until the contract ends with deposit at destination; and that part of this duty to safeguard passengers while leaving a car or other vehicle consists in taking care to put them off at a reasonably safe place. It was declared, however, that this rule was to be distinguished from the one holding a carrier only to ordinary diligence in respect of platforms and approaches.

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There are many cases which declare it to be the duty of a carrier to guard passengers against injury at its stations, and do so in language which, *per se*, imports an absolute duty. However, in such cases, the statements are not made in connection with the question of degree of care, and in reality, they mean little, if anything, more than would have meant a declaration of the court that to passengers at its stations the carrier owes a certain duty, the measure of which need not be discussed at that time. Since, therefore, such cases do not really touch the question here considered, only a very few of them are herein cited, and it is only by way of illustration that attention is directed to the following cases declaring that railroad companies are bound to keep in a safe condition all portions of their platforms and approaches thereto, and all portions of their station grounds reasonably near to the platform, where passengers or those who have purchased tickets with a view to take passage on the cars, or to debark therefrom, would naturally or ordinarily be likely to go (Texas & St. L. R. Co. v. Orr, 46 Ark. 182; Pennsylvania Co. v. Marion, 123 Ind. 415, 7 L.R.A. 687, 18 Am. St. Rep. 330, 23 N. E. 973; Louisville, N. A. & C. R. Co. v. Treadway, 142 Ind. 475, 143 Ind. 689, 40 N. E. 807, 41 N. E. 794; Peniston v. Chicago, St. L. & N. O. R. Co. 34 La. Ann. 777, 44 Am. Rep. 444; Turner v. Vicksburg, S. & P. R. Co. 37 La. Ann. 648, 55 Am. Rep. 514; Moses v. Louisville, N. O. & T. R. Co. 39 La. Ann. 649, 4 Am. St. Rep. 231, 2 So. 567); that this duty is the same at a flag station as at a regular station (Pineus v. Atlantic Coast Line R. Co. 140 N. C. 450, 111 Am. St. Rep. 856, 53 S. E. 297); that when a station platform becomes slippery from ice and snow, it is the company's duty to make it safe again within a reasonable time by removal of the source of danger (Chicago & N. W. R. Co. v. Smith, 59 Ill. App. 242, affirmed in 162 Ill. 185, 44 N. E. 390); that it is the duty of the carrier to have its station lighted for the accommodation and safety of passengers arriving or departing upon their trains (Fordyce v. Merrill, 49

St. Louis, I. M. & S. R. Co. 34 Ark. 613; St. Louis South Western R. Co. v. Russell, 64 Ark. 237, 41 S. W. 807; Illinois C. R. Co. v. Murphy, 123 Ky. 787, 11 L.R.A. (N.S.) 352, 97 S. W. 729.

All the instructions given by the court must be taken and considered together, and if as a whole they correctly state the law of the case this is sufficient.

Eureka Springs R. Co. v. Timmons, 51 Ark. 459, 11 S. W. 690; St. Louis, I. M. & S. R. Co. v. Sweet, 60 Ark. 550, 31 S. W. 571; St. Louis, I. M. & S. R. Co. v. Stewart, 68 Ark. 606, 82 Am. St. Rep. 311, 61 S. W. 109.

It was the duty of the defendant in operating its trains to exercise the highest degree of care, diligence and skill.

Philadelphia & R. R. Co. v. Derby, 14

How. 486, 14 L. ed. 509; The New World v. King, 16 How. 469, 14 L. ed. 1019; New York C. R. Co. v. Lockwood, 17 Wall. 357, 21 L. ed. 627; Indianapolis & St. L. R. Co. v. Horst, 93 U. S. 291, 23 L. ed. 898; 2 Redf. Railways, 219; Hutchinson, Carr. § 501; Cooley, Torts, pp. 642, 643; George v. St. Louis, I. M. & S. R. Co. 34 Ark. 613; Little Rock & Ft. S. R. Co. v. Miles, 40 Ark. 298, 48 Am. Rep. 10; St. Louis, I. M. & S. R. Co. v. Sweet, 60 Ark. 550, 31 S. W. 571.

McCulloch, Ch. J., delivered the opinion of the court:

The plaintiff, Rush Woods, sues the railroad company to recover damages for personal injuries received in a peculiar and

Ark. 277, 5 S. W. 329; St. Louis, I. M. & S. R. Co. v. Briggs, 87 Ark. 581, 113 S. W. 644; Reynolds v. Texas & P. R. Co. 37 La. Ann. 694; that this requires the lights to be maintained for a reasonable time before and after the arrival and departure of trains (St. Louis, I. M. & S. R. Co. v. Battle, 69 Ark. 369, 63 S. W. 805; Louisville, N. A. & C. R. Co. v. Treadway, 142 Ind. 475, 143 Ind. 689, 40 N. E. 807, 41 N. E. 794; Waller v. Missouri, K. & T. R. Co. 59 Mo. App. 410); and that this duty applies to a flag station at which the carrier knows that passengers will congregate on a certain night (Cleveland, C. C. & St. L. R. Co. v. Harvey, — Ind. App. —, 90 N. E. 318).

In this connection attention is directed to Wood v. Metropolitan Street R. Co. 181 Mo. 433, 81 S. W. 152, where the court said that it is the duty of a carrier to keep its station platforms and approaches in such a condition that passengers who have occasion to use them can do so in safety; but at another point in its opinion, the court seems to indicate that the proper criterion for determining whether the carrier took the proper precaution to maintain its platform in such a condition as to prevent its collapse was that of ordinary care and reasonable inspection.

The measure of care imposed upon the carrier has, in a few cases, apparently been limited by restricting its application to certain persons, that is, to persons exercising a certain degree of care for their own safety. Such cases, of course, mean little, if anything, more than that the carrier's duty to protect the passenger against injury is not absolute, and obtains only in favor of persons not contributorily negligent. For instance, it has been held that a passenger alighting from a train at a place where he must cross a track to reach the public highway may, in the absence of warning, presume that trains will not be so operated as to impose on him the same degree of care which he would be obliged to exercise if he were not a passenger (Chesapeake & O. R. Co. v. King, 49 L.R.A. 102, 40 C. C. A. 432, 99 Fed. 251); and, on

the other hand, that, in the construction and maintenance of its stations and platforms, the carrier is not required to provide against accidents resulting either from the reckless disregard by passengers of its reasonable rules, or through their negligent heedlessness of their personal safety, but is bound only to exercise such a degree of care and prudence as is sufficient to protect the ordinary passenger using ordinary care (Lauterer v. Manhattan R. Co. 63 C. C. A. 38, 128 Fed. 540); and an application of this rule, in one case, led to the result that the fact of the intoxication of a passenger who fell into an open stairway in the night on a station platform, does not excuse the carrier for maintaining a dangerous place, if persons in the exercise of ordinary care might have been injured thereby (Chicago & E. I. R. Co. v. Lawrence, 98 Ill. App. 635). This duty toward persons exercising ordinary care has been held to devolve upon the carrier, not only in respect of the physical condition of its premises (Grimes v. Pennsylvania Co. 36 Fed. 72; Louisville & N. R. Co. v. Smith, 9 Ky. L. Rep. 404 abstract); but also in respect of lighting them (Grimes v. Pennsylvania Co. supra; Louisville & N. R. Co. v. Ricketts, 18 Ky. L. Rep. 687, 37 S. W. 952, subsequent appeal 21 Ky. L. Rep. 662, 52 S. W. 939; Sargent v. St. Louis & S. F. R. Co. 114 Mo. 348, 19 L.R.A. 460, 21 S. W. 823).

Degree of care—highest or extraordinary care.

In a very few instances carriers have been held to the exercise of the same high degree of care for the safety of passengers at stations, as for their safety during transportation.

Thus, it was declared in Knight v. Portland, S. & P. R. Co. 56 Me. 234, 96 Am. Dec. 449, that carriers of passengers are bound to the most exact care and diligence, not only in the management of their trains and cars, but also in the structure and care of their tracks, and in all subsidiary arrangements necessary to the safety of passengers; and that a safe passageway to

somewhat unusual manner, though alleged to be the result of negligence on the part of defendant's servants in the operation of its train. On the night of January 2, 1908, he was standing on the company's platform at Morrell, Arkansas, awaiting the approach of a passenger train on which he expected to embark, when the engine of that train struck a mule, knocking it over against plaintiff and severely injuring him. Negligence of defendant's servants is alleged in running the train at an excessive and unusual rate of speed when approaching the station, and in failing to exercise care to prevent striking the mule after its presence was discovered on the track. There was a trial before a jury resulting in a verdict in favor of plaintiff.

The train was several hours behind schedule time when it reached Morrell, and evidence was adduced to the effect that, when it approached the station, the rate of speed was greater than usual, and that it ran nearly 200 feet beyond the customary stopping place. The engine struck the mule. The mule, with others, came out from behind a seed house or platform near the station. There is a conflict in the evidence as to whether or not the engineer and fireman were prevented, by reason of the curved track, from seeing the stock ahead, near the track, in time to slow up the train. Evidence was also adduced to the effect that no stock alarm was sounded, though it was proved beyond dispute that the engine whistled at the proper place for the

and from cars or boats is a subsidiary arrangement within this rule.

And in *Fremont E. & M. Valley R. Co. v. Hagblad*, 72 Neb. 773, 4 L.R.A. (N.S.) 254, 101 N. W. 1033, 106 N. W. 1041, 9 A. & E. Ann. Cas. 1096, it was held that the duty of the carrier to provide the passenger safe egress from, and ingress to, its eating houses, from its trains, which it invites them to visit, is no less stringent than the duty to furnish the passengers safe passage on its cars.

And in *Brackett v. Southern R. Co.* — S. C. —, 70 S. E. 1026, the court, in justifying its position that the carrier is bound to exercise the same high degree of care with respect to the arrangement and comfort of its stations as with respect to the operation of its trains and the maintenance of cars and roadbeds, said: "Counsel for defendant submitted the following important request to charge, which was refused: 'I charge and instruct you that a railroad company does not owe the same high degree of care to persons who are in its station or waiting room as passengers, in so far as the arrangement and comfort of such station or waiting rooms are concerned, as it does to persons who are passengers on one of its trains. In other words, a railroad company is not bound to exercise extraordinary care in reference to the arrangements of its station or waiting rooms; it is only required to exercise reasonable care; that is, such care as men of ordinary prudence would exercise under the same circumstances.' There is much strong authority supporting this proposition, and the argument in its favor has often been forcibly stated in textbooks and judicial decisions. But we think the weight of reason and authority sustains the rule . . . that the burden of extraordinary care is on the carrier in the management of its stations, as well as in the operation of its cars. . . . The public business of carrying passengers is now so controlled by a few persons or corporations, that those who travel must, of necessity, use their stations and waiting rooms, and with increasing population the number of persons using these stations is constant—33 L.R.A. (N.S.)

ly on the increase. The arrangements for the comfort and health of all classes of the general public—women and children, the old and the feeble, the ignorant and inexperienced—are under the exclusive control of the carriers, and it seems but reasonable that they should be held to a very high degree of care in providing at their stations for the safety and comfort of those whom they impliedly invite to use their stations and waiting rooms."

So, it has been contended that although a railroad company is not bound to foresee and provide against accidents that no one could by the highest degree of practicable care anticipate, yet it is bound to use the highest degree of practicable care to provide against injury to passengers that may be foreseen and prevented, and a railroad company which leaves the platform of its depot in an unsafe condition will be held to have contemplated the general nature of any injuries to a passenger, and it is not necessary that precisely such an accident as actually occurred might have been anticipated. *Louisville, N. A. & C. R. v. Lucas*, 119 Ind. 583, 6 L.R.A. 193, 21 N. E. 968.

In *Waldman v. Brooklyn Union Elev. R. Co.* 136 App. Div. 376, 120 N. Y. Supp. 1017, involving an action by one who was injured by a falling window while waiting for a train on the defendant's platform, was declared that the defendant was charged to exercise that high degree of care which is owed to passengers, in order to provide a safe platform.

In a few cases the imposition of a high degree of care upon the company seems to be the result, more of the special circumstances of the case, than of any expressed inclination of the courts to lay down any general proposition of law. This may fairly be said of cases holding that the extraordinary care required of a railroad company in respect of passengers on trains is required in respect of a bridge or elevated platform on the railroad property, which is used for an approach to the station, and over which passengers are invited to enter the premises for the purpose of taking passage, where it

station. Morrell is an incorporated town containing from 300 to 500 inhabitants.

The trial court gave, over the objection of defendant, the following among other instructions: "(5) If you find from the evidence that the defendant was operating its train at an unusual speed in the town of Morrell, and by reason thereof struck a mule, and if you find that, by the exercise of ordinary care, defendant could have avoided striking said mule and injuring plaintiff, had it been operating said train at its usual rate of speed, the defendant is liable." The effect of that instruction was to declare the running of the train at an unusual rate of speed in the town of Morrell to be negligence *per se*, and that the defendant was liable if the injury would

not have occurred otherwise. This is not correct, for it should have been submitted to the jury to determine whether or not the running of the train at the unusual rate of speed, under the circumstances, constituted negligence. Judge Elliott correctly states the rule on the subject as follows: "In the absence of any statute or ordinance upon the subject, no rate of speed is negligence *per se*. But, when considered in connection with other circumstances, as it must be in some cases, the court may sometimes be justified in declaring that the company was guilty of negligence in running its train at an excessive and dangerous rate of speed under the circumstances of the particular case. Ordinarily, however, the question is one of fact for the jury." 3 Elliott, Rail-

joins an open trestle on the same level into which persons are liable to walk while crossing the bridge (Johns v. Charlotte, C. & A. R. Co. 39 S. C. 162, 20 L.R.A. 520, 39 Am. St. Rep. 709, 17 S. E. 698); that the same high degree of care which a carrier owes to its passengers while on its trains devolves upon it with respect to the safety of a passenger, and in guarding him against pitfalls, where, in company with, and upon the invitation of, the conductor of a train which has stopped at some distance from the station, he is taking the course indicated by the conductor, to reach the train for the purpose of boarding it (San Antonio & A. P. R. Co. v. Turney, 33 Tex. Civ. App. 626, 78 S. W. 256); that if, at the very threshold of a gate guarding the entrance to its station, a carrier places a log against which its passengers will be in danger of stumbling in the dark, it is bound to do everything in its power to guard against the danger; and omission to do so is negligence (Osborn v. Union Ferry Co. 53 Barb. 629); that where the injury was sustained by falling through a hole in the floor of a dark toilet room in the station, the defendant owed the passenger the highest degree of care consistent with the proper management of the business in which it was engaged (Jordan v. New York, N. H. & H. R. Co. 165 Mass. 346, 32 L.R.A. 101, 52 Am. St. Rep. 522, 43 N. E. 111). See also in this connection Missouri, K. & T. R. Co. v. Harrison, — Tex. Civ. App. —, 120 S. W. 254, where the court, in affirming a recovery for injuries resulting when a person upon a station platform was struck by an incoming train while he was attempting to pass around a depression in the platform filled with water, and was thrown against the plaintiff, declared on the question whether suffering the depression to exist in the platform was negligence, that it was the carrier's duty to exercise the highest degree of care that a very cautious, competent, and prudent person would exercise in similar circumstances to provide its passengers a safe approach to its trains.

In Dilleshaw v. Charleston & W. C. R. Co. 85 S. C. 334, 67 S. E. 304, the court de-

clared that, in holding a carrier to the highest degree of care for the safety of its passengers, it could not lay it down as a rule of law that the highest degree of care required the carrier to see that the station grounds were kept free from any depressions or irregularities.

—less care at station than in transportation generally.

The cases holding the carrier to the exercise of the same degree of care for the safety of passengers at stations as in their transportation are in the minority, for while the majority of the cases differ verbally as to the so-called measure of care required at stations, they require, in one form of expression or another, a lesser measure than is usually imposed upon the carrier while in the act of transportation.

The degree of care is not fixed solely by the relation of carrier and passenger, but is measured by the consequences which may follow the want of care. A railroad company is held to the highest degree of care in respect of the condition and management of its engines and cars, because negligence in that respect involves extreme peril to passengers, against which they cannot protect themselves; and it would not act reasonably if it did not exercise greater care in equipping and running its trains, than in regard to the condition of its station grounds. Moreland v. Boston & P. R. Corp. 141 Mass. 31, 6 N. E. 225. This doctrine is based upon the ground that the dangers to be apprehended, and the liability to accidents, and the inability of travelers to guard against or escape them in the one case, are infinitely greater than in the other (Kirby v. Delaware & H. Canal Co. 20 App. Div. 473, 46 N. Y. Supp. 777); and is merely a result of applying the rule that care shall be commensurate with the danger (Taylor v. Pennsylvania Co. 50 Fed. 755).

One who is attempting to board a train of one of several railroad companies using common tracks through a station, for the purpose of taking passage thereon, is a pas-

roads, § 1160. This is the rule adopted by this court. *Ford v. St. Louis, I. M. & S. R. Co.* 66 Ark. 363, 50 S. W. 864; *St. Louis, I. M. & S. R. Co. v. Kimberlain*, 76 Ark. 100, 88 S. W. 599. The court gave another instruction at defendant's request, telling the jury that running the train at an excessive and unusual rate of speed is not negligence *per se*, but this did not cure the error of the former instruction, as the two were directly conflicting.

The giving of the following instruction is also assigned as error: "(6) Railroad companies in operating trains are required to use the utmost care and foresight, and are held responsible for the slightest negligence. The first and most important duty incumbent upon them is to provide for safe-

ty of their passengers. To this end, they are required to provide all things necessary to their security, reasonably consistent with their business, and appropriate to the means of conveyance employed by them, and to exercise the highest degree of practicable care and diligence and skill in the operation of their trains." The objection to the instruction is that it is abstract in this case, and also that it is an incorrect statement of the law applicable to the case. The declaration that railroad companies are required to provide all things necessary to the security of passengers reasonably consistent with their business and appropriate to the means of conveyance employed by them is abstract, and is inapplicable to the facts of this case, for the reason that the

senger as to all roads using those tracks, for the purpose of determining the measure of care which they owe him. *Chicago, R. I. & P. R. Co. v. Stepp*, 22 L.R.A. (N.S.) 350, 90 C. C. A. 431, 164 Fed. 785.

And with respect to the safety of a hotel temporarily used by a carrier for use by its passengers during the rebuilding of its burned station, the measure of its duty is no greater and no less than its duty in respect of stations constructed and maintained by it. *Kirby v. Delaware & H. Canal Co.* *supra*.

But, only in case of gross negligence can a carrier be held liable for injury to one who departs from the way provided for egress from its station, and takes another way, whose use is forbidden by danger signs. *Perego v. Lake Shore & M. S. R. Co.* 158 Mich. 225, 122 N. W. 535.

And the fact that a person who was struck and injured by the body of a person killed by a passing train was standing on a station platform, waiting for a train, after purchasing a ticket, gives him no greater right of action against the company than if he had been injured at any other place where he had a right to be. *Wood v. Pennsylvania R. Co.* 177 Pa. 306, 35 L.R.A. 199, 55 Am. St. Rep. 728, 35 Atl. 689.

A carrier which, by advertisements and reduced rates, induces a large number of persons to collect at its terminal station, is bound to take such precautions for the safety of passengers as the increased dangers attendant upon the collection of a large crowd render reasonably necessary under the circumstances. *Taylor v. Pennsylvania Co.* *supra*.

So, it has been held that evidence that the carrier had advertised an excursion, that the train was late, and that a crowd had assembled at the station, was properly introduced, because it was material upon the question of the amount of care and diligence to be exercised by the carrier in handling engines and trains at and about the station. *International & G. N. R. Co. v. Foster*, 26 Tex. Civ. App. 497, 63 S. W. 952.

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It respect of lighting its platforms for use by passengers, a carrier is not required to exercise "a high degree of care," it being required only to provide a reasonably safe means of ingress and egress to and from its station (*McCormick v. Detroit, G. H. & M. R. Co.* 141 Mich. 17, 104 N. W. 390); and the character and the extent of the lights must depend upon the character and extent of the business transacted in the particular station (*Sargent v. St. Louis & S. F. R. Co.* 114 Mo. 348, 19 L.R.A. 460, 21 S. W. 823); the carrier's duty being determined in the light of the rule that precautionary requirements increase in the ratio that danger becomes more threatening (*Alabama G. S. R. Co. v. Arnold*, 84 Ala. 159, 5 Am. St. Rep. 354, 4 So. 359); and measured by what a prudent man, engaged in like business, would regard as necessary to render the platform reasonably safe for use by passengers exercising ordinary care (*Cleveland, A. & C. R. Co. v. Anderson*, 21 Ohio C. C. 288, 11 Ohio C. D. 765).

Where a carrier deposits freight upon its platform in the daytime, it must use care in an added and commensurate degree to the end that the platform shall be reasonably safe for the use of passengers. *Matthieson v. Burlington, C. R. & N. R. Co.* 125 Iowa, 90, 100 N. W. 51.

—duty same as that of owner of ordinary premises.

The view has been taken that the duty respecting the construction and maintenance of station buildings and platforms, and the lighting of the same, is not so rigorous as that imposed upon carriers in relation to roadbeds, tracks, cars, appliances, and the like; and that in the construction, maintenance, and lighting of its premises for use by passengers, it is held to no higher degree of care than an individual owner of premises used for ordinary purposes (*Randolph v. Chicago, M. & St. P. R. Co.* 106 Mo. App. 646, 79 S. W. 1170); that is, its duty has been regarded as neither greater nor less than that of any person

question of failure to provide the things necessary to the security of passengers is not involved in the controversy, and the failure to provide things for their safety had nothing to do with plaintiff's injury. The jury might have inferred from it that it was the duty of defendant to provide some means of security against the happening of such an occurrence as this. There is no proof that the platform or waiting room at the station was unsafe, or that the company omitted anything reasonably necessary for the security of passengers. The instruction is incorrect, because it places too high a degree of care upon the company as to passengers waiting at stations. The exercise of ordinary care is the measure of the duty of a public carrier to protect passengers while at stations. *Hutchinson, Car.* §§ 935, 941; 3 *Thomp. Neg.* §§ 274, 278; *Huddleston v. St. Louis, I. M. & S. R. Co.* 90 Ark. 378, 119 S. W. 280; *St. Louis, I.*

M. & S. R. Co. v. Wilson, 70 Ark. 136, 91 Am. St. Rep. 74, 66 S. W. 661; *St. Louis, I. M. & S. R. Co. v. Barnett*, 65 Ark. 255, 45 S. W. 550. The higher degree of care is exacted only during the time in which the passenger has given himself wholly in charge of the carrier,—while on the train or getting on or off, for then only is the passenger subjected to the peculiar hazards of that mode of travel, against which the carrier must exercise the highest degree of skill and care. *Falls v. San Francisco & N. P. R. Co.* 97 Cal. 114, 31 Pac. 901. But when those extraordinary hazards have ceased, or before they have begun, the degree of care is relaxed as the necessity for it ceases.

The errors in giving the two instructions hereinbefore mentioned were prejudicial, and for this reason the judgment must be reversed, and the cause remanded for a new trial. It is so ordered.

to another who, by invitation or inducement, express or implied, has come upon his premises for the purpose of transacting business (*Chase v. Atchison, T. & S. F. R. Co.* 134 Mo. App. 655, 114 S. W. 1141); and this obligation is said to require the exercise of only a reasonable degree of care (*Gunderman v. Missouri, K. & T. R. Co.* 58 Mo. App. 370); having regard for the nature of the business (*Pennsylvania Co. v. Marion*, 104 Ind. 239, 3 N. E. 874); and it is therefore error to charge the jury that it is the carrier's duty to make the platform "as reasonably safe as possible" (*Finseth v. City & Suburban R. Co.* 32 Or. 1, 39 L.R.A. 517, 51 Pac. 84). One court has inclined to the view that, in respect of keeping its sidewalks safe for use by passengers, the carrier's duty is of the same standard as that of a municipality with respect to its sidewalks. *Bateman v. New York C. & H. R. R. Co.* 47 Hun, 429.

—reasonable care.

Other cases declare that since a passenger's entrance to the carrier's station is characterized by none of the hazards incident to the journey itself. (*Falls v. San Francisco & N. P. R. Co.* 97 Cal. 114, 31 Pac. 901); and that since a rule properly ceases with the reason for it (*Taylor v. Pennsylvania Co.* 50 Fed. 755); the degree of care owed to the passenger is justly lessened to the extent that, in such a place and at such a time, the carrier is bound to exercise only a reasonable degree of care for the protection of its passengers (*Ibid.*); in view of the dangers to be apprehended (*Falls v. San Francisco & N. P. R. Co.* *supra*).

The averment in a declaration against a carrier, that it is charged with the duty to furnish safe ingress and egress to and from its cars, is too broad, for the literal signification of such a statement is that the carrier is an insurer in this respect. (*Falk v. New York, S. & W. R. Co.* 56 N. J. L. 33 L.R.A. (N.S.)

380, 29 Atl. 157); and the carrier does not insure the safety of passengers under such conditions (*Renneker v. South Carolina R. Co.* 20 S. C. 219); nor, indeed, is it required to exercise the highest degree of care (*Hart v. Seattle, R. & S. R. Co.* 37 Wash. 424, 79 Pac. 954); but if it suffers dangerous conditions or practices to exist or prevail upon those portions of its premises to which passengers are expected to resort, it may be held responsible for injuries resulting therefrom which might reasonably have been expected (*Gascoigne v. Metropolitan West Side Elev. R. Co.* 143 Ill. App. 547; *Galloway v. Chicago, M. & St. P. R. Co.* 56 Minn. 346, 23 L.R.A. 442, 45 Am. St. Rep. 468, 57 N. W. 1058).

While the cases which measure the carrier's duty by what is "reasonable" have enunciated the rule in different forms, they appear, as a matter of fact, to mean about the same. Thus, one form in which the rule has been stated is that the carrier is bound to do what is reasonably necessary on the station premises to insure their safety for proper use by passengers (*Beard v. Connecticut & P. River R. Co.* 48 Vt. 101); while in other cases it has been declared that the carrier must make reasonable efforts and take reasonable precautions to keep its approaches in a safe condition (*Chicago & A. R. Co. v. Wilson*, 63 Ill. 167; *Townsend v. Boston*, 187 Mass. 283, 72 N. E. 991); or, what is the same thing, that a passenger has the right to assume that every necessary and reasonable precaution will be taken for his safety (*Campbell v. Yazoo & M. Valley R. Co.* 95 Miss. 309, 48 So. 618); but the greater number of cases which make reasonableness the criterion, state, in terms, that the carrier must exercise reasonable care for the safety and protection of passengers who are properly using its stations, platforms, and approaches (*Pere Marquette R. Co. v. Strange*, 171 Ind. 160, 20 L.R.A. (N.S.) 1041, 84 N. E. 819, 85 N. E. 1026; *Atchi-*

son, T. & S. F. R. Co. v. Holloway, 71 Kan. 1, 114 Am. St. Rep. 462, 80 Pac. 31; Falk v. New York, S. & W. R. Co. 56 N. J. L. 380, 29 Atl. 157; Exton v. Central R. Co. 63 N. J. L. 356, 56 L.R.A. 508, 46 Atl. 1099; Redner v. Lehigh & H. River R. Co. 73 Hun, 562, 26 N. Y. Supp. 1059; Scholtz v. Interborough Rapid Transit Co. 48 Misc. 619, 95 N. Y. Supp. 557; Renneker v. South Carolina R. Co. 20 S. C. 219; Hart v. Seattle, R. & S. R. Co. 37 Wash. 424, 79 Pac. 954; and a few cases declare that the rule is that of reasonable care, to be determined by the situation and the probable dangers (Crowe v. Michigan C. R. Co. 142 Mich. 692, 106 N. W. 395; Renneker v. South Carolina R. Co. 20 S. C. 219) together with the circumstances of the case, including the nature of the road, the character of the traffic, and the place where the accident occurred. (Falls v. San Francisco & N. P. R. Co. 97 Cal. 114, 31 Pac. 901); and that this measure of care does not stop short of every reasonable provision for the safety of the passengers, having a regard for such conditions (Glenn v. Lake Erie & W. R. Co. — Ind. App. —, 73 N. E. 861).

It has been held that in respect of sidewalks maintained by carriers for use by its passengers, between its station and the public streets, its duty is the same as that of a municipality,—the duty of exercising reasonable care (O'Reilly v. Long Island R. Co. 15 App. Div. 79, 44 N. Y. Supp. 264, former appeal, 4 App. Div. 139, 38 N. Y. Supp. 779); but it seems that for the purpose of determining whether reasonable care has been exercised, the rule in the case of a city, that a reasonable time must elapse before notice of a dangerous condition will be imparted, cannot be applied where, during the continuance of a snow storm, the carrier stationed an employee upon its platform to keep it free from snow and ice (McGuire v. Interborough Rapid Transit Co. 104 App. Div. 105, 93 N. Y. Supp. 316).

Although the duty to exercise reasonable care does not apply where a passenger, waiting at a station used for both freight and passengers, goes to a platform of higher elevation than the other platform, and which he knows is used exclusively for the handling of freight, and is injured by falling through a hole therein (Gunderman v. Missouri, K. & T. R. Co. 58 Mo. App. 370; its application to the condition of an approach cannot be refused because the approach may have been adopted, instead of constructed, by the carrier (Gulf, C. & S. F. R. Co. v. Glenk, 9 Tex. Civ. App. 590, 30 S. W. 278); nor because it may have been constructed and owned by other persons, if it is constantly and notoriously used by passengers as a means of approach (Schlessinger v. Manhattan R. Co. 49 Misc. 504, 98 N. Y. Supp. 840).

A railroad company is not only bound to exercise reasonable care to protect its passengers from assault and injury by strangers (Exton v. Central R. Co. 63 N. J. L. 356, 56 L.R.A. (N.S.)

56 L.R.A. 508, 46 Atl. 1099); but, if it is engaged in the transportation of large numbers of passengers to and from stations, it must exercise reasonable care to limit the number of passengers who shall be permitted to go upon the platform at one time, and to regulate the movements and disposition of those admitted (Dittmar v. Brooklyn Heights R. Co. 91 App. Div. 378, 86 N. Y. Supp. 878; McGearty v. Manhattan R. Co. 15 App. Div. 2, 43 N. Y. Supp. 1086); and the duty to exercise reasonable care also extends to the lighting of the premises at night (Toledo, St. L. & W. R. Co. v. Stevenson, 122 Ill. App. 654; Buemann v. St. Paul, M. & M. R. Co. 32 Minn. 390, 20 N. W. 379; Abbot v. Oregon R. & Nav. Co. 46 Or. 549, 1 L.R.A. (N.S.) 851, 114 Am. St. Rep. 885, 80 Pac. 1012, 7 A. & E. Ann. Cas. 961).

—reasonably safe.

Then there are cases which make "reasonable safety" the criterion. Whether the duty to keep the premises "reasonably safe" is the same as the obligation to exercise "reasonable care" to keep them safe may, at the least, be said to admit of argument. But the possibility that these phrases may, in many instances, have been regarded as interchangeable, or, at least, the likelihood that the one may have been inadvertently used as a substitute for the other, is illustrated by the case of Fullerton v. Fordyce, 121 Mo. 1, 42 Am. St. Rep. 516, 25 S. W. 587, where the court, after declaring that it was the duty of a carrier to keep its station platforms "in a reasonably safe condition for convenient use," went on to say that since it was the duty of the carrier "to use reasonable care" to see that the platform was kept in a safe condition, it was gross negligence to allow a hole 8 inches wide and 6 feet long to remain in the floor of the platform for a period of four days.

On the other hand it might be objected that to say that the carrier is bound to keep the premises reasonably safe, is erroneously to impose an absolute duty in terms. Some such objection probably prevailed where it was held that the duty of a carrier in respect of the condition of its waiting room is only to exercise ordinary care to keep it in a safe condition, and its duty is not "to keep its waiting room in a reasonably safe condition." St. Louis, I. M. & S. R. Co. v. Grimsley, 90 Ark. 64, 117 S. W. 1064.

But, however this may be, there are numerous cases declaring that it is the carrier's duty to keep its stations, platforms, and approaches, not absolutely safe (Texas & P. R. Co. v. Woods, 15 Tex. Civ. App. 612, 40 S. W. 846), but in a reasonably safe condition for use by its passengers (Scanlan v. Tenney, 72 Fed. 225; Matthieson v. Burlington, C. R. & N. R. Co. 125 Iowa, 90, 100 N. W. 51; Irvin v. Missouri P. R. Co. 81 Kan. 649, 26 L.R.A. (N.S.) 739, 106 Pac. 1063; Cincinnati, N. O. & T. P. R. Co. v. Giboney, 124 Ky. 806,

100 S. W. 216; *MacLaren v. Boston Elev. R. Co.* 197 Mass. 490, 83 N. E. 1088; *Robertson v. Wabash R. Co.* 162 Mo. 382, 53 S. W. 1082; *Gunderman v. Missouri, K. & T. R. Co.* 58 Mo. App. 370; *Union P. R. Co. v. Evans*, 52 Neb. 50, 71 N. W. 1062; *Delaware, L. & W. R. Co. v. Trautwein*, 52 N. J. L. 169, 7 L.R.A. 435, 19 Am. St. Rep. 442, 19 Atl. 178; *Gilmore v. Philadelphia & R. R. Co.* 154 Pa. 375, 25 Atl. 774; *Texas & P. R. Co. v. Woods*, 15 Tex. Civ. App. 612, 40 S. W. 846; *Chesapeake & O. R. Co. v. Smith*, 103 Va. 326, 49 S. E. 487; *Herman v. Great Northern R. Co.* 27 Wash. 472, 57 L.R.A. 300, 68 Pac. 82; *White v. Seattle, E. & T. Nav. Co.* 36 Wash. 281, 104 Am. St. Rep. 948, 78 Pac. 909; *Barker v. Ohio River R. Co.* 51 W. Va. 423, 90 Am. St. Rep. 808, 41 S. E. 148). Or, as was remarked in one case, the duty of a carrier to a passenger who has alighted from its train is only to see that he is afforded a reasonable protection and immunity from danger in getting away from the point at which he alighted (*Central R. & Bkg. Co. v. Smith*, 80 Ga. 526, 5 S. E. 772); or, stating it in a different form: When a passenger alights from the train by invitation and at a point selected by the carrier, he is entitled to assume that a reasonably safe means of exit has been provided for him (*Burnham v. Wabash Western R. Co.* 91 Mich. 523, 52 N. W. 14). So, it has been held that the maintenance by a railroad company of a door like those in common use is not negligence merely because it is not all made of glass above the middle, so persons on opposite sides can see each other, nor because a screw eye 4 feet 10 inches from the bottom projects nine-sixteenths of an inch beyond the surface and causes injury to a person against whom it is violently pushed by another hurrying to a train, for the carrier is not bound to take precaution against the unusual and negligent use of its appliances by strangers; but if the appliances are reasonably safe when used with ordinary care, the duty of the carrier who supplies them is performed (*Graeff v. Philadelphia & R. R. Co.* 161 Pa. 230, 23 L.R.A. 606, 41 Am. St. Rep. 885, 28 Atl. 1107).

This duty to keep the premises reasonably safe has been held to devolve upon the company in the maintenance of a baggage room for use by passengers who go there to identify their baggage (*Bates v. Chicago, M. & St. P. R. Co.* 140 Wis. 235, 133 Am. St. Rep. 1069, 122 N. W. 745); and it has been held to extend not only to the physical condition of the platform, but also to the manner in which the carrier allows it to be used (*Mangum v. North Carolina R. Co.* 145 N. C. 152, 13 L.R.A. (N.S.) 689, 122 Am. St. Rep. 437, 58 S. E. 913); so that where, in order to reach a train, it is necessary for a passenger to cross over tracks intervening between the train and the station, the carrier is charged with the positive duty to provide a reasonably safe passage over intervening tracks, and not to permit locomotives or trains to pass over them while passengers are so 33 L.R.A. (N.S.)

crossing (*Keifner v. Pittsburg, C. C. & St. L. R. Co.* 223 Pa. 50, 70 Atl. 253).

The railway company must provide reasonable accommodations and appointments at their stations for their passengers (*Stewart v. International & G. N. R. Co.* 53 Tex. 289, 37 Am. Rep. 753); and this includes not only, the obligation to maintain a fire in the waiting room if necessary to make it comfortable (*Cincinnati, N. O. & T. P. R. Co. v. Mounts*, 31 Ky. L. Rep. 1162, 104 S. W. 748); but also the duty to keep the premises reasonably lighted for a sufficient time before and after the arrival and departure of trains, to enable passengers to avoid danger (*Hall v. Bessemer & L. E. R. Co.* 36 Pa. Super. Ct. 556); or, according to one case, to afford passengers a reasonable opportunity or time to reach a public highway or other safe thoroughfare, by the aid of such lighting, if it is needed for that purpose (*Wallace v. Wilmington & N. R. Co.* 8 Houst. [Del.] 529, 18 Atl. 818); or, as was said in another case, the carrier's duty is not discharged unless it so lights the place as to enable the traveling public to approach and leave its stations and trains with a reasonable degree of safety, though this principle only applies to the duty of lighting such platforms and approaches as are reasonably necessary to the ingress and egress to and from these stations and trains, and not necessarily to all platforms and approaches (*Texas & P. R. Co. v. Reich*, — Tex. Civ. App. —, 32 S. W. 817); but no lesser duty, in this respect, devolves upon the company in favor of persons arriving upon a special train out of the usual time of regular trains (*Gerhart v. Wabash R. Co.* 110 Mo. App. 105, 84 S. W. 100). It has been held that whether this duty has been performed in a particular case, depends upon the character of the station and the extent of the business there transacted, for, it is said, if many passengers are to be taken on and discharged from trains, and much baggage, mail, and express is to be handled by many employees, confusion and accident at night can be prevented only by the aid of the lighting system much more extensive than would be required under other circumstances (*St. Louis & S. F. R. Co. v. Marshall*, 71 Kan. 866, 81 Pac. 169).

So, it has been held that whether the carrier builds the platform itself or adopts one built by someone else, it is required to maintain it in a reasonably safe condition (*Haselton v. Portsmouth, K. & Y. Street R. Co.* 71 N. H. 589, 53 Atl. 1016).

Likewise it is held that a carrier is bound to keep "a recognized way" to and from its station in a reasonably safe condition for use by its passengers, by setting up barriers or lights to protect them from falling into holes in close proximity thereto (*Cross v. Lake Shore & M. S. R. Co.* 69 Mich. 363, 13 Am. St. Rep. 399, 37 N. W. 361); and that if, with full knowledge of the facts, it permits an unsafe and dangerous means of approach to its station

to be provided by another and used, it is as much liable for the injury as if it had itself set up and maintained the dangerous way (*Collins v. Toledo, A. A. & N. M. R. Co.* 80 Mich. 390, 45 N. W. 178); and that, in the absence of knowledge of a passenger that only one path has been provided by the carrier for the purpose of enabling passengers to leave its station, and in the absence of any direction or notice from the carrier to use a particular path, the passenger is at liberty to use any path which appears to be designed for such use, and as to him it is the carrier's duty to see that all such paths are reasonably safe and convenient (*Cazneau v. Fitchburg R. Co.* 161 Mass. 355, 37 N. E. 311); while, by way of limitation, it has been pointed out that the carrier's duty to maintain in a reasonably safe condition the approaches to and from its station does not apply to every cross or short cut over neighboring property, which individuals may adopt in reaching the station, although the use is sufficient to create a visible path, if the carrier does nothing to induce the public to believe that it has provided the path, or holds it out as safe (*Woods v. White Star Line*, 160 Mich. 540, 27 L.R.A.(N.S.) 992, 125 N. W. 396).

—ordinary care.

Again, there are cases which impose upon the carrier the duty of exercising "ordinary care" for the safety of passengers at its stations; and, from a practical view point at least, this seems about the same as the rule of "reasonable care." The likelihood that the two forms of expression may be used interchangeably may, perhaps, be illustrated by the case of *MacFeat v. Philadelphia, W. & B. R. Co.* 5 Penn. (Del.) 52, 62 Atl. 808, where the court declared that common carriers of passengers are responsible for any negligence resulting in injury to passengers, and are required, in the preparation, conduct, and management of their means of conveyance, to exercise every degree of care, diligence, and skill which a "reasonable man" would use in like circumstances; and then afterwards said that the term "ordinary care" when applied to the management of railroad engines and cars in motion imports all the care which the peculiar circumstances of the place or occasion reasonably require, and that this will be increased or diminished according as the ordinary liability to danger and accident is increased or diminished by circumstances.

Cases making "ordinary care" the criterion declare that the carrier is bound, neither so to maintain its premises as to make accidents to passengers using the same impossible (*Lycett v. Manhattan R. Co.* 12 App. Div. 326, 42 N. Y. Supp. 431); that is, to keep them absolutely safe (*Skottowe v. Oregon Short Line & U. N. R. Co.* 22 Or. 430, 16 L.R.A. 593, 30 Pac. 222); for it is not an insurer in this regard (*Gulf, C. & S. F. R. Co. v. Gross*, — Tex. Civ. App. —, 21 S. W. 186); nor to exer-

cise extraordinary diligence in this respect (*Georgia, C. & N. R. Co. v. Brown*, 120 Ga. 380, 47 S. E. 942); and that a lesser degree of care is required in regard to the condition of the approaches to its cars, such as platforms, halls, stairways, etc., than in respect of the roadbed, machinery, etc. (*Kelly v. Manhattan R. Co.* 112 N. Y. 443, 3 L.R.A. 74, 20 N. E. 383). It's duty is stated to be that of exercising, in view of the dangers to be apprehended, as said in some cases (*Chicago & G. T. R. Co. v. Stewart*, 77 Ill. App. 66; *Laffin v. Buffalo & S. W. R. Co.* 106 N. Y. 136, 60 Am. Rep. 433, 12 N. E. 599; *Kelly v. Manhattan R. Co.* 112 N. Y. 443, 3 L.R.A. 74, 20 N. E. 383; *Lycett v. Manhattan R. Co.* 12 App. Div. 326, 42 N. Y. Supp. 431; *Skottowe v. Oregon Short Line & U. N. R. Co.* 22 Or. 430, 16 L.R.A. 593, 30 Pac. 222), ordinary care for the safety and comfort of passengers at its stations (*St. Louis, I. M. & S. R. Co. v. Wilson*, 70 Ark. 136, 91 Am. St. Rep. 74, 66 S. W. 661; *Arkansas Midland R. Co. v. Robinson*, — Ark. —, 130 S. W. 536; *Southern R. Co. v. Reeves*, 116 Ga. 743, 42 S. E. 1015; *Georgia, C. & N. R. Co. v. Brown*, 120 Ga. 380, 47 S. E. 942; *Illinois C. R. Co. v. Keegan*, 210 Ill. 150, 71 N. E. 321; *Chicago & G. T. R. Co. v. Stewart*, 77 Ill. App. 66; *Pittsburgh, C. C. & St. L. R. Co. v. Harris*, 38 Ind. App. 77, 77 N. E. 1051; *Louisville & N. R. Co. v. Wolfe*, 80 Ky. 82; *Bacon v. Casco Bay S. B. Co.* 90 Me. 46, 37 Atl. 328; *Burke v. St. Louis & S. W. R. Co.* 120 Mo. App. 683, 97 S. W. 981; *Chicago, B. & Q. R. Co. v. Mann*, 78 Neb. 541, 111 N. W. 379; *Laffin v. Buffalo & S. W. R. Co.* 106 N. Y. 136, 60 Am. Rep. 433, 12 N. E. 599; *Missouri, K. & T. R. Co. v. Criswell*, 101 Tex. 399, 108 S. W. 806; *Texas Midland R. Co. v. Brown*, — Tex. Civ. App. —, 58 S. W. 44; *Chicago, R. I. & P. R. Co. v. Barrett*, 35 Tex. Civ. App. 366, 80 S. W. 660). Stated a little more elaborately, its duty is to provide a reasonably safe place for the accommodation of those awaiting the arrival and departure of trains, and to take such precaution for their safety as would naturally occur to ordinarily prudent and careful men, and to guard against such dangers of accidents as are likely to occur or are reasonably to be apprehended by prudent men (*Kirby v. Delaware & H. Canal Co.* 20 App. Div. 473, 46 N. Y. Supp. 777).

On the other hand, in *Weston v. New York Elev. R. Co.* 73 N. Y. 595, where a passenger was injured by slipping upon an icy platform, the court held that it is not sufficient that the carrier does what ordinary care and prudence require of any individual over whose premises the public are permitted to go, and that while the company is not bound, on the other hand, to keep its platform in such a condition that it would have been impossible for any passenger to slip, it should so maintain it as to avoid injury to a person using the ordinary care which people use when not apprised of danger. And it was held in *Gulf, C. & S. F. R. Co. v. Butcher*, 83 Tex.

309, 18 S. W. 583, that the carrier was not bound to have its platform absolutely safe, but only reasonably so under the circumstances; but that in accomplishing this result it was bound to use more than ordinary care and precaution, the court apparently being of the opinion that the degree of care which the carrier was bound to exercise in the circumstances was that which a very prudent person would have used in his own case under the same or similar circumstances. These two cases are, of course, overwhelmed by those declaring in favor of the rule of ordinary care.

This duty to exercise ordinary care has been held to require the premises to be kept free from traps and pitfalls such as are likely to cause injury to passengers (*McNaughton v. Illinois C. R. Co.* 136 Iowa, 177, 113 N. W. 844); although one seeking to recover for injury thereby must prove that the carrier or its servants knew, or by the exercise of ordinary care could have known, of the defect in time to have reasonable opportunity to repair it (*Munro v. St. Louis & S. F. R. Co.* — Mo. App. —, 135 S. W. 1016).

So, while the carrier is not primarily liable for the negligence of a mail agent, it must exercise ordinary care to protect passengers against injuries by mail sacks thrown from its trains, either by requiring the sacks to be thrown at a certain place, or by notices of warning, or other suitable means. *Huddleston v. St. Louis, I. M. & S. R. Co.* 90 Ark. 378, 119 S. W. 280.

And in *Trinity & S. R. Co. v. O'Brien*, 18 Tex. Civ. App. 690, 46 S. W. 389, involving an action for injuries received in defendant's railway station by being bitten by a dog alleged to have been improperly fastened by the defendant's servant, it was held that the jury should have been charged that the degree of care devolving upon the defendant was that employed by reasonably prudent persons, and not that which would be exercised by "very prudent persons" in such situations.

While it has been held that a carrier cannot escape liability for injury to a passenger who tripped over the brace of a semaphore pole on the platform, by showing that the semaphore and its attachments were constructed in the manner usually followed by railway companies, but that the criterion in determining its responsibility is whether ordinary care was exercised in its construction and maintenance (*Vance v. Great Northern R. Co.* 106 Minn. 172, 118 N. W. 674), it has, on the other hand, been held, in applying the rule of ordinary care, that the adoption of a method of platform construction which accords with that in general use by well-regulated railroad companies, and which is approved by experience, is a due performance of the duty which the carrier owes to its passengers (*Feil v. West Jersey & S. R. Co.* 77 N. J. L. 502, 72 Atl. 362).

With respect to heating its stations, during cold weather, for use by passengers, the carrier is not charged with the duty

owed by an innkeeper to his guest, but he must exercise ordinary care for the accommodation and comfort of the passengers (*International & G. N. R. Co. v. Doolan*, — Tex. Civ. App. —, 120 S. W. 1118); and it is not relieved of this duty with respect to a person compelled to wait several hours for a delayed train, by the adoption of a statute requiring the carrier to keep its station lighted and warm for a period of not less than one hour before the arrival and after the departure of all trains (*Texas & P. R. Co. v. Cornelius*, 10 Tex. Civ. App. 125, 30 S. W. 720; *International & G. N. R. Co. v. Doolin*, supra).

The rule that ordinary care only is required was applied where the defendant alleged that she was injured by falling over a man engaged in posting bills in a passageway leading to the defendant's ticket office (*Lycett v. Manhattan R. Co.* 12 App. Div. 326, 42 N. Y. Supp. 431); and it is held to apply to the removal of ice or snow from the platform (*Waterbury v. Chicago, M. & St. P. R. Co.* 104 Iowa, 32, 73 N. W. 341); and also to the lighting of the station, platforms, and approaches (*St. Louis, I. M. & S. R. Co. v. Battle*, 69 Ark. 369, 63 S. W. 805; *Hiatt v. Des Moines, N. & W. R. Co.* 96 Iowa, 169, 64 N. W. 766; *Texas C. R. Co. v. Wheeler*, 52 Tex. Civ. App. 603, 116 S. W. 83).

A carrier which attracts unusually large crowds to its station is bound to exercise ordinary and reasonable care for their safety, having due regard to the numbers and character of those on its premises and for the risks and dangers to which they are exposed. *Illinois C. R. Co. v. Treat*, 75 Ill. App. 327, affirmed in 179 Ill. 576, 54 N. E. 290. Ordinary prudence, in such circumstances, requires the carrier to protect its passengers against injuries resulting from dangers that attend the congregation of persons in large numbers (*Cousineau v. Muskegon Traction & Lighting Co.* 145 Mich. 314, 108 N. W. 720).

To render the rule of ordinary care applicable, the use which a passenger makes of the premises must be exercised in conformity with the manifest purposes for which they were intended. *Dotson v. Erie R. Co.* 68 N. J. L. 679, 54 Atl. 827.

So, no duty toward a passenger of exercising ordinary care devolves upon a carrier in respect of a portion of its platform used exclusively for the handling of freight, where it is not a place to which the public would naturally or ordinarily resort, and there is nothing from which consent or invitation to do so can be implied. *Houston E. & W. T. R. Co. v. Grubbs*, 28 Tex. Civ. App. 367, 67 S. W. 519.

But the carrier's duty to exercise ordinary care to keep and maintain its platform in a reasonably safe condition obtains irrespective of whether it was built by, and was under the control of, a third person, if it is used by the carrier, or by its passengers with its knowledge and consent. *Houston, E. & W. T. R. Co. v. McCarty*, 40 Tex. Civ. App. 364, 89 S. W. 805.

And a railway company which, expressly or by implication, invites its passengers to use a stile over a wire fence in leaving its grounds, is bound to use at least ordinary care in seeing that it is fit for the purpose intended, although the stile was not erected by it, and the defective part is not on its property, and notwithstanding it has no right to go upon the adjoining premises to make inspection or repairs. *Cotant v. Boone Suburban R. Co.* 125 Iowa, 46, 69 L.R.A. 982, 99 N. W. 115.

So, the fact that an approach to a passenger station was constructed by town authorities does not excuse the railroad company from its duty to exercise ordinary care to keep it free from danger to its patrons. *St. Louis & S. F. R. Co. v. Caldwell*, 93 Ark. 286, 124 S. W. 1034.

And a carrier's duty to exercise ordinary care in respect of the physical condition and proper lighting of a walk leading to a boat landing is not defeated by the fact that the walk is upon a public street, where the street has never been opened as such, nor used except by the carrier and those doing business with it. *Skottowe v. Oregon Short Line & U. N. R. Co.* 22 Or. 430, 16 L.R.A. 593, 30 Pac. 222. L. A. W.

KENTUCKY COURT OF APPEALS.

LOUISVILLE RAILROAD COMPANY,
Appt.,

FRANK HUTTI.

(141 Ky. 511, 133 S. W. 200.)

Carrier — transfer a condition to paying fare.

1. A passenger on a street car who is entitled to transfer on payment of fare cannot make the simultaneous issuance of the transfer a condition of paying the fare, and in case he attempts to do so, and refuses to pay his fare without receiving his transfer, he may be ejected from the car, although experience has shown that, if the transfer is not issued when the fare is paid, but after the conductor has finished collecting all fares in the car, he will reach his transfer point before receiving the transfer.

False arrest — probable cause — fine.

2. An action cannot be maintained for

Note.—A question similar to that involved in *LOUISVILLE R. Co. v. HUTTI* was raised in *Louisville & N. R. Co. v. Cotten-gim*, 13 L.R.A. (N.S.) 624, where a passenger tendered a larger sum of money than the amount of his fare, and demanded a return of the proper change as a condition for giving up the larger sum, it being held that this was an insufficient tender.

As to what will amount to a sufficient tender of fare to prevent ejection, see *Kirk v. Seattle Electric Co.* 31 L.R.A. (N.S.) 991, and the note appended thereto. 33 L.R.A. (N.S.)

false arrest if a fine has been imposed by a police court for the conduct which caused the arrest.

(January 11, 1911.)

A PPEAL by defendant from a judgment of the Common Pleas Branch, Third Division, of the Circuit Court for Jefferson County, overruling the defendant's motion for a peremptory instruction in an action for an assault by defendant's servant, and for false arrest and imprisonment. Reversed.

The facts are stated in the opinion.

Messrs. Fairleigh, Straus, & Fairleigh and Howard B. Lee for appellant.

Messrs. Edwards, Ogden, & Peak for appellee.

O'Rear, J., delivered the opinion of the court:

Appellee took passage on one of appellant's street cars on Fourth street, in Louisville. He wanted to transfer to another car going down Oak street. When approached for his fare on the Fourth street car, he held out his hand containing the fare, a nickel, and offered to pay it, but demanded as a condition that he be then and there handed a transfer ticket. The rule of the company was that conductors should issue and deliver transfer tickets when fares were paid. The conductor did not refuse to give a transfer ticket. According to some of the witnesses, he said that he would issue all transfers after he had collected all fares. According to other testimony, he said that he would issue the transfer to appellee after he had paid his fare. Appellee insisted that he had failed on previous occasions to get his transfer, as the car would pass Oak street before the conductor would pass through issuing transfer slips after he had finished collecting all fares. The conductor insisted upon payment of the fare. He did not refuse to give the transfer ticket, but insisted on the fares being paid first. Appellee insisted on the transfer ticket's being handed him simultaneously with the payment of the fare. The altercation between the conductor and the passenger maintained that form; appellee retaining his fare in his hand, but offering it upon the condition that the transfer ticket be then and there handed to him. The conductor stopped the car and told appellee to get off. He refused. The conductor then took hold of him and tried to put him off, but failed. A policeman was called by the conductor, who arrested appellee on the conductor's complaint, charged with disorderly conduct. He was fined in the police court. He thereupon instituted this proceeding against appellant for the assault

upon him by the conductor, and for false arrest and imprisonment. Upon the disclosure of the foregoing facts the court struck out the cause of action based on the false arrest, as the judgment of the police court was conclusive of the existence of reasonable grounds therefor. The ruling was proper. Upon the other branch of the case the circuit court overruled appellant's motion for a peremptory instruction, and submitted the question to the jury, who returned a verdict for appellee for \$250 damages.

The ground of complaint on this appeal is the refusal of the trial court to grant appellant's motion for peremptory instruction. The propriety of the ruling depends on the nature of the contract to carry the passenger and the rights of the parties upon its breach. It may be assumed that appellee was entitled to a transfer, under his contract, entitling him to continue his journey upon the Oak street car, provided the contract was consummated. But before he was entitled either to continue his passage on the Fourth street car, or to transfer to the Oak street car, he must first have paid or tendered the necessary fare, which was 5 cents. He did not pay it. He tendered it, but tendered it conditionally; and from what he then said, and from his conduct as well, it is inferable that, unless the conductor had complied with his demand to deliver simultaneously the transfer ticket, he would not have paid the fare tendered. In this appellee misconceived his right. It was his duty to pay his fare, or to tender it, without condition. If thereupon the conductor refused to allow him to proceed upon the car, and ejected him, he had his demand for damages. Or if the conductor should have received his fare, and have allowed him to remain on the Fourth street car, but failed to give him in time a transfer ticket entitling him to continue his journey on the Oak street car, he was entitled to his damages, which would be the sum which he might have been compelled to pay on the Oak street car in order to complete his passage. But, though the conductor wrongfully intended not to issue appellee a transfer slip, that did not entitle appellee to ride on the Fourth street car without paying the fare. The conductor had the right to demand the payment of the fare before either allowing appellee to continue upon the car or issuing him a transfer slip. The contract began only upon the payment or tender of the consideration. The acts could not well be simultaneous—at least, are not required to be. One must precede, and that is payment. Possibly a more courteous and patient treatment and explanation by the conductor might have averted the trouble.

33 L.R.A. (N.S.)

But, whether so or not, the conductor was within his legal rights in demanding the payment of the fare first, and refusing a conditional tender of it. When appellee refused either to pay or tender the fare unconditionally, he had not the right to remain on the car. He had not the right to ride there without paying the fare. When requested to leave the car after it stopped for that purpose, he was in the wrong in failing to do so; and it was lawful for the conductor to eject him, using no more force than was reasonably necessary for that purpose. It is not complained that the conductor used excessive force.

Under the facts shown, the court erred in not granting appellant's motion for peremptory instruction.

Reversed and remanded for proceedings consistent herewith.

IDAHO SUPREME COURT.

RE GUARDIANSHIP OF ELLENA MAY CROCHERON et al.

A. B. CROCHERON, Appt.,
v.

JOSEPH BABINGTON, Respt.

(16 Idaho, 441, 101 Pac. 741.)

Guardian — surviving parent — rights.

1. Under the provisions of § 5774, Rev. Codes, the surviving parent who is competent to transact his own business, and not otherwise unsuitable, is entitled to the guardianship of his minor children.

Same — facts — conclusion.

2. Held, under the facts of this case, it appears that the father is competent to transact his own business, and that he is not otherwise unsuitable to have the guardianship of his minor children.

(May 1, 1909.)

Headnotes by SULLIVAN, Ch. J.

Note. — Right of parent to appointment as guardian of minor child.

- I. Scope, 868.
- II. General rights of father, 869.
- III. General rights of mother, 870.
- IV. Rights as between parents, 871.
- V. Welfare of child as affecting parents' rights, 871.
- VI. Suitableness of parents.
 - a. In general, 872.
 - b. Father, 872.
 - c. Mother.
 1. In general, 874.
 2. Effect of remarriage, 875.

I. Scope.

This note is confined strictly to the sub-

APPEAL by protestant from a judgment of the District Court for Owyhee County affirming a judgment of the Probate Court appointing Joseph Babington guardian of the estates and persons of Ellena May and Letha Joan Crocheron, and denying protestant's application to be himself appointed. Reversed.

The facts are stated in the opinion.

Messrs. C. P. McCarthy and T. D. Cahalan, for appellant:

The father has a legal right to guardianship which cannot be set aside unless it is affirmatively clear and positively shown that the father is not competent to transact his own business, or is otherwise unsuitable.

Re Galleher, 2 Cal. App. 364, 84 Pac. 352;

Markwell v. Pereles, 95 Wis. 406, 69 N. W. 798; Schouler, Dom. Rel. §§ 245-248; Ex parte Miller, 109 Cal. 662, 42 Pac. 428; Campbell v. Wright, 130 Cal. 380, 62 Pac. 613; Hernandez v. Thomas, 50 Fla. 522, 2 L.R.A. 203, 111 Am. St. Rep. 137, 39 So. 641; 7 A. & E. Ann. Cas. 440; Ex parte Davidge, 72 S. C. 16, 51 S. E. 269; Watts v. Lively, — Tex. Civ. App. —, 60 S. W. 676; Gilmore v. Kitson, 165 Ind. 402, 74 N. E. 1083; Weir v. Marley, 99 Mo. 484, 6 L.R.A. 672, 12 S. W. 798; Re Scarritt, 70 Mo. 565, 43 Am. Rep. 768; State ex rel. Hodgdon v. Libbey, 44 N. H. 321, 82 Am. Dec. 223; Com. v. Briggs, 16 Pick. 204; State ex rel. Herrick v. Richardson, 40 N. H. 272; Rust v. Vanvacter, 9 W. Va. 600;

ject indicated in the title, and therefore does not deal with the right of the parent to obtain the custody and control of minor children except as that question is incidental to the appointment of the parent as guardian.

As to the effect of attempt by father to appoint guardian for his child as against the surviving mother, see note to Kellogg v. Burdick, 13 L.R.A. (N.S.) 288.

As to right of parent to appoint a testamentary guardian for minor children, see note to Hernandez v. Thomas, 2 L.R.A. (N.S.) 203.

II. General rights of father.

By the great weight of statutory and judicial authority, the father of a minor is entitled to appointment as guardian of such child in preference to any other person, provided only that he is fit and suitable to be intrusted with the welfare of the infant's person and the custody of its property. Re Galleher, 2 Cal. App. 364, 84 Pac. 352; RE CROCHERON; Andrino v. Yates, 12 Idaho, 618, 87 Pac. 787; Gill v. Riley, 28 Ky. L. Rep. 639, 90 S. W. 2; Griffin v. Sarsfield, 2 Dem. 4; Re McChesney, 106 Wis. 315, 82 N. W. 149.

And the putative father, if otherwise competent, is, on the death of the mother of an illegitimate child, impliedly entitled to appointment as guardian under a statute providing that the father while living, and where there is no lawful father, the mother, if living, shall be entitled to the guardianship of their minor children. Barela v. Roberts, 34 Tex. 554.

And in Ex parte Bond, 16 L. J. Ch. N. S. 147, 11 Jur. 114, a father, upon satisfactory proof to the court on means and condition in life, and the giving of a bond by two sureties, was appointed guardian of the estate of his minor daughter. The right of the father to such appointment was not otherwise discussed.

But in Senseman's Appeal, 21 Pa. 331, it was said that "it is deemed improper to appoint the father the guardian of his child's estate." The court stated the reasons as follows:

"It is the duty of a father to maintain, protect, and educate his offspring. His power over them is derived from that duty. The latter could not be performed without the existence of the former. The authority of a guardian bears a near resemblance to that of a father, and is plainly derived out of it; the guardian being only a temporary parent. He usually performs the office of both tutor and curator of the Roman law: the former of which had charge of the maintenance and education of the minor, and the latter the care of his fortune. From the existence of the parent's authority, and the just obligations the child is under to him for his care and protection, he is apt to forget that his only compensation is its affection, obedience, and services. He has no right to the estate which it may have received from the bounty of others. To place its property or money in his hands has been found unfavorable to the interests and happiness of both. It throws obstacles in the way of enforcing the rights of the minor, not likely to be encountered in a contest with a stranger."

The early Alabama cases are confusing, and in part, at least, conflict with the general rule. Thus, in Hall v. Lay, 2 Ala. 529, it was said that the statement in Huie v. Nixon, 6 Port. (Ala.) 77, to the effect that the relation of parent forms no exclusive claim to the wardship of a minor child, and that such a claim might be set aside in favor of a stranger if the parent was unfit, was erroneous. In fact, it has been held in Alabama that a guardian cannot be appointed for an infant under fourteen years of age if its father be alive, except under very peculiar circumstances, as the father, as natural guardian, was, as such, held entitled to its custody and control. Hall v. Lay, supra; Wood v. Wood, 3 Ala. 756 (holding that this rule extends to the property of the minor child. But that this is not good law, see Lang v. Pettus, 11 Ala. 37, and Nelson v. Goree, 34 Ala. 565). But the later law of Alabama seems to accord with the general rule in that it is provided by statute, that when a minor has a father

Johnston v. Johnston, 89 Wis. 416, 62 N. W. 181; Re Salter, 142 Cal. 412, 76 Pac. 51.

The competency and suitability of the father at the time of his application are the questions to be considered.

Parker v. Wiggins, — Tex. Civ. App. —, 86 S. W. 788; Hernandez v. Thomas, 50 Fla. 522, 2 L.R.A. 203, 111 Am. St. Rep. 137, 39 So. 641, 7 A. & E. Ann. Cas. 446.

Messrs. C. M. Hays and J. F. Nugent, for respondent:

The welfare and the happiness of the infant are the all-controlling questions.

Andrino v. Yates, 12 Idaho, 618, 87 Pac. 787; Lally v. Fitz Henry, 85 Iowa, 49, 16 L.R.A. 681, 51 N. W. 1155; Bonnett ex rel. Newmeyer v. Bonnett, 61 Iowa, 201, 47 Am. Rep. 810, 16 N. W. 91; Shaw v. Nachit-

wey, 43 Iowa, 658; Drumb v. Keen, 47 Iowa, 437; Fouts v. Pierce, 64 Iowa, 73, 19 N. W. 854; Jenkins v. Clark, 71 Iowa, 556, 32 N. W. 504; Joab v. Sheets, 99 Ind. 328; United States v. Green, 3 Mason, 485, Fed. Cas. No. 15,256; Corrie v. Corrie, 42 Mich. 509, 4 N. W. 213; Re Bort, 25 Kan. 310, 37 Am. Rep. 255; Sturtevant v. State, 15 Neb. 459, 48 Am. Rep. 349, 19 N. W. 617; Re Stockman, 71 Mich. 180, 38 N. W. 876; Giles v. Giles, 30 Neb. 624, 46 N. W. 916; Re Gates, 95 Cal. 461, 30 Pac. 596; Merritt v. Swimley, 82 Va. 433, 3 Am. St. Rep. 115; Richards v. Collins, 45 N. J. Eq. 283, 14 Am. St. Rep. 726, 17 Atl. 831; Com v. Hammond; 10 Pick. 274; Re McDowle, 8 Johns. 328; People ex rel. Ordonaux v. Chegaray, 18 Wend. 637; Green v. Campbell, 35 W.

living, and has an estate in his own right, a guardian must be appointed, and his father, if suitable, is entitled to a preference; and, if dead, the mother is entitled to the same rights as the father when living. Striplin v. Ware, 36 Ala. 87.

In Louisiana it is provided by statute that the father cannot, for any cause whatever, be excused from the obligation of the tutorship of his minor children, and held that the appointment of any other person is null. Watt's Succession, 111 La. 937, 36 So. 31. And under the early Louisiana law, the father could not be excused from the tutorship (which included personal care and control and administration of the child's property) of his minor child by an appointment by the child's adopted mother of a testamentary tutor, as, under the Code, tutorship of a minor child belonged of right to the surviving father or mother, and the right of the natural parent to control was not entirely lost by adoption. But under later statutes which have broadened the rights of adopting parents, it is held that the natural parent is not entitled to appointment as against a testamentary tutor appointed by the adopting mother. Haley's Succession, 49 La. Ann. 709, 22 So. 251.

III. General rights of mother.

The general rule is to the effect that if the father of a minor is dead, the mother is entitled to the same preference as regards appointment as guardian of her minor children as the father would be entitled to were he alive. Re Snowball, 156 Cal. 240, 104 Pac. 444; Re Salter, 142 Cal. 412, 76 Pac. 51; Re Campbell, 130 Cal. 380, 62 Pac. 613; Re Austerhaudt Minors, Myrick, Prob. Ct. Rep. (Cal.) 18; Re Lindner, 13 Cal. App. 209, 109 Pac. 101; Re Galleher, 2 Cal. App. 364, 84 Pac. 352; Re CROCHERON; Eldridge v. Lippincott, 1 N. J. L. 397; Re Meech, 1 Connolly, 535, 7 N. Y. Supp. 257; Burmester v. Orth, 5 Redf. 259; Re Burdick, 41 Misc. 346, 84 N. Y. Supp. 942, reversed on other grounds in 98 App. Div. 560, 90 N. Y. Supp. 161; 33 L.R.A.(N.S.)

Barela v. Roberts, 34 Tex. 554; Re Master-son, 45 Wash. 48, 122 Am. St. Rep. 886, 87 Pac. 1047; Ramsay v. Ramsay, 20 Wis. 507; Re X. 68 L. J. Ch. N. S. 265 [1899], 1 Ch. 526, 80 L. T. N. S. 311, 47 Week. Rep. 345.

And in King v. Seals, 45 Ala. 415, it was held that a mother during her widowhood may become the guardian of her minor children, where there are no statutory restrictions as to sex.

So, the mother of an illegitimate child, if deemed a fit and proper person, may be appointed its guardian. Ramsay v. Thompson, 71 Md. 315, 6 L.R.A. 705, 18 Atl. 592.

And in Wallis v. Campbell, 13 Ves. Jr. 517, a married woman was appointed guardian of the estate of her illegitimate child.

In Re Allsop, C. P. Cooper, 44, 7 L. J. Ch. N. S. 194, a mother, upon the death of her husband, was appointed guardian of the estate of her infant son; but the question of her right to such appointment was not discussed.

But in Re Cook, 20 L. J. Ch. N. S. 392, 15 Jur. 836, it was said that in no rank of life would the court appoint a mother to be the guardian of her minor children without having information as to the deceased father's family. (No further explanation is given in the report of the case.)

And in Courtois v. Vincent, Jacob, 268, another person than the mother was appointed guardian of her minor children, although she petitioned for such appointment. The case as reported does not show the reasons for the decision, or upon what it was based.

And where, in addition to the provision that the custody shall go to father or mother, if competent, the statute further provides that the father and mother, if living apart, have equal rights, the mother, living apart from her husband, if competent, is entitled to the custody of her child, as against a paternal grandparent. Re Van Loan, 142 Cal. 423, 76 Pac. 37.

And in Isaacs v. Taylor, 3 Dana, 600, it was held that the mother, if not unworthy, should be appointed guardian of her in-

Va. 698, 29 Am. St. Rep. 848, 14 S. E. 212; Jones v. Bowman, 13 Wyo. 79, 67 L.R.A. 860, 77 Pac. 441; Willet v. Warren, 34 Wash. 647, 76 Pac. 274; Campbell v. Wright, 130 Cal. 380, 62 Pac. 613; Van Walters v. Children's Guardians, 132 Ind. 567, 18 L.R.A. 431, 32 N. E. 508; Russner v. McMillan, 37 Wash. 416, 79 Pac. 988.

The court will take into view not merely the child's temporal welfare, but the state of her affections, attachments, her training, education, and morals.

Foster v. Mott, 3 Bradf. 412; Badenhoof v. Johnson, 11 Nev. 87; United States ex rel. Schneider v. Sauvage, 91 Fed. 490; Re Carter, 77 Kan. 765, 93 Pac. 584; Kelsey v. Green, 69 Conn. 291, 38 L.R.A. 473, 37 Atl. 679; Sheers v. Stein, 75 Wis. 44, 5 L.R.A.

783, 43 N. W. 728; Whalen v. Olmstead, 61 Conn. 263, 15 L.R.A. 595, 23 Atl. 964; 15 Am. & Eng. Enc. Law, 2d ed. p. 38; 3 Am. & Eng. Enc. Law, p. 357; 5 Am. & Eng. Enc. Law, p. 838, note 38; 22 Cyc. Law & Proc. p. 519; Church, Habeas Corpus, § 446; Schouler, Dom. Rel. 5th ed. § 248; 2 Story, Eq. Jur. § 1341; Brooke v. Logan, 2 Am. St. Rep. 183, note; Tytler v. Tytler, 15 Wyo. 319, 123 Am. St. Rep. 1067, 89 Pac. 2.

It is not a question of right of property in the child.

Merritt v. Swimley, 82 Va. 433, 3 Am. St. Rep. 115; United States v. Green, 3 Mason, 485; Fed. Cas. No. 15,256; Hocheimer, Custody of Infants, § 10.

Bad reputation once established is presumed to continue.

fant child, especially in preference to the executor of the child's deceased father.

And in Louisiana, the appointment of any other than the mother, where the natural father is dead, is void, as a tutor dative cannot be appointed where a legitimate tutor exists. Magdeleine v. Mayor, 1 Mart. (La.) 200.

But a mother's right to appointment as tutrix of her minor children was unknown to the Roman law until the promulgation of the 118th Novel of Justinian, chapter 5 of which conferred tutorship on her as the nearest relation when the father had appointed no tutor by will, but upon the express condition that she renounce the right to remarry. Berlucaux v. Berlucaux, 7 La. 545.

IV. Rights as between parents.

As before shown, other things being equal, the father is the first to be preferred and the mother the second in line of preference in selecting a guardian for a minor child.

But as between a mother of good character who has remarried after obtaining a divorce, and a father of questionable character who has remarried one whose character is seriously attacked, the guardianship of minor girls should be awarded to the mother. Re Austerhaudt Minors, Myrick, Prob. Ct. Rep. (Cal.) 18. See also Re Van Loan, supra, III. for statutory provision regulating rights when parents are living apart.

V. Welfare of child as affecting parents' rights.

As between a father and a grandparent, a mere finding that the appointment of the grandparent is for the best interests of the minor in respect of the temporal, monetary, and moral welfare is insufficient to warrant giving the custody of the minor to the grandparent, where by statute it is made the duty of the court to appoint the father or the mother if found competent to discharge the duties of guardianship. Re Campbell, 130 Cal. 380, 62 Pac. 613. And 33 L.R.A. (N.S.)

under such statute the right of the father, he being competent to have the custody and control of his child, is not affected by the fact that the child is in delicate health, and would have better opportunity for fresh air and exercise at the home of his grandparent than at the city residence of his father. Re Salter, 142 Cal. 412, 76 Pac. 51. And see Weisne's Appeal, 39 Conn. 537, to the effect that the fact that the minor is in such a condition of health that removal would not be safe is not entitled to consideration in determining the right of a mother to her child as against a stranger who had been appointed its guardian upon application stating that the mother was unfit to have the custody.

And the fact that the father's financial ability is not as great as another's does not warrant granting letters of guardianship of minor children to such other in preference to their father, if he is otherwise suitable. Re Tully Infants, 54 Misc. 184, 105 N. Y. Supp. 858.

So it has been held that, as against strangers, the father, however humble and poor, if of good moral character and able to support the child in his own style of life, cannot be deprived of its guardianship, however brilliant the advantages others may offer. Hernandez v. Thomas, 50 Fla. 522, 2 L.R.A. (N.S.) 203, 111 Am. St. Rep. 137, 39 So. 641, 7 A. & E. Ann. Cas. 446. See also RE CROCHERON.

And where the statute entitles first the mother and then the next of kin to be appointed guardians of a minor under fourteen years of age, the right of the mother cannot be disregarded unless for satisfactory reasons. But such right must be held in subordination to, and exercised in consistency with, the rights, the moral training, and the highest welfare of the child. Albert v. Perry, 14 N. J. Eq. 540. See also Re Winans, 5 N. J. L. J. 250.

In some cases it is said that the welfare of the child is a paramount consideration (Griffin v. Sarsfield, 2 Dem. 4; Re Meech, 1 Connoly, 535, 7 N. Y. Supp. 257); and in others, that the controlling consideration is the welfare of the child (Re John-

Mynatt v. Hudson, 66 Tex. 66, 17 S. W. 396; *Snow v. Grace*, 29 Ark. 138; 1 Greenl. Ev. §§ 461, 462; *Com. v. Billings*, 97 Mass. 405; *Rathbun v. Ross*, 46 Barb. 127; *State v. Lanier*, 79 N. C. 622.

Sullivan, Ch. J., delivered the opinion of the court:

This appeal involves the guardianship of Ellena May and Letha Joan Crocheron, minor daughters of A. B. Crocheron. Said children are about eight and ten years of age, respectively, at the present time. It appears that the mother of these children, Mrs. Millie Crocheron, died about November 9, 1907, in Nampa, Idaho, and thereafter, on December 24, 1907, Joseph Babington, the stepfather of the mother, filed his petition

in the probate court of Owyhee county, praying that he be appointed guardian of said minors. Said petition sets forth the death of the mother, and, among other facts, states as follows: "That A. B. Crocheron, father of said Ellena May and Letha Joan Crocheron, is an unsuitable person to be appointed their guardian, by reason of his indigent condition and incapacity to properly provide for and educate them; by reason of his insobriety and lack of integrity; by reason of the fact he abandoned said children in 1903, and has failed and neglected to provide for their support since said time; and by reason of his immorality. That he is without a home, and a nonresident of Owyhee county, where said children reside. That therefore it is necessary and

son, 87 Iowa, 130, 54 N. W. 69; *Re Winans*, 6 N. J. L. J. 250; *Re Burdick*, 41 Misc. 348, 84 N. Y. Supp. 932; while in still others it is said that the best interests of the minor are alone to be consulted (*Holley v. Chamberlain*, 1 Redf. 333). But that it is not enough to consider the interests of the child alone, and that the natural rights of the parent must be considered, see *Hernandez v. Thomas*, 50 Fla. 525, 2 L.R.A. (N.S.) 203, 111 Am. St. Rep. 137, 39 So. 641, 7 A. & E. Ann. Cas. 446, as set out in *RE CROCHERON*.

However, where the right of the parent, because of evidence tending to show abandonment, forfeiture, or unsuitableness, is not clear, it has been held that the best interests of the child will govern. *Andrino v. Yates*, 12 Idaho, 618, 87 Pac. 787; *Smidt v. Bennga*, 140 Iowa, 399, 118 N. W. 439.

VI. Suitableness of parents.

a. In general.

The question of the competency or incompetency of the petitioning parent is largely one of discretion in the trial court. *Re Bedford*, 158 Cal. 145, 110 Pac. 302.

Under statutes which provide that the parent, if competent, is entitled to the guardianship of his or her children, the prima facie presumption is that the parent is competent, and the fact of competency or incompetency is the controlling question, and custody of a minor cannot be awarded to another unless the parent or parents are actually found incompetent. *Campbell v. Wright*, 130 Cal. 380, 62 Pac. 613; *Re Salter*, 142 Cal. 412, 76 Pac. 51; *Re Galleher*, 2 Cal. App. 364, 84 Pac. 352. And that the reason for the appointment of another than the parent must be urgent and the grounds clearly sustained, see *Gill v. Riley*, 28 Ky. L. Rep. 639, 90 S. W. 2.

b. Father.

Proof that the father has for a considerable period owed meat and grocery bills and for medical attendance for and burial expenses of his deceased wife does not indi-

cate a lacking in integrity sufficient to justify a refusal to appoint him guardian of his minor child under a statute securing that right to him at common law. *Re Galleher*, 2 Cal. App. 364, 84 Pac. 352. And that lack of integrity of itself is not a legal ground for depriving a father of his child, see *RE CROCHERON*. And that failure or inability to pay his debts does not of itself render a father incompetent, see *RE CROCHERON*.

And where notorious bad conduct or unfaithfulness in the administration of the minor's property are the only causes for which a father can be excluded from the tutorship of his minor children, proof that a father is improvident, careless in pecuniary matters, and wanting in habits of industry, is not sufficient to preclude him from so acting. *Segura v. Prados*, 2 La. Ann. 751.

But a judgment of divorce in favor of the wife for cruel and inhuman treatment of herself and children by the husband, together with the expression of a doubt by the petitioning father as to the paternity of the child, which is of tender years, and whose guardianship he is seeking, sufficiently shows unsuitableness of the father to receive appointment as guardian. Especially where the deceased mother expressed a testamentary wish that another be appointed, and it appears that such other could do much more for the comfort and welfare of the child. *Griffin v. Sarsfield*, 2 Dem. 4. (As to effect of death of parent to whom custody of child was awarded in a divorce suit upon right of surviving parent, see note in 20 L.R.A. (N.S.) 171.)

And in *Wellesley v. Beaufort*, 2 Russ. Ch. 1, affirmed in *Wellesley v. Wellesley*, 2 Bligh, N. R. 124, 1 Dowl. N. S. 152, Lord Eldon refused to award the custody and control of the person and property of minors to their father where it appeared that he had lived in open adultery with a married woman both before and after the death of his wife, and had expressed desires that his children learn to swear and use indecent language and associate with people of the lowest moral type.

convenient that a guardian be appointed to the persons and estates of said minors." On January 4, 1908, A. B. Crocheron, the father of said minor children, presented his petition to said probate court, showing that said minor children had a certain interest in the estate of their deceased mother, and prayed that he be appointed guardian of said minors, and thereafter, on January 13, 1908, filed his objections in said probate court to the appointment of Joseph Babington as guardian of said minors, alleging that he is the father of said minors, and denying that he is an unsuitable person to be appointed guardian of them, and denying all of the material allegations of the petition of Babington which go to show that he is not competent to transact the business of

the minors, and not otherwise suitable to become the guardian of said minors. After hearing said matter the probate court granted the petition of Babington, and appointed him guardian of said minors, and issued letters of guardianship to him. He thereupon took the oath of office as such guardian, and was given custody of said minors. From that action of the probate court the father appealed to the district court. A hearing was there had, and a number of witnesses testified and documentary evidence was introduced on the trial. The court thereafter made findings of fact and conclusions of law, and entered judgment against the appellant, and sustained the action of the probate court. A motion for a new trial was thereafter made and overruled by

And a father who was divorced for cruel and inhuman treatment and immoral relations extending over a long period, who utterly ignored not only the sickness and death and funeral of his son, although he had been afforded an opportunity to visit him and to attend the funeral, and who has expressed a suspicion as to the paternity of his minor children, is not a suitable person to act as guardian of such children, within a statute entitling him so to act if suitable, although he has remarried, has considerable property, a good home, enjoys the confidence and respect of his neighbors, and has been of good conduct aside from ignoring his children since his second marriage. *Re McChesney*, 106 Wis. 315, 82 N. W. 149.

So the father will be denied guardianship of his son's estate and person, although the son is over fourteen years of age, and petitions for the appointment, where it appears that the father had mismanaged the infant's estate, and had been fined and imprisoned for contempt of court in connection with court orders as to the management of such property. *Re White*, 40 App. Div. 165, 57 N. Y. Supp. 802, affirmed on opinion below in 160 N. Y. 685, 55 N. E. 1101.

And the claims of the father will be disregarded where an infant over fourteen years of age petitions for the appointment of another as his guardian, and the father is a resident of a distant state, and it appears that there exists such a feeling of antagonism between the father and son as to induce the belief that the petitioner's welfare would be best subserved by the appointment of another than the father. *Johnson v. Borden*, 4 Dem. 36.

Proof that a father four years previous did drink some and at times became a "little hilarious," and has at times failed to or is unable to pay his debts, is not sufficient to deprive him of the guardianship of his children as incompetent to transact business or otherwise unsuitable, where it appears that he is neither indigent nor

immoral, and is capable of properly providing for and educating his children. *Re CROCHERON*.

But where intemperate habits and the resulting conduct render it not only improper, but rash and dangerous to intrust the father as guardian with the care and custody of his minor children, he must be denied letters; but if he, by continuous maintenance of habits of strict sobriety, can show that no further danger exists, the court will revoke letters granted to another, and appoint the father if he is otherwise suitable. *Re Raborg*, 3 N. Y. S. R. 323.

And convictions of petit larceny and of intoxication are sufficient to warrant an appointment of one other than the convicted father as the guardian of the minor children. *Re Jacquet*, 40 Misc. 575, 82 N. Y. Supp. 986.

And a father who has been divorced for nonsupport is not entitled to the guardianship of his minor children after the death of their mother, where it appears that he has no home, that he uses liquor freely and is often drunk, although not an habitual drunkard, that he is a night waiter in a basement saloon, and that he has given the children, aged one, two, and five, respectively, liquor until they have acquired an appetite for it, as against the maternal grandmother, who is found to be a suitable person. *Russner v. McMillan*, 37 Wash. 416, 79 Pac. 988.

And that whenever a man becomes so addicted to the use of intoxicating liquors that he can be classed as an inebriate or habitual drunkard, or as dangerous to the physical or moral welfare of his children by reason of his violent character or of his immoral habits and person, he is unsuitable to have the custody of his children, see *Re CROCHERON*.

But evidence of quarrels of the parents of infants, together with the fact that the father was intoxicated once or twice, is not sufficient to warrant denying the father appointment as guardian of such infants,

the court. This appeal is from the judgment, and the order overruling the motion for a new trial.

Only one error is assigned, and that is the insufficiency of the evidence to justify the findings of facts and conclusions of law, and the decision made by the court. Under the provisions of § 5774, Rev. Codes 1909, the father is entitled to the guardianship of his minor children if he is competent to transact his own business, and not otherwise unsuitable for that trust. Said section is as follows: "Either the father or mother of a minor, being themselves respectively competent to transact their own business, and not otherwise unsuitable, must be entitled to the guardianship of the minor." The second finding of fact made by the court is

as follows: "That the said A. B. Crocheron is the father of said minors, and is not indigent or incapable of properly providing for said minors, or of educating them;" and the third is as follows: "That the said Crocheron is not an immoral man." By the fourth finding the court found: "That said Crocheron is a man of insobriety and intemperate habits, that he is addicted to the use of intoxicating liquors, and that he is lacking in integrity." The evidence amply supports said findings 2 and 3, but the evidence does not support the fourth finding of fact, and there is no evidence whatever to show that said Crocheron is lacking in integrity. The fact that a father is lacking in integrity—does not pay his debts—is no cause for depriving him of the guardianship of his

especially where he is a steady and consistent worker. *Re Tully Infants*, 54 Misc. 184, 105 N. Y. Supp. 858.

But in *Re Kershaw*, 5 Rob. (La.) 488, it was held that evidence that the father of a minor frequently got drunk, together with the testimony based on suspicion of two or three witnesses that he kept a slave as a concubine, is not sufficient to show notorious bad conduct within the Louisiana statute, especially where it appears by the testimony of several witnesses that the father is inoffensive when drunk, that at other times he is quiet and a good citizen, that he does not drink as frequently as formerly, and that he manifests the warmest affection for his child, and is boarding her in a respectable family, the court saying that a finding of notorious bad conduct cannot be based upon light or doubtful testimony, but that, on the other hand, the case must be a very strong one.

That the father never is competent to act as guardian of his minor child, see *Senseman's Appeal*, 21 Pa. 331, as set out *supra*, II.

c. Mother.

1. In general.

It may safely be stated that the courts generally require clear and convincing proof of the fitness, for, as before stated, the presumption is that the parent is a suitable person for appointment as guardian, and the courts are reluctant to decree a separation of parent and child. *Re Snowball*, 156 Cal. 240, 104 Pac. 444; *Re Lindner*, 13 Cal. App. 208, 109 Pac. 101; *Eldridge v. Lippincott*, 1 N. J. L. 397. But notoriously bad conduct is sufficient to exclude a mother from appointment to the tutorship of her minor children. *Hoyle's Succession*, 109 La. 623, 33 So. 625.

In the following cases a question of fact as to the suitability of the mother has arisen.

Thus, it has been held that the fact that the mother has no means to support and maintain her minor child will not prevent her appointment as guardian of such child, 33 L.R.A. (N.S.)

where she is otherwise entitled thereto. *Ramsay v. Ramsay*, 20 Wis. 507.

And in Louisiana, it is held that non-residence of itself is not a bar to the appointment of a widow as tutrix of her minor son, where he has interests in the state. *Gaine's Succession*, 42 La. Ann. 699, 7 So. 788.

The fact that a mother of minors twelve years before, and while the wife of their father, had for a short time sustained immoral relations with a third person, is not of itself sufficient to render her unfit to act as guardian to such children, where such acts were condoned by her husband, and thereafter she lived a virtuous and blameless life. *Re Tank*, 129 Wis. 629, 109 N. W. 565.

Nor do general statements by manifestly unfriendly witnesses that the child was always filthy, and that the widowed mother did not keep her house clean, without any showing as to real knowledge possessed by such witnesses, warrant a finding that the mother is not a fit person to have the care of her child, there being nothing tending to show any loose or immoral conduct upon her part, or any neglect which has ever injured the health or physical well-being of the child. *Re Lindner*, 13 Cal. App. 208, 109 Pac. 101.

But where the mother seeking guardianship of her infant child has confessedly led a disreputable life from early girlhood, has exhibited no affection or anxiety for the child, although living apart from it for seven years, has an illegitimate child in an orphan asylum, and evidently seeks not so much the custody of the child, as the patrimony provided it by the deceased father, her petition will be denied on the ground of unfitness. *Re Meech*, 1 Connolly, 535, 7 N. Y. Supp. 257.

And a widow who has lived in concubinage with a man from whom she has had children during her widowhood, and who is considered by her class as depraved, is amenable to the charge of "notorious bad conduct" sufficient to exclude her from the tutorship of her minor children under the Louisiana statute, although she has ceased

children. The evidence shows conclusively that he is a man of honor and strict integrity in his dealings with his fellow men. The petitioner undertook by his evidence to cast some reflection on Crocheron's integrity by showing that he had been elected assessor and tax collector for two terms in Owyhee county, and that he was short in his accounts as such officer. The evidence also shows that when the matter was called to his attention, he at once put up sufficient money with the clerk of the board of county commissioners of said county to cover all shortage that could in any manner occur, and that the clerk failed to pay over said money on any shortage that was found against him; that he thereafter paid said shortage, whatever it was, a second time.

So far as his insobriety and intemperate habits are concerned, the evidence shows that he did drink some; that he at times became a little hilarious; but the evidence fails to show that because of his intemperate habits he was ever unfitted to perform his duties as an officer, or attend to his own business affairs. The evidence does not show that he was incompetent at any time to transact his own business, and nowhere shows that he is unsuitable to act as the guardian of said two minor children.

It appears from the record that Joseph Babington, the guardian appointed by the probate court, was the stepfather of Crocheron's deceased wife; that Crocheron was married to her in October, 1897, in Owyhee

all intimate intercourse with her paramour and lived an exemplary life for eighteen months, such circumstances being insufficient to show reformation, and to warrant intrusting her with the custody and control of the persons and property of the minor children of the marriage. *Le Blanc's Succession*, 37 La. Ann. 546.

And where it appears that the mother of an infant had been separated from the father for several years for her fault, and that she was engaged in a disreputable business and kept a disreputable house, such mother will be deemed an unsuitable person to be appointed guardian of such infant, as against one who is a suitable person, and with whom the child has been living for three years at the request of the father. *Burmeister v. Orth*, 5 Redf. 259.

And under a statute entitling the parents to the guardianship of their minor children when competent to transact business and not otherwise unsuitable, the mother of a child which had resided with another from the age of two and one half to nearly twelve years without having seen its mother is "unsuitable," where the conditions are such, because of acts of the parent, that the care and custody of the child cannot be changed without endangering its happiness and welfare. *Andrino v. Yates*, 12 Idaho, 618, 87 Pac. 787.

And it has been held that a mother demonstrates herself to be an unfit person to have the custody and care of her minor children by committing them to an almshouse and abandoning her right as natural mother. *Phillips's Petition*, 9 Pa. Dist. R. 745. See also *Com. ex rel. Philips v. Klemesen*, 9 Pa. Dist. R. 165.

So the natural mother of a minor, by consenting to an adoption of such child under a statute divesting her of all rights, waives any preference to appointment as guardian of such child upon the death of its adopted parents, to which she might otherwise have been entitled under a statute providing that the mother is entitled to the guardianship of her minor children in case of the decease of the father. *Re Mas-*
33 L.R.A. (N.S.)

terson, 45 Wash. 48, 122 Am. St. Rep. 886, 87 Pac. 1047.

And a mother will be denied guardianship of the property of her son, who lacks but one and one-half years of majority, where the sole object and motive of her application for appointment was to demonstrate to him her maternal rights, and enforce complete obedience to her during minority as to all his matters. *Re Wyckoff*, 67 Misc. 1, 124 N. Y. Supp. 625

2. Effect of remarriage.

In California, before its annexation to the United States, the mother of an infant by a former marriage, under the prevailing Mexican law, could not be appointed guardian after her second marriage. *Brady v. Reese*, 51 Cal. 457.

And where the common-law limitations on the rights of married women have not been removed, it is held that the mother of a minor, living with a second husband, though otherwise competent, cannot be appointed guardian of the minor's estate. *Holley v. Chamberlain*, 1 Redf. 333. See also *Swartwout v. Swartwout*, 2 Redf. 52.

But where the common-law restrictions have been removed, it is held that the fact that the mother of an infant whose father is dead is living with a second husband furnishes no objection to her appointment as general guardian of such child. *Re Hermance*, 2 Dem. 1. And under guardianship statutes which do not specify disabilities as to married women, an intelligent and worthy woman, although remarried, is, with the consent of her husband, competent to be appointed guardian of her minor children, provided the husband also is a suitable person. *Ex parte Maxwell*, 19 Ind. 88; *Palmer v. Oakley*, 2 Dougl. (Mich.) 433, 47 Am. Dec. 41 (in this case the question of the suitability of the husband was not raised); *Goss v. Stone*, 63 Mich. 319, 29 N. W. 735 (suitableness of husband not discussed). And see *Re X*, 68 L. J. Ch. N. S. 265 [1899] 1 Ch. 526, 80 L. T. N. S. 311, 47 Week. Rep. 345, wherein it was held

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The fact that a mother of minors twelve years before, and while the wife of their father, had for a short time sustained immoral relations with a third person, is not of itself sufficient to render her unfit to act as guardian to such children, where such acts were condoned by her husband, and thereafter she lived a virtuous and blameless life. *Re Tank*, 129 Wis. 629, 109 N. W. 565.

Nor do general statements by manifestly unfriendly witnesses that the child was always filthy, and that the widowed mother did not keep her house clean, without any showing as to real knowledge possessed by such witnesses, warrant a finding that the mother is not a fit person to have the care of her child, there being nothing tending to show any loose or immoral conduct upon her part, or any neglect which has ever injured the health or physical well-being of the child. *Re Lindner*, 13 Cal. App. 208, 109 Pac. 101.

But where the mother seeking guardianship of her infant child has confessedly led a disreputable life from early girlhood, has exhibited no affection or anxiety for the child, although living apart from it for seven years, has an illegitimate child in an orphan asylum, and evidently seeks not so much the custody of the child, as the patrimony provided it by the deceased father, her petition will be denied on the ground of unfitness. *Re Meech*, 1 Connolly, 535, 7 N. Y. Supp. 257.

And a widow who has lived in concubinage with a man from whom she has had children during her widowhood, and who is considered by her class as depraved, is amenable to the charge of "notorious bad conduct" sufficient to exclude her from the tutorship of her minor children under the Louisiana statute, although she has ceased

children. The evidence shows conclusively that he is a man of honor and strict integrity in his dealings with his fellow men. The petitioner undertook by his evidence to cast some reflection on Crocheron's integrity by showing that he had been elected assessor and tax collector for two terms in Owyhee county, and that he was short in his accounts as such officer. The evidence also shows that when the matter was called to his attention, he at once put up sufficient money with the clerk of the board of county commissioners of said county to cover all shortage that could in any manner occur, and that the clerk failed to pay over said money on any shortage that was found against him; that he thereafter paid said shortage, whatever it was, a second time.

all intimate intercourse with her paramour and lived an exemplary life for eighteen months, such circumstances being insufficient to show reformation, and to warrant intrusting her with the custody and control of the persons and property of the minor children of the marriage. *Le Blanc's Succession*, 37 La. Ann. 546.

And where it appears that the mother of an infant had been separated from the father for several years for her fault, and that she was engaged in a disreputable business and kept a disreputable house, such mother will be deemed an unsuitable person to be appointed guardian of such infant, as against one who is a suitable person, and with whom the child has been living for three years at the request of the father. *Burmester v. Orth*, 5 Redf. 259.

And under a statute entitling the parents to the guardianship of their minor children when competent to transact business and not otherwise unsuitable, the mother of a child which had resided with another from the age of two and one half to nearly twelve years without having seen its mother is "unsuitable," where the conditions are such, because of acts of the parent, that the care and custody of the child cannot be changed without endangering its happiness and welfare. *Andrino v. Yates*, 12 Idaho, 618, 87 Pac. 787.

And it has been held that a mother demonstrates herself to be an unfit person to have the custody and care of her minor children by committing them to an almshouse and abandoning her right as natural mother. *Phillips's Petition*, 9 Pa. Dist. R. 745. See also *Com. ex rel. Phillips v. Klemesen*, 9 Pa. Dist. R. 165.

So the natural mother of a minor, by consenting to an adoption of such child under a statute divesting her of all rights, waives any preference to appointment as guardian of such child upon the death of its adopted parents, to which she might otherwise have been entitled under a statute providing that the mother is entitled to the guardianship of her minor children in case of the decease of the father. *Re Mas-* 33 L.R.A. (N.S.)

So far as his insobriety and intemperate habits are concerned, the evidence shows that he did drink some; that he at times became a little hilarious; but the evidence fails to show that because of his intemperate habits he was ever unfitted to perform his duties as an officer, or attend to his own business affairs. The evidence does not show that he was incompetent at any time to transact his own business, and nowhere shows that he is unsuitable to act as the guardian of said two minor children.

It appears from the record that Joseph Babington, the guardian appointed by the probate court, was the stepfather of Crocheron's deceased wife; that Crocheron was married to her in October, 1897, in Owyhee

terson, 45 Wash. 48, 122 Am. St. Rep. 886, 87 Pac. 1047.

And a mother will be denied guardianship of the property of her son, who lacks but one and one-half years of majority, where the sole object and motive of her application for appointment was to demonstrate to him her maternal rights, and enforce complete obedience to her during minority as to all his matters. *Re Wyckoff*, 67 Misc. 1, 124 N. Y. Supp. 625

2. Effect of remarriage.

In California, before its annexation to the United States, the mother of an infant by a former marriage, under the prevailing Mexican law, could not be appointed guardian after her second marriage. *Braly v. Reese*, 51 Cal. 457.

And where the common-law limitations on the rights of married women have not been removed, it is held that the mother of a minor, living with a second husband, though otherwise competent, cannot be appointed guardian of the minor's estate. *Holley v. Chamberlain*, 1 Redf. 333. See also *Swartwout v. Swartwout*, 2 Redf. 52.

But where the common-law restrictions have been removed, it is held that the fact that the mother of an infant whose father is dead is living with a second husband furnishes no objection to her appointment as general guardian of such child. *Re Her-mance*, 2 Dem. 1. And under guardianship statutes which do not specify disabilities as to married women, an intelligent and worthy woman, although remarried, is, with the consent of her husband, competent to be appointed guardian of her minor children, provided the husband also is a suitable person. *Ex parte Maxwell*, 19 Ind. 88; *Palmer v. Oakley*, 2 Dougl. (Mich.) 433, 47 Am. Dec. 41 (in this case the question of the suitability of the husband was not raised); *Goss v. Stone*, 63 Mich. 319, 29 N. W. 735 (suitableness of husband not discussed). And see *Re X*, 68 L. J. Ch. N. S. 265 [1899] 1 Ch. 526, 80 L. T. N. S. 311, 47 Week. Rep. 345, wherein it was held

county; that she was the daughter of Mrs. Babington by a former husband; that the Babingtons have resided in Owyhee county for forty-odd years. It appears that Crocheron was assessor of said county for two terms, commencing in 1891 and 1892, and also in 1895 and 1896, and was elected sheriff of that county in the fall of 1896, and held that office for two years; that thereafter he was for a time connected with a saloon in Silver City. Thereafter he removed to Bruneau in said county with his family, and was appointed postmaster there. Thereafter he went to his mother's ranch on Sinkers creek in that county, and remained there for a time. It appears that his wife was very much attached to her mother and her stepfather, the Babingtons, and that the mother had been opposed to the marriage of Crocheron to her daughter; that they quite frequently visited the Crocheron ranch, and often took Mrs. Crocheron home with them, without consulting her husband. It appears that the Babingtons were very much prejudiced against Crocheron, and that during his term of office he was addicted to strong drink to some extent. All of the evidence as to his habit of drinking applies to his conduct some four years prior to the commencement of these proceedings, and the record contains no evidence showing that he has been addicted to the drink habit for about four years immediately preceding the commencement of these proceedings. Crocheron became discontented, and was not pleased with the influence the Babingtons had over his wife, and he urged his wife to go with him to Pocatello, Idaho, or elsewhere, and make a home, but she absolutely refused to leave her stepfather and mother. This condition continued up to March, 1904, when appellant left his wife, on his mother's ranch, and went to Pocatello and sought employment there. He was out of employment for some time, then worked in the railroad yards there, and then with a fence and bridge gang; also cut timbers for a coal

mine, and worked for a time near Minidoka and Twin Falls in Idaho, and on June 23, 1906, he went to work for his brother-in-law, a Mr. Hyde, at Thousand Springs, in this state, and continued to work for him until July 20, 1907. He thereafter went to Nevada on a prospecting trip, and was at Elko in that state when informed of his wife's death. He immediately returned to Nampa, where his wife died, attended the funeral, paid all funeral expenses, and desired at that time to take charge of his children, but through the importunities of Mr. Babington, the step-grandfather of his children, and his wife, consented that they remain with them until the holidays of 1907 and 1908.

After Crocheron left his mother's ranch in March, 1904, Mrs. Crocheron and the children remained on the ranch for some months, and then went to her old home, the Babington ranch on Reynolds' creek, in Owyhee county, and remained there for about fifteen months. She then went to Nampa in October, 1905, to place said children in school. The Babingtons purchased a house for her to live in at Nampa, and some articles of furniture, and Mrs. Crocheron resided there with her children from that time until her death, in November, 1907, except during school vacations, which she spent on the Babington ranch at Reynolds' creek. It appears from the evidence that during the time that Crocheron was absent from his family he wrote his wife frequently, and urged her to come and live with him. She positively refused to do so. It also appears that during said time appellant sent her, from month to month, on an average about \$30 per month. Besides, she sold some horses that were on the ranch when Crocheron left, and also received the proceeds of the sale of a few head of cattle from Crocheron's brother. The evidence shows that he sent her all of the money he earned during his absence, except what was necessary for his own maintenance. If a month during that time went by without his sending her

that remarriage of the mother did not of itself disqualify her from acting as guardian of her minor child, and that the mere fact that the second husband was of a different religion from that of the father was not sufficient to disqualify the mother, where the infant was not interfered with, and was being brought up properly.

In *Villareal v. Mellish*, 2 Swanst. 533, a mother, although remarried, was appointed guardian of her infant children.

And in *Corbet v. Tottenham*, 1 Ball & B. 59, 2 Molloy, 319, it was held that a mother is not rendered incompetent to be guardian of the children of her first marriage by the fact that she has children by a second marriage.

In Louisiana, which derives its law of 33 L.R.A. (N.S.)

tutorship from the civil law, a widow who remarries without being continued in the tutorship of her minor children by a family meeting forfeits such tutorship and cannot be reinstated as natural tutrix, but upon giving bond can be appointed dative tutrix. *Re Mossy*, 3 Rob. (La.) 390; *Webb v. Webb*, 5 La. Ann. 595; *Puck's Succession*, 9 La. Ann. 307; *Re Foley*, 34 La. Ann. 130; *Carbajal's Succession*, 111 La. 944, 36 So. 41. See also *Marinovich's Succession*, 105 La. 106, 29 So. 500.

But under the Roman law (chap. 5, 118th Novel of Justinian) a mother could be appointed tutrix of her minor children only upon renouncing the right to contract a second marriage. *Berluchaux v. Berluchaux*, 7 La. 545.

G. J. C.

money, it was because he was not earning more than sufficient for his own support. The record fails to show that there was any trouble or dissension between Crocheron and his wife during her lifetime, except that caused by the wife's mother and her stepfather. They were evidently very much prejudiced against Crocheron, perhaps because of his being addicted, to some extent, to the drink habit during the time that he held the offices above mentioned, and up to the time he left his family. Because of their prejudice and influence over his wife the evidence shows that Crocheron was very anxious to take his family from Owyhee county, and away from the influence of the stepfather and mother. There is no evidence in the record that would justify the appellant in leaving his family for forty-four months, and we cannot justify his conduct in that regard, although he furnished them all the money he earned, except what was necessary to maintain himself. The fact of his leaving his family for that length of time, however, would not alone be sufficient to show that he was unfit to have the guardianship of his own children. There is nothing in the record to show that he has not a tender regard for said children, and that it would be against their interests to give him the guardianship of them. The record shows that he desires to place them with his sister, Mrs. Hyde, who, it is conceded by counsel for respondent, is among the very best women of Owyhee county. Mrs. Hyde was a warm friend of the deceased mother during her lifetime, and it also appears that the deceased mother stated to Mrs. Hyde that she desired, in case anything happened to her, that she (Mrs. Hyde) should take charge of the children. And it sufficiently appears that the children would be educated and well cared for if the father had control of them. A brother-in-law and two brothers, and I think the mother of the defendant, reside in Owyhee county, and are among the most respectable people of that county. No valid reason appears why the father should not be given the control of his children. Mr. Babington, the step-grandfather of said children and Mrs. Babington, their grandmother, are respected and honored people, and no doubt have a great affection for the children, but that is no reason, under the law, why the father, he being ready, able, and willing to properly care for and educate them, should be deprived of their guardianship.

The trial court found as a fact that said father was not indigent or incapable of properly providing for said minors and educating them, and that he is not an immoral man. Those findings, as before stated, are amply sustained by the evidence, but there.

is no evidence to show that he is so intemperate in his habits, and so addicted to the use of intoxicating liquors, as would deprive him, under the law, of the right to the guardianship of his daughters, and there is no evidence whatever to show that he is not a fit, proper, and competent person to have the guardianship of them. The evidence clearly shows that the appellant is competent to transact his own business, and that he is otherwise suitable to have the guardianship of said children. Therefore, under the provisions of said § 5774, he is entitled to their care and custody.

In *Hernandez v. Thomas*, 50 Fla. 522, 2 L.R.A.(N.S.) 203, 111 Am. St. Rep. 137, 39 So. 641, 7 A. & E. Ann. Cas. 446, the court said: "We have held, . . . in accordance with the prevailing rule in American courts, that in awarding the custody of children the paramount consideration is the welfare of the child, rather than the technical legal right of the parent. While this is true, yet the court should not lightly and without good cause invade the natural right of the parent to the custody, care, and control of his infant child." In *Re Galleher*, 2 Cal. App. 384, 84 Pac. 352, the court said: "It is well settled in this state that a parent is entitled to the guardianship of his child under the age of fourteen years, if he is a fit, proper, and competent person, in preference to any other person." See also *Markwell v. Pereles*, 95 Wis. 406, 69 N. W. 798. In *Ex parte Davidge*, 72 S. C. 16, 51 S. E. 269, the court holds that the welfare of the children must be considered, but that the parent's right to the love and influence of his children, and the happiness they bring him, must also be recognized and considered along with the interest of the children, and says: "To separate a child from its parent is therefore a very strong measure, justified only by convincing proof of the parent's unfitness. No inflexible rule can be laid down by which unfitness may be determined. Each case must be decided on its own peculiar facts; but manifestly it is not sufficient to prove the poverty of the parent, and that financial benefit will come to the child from separation, or that the parent has faults of disposition and behavior somewhat unusual and trying. The condition in life, or the character and habits of the parent, must be shown to be such that provision for the child's ordinary comfort and contentment, or for its intellectual and moral development, cannot be reasonably expected at his hands." In *Watts v. Lively*, — Tex. Civ. App. —, 60 S. W. 676, the court said: "As aptly said by the trial court, the issue was to what is for the best interest of the child is not determined by showing in whose custody it would likely be more comfortably

reared. In order to overcome the presumption of law that the best interest of the child would be subserved by placing it in the custody of the father, who is responsible for its being, and who, under the laws of God and man, is held responsible for its care and protection, it must plainly appear that the father is unworthy of the trust." The supreme court of Indiana, in *Gilmore v. Kitson*, 165 Ind. 402, 74 N. E. 1083, said: "Courts must not be tempted to interfere with the natural order of family life, except in special cases of extreme urgency. . . . Paternal control of the family has been a fundamental principle in the history of mankind, and its free exercise, restricted only in the interest of humanity and good morals, is essential to the highest development of the race. What influence more likely to lead to despondency and self-destruction than the unnatural separation of a parent from his child, and what greater stimulus to worthy ambition and noble endeavor on the part of a father than the care and companionship of his motherless girl?" In *Weir v. Marley*, 99 Mo. 484, 6 L.R.A. 672, 12 S. W. 798, the court held that, where it was sought to deprive a father of the custody of his child, the burden is upon him who avers such unfitness; that the presumptions are against it. In *Rust v. Vanvactor*, 9 W. Va. 600, the court said: "The father is the natural guardian of his infant children, and, in the absence of good and sufficient reasons shown to the judge or court, such as ill usage, grossly immoral principles or habits, want of ability, etc., is entitled to their custody, care, and education. It seems that all the authorities concur on this point. [Cites many authorities.] The custody of the minor will be assigned to the person having the right, unless it appears he is an improper person to take it." In *Andrino v. Yates*, 12 Idaho, 618, 87 Pac. 787, this court held that, where the legal right of a parent to the guardianship of a child is not clear, the best interests of the child will govern the decision of the court. In the case at bar, however, the legal right of the father to the guardianship of said minors clearly appears, and under the law he is entitled to the guardianship of them.

The decision of the lower court must be reversed, and the cause remanded, with instructions to the District Court to make findings of fact and conclusions of law in accordance with the views expressed in this opinion, and to certify the same back to the Probate Court, with directions to appoint the said A. B. Crocheron guardian of said minor children. Costs are awarded to appellant.

Stewart and Aillshtie, JJ., concur.
33 L.R.A. (N.S.)

A petition for rehearing having been filed, Stewart, J., on May 17, 1909, handed down the following additional opinion:

A petition for a rehearing has been filed in this case, and counsel urges, with much zeal and vigor, that the court failed to give due consideration to the evidence under the former decisions of this court. The argument of counsel is based upon two propositions: First, that the district court, in appointing a guardian under the statute, is vested with discretion; second, that there was a conflict in the evidence in this case as to the fitness and suitability of Crocheron for appointment as guardian; and, there being a conflict, the findings of the trial court should not be set aside. Were the members of this court unacquainted with the usual zeal and enthusiasm with which counsel for the respondent always presents the cause of his client, the court would be unable to fully account for the extreme views counsel has taken as to what is shown by the record in this case. From counsel's contention we must at once conclude that the parent of a minor child has no natural right to the care and custody of such child, and that in the selection of a guardian for a minor the probate court is vested with the discretion to take the custody of a minor away from its parents, and give such custody to another, from the simple fact that in so doing the child may be surrounded with greater material comforts than if given to the parent, and by so doing may give effect to the wishes of the child, although only eight or nine years of age. Such, however, is not the law.

The application for the appointment of a guardian of a minor under the laws of this state is a statutory proceeding, and the power of the court is fixed and determined by the statute. The usual powers exercised by courts of equity are not given to the court in making an appointment of a guardian under the laws of this state. *Re Campbell*, 130 Cal. 380, 62 Pac. 613. By the provisions of § 5770, Rev. Codes, the power of the court to appoint a guardian is limited to cases "of minors who have no guardian legally appointed by will or deed." In making such appointment, § 5774, Rev. Codes, requires the court to appoint the father or mother as such guardian, if competent to transact his own business, and not otherwise unsuitable. This section is compulsory as to requiring the father or mother to be appointed if competent to transact his own business, and not otherwise unsuitable. The statute leaves open for investigation the competency of the father or mother to transact his own business, and, if thus competent, whether he is otherwise unsuitable. In this case there is no contention whatever, and

no evidence was offered to the effect that Crocheron, the father, was not competent to transact his own business. It is claimed, however, by respondent, and it is upon this point counsel so earnestly argue, that the evidence shows that Crocheron was otherwise unsuitable. Counsel seems to be able to gather great consolation from the case of *Andrino v. Yates*, 12 Idaho, 618, 87 Pac. 787, and seems to think that that case is decisive of the question under consideration. In that case this court held: "Of course the legal rights of the parent must be respected, and the law contemplates that those rights may have been abandoned, surrendered, transferred, or forfeited;" and, in that case throughout, this court clearly recognized the legal right of the parent, but held that, under the facts of that case, the parent had abandoned, surrendered, and forfeited her right to the custody of such child. But such is not the finding of the court or the proof in this case.

Counsel often quotes in his petition for a rehearing, as he did in his brief, that the "welfare of the infant is the polar star by which the discretion of the court is to be guided." This expression is not intended to convey the impression that in appointing a guardian the court can ignore the requirements of the statute, and appoint a person other than the father and mother, unless such father or mother are incompetent to transact their own business, or are otherwise unsuitable. This expression, as well as the statute, does not mean that the father is unsuitable because he is poor, or because he is unable to provide as palatial a home or surroundings as some other person, or because at times he indulges in the use of intoxicating liquors, or because at times he is unable to, or does not, pay his debts. If the court has the discretion of taking away from the parent his legal right to the custody of a child from the mere fact that the parent is poor or unable at times to pay his debts when due, or that he indulges at times in the use of intoxicating liquors, then the legal right of the parent would be of but little force, and the courts might be kept busy transferring the custody of minors from their natural guardian, the parent, to strangers. The supreme court of California in the case of *Re Salter*, 142 Cal. 412, 76 Pac. 51, in discussing this question, says: "But even if the father were poor and unable to provide for the child as comfortably as his grandmother could, or would be compelled to maintain him at his place of abode in Los Angeles under the circumstances found by the lower court, these considerations would furnish no legal ground for depriving him of the custody of the child. They apply merely to its material tempo-

ral welfare; and, if such considerations were controlling, they could, in every instance where poverty was the misfortune of a parent, be invoked to deprive him of his child in favor of one more fortunately situated and better able to minister to its material comfort. Common humanity would be shocked at the serious maintenance of such a proposition."

In this case the court finds that the father is not indigent, and is capable of properly providing for said minors and educating them; that he is not an immoral man, but he is a man of insobriety and intemperate habits, and is addicted to the use of intoxicating liquors and lacking in integrity. It will thus be seen, as stated in the former opinion, that the only finding which could be construed as supporting the conclusion reached by the court that Crocheron was an unsuitable person to be appointed guardian is the finding that he is a man of "insobriety and intemperate habits, and lacking in integrity." This finding, however, does not satisfy the requirements of the statute. In the first place, lack of integrity is not a legal ground for depriving a father of his child. "Integrity," as defined in the *Standard Dictionary*, means: "Uprightness of character and soundness of moral principle; honesty; probity; as, his business career showed his integrity." In this finding the court evidently did not use the word "integrity" in the sense that it meant upright-ness of character and soundness of moral principle, for the court has expressly found that the father is not an immoral man. The court must have used the word "integrity" in the sense that the father was not honest in his business transactions. But we know of no principle of law which would authorize a court to take a child away from a father because there was evidence of the father's dishonesty in his business transactions.

So, the only matter left for consideration is the finding that the father is a man of insobriety and intemperate habits, and is addicted to the use of intoxicating liquors. Just what the court meant by this statement it is difficult to understand; but, reading the finding in connection with the evidence, the latter shows that certain parties testified that about four years prior to the time the case was tried in the probate court, the father's reputation for sobriety was bad. There was some evidence that at times he became a little hilarious, but this was all. There was no evidence that the father drank to excess, or that his drinking had a demoralizing or degrading effect upon him, or that it unfitted him to associate with his children, or would in any way degrade them. Intemperance might unfit a person to have

the custody of his minor children, but to do so it should clearly appear that the parent was so intemperate that he was an habitual drunkard, and that his conduct would have a tendency to demoralize and degrade his children. This, however, the court does not find, and there is no evidence whatever to support such conclusion. On the contrary, the court did find that the father was not immoral, and was capable of providing for his minor children and educating them. This finding, taken in connection with the finding that the father was intemperate, would clearly indicate that such intemperance did not render the father unfit to provide for and educate his children, and did not result in immorality. If so, there was no legal reason why the father should be denied the custody of his children.

Petition for rehearing denied.

Sullivan, Ch. J., concurs.

Allshtle, J., concurring:

In concurring in the order denying a rehearing in this case I desire to make some special reference to the case of *Andrino v. Yates*, 12 Idaho, 618, 87 Pac. 787, on which case petitioner appears to have placed his reliance for an affirmance of the judgment in the present case. Being not only familiar with the opinion in that case, but with the record made on which the opinion was written, I desire to call special attention to the salient features of that case, which are radically different from the facts in the case at bar. In that case the mother, who had deserted two husbands, and was living with the third, and who had been somewhat of a rambler herself, abandoned her infant daughter at the age of about eight months, and did not thereafter see her, or demand or undertake to resume her custody, for nearly twelve years; neither did she contribute anything more than a few pittance toward the maintenance, care, or comfort of the child. When she first left the child, she made some temporary provision for its care, but very soon neglected that entirely, and the child was thereafter left to the care of strangers, and such care as the father could give it for the couple of years he lived. Thereafter the child was in the care and custody of its aunt, Mrs. Yates, who was finally appointed its guardian by the probate court. Subsequent to the appointment of Mrs. Yates as guardian of the child, the mother, Mrs. Andrino, applied to this court for a writ of habeas corpus. This court examined both the mother and child in open court, and heard other witnesses. It there appeared clearly and satisfactorily to the court, as stated in that opinion, that "her original legal right as mother

was abandoned, forfeited or surrendered" by her continuous conduct, running through a period of nearly a dozen years, and that she could not, at that late date, be heard to reassert her maternal right as the natural guardian of the child "to the manifest injury of the child;" that "her strict legal custody has ceased to be a rightful custody, and she is equitably estopped from asserting it as a legal right." In that case the principle of both abandonment and estoppel were invoked against the mother. Her alleged unfitness on other grounds, and for other reasons was considered merely as incidental and cumulative reasons for not restoring to her the custody of a child, then a dozen years old, that she had for more than eleven years abandoned to the mercies, charity, and good offices of strangers and relatives. Her actual unfitness for its custody at the time was not the real reason for denying her its custody. Upon consideration of these questions, and of the decisive points upon which the *Andrino Case* turned, it must at once be apparent that the case at bar differs essentially and materially from that case. Here the father never abandoned the children. The fact that he left his wife for a time in no sense constituted an abandonment of his minor children. They were in the custody of their mother, who appears to have taken the best of care of them. He had no quarrel with the mother, but his quarrel was with the mother-in-law, and father-in-law. During all this time he was contributing abundantly, and in fact all of his earnings, for the care and maintenance of the mother and children. As soon as the mother died, he at once asserted his natural and legal right to the care and custody of his minor children.

Passing briefly to the grounds of incompetency urged in this case, I will say that no case has ever been called to my attention where a parent was denied the custody of his or her minor children on the grounds of dishonesty in business dealings, or of untruthfulness or failure to pay debts and legal obligations. If that were a legal ground for taking a man's child away from him, it would certainly play havoc with the homes of some very prominent men in the business, commercial, and social world, if we can rightly judge from the records that are daily brought before us in civil actions. I have no doubt, on the other hand, but that drunkenness is a ground for depriving a father of the custody of his children. The question of the degree and extent of the habit must determine in every case the fitness or unfitness of the parent to continue the care and custody of his children. What to my mind might seem to disqualify one from continuing the care and custody of

his children might not be considered sufficient by someone else. But it is clear to me that whenever a man becomes so addicted to the use of intoxicating drink that he can be classed as an inebriate or habitual drunkard, or as dangerous to the physical or moral welfare of his children by reason of his violent character or of his immoral habits and practices, he is no longer fit to have the custody of children. In this case, however, the evidence does not show that the father is a drunkard, or that he is addicted to the use of intoxicating drink at the present time, or ever has been, except occasionally. It is true a doctor testified that he had seen him when he was drinking, and that Crocheron became "hilarious." Now if this word "hilarious" does not have a barroom meaning that differs from its ordinary English meaning as defined in the lexicons, it does not imply that he was in a drunken condition. It should also be remembered that in this kind of case the question is not a man's reputation, but his actual conduct, that must be the test.

KENTUCKY COURT OF APPEALS.

LAURA B. CLAREY, Appt.,

v.

UNION CENTRAL LIFE INSURANCE COMPANY.

(143 Ky. 540, 136 S. W. 1014.)

Conflict of laws — insurance policy — suit in third state.

A provision in an insurance policy requiring suit to be brought within a year after death of insured, which is valid in both the state where the insurer resides and that where the insured resides, will be enforced by the courts of a third state in which the insured dies and where suit is brought, although it is contrary to the public policy of that state and void there.

(May 9, 1911.)

APPEAL by plaintiff from a judgment of the Circuit Court for McCracken County in defendant's favor in an action brought to recover the amount alleged to be due on a life insurance policy. Affirmed.

The facts are stated in the opinion.

Messrs. Oliver & Oliver, for appellant:
Limitation of time within which an ac-

Note.—The general subject of conflict of laws relating to insurance contracts is covered in the notes to Johnson v. Mutual L. Ins. Co. 63 L.R.A. 833, and McElroy v. Metropolitan L. Ins. Co. 23 L.R.A.(N.S.) 968.

As to the specific point in relation to contractual limitations, see page 868 of the earlier note and page 982 of the later note. 33 L.R.A.(N.S.)

tion can be brought, whether statutory or contractual, is a part of the remedy, and not of the substantive law, and is controlled solely by the *lex fori*, and not the *lex loci contractus*.

Adams Exp. Co. v. Walker, 119 Ky. 121, 67 L.R.A. 412, 83 S. W. 106; Lee v. Union Cent. L. Ins. Co. 22 Ky. L. Rep. 1712, 56 S. W. 724; Templeton v. Sharp, 10 Ky. L. Rep. 500, 9 S. W. 507, 696; Bagby v. Champ, 83 Ky. 13; McArthur v. Goddin, 12 Bush, 279; Davis v. Morton, 5 Bush, 160, 96 Am. Dec. 345; Bennett v. Devlin, 17 B. Mon. 358; Ingraham v. Arnold, 1 J. J. March. 406; Graves v. Graves, 2 Bibb, 207, 4 Am. Dec. 697; Scudder v. Union Nat. Bank, 91 U. S. 406, 23 L. ed. 245; 25 Cyc. Law & Proc. p. 1018 and notes.

A period of limitation within which an action may be brought, of shorter time than that fixed by statute, is against and contrary and repugnant to the public policy of the state of Kentucky, and will not be enforced by the courts of Kentucky.

Union Cent. L. Ins. Co. v. Spinks, 119 Ky. 261, 69 L.R.A. 264, 83 S. W. 615, 84 S. W. 1160, 7 A. & E. Ann. Cas. 913; Western U. Tele. Co. v. Eubanks, 100 Ky. 591, 36 L.R.A. 711, 66 Am. St. Rep. 361, 38 S. W. 1068; Adams Exp. Co. v. Walker, 119 Ky. 121, 67 L.R.A. 412, 83 S. W. 106; Continental Casualty Co. v. Harrod, 30 Ky. L. Rep. 1117, 100 S. W. 262.

A cause of action arises or accrues at the place where the assured has domicile at the time of his death.

Rippstein v. St. Louis Mut. L. Ins. Co. 57 Mo. 86; Bankers L. Ins. Co. v. Robbins, 53 Neb. 44, 73 N. W. 269; Brull v. Northwestern Mut. Relief Asso. 72 Wis. 430, 39 N. W. 529; Johnson v. Mutual L. Ins. Co. 180 Mass. 407, 63 L.R.A. 833, 62 N. E. 733.

Messrs. Hendrick & Crice for appellee.

Lassing, J., delivered the opinion of the court:

On December 5, 1889, George E. Phillips, a resident of the state of Wisconsin, made application for a policy of insurance in the Union Central Life Insurance Company, through its local agent at Oshkosh, in that state. This application was forwarded by the local agent to the home office of the company in Cincinnati, Ohio, and was accepted by the company, and a policy issued according to the terms set out in the application, insuring the life of said Phillips for \$2,000 for an annual premium of \$58.18. At the request of the applicant, his wife, Laura B. Phillips, was named as the beneficiary therein. The policy was sent to the agent at Oshkosh, by him delivered to Phillips, and the first premium paid to said

agent. Thereafter the insured and his wife removed to the state of Illinois, where they separated in 1891. Following their separation, the insured moved to Paducah, Kentucky, where he resided until his death in 1906. In 1893, Phillips instituted a suit for divorce against his wife, Laura B. Phillips, and upon final hearing a decree was entered, granting him an absolute divorce from her. In the course of time, he married again, and his former wife, who continued to make Illinois her home, intermarried with one Clarey, and still resides in that state. After his separation and divorce from his wife, the insured presented the policy to the company for its consent to an assignment by his former wife to himself of all her interest therein; and he later borrowed money on this policy from the company and pledged it as security.

The insured died May 17, 1906. His wife qualified as administratrix, and upon making proof of her husband's death collected the amount due on the policy, after deducting the amount of her husband's indebtedness to the company. After the lapse of more than a year from the death of the insured, his former wife, Laura B. Clarey, instituted a suit in the McCracken circuit court against the insurance company, in which she sought to recover the amount of this policy, upon the theory that, as she was named beneficiary therein, the company had no right to pay it to anyone else.

The company pleaded the facts, the separation from her husband, the assignment and transfer of her interest in the policy to him, and the settlement with his administratrix. It further pleaded the provision of the policy to the effect that no suit to recover under it should be brought after one year from the death of the insured, that the contract was entered into and to be performed in the state of Wisconsin, and that, under the laws of Wisconsin, where the contract was made, and the laws of the state of Ohio as well, where the policy was issued, such a condition is valid, binding, and enforceable. The plaintiff traversed all of the material allegations of the answer, except that she admitted that under the laws of the states of Wisconsin and Ohio the clause in the contract, providing that no suit should be brought to recover under the policy after one year from the death of the insured, was a binding, legal, and enforceable obligation. But she pleaded that, as the insured died in Kentucky, the contract should be construed according to the laws of this state, and not of the state where the contract was made or to be performed. Several issues of law and fact were made by the pleadings, and upon motion the case was transferred to equity and 33 L.R.A. (N.S.)

tried by the chancellor. Upon a full consideration he adjudged that the plaintiff was not entitled to recover, and dismissed her suit. From that judgment, she appeals.

It is stated in brief that the chancellor was of opinion that the clause in the contract, denying the right of the plaintiff to maintain a suit on the contract after one year from the death of the insured, was a binding and enforceable provision, and as the suit was not instituted within the year plaintiff could not maintain it. We will dispose of this question first.

There is no dispute whatever as to the facts. At the time the contract was entered into, the plaintiff resided in Wisconsin, and the insurance company is an Ohio corporation. It is conceded that, under the laws of both Wisconsin and Ohio, the provision under consideration is a valid, binding, and enforceable provision, so that, if this contract is to be controlled, either by the laws of the state of Wisconsin, where it was made, or the laws of the state of Ohio, the residence of the insurance company, plaintiff lost any right that she had to maintain the suit by permitting more than a year to run before instituting same. On the other hand, if the contract is to be construed according to the laws of this state, where the insured died, then, under the rule announced by this court, in *Union Cent. L. Ins. Co. v. Spinks*, 119 Ky. 261, 69 L.R.A. 264, 83 S.W. 615, 84 S.W. 1160, 7 A. & E. Ann. Cas. 913, 27 Ky. L. Rep. 453, 85 S.W. 719, such provision cannot be accepted as a bar to plaintiff's right to prosecute the suit, for the reason that in the *Spinks* Case it was expressly held that such a provision was against the public policy of this state, and for that reason void. The contract in the *Spinks* Case was controlled by the laws of this state, for the reason that it was made and entered into in this state, *Spinks* being a resident of this state at the time. For the appellant it is insisted that, inasmuch as the insured had made Kentucky his home for several years prior to his death, and died here and his estate was administered here, the rule announced in the *Spinks* Case must control. For appellee it is insisted that the contract must be controlled by the laws of the place where it was made and entered into or to be performed, and that, for the purposes of this case, it is immaterial whether it is controlled by the laws of the state of Wisconsin or the state of Ohio, and that it is entirely immaterial where the insured resided after the contract was made and entered into, or where he died and his estate was administered.

As a general rule, a contract is governed and controlled by the laws of the place

where it is made. In 9 Cyc. Law & Proc. p. 582, it is stated that: "The law of the place where the contract is entered into at the time of making the same is as much a part of the contract as though it were expressed therein." Again, in 9 Cyc. Law & Proc. p. 667, it is stated that *prima facie* the "proper law of the contract is presumed to be the law of the country where the contract is made (*lex loci contractus*); this presumption applies with special force when the contract is to be performed wholly in the country where it is made, or may be performed anywhere, but it may apply to a contract partly or even wholly to be performed in another country. In other words, the proper law of a contract is the law of the place where it is made. This law . . . governs not only as to its execution, authentication, and construction, but also as to the legal obligations arising from it, and as to what is to be deemed a performance, satisfaction, or discharge."

The decisions of this court are in harmony and accord with the principle thus announced, and in *Ford v. Buckeye State Ins. Co.* 6 Bush, 133, 99 Am. Dec. 663, this court held that where a contract, made in Indiana, was not enforceable under the laws of that state, it would not be enforced in this state. And in *Jameson v. Gregory*, 4 Met. (Ky.) 363, it was held that the legality of a contract must be decided by the laws of the state in which it was made. In *Archer v. National Ins. Co.* 2 Bush, 226, it was held that the validity and legality of a contract executed in Indiana must be determined by the laws of that state. In *Young v. Harris*, 14 B. Mon. 556, 61 Am. Dec. 170, this court, through Chief Justice Marshall, said: "The general principle determining the law by which a contract is to be construed is that, unless the place appointed for its payment be different from that in which it is made, it is to be governed by the law of the place where it is made, which is the *lex loci contractus*." In *Western U. Teleg. Co. v. Eubanks*, 100 Ky. 591, 36 L.R.A. 711, 66 Am. St. Rep. 361, 38 S. W. 1068, it is said that "the general rule is that the law of the place where the contract is to be performed governs, subject, of course, to the rule that a contract which is void by the law of the place where made is void everywhere." And in *Hyatt v. Bank of Kentucky*, 8 Bush, 193, it was held, where a note was executed in Louisiana, that as between the maker of the note and the payee its legal effect must be determined by the law of that state.

It will thus be seen to be the law of this state that in construing contracts made and to be performed in another state,

the law of the state where the contract is made and to be performed controls; but this law, like any other fact, must be proven. In the case at bar it is admitted in the pleading.

Applying the foregoing principles to the case under consideration, whether this contract is to be construed and governed by the laws of the state of Wisconsin, where it was made, or the laws of the state of Ohio, where it is claimed it was to be performed, is wholly immaterial, for it certainly must be construed, and the rights of the parties thereunder determined, by the laws of one or the other of these states, and in either event the contention of appellee must be upheld. As plaintiff had no right to prosecute the suit, it becomes unnecessary to pass upon the other questions raised.

Judgment affirmed.

Petition for rehearing denied.

WEST VIRGINIA SUPREME COURT OF APPEALS.

JOHN B. FLOYD

v.

J. B. DUFFY, Admr., etc., of Patrick Duffy, et al., Appts.

(68 W. Va. 339, 69 S. E. 993.)

Trust — creation — necessity of writing.

1. Creations and declarations of trusts in lands may be made and proved in this state as they could be in England, before, the English statute of frauds; the 7th section of that statute, requiring the proof of such creations and declarations to be in writing, never having been in force in this state.

Constructive trust — establishment — absence of writing.

2. Though no contract for the sale of land is enforceable, either at law or in equity, unless it be in writing, and no estate in land for more than five years can pass except by deed or will, there are many instances in which courts of equity except

Headnotes by POTTENBARGER, J.

Note. — Validity of parol partnership to deal in land.

This note supplements the notes to *Bates v. Babcock*, 16 L.R.A. 745, and *Scheuer v. Cochem*, 4 L.R.A. (N.S.) 427.

The rule that partnership agreements for the purchase and sale of real estate are not within the statute of frauds is sustained by the majority of the cases in point decided since those notes.

In *Garth v. Davis*, 120 Ky. 106, 117 Am. St. Rep. 571, 85 S. W. 692, it is held that a verbal agreement to become partners to deal in real estate is not within the statute of frauds.

So, in *Buckley v. Doige*, 188 N. Y. 238,

transactions relating to land from the operation of these provisions, on the ground that they stand upon equities independent of the contracts attending them, and establish constructive trusts in favor of grantors, as well as persons not mentioned in the deed.

Statute of frauds — agreement to subdivide and sell land — common purpose.

3. A conveyance of the legal title to land obtained by the grantee in pursuance of a verbal agreement between himself and a third party, prior in date to the deed or contemporaneous therewith, for their common benefit, no purchase money having been paid by either of them, and it having been the intention and agreement of the parties to sell the land in small portions, and pay for the same out of the proceeds thereof as sold, and reconvey all that should remain unsold after a certain date, is not within the statute of frauds; and, by virtue thereof, the grantee took the legal title in trust for himself, the grantor, and such third party.

Same — partnership agreement — trust.

4. If, in pursuance of a prior or contemporaneous agreement of copartnership to purchase and sell land for profit, one of the parties obtain a conveyance of the land to himself, proof of such agreement and conveyance, pursuant thereto, establishes a trust in the lands in favor of the other partner, not inhibited by the statute of frauds.

80 N. E. 913, 11 A. & E. Ann. Cas. 263, and in *Stitt v. Rat Portage Lumber Co.* 98 Minn. 52, 107 N. W. 824, a copartnership for dealing in real estate may be created by parol.

In *Vaught v. Hogue*, 32 Ky. L. Rep. 1061, 107 S. W. 757, it is held that where it is agreed that one should furnish another money to buy a certain tract of land, and that the latter should repay the money so furnished, and that all the profit made on the transaction should be divided equally between them, the contract is not within the statute of frauds, whether the parties be regarded as partners in the transaction or jointly interested in the venture.

So, in *Mallon v. Buster*, 121 Ky. 379, 123 Am. St. Rep. 201, 89 S. W. 257, it is held that a parol partnership formed by bidders at a judicial sale, to buy and divide the land, is not within the statute of frauds.

And in *Griffin v. Schlenk*, 31 Ky. L. Rep. 422, 102 S. W. 837, it is held that a parol contract between joint owners of real property, that one is to bid at a public sale of it for the benefit of all, is valid.

An agreement between two parties to purchase real estate at commissioners' sale, one to advance the purchase money by way of loan, and the property to be taken by them on shares, is not within the statute. *Wiedemann v. Crawford*, 142 Ky. 303, 134 S. W. 495.

So, an agreement between two persons to purchase, develop, and sell lands on joint

Pleading — proof — agreement — equity.

5. While, in equity, the *allegata* and *probata* must correspond, the rules for the enforcement of this principle in courts of equity are more liberal than those applied in actions at law, and an agreement in matters of substance only is required; it being sufficient that the cause of action made out by the bill and the evidence is substantially the same.

Appeal — failure to mature bill — effect.

6. If on appeal it appears that the original bill is broad enough to admit the evidence and sustain the decree pronounced, the decree will not be reversed for failure to mature an amended bill unnecessarily filed.

Pleading — amendment — meeting case.

7. The trial court may properly allow an amended bill to be filed, after the evidence taken has developed a state of facts variant from those set up in the original bill, but not constituting a departure as defined by the courts, nor a new cause of action.

Appeal — allowing amendment — interference.

8. The exercise of the discretion of the trial court in permitting an amended bill to be filed will not be disturbed by an appellate court, except in cases of abuse of such discretion.

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account, and share equally in the profits and losses of the venture, is not within the statute of frauds, but constitutes them partners to the extent of the undertaking governed by it. *Morgart v. Smouse*, 103 Md. 463, 115 Am. St. Rep. 367, 63 Atl. 1070, 7 A. & E. Ann. Cas. 1140.

And a parol partnership for the purchase and sale of land for speculation, the profits to be divided among the partners, is not within the statute. *Miller v. Ferguson*, 107 Va. 249, 122 Am. St. Rep. 840, 57 S. E. 649, 13 A. & E. Ann. Cas. 138.

So, a parol agreement for a joint mining venture, in which both parties stipulated to contribute services and money for their joint and equal benefit, is not within the statute. *Cascaden v. Dunbar*, 84 C. C. A. 556, 157 Fed. 62.

So, a contract, upon sufficient consideration, to divide the profits of a purchase and sale of land, need not be in writing. *Rice v. Parrott*, 76 Neb. 501, 107 N. W. 840, affirmed on rehearing in 76 Neb. 505, 111 N. W. 583.

And a verbal agreement made by parties, to share in the profits of a contemplated speculation in mining property, does not involve such an interest in real estate as to bring it within the statute of frauds. *Jones v. Patrick*, 140 Fed. 403.

In *Rauch v. Donovan*, 126 App. Div. 52, 110 N. Y. Supp. 690, it is held that an agreement for a joint venture with respect to a parcel of land, title to be taken in one of the parties, to be held on their joint ac-

APPEAL by defendants from a judgment of the Circuit Court for Kanawha County in plaintiff's favor in a suit for an accounting of profits against the estate of deceased and for a partition of unsold lots which were alleged to have been conveyed to deceased in trust for himself and the plaintiff. Affirmed.

The facts are stated in the opinion.

Messrs. Linn & Byrne and Mollohan, McClintic, & Mathews for appellants.

Messrs. J. W. Kennedy and E. B. Dyer, for appellee:

When once a trust is clearly established, a court of equity looks at the substance, and will not defeat it on trivial grounds, but the trust continues until surrendered.

Murry v. Sell, 23 W. Va. 475; Currence v. Ward, 43 W. Va. 367, 27 S. E. 329.

A trust in real estate may be proved by parol evidence.

Hamilton v. McKinney, 52 W. Va. 317, 43 S. E. 82; Currence v. Ward, supra.

A decree of the lower court will not be reversed on appeal, unless error affirmatively appears on the face of the record.

Cox v. The Coal & Oil Investment Co. 61 W. Va. 293, — S. E. —; Smith v. Yoke, 27 W. Va. 639; Yoke v. Shay, 47 W. Va. 40, 34 S. E. 748; Shrewsbury v. Miller, 10 W. Va. 115; Richardson v. Donehoo, 16 W. Va. 685; Griffith v. Corrothers, 42 W. Va. 59,

24 S. E. 569; Spurgin v. Spurgin, 47 W. Va. 38, 34 S. E. 750.

Poffenbarger, J., delivered the opinion of the court:

The object of the bill in this cause was an accounting by the estate of Patrick F. Duffy, deceased, for one half of the proceeds of the sale of a large number of town lots, and partition of a few lots remaining unsold out of the property, all of which the bill alleges was conveyed to Duffy, to hold in trust for himself and the plaintiff, John B. Floyd.

The plaintiff proceeds upon the theory of a purchase of 137 lots, constituting what is known as the McClung addition to the city of Charleston, at the price of \$30,000, none of which was paid or intended to be paid at the date of the conveyance, but all to be paid out of the proceeds of the sale of the lots, at prices per lot agreed upon between McClung, the grantor in the deed to Duffy, on the one hand, and Duffy and Floyd on the other, if the lots could be sold within a specified time, and, if not, the balance to be paid or settled by a reconveyance of the unsold lots at the prices agreed upon in the collateral agreement. While the deed from McClung to Duffy recites the payment of \$6,000 in cash and the execution of three promissory notes for \$8,000 each, the con-

count and sold and the profits divided, is not an agreement for the sale of property or for the conveyance of an interest in land, within the statute of frauds, and need not be in writing.

And in *Pounds v. Egbert*, 117 App. Div. 756, 102 N. Y. Supp. 1079, it is held that while an agreement to form a copartnership to deal in lands does not involve any element violative of the statute of frauds, yet, if such agreement also provides for a conveyance of real property from one partner to another or to the copartnership, it then provides for the creation of an estate or interest in lands, and comes directly within the statute of frauds.

On the other hand, the following cases adopt the rule that such agreements are contracts respecting an interest in land, and void by the statute of frauds if not in writing:

A parol contract by which two persons enter into a partnership to purchase real estate, one to furnish the money and take the title, and convey a half interest to the other upon receiving his share of the purchase price, is void under the statute of frauds. *Scheuer v. Cochem*, 126 Wis. 209, 4 L.R.A. (N.S.) 427, 105 N. W. 573.

So, a parol promise to conduct partnership dealings in real estate is void under the statute of frauds. *Langley v. Sanborn*, 135 Wis. 178, 114 N. W. 787.

An a parol agreement that a third party

should furnish one member of a partnership dealing in real estate money to purchase in his own name his copartner's interest, and hold it for said third party's benefit, is invalid as being within the statute. *Butts v. Cooper*, 152 Ala. 375, 44 So. 616.

And an oral agreement to purchase and sell real estate in partnership, and divide the profits, with the understanding that each person shall have an interest in the property, is, although applying to a series of transactions, invalid under the statute of frauds, where no performance takes place except the payment of the necessary incidental expense, the one advancing money for any parcel of land taking the title thereto. *Nester v. Sullivan*, 147 Mich. 493, 9 L.R.A. (N.S.) 1106, 111 N. W. 85, modified in 147 Mich. 508, 111 N. W. 1033.

In *Norton v. Brink*, 75 Neb. 566, 7 L.R.A. (N.S.) 945, 121 Am. St. Rep. 822, 106 N. W. 668, 110 N. W. 669, and in *Mancuso v. Rosso*, 81 Neb. 786, 116 N. W. 679, it is held that a parol agreement between two persons to purchase a single tract of land together or "in partnership," where the purchase is finally made by one of them, who pays the whole of the purchase price and takes the title to himself, the other simply agreeing to pay him one half thereof on demand, does not create a partnership between such persons, and is within the statute of frauds.

J. D. C.

tention of the plaintiff is that no money was paid nor any notes executed at the inception of the transaction, and that no interest on the purchase money was contemplated or paid for a period of three years after the date of the deed, at which time all purchase money was to be paid out of the sales of lots and by reconveyances of the unsold lots, if any. The deed from McClung to Duffy bears date May 7, 1890. Lots were conveyed by Duffy as early as July, 1890, and he continued to make conveyances for a number of years, but, having later become financially embarrassed, and his creditors having acquired liens on the property, he was unable to proceed further with the enterprise. Two of the lots were judicially sold, at the instance of his creditors. About the year 1901, a friend of his purchased a number of the judgments and allowed him to make private sales of sufficient property, through an attorney in fact, appointed for the purpose, to pay off all, or practically all, of his debts. In this way, all of the McClung property, except about thirty-three lots, was sold, and the proceeds went into the hands of Duffy or to his creditors. In March, 1905, Duffy died. At and immediately before the conveyance to Duffy, and from that time until he became financially embarrassed, Floyd undoubtedly had relations with him respecting the property. He was active in effecting sales of the lots. He seems to have incurred some expense in cutting a ditch for the benefit of the property, and otherwise interested himself in the promotion of the enterprise. W. E. R. Byrne, the attorney in fact, and Duffy's heirs, deny all knowledge of any claim on the part of Floyd to any interest in the property until after the death of P. F. Duffy, and say they understood from the latter that Floyd was selling the lots on a commission. Declarations of P. F. Duffy to this effect are put in evidence by witnesses. A large amount of testimony was taken on both sides, and the circuit court of Kanawha county rendered a decree declaring that Duffy took title to the lots in trust for himself and the plaintiff, and referred the cause to a commissioner to state an account between the parties as a basis for a decree giving the relief prayed for in the bill. Pending the suit, the lots remaining unsold at the institution thereof were conveyed by Duffy's heirs to Isaac Loewenstein, in consideration of \$27,000; the purchaser paying \$7,000 in cash and executing notes for the residue.

As the trust alleged in the bill is predicated on parol evidence, it becomes necessary to determine, in the first instance, whether it can be so established. Assuming the agreement between Floyd and Duffy

to have been made before the deed was executed and delivered to the latter, it nevertheless remains that no money was paid on the purchase price by the plaintiff, nor, indeed, anything more than a nominal sum by Duffy. All that was ever paid on the property seems to have been paid after the delivery of the deed. There was no agreement to pay anything otherwise than out of the proceeds of the sale of lots, as such sales should be made; Duffy and Floyd taking the excess of purchase money over the prices named in the collateral agreement, as their profit. Counsel for the appellee frankly admit that the trust is not in writing. They assert it is not a resulting trust, nor a constructive trust, but is an express trust, which the law permits without writing. At common law no particular form of creation or declaration of a trust or use was required. It could be by deed or will, or writing not under seal, or by mere word of mouth. Uses and trusts were simply averred and proved like any other facts, and writing was not required. *Currence v. Ward*, 43 W. Va. 370, 27 S. E. 329; 28 Am. and Eng. Enc. Law, p. 869; *Saunders, Uses & Tr.* 152, * 210; *Perry, Tr.* § 75. In 1676, the English statute of frauds was passed, the 7th section of which required all declarations or creations of trusts or confidences in any land, tenements, or hereditaments to be proved by some writing signed by the party, enabled to declare such trust, or by his last will in writing. *Saunders, Uses & Tr. Id.*; *Perry, Tr. Id.* Not being made expressly applicable to the colonies, this statute was never in effect in Virginia (28 Am. & Eng. Enc. Law, p. 873), but in 1787, Virginia enacted a statute of frauds, the same in many respects as that of England, but omitting said 7th section, relating to declarations of trust. Nor has it ever been incorporated in the statutes of this state. Hence, trusts in land may be declared in this state as at common law. *Currence v. Ward*, cited. However, every contract relating to land is not a declaration or creation of a trust. There is no pretense that Floyd obtained the legal title to the land. The utmost that he could have had was an equitable title, based upon his parol contract. If he had paid money, his right would have rested not upon the agreement, but upon the payment, upon a fact of which the agreement was a mere attendant. Under the principles declared in *Currence v. Ward*, it suffices that the payment be made at or before the vesting of the legal title in the trustee. That did not occur in this case. No purchase money was ever paid until after the delivery of the deed. As to this, there is neither controversy nor doubt.

It is insisted, however, that an express oral agreement on the part of the grantee to hold in trust for a third party, antedating the vesting of the legal title, and to which the grantor was not a party, creates an express trust, permissible in this state because our statute of frauds does not require the creation or declaration of a trust to be in writing. Would such an agreement be anything more than a contract to sell land? The purchaser takes the whole title in himself. Nothing is paid by the third party, and, consequently, his claim is based solely upon the agreement, and that agreement calls for the beneficial ownership of all, or a portion, of the property, giving a right to call, in a court of equity, for the conveyance of the legal title. Such third person has no interest whatever in the land. Having had no previous right in it, and not having paid anything, there seems to be nothing upon which a court of equity can predicate relief, resting in conscience, and not upon contract alone.

This seems to put the case within another provision of the English statute of frauds, substantially incorporated in our law, denying remedy upon any agreement or contract for the sale of land, unless it, or a memorandum thereof, is in writing. Code 1906, § 3438. Another statutory provision declares that no estate of inheritance or freehold, or for a term of more than five years, in lands, shall be conveyed unless by deed or will. Code 1906, § 3020. These provisions absolutely prevent the acquisition of any estate in land for more than five years by means of a mere verbal contract. There must be something more; an equity outside and independent of, or in addition to, the contract. There are numerous instances of such equities. If one person pay all or part of the purchase money, and the conveyance is made to another, a resulting trust in favor of the party who paid the money arises. If one person has an equity of redemption in land, and another purchases it at forced sale for the benefit of the debtor, taking the title in his own name as a mere security, and so stepping into the shoes of the creditor, the debtor may have the title back on repaying the purchase money; or, if an absolute deed is found to be, under the peculiar circumstances of the transaction, in fact only a mortgage, there is a trust relation.

In all these instances and others to be found in the books, the *cestui que trust* either put money into the property or had an antecedent interest in the land, constituting substantially the basis of an equity. It is this, not the verbal agreement, that confers right to invoke the aid of a court of equity, notwithstanding the statute of 33 L.R.A. (N.S.)

frauds. Such cases are held not to have been within the legislative intent, since to include them would make the statute work injustice, wrong, and oppression. On the same principle, certain cases are excluded, in equity, from its operation, on the ground of actual fraud, since, in that forum, fraud vitiates everything in which it is found. Thus, many of the decisions say the mere intention of a grantee in a voluntary conveyance, that is, a conveyance not made upon a valuable consideration, not to hold in trust for the grantor, if such intention exist at the time of the conveyance, constitutes such fraud as to render the grantee a constructive trustee; he having previously agreed so to hold it. 15 Am. & Eng. Enc. Law, p. 1194. In cases of this class, the true rule seems to be that there must have been an original misrepresentation by means of which the legal title was obtained; an original intention to circumvent, and get the better bargain, by the confidence reposed (Browne, Stat. Fr. § 94); though some courts say the mere refusal to execute the trust suffices to establish fraud. Here, the ground of equitable relief and immunity from the statute is the fraud perpetrated, not the agreement to hold in trust. All the instances named are designated constructive, not actual, trusts. In some the fraud is constructive; in others it is actual; in all, courts of equity say it is against conscience to permit the holder of the legal title to deny the *cestui que trust* the benefit intended for him, and the conclusion and determination rest upon the facts and circumstances, not upon the mere sanctity of an agreement. Unless some such circumstances exist, a court of equity looks upon a contract exactly as it is viewed in a court of law. An agreement valid in law is valid in equity, and one not valid at law will not be enforced in equity.

By the great weight of authority, if not, indeed, by all courts, an agreement on the part of one purchasing land with his own money, and taking the conveyance in his own name, to hold it in trust for another person, or to reconvey it to the grantor, is within the statute of frauds. 15 Am. & Eng. Enc. Law, p. 1188. Likewise, if a voluntary grantee in a conveyance orally agree to hold the land in trust for the grantor, or reconvey it upon demand, or to hold in trust for, or convey to, a third person, the agreement is generally held to be within the statute of frauds, unless circumstances exist constituting an equity, such as confidential relationship between the parties, or fraud in the procurement of the conveyance. 15 Am. & Eng. Enc. Law, p. 1192. As to this, the authorities are not uniform. Our leading case on this subject

is *Troll v. Carter*, 15 W. Va. 567. There, the minority rule seems to have commended itself to the court, as, in the fourth point of the syllabus, it is said that a volunteer will be held to the performance of the parol trust, because to allow him to hold the land obtained by his promise to take it in trust for third parties would permit him to commit a fraud. *Hardman v. Orr*, in 5 W. Va. 71, permits the establishment of such a trust, and enforces it, but the authorities relied upon in the opinion are not, in a single instance, applicable to the question we are discussing. *Hardman*, in his lifetime, purchased land with money furnished by *Hickman*, who directed the conveyance to be made to *Hardman*, and orally declared the land was to be held by him for the use and benefit of *Mrs. Orr*, *Hickman's* natural daughter, and, after a reasonable time, conveyed to her. No reference is made in the opinion to the statute of frauds. The court merely said: "When the land was paid for with the money furnished by *Hickman*, and the legal title vested in *Hardman*, the trustee, for the benefit of *Mrs. Orr*, a perfected and complete gift was made to *Mrs. Orr*, which may be enforced against the trustee or his heirs." This is followed by the observation that it is competent to prove the objects of a trust by parol evidence. All the cases cited to sustain the first proposition involved trusts created by deed or written contracts, and nowhere in the opinion is the statute of frauds mentioned. The doctrine of *Troll v. Carter*, above stated, is reiterated in *Zane v. Fink*, 18 W. Va. 693, 715, and *Titchenell v. Jackson*, 26 W. Va. 460, 467, 468. The decisions of this court above referred to leave undecided the question whether an agreement on the part of the grantee who has paid a valuable consideration for the land, to hold it in trust for a third party, is within the statute; but, as we have shown, it is held by the great weight of authority to be so, and we think this conclusion accords with reason and principle. If such a case is not within the statute, a trust may be ingrafted, by parol evidence, upon almost any conveyance. Proof of such an agreement is, as we have said, nothing short of a contract to sell and convey land. While the earlier cases do not decide it, *Nash v. Jones*, 41 W. Va. 769, 24 S. E. 592; *Currence v. Ward*, 43 W. Va. 367, 27 S. E. 329; and *Woods v. Ward*, 48 W. Va. 652, 37 S. E. 520, seem to settle the question in accordance with the view here expressed.

In Pennsylvania, where this question has received much learned attention, a distinction has been marked between declarations of trust on the part of the grantor and like declarations on the part of the grantee. In 33 L.R.A. (N.S.)

Kisler v. Kisler, 2 Watts, 323-325, 27 Am. Dec. 308, Chief Justice Gibson brought his great analytical powers to bear upon it. He said: "That an express trust may be declared by parol, I am not disposed to deny; but if declared by the grantee, and not the grantor, of the legal estate, where its object is not to indicate a beneficiary purpose by the grantor in favor of the *cestui que trust*, it must, to be binding, be made in consideration of payment of the purchase money by the *cestui que trust*; and then it would produce no other effect than the law would produce without it. Probably, it was the object of the statute to sustain a gift of the land by the grantor to a person not named in the conveyance; but not a gift by the party purchasing, the execution of which could not be enforced for want of a consideration. If I proclaim that I hold my house for B it is evidence of a trust, which may, however, be rebutted by proof that the beneficial ownership is not in him; for such a declaration is not binding as a gift even of a chattel. But if I convey my house to A, with parol direction to hold it for B, a confidence arises which it would be unconscionable in A to violate; and this would constitute that species of express parol trust which it was the object of our statute to sustain. But if I proclaim that I hold my house for B, on terms of conveying it to him when he shall reimburse me what I paid for it, this is not a trust, but a contract of sale within the operation of the prohibitory clause." See, also, *Robertson v. Robertson*, 9 Watts, 32; *Haines v. O'Conner*, 10 Watts, 313, 30 Am. Dec. 180; *Fox v. Heffner*, 1 Watts & S. 372; *Jackman v. Ringland*, 4 Watts & S. 149; *Blyholder v. Gilson*, 18 Pa. 134; *Freeman v. Freeman*, 2 Pars. Sel. Eq. Cas. 81.

No doubt the *McClungs* could have declared a parol trust in favor of *Floyd*, under the principles just stated; but there is no evidence of any such declaration. They dealt with *Duffy* alone. *Floyd* was not a party to the deed, nor does it appear that he was a party to the alleged collateral agreement. He dealt with *Duffy*, and had no prior interest in the land. Hence the case does not fall within that class in which land conveyed for a specific purpose comes back to the grantor upon the failure or accomplishment of such purpose, on the theory of a resulting trust, resting upon implication. In such cases, there is an independent equity in the grantor, growing out of a former beneficial interest in him, which has passed from him only partially or not at all, as in the case of a mortgage in the form of a deed absolute on its face, or the conveyance of land for a specific pur-

pose which fails or has been accomplished, leaving a surplus or residue in the hands of the trustee, or the declaration of a trust by the grantor in favor of a third person. This original beneficial interest, an established fact, shown by parol evidence to have been conveyed only as security for a debt, or to have been placed in the hands of the grantee as trustee for the execution of certain purposes of the grantor, the full accomplishment of which has required the use of only a portion of the property, or which have wholly failed for some reason, constitutes the basis of an equity outside of the deed and measurably independent of it. A state of facts is thus disclosed which makes a claim of absolute ownership on the part of the grantee contrary to conscience, and variant from principles of justice and equity. *Hess' Appeal*, 112 Pa. 168, 4 Atl. 340; *Rice v. Rice*, 107 Mich. 241, 65 N. W. 103; *Thompson v. Thompson*, 30 Neb. 489, 46 N. W. 638; *Pierson v. Pierson*, 5 Del. Ch. 11; *Haigh v. Kaye*, L. R. 7 Ch. 469, 41 L. J. Ch. N. S. 567, 26 L. T. N. S. 675, 20 Week. Rep. 597; *Lincoln v. Wright*, 4 DeG. & J. 16, 28 L. J. Ch. N. S. 705, 7 Week. Rep. 350; *Booth v. Turle*, L. R. 16 Eq. 182; *Troll v. Carter*, 15 W. Va. 567, 577, 578; *Sadler v. Taylor*, 49 W. Va. 104, 38 S. E. 583; *Thacker v. Morris*, 52 W. Va. 220, 94 Am. St. Rep. 928, 43 S. E. 141; *Vangilder v. Hoffman*, 22 W. Va. 1; *Lawrence v. Du Bois*, 16 W. Va. 443; *Davis v. Demming*, 12 W. Va. 246.

Though the evidence gives no support to the theory of a declaration of trust by the grantors in favor of Floyd, and the bills cannot be read as asserting one, and it is clear that the latter never had any prior interest in the land, it seems reasonably clear that he may invoke the general principle declared and illustrated by the authorities just cited, if he has established a state of facts constituting an independent equity, a right in respect to the property resting in justice, equity, and good conscience, and not denied to him by the statute of frauds. An agreement between him and Duffy, made prior to the conveyance or contemporaneously therewith, to have the legal title to the land conveyed to the latter for the joint benefit of both, and subsequently to acquire the beneficial ownership by sales of the land in small portions and payment of the purchase money out of the proceeds of the same, would constitute, in our opinion, such an equity. Assuming this to have been their understanding and arrangement, the agreement was to buy and pay for the land. It was not a purchase by one and a resale to the other. In so far as it was a purchase at all, it was a joint one for their common benefit. Neither of them paid anything, nor

bound himself to pay anything, except contingently or conditionally. The legal title was taken by Duffy in pursuance of a prior or contemporaneous agreement between himself and Floyd, to enable them to execute the agreement and effectuate its purposes. It was taken for their common benefit. That the statute of frauds does not inhibit such a contract seems to have been unequivocally asserted in *Currence v. Ward*, 43 W. Va. 367, 27 S. E. 329; and that *Ludwick v. Johnson*, 67 W. Va. 499, 68 S. E. 117, and *Id.* 58 W. Va. 464, 52 S. E. 489, places such an agreement outside of the statute, there can be no doubt. Thus, treated as a mere contract of purchase of land creating an equitable interest therein, on the part of a third person, antedating the vesting of the legal title in the trustee or ostensible purchaser, or contemporaneous therewith, the agreement is not under the ban of the statute.

But the theory of this bill goes even beyond that. Floyd and Duffy may be said to have formed a partnership for the purchase and resale of this land, imposing upon each an equal burden for purchase money and expenses, and conferring upon each the right to an equal share of the profits, in pursuance of which Duffy took the legal title in his own name for their common benefit. That such a purchase is not within the statute is attested by an abundance of authority. *Dale v. Hamilton*, 5 Hare, 369; *Essex v. Essex*, 20 Beav. 442; *Miller v. Ferguson*, 107 Va. 249, 122 Am. St. Rep. 840, 57 S. E. 649, 13 A. & E. Ann. Cas. 138; *Chester v. Dickerson*, 54 N. Y. 1, 13 Am. Rep. 550; *Fairchild v. Fairchild*, 64 N. Y. 471; *Traphagen v. Burt*, 67 N. Y. 30; *Clagett v. Kilbourne*, 1 Black, 346, 17 L. ed. 213; *Bunnel v. Taintor*, 4 Conn. 568; *Holmes v. McCray*, 51 Ind. 358, 19 Am. Rep. 735; *Hirbour v. Reeding*, 3 Mont. 15, 11 Mor. Min. Rep. 514; *Welland v. Huber*, 8 Nev. 203, 13 Mor. Min. Rep. 363; *Reagan v. McKibben*, 11 S. D. 270, 76 N. W. 943, 19 Mor. Min. Rep. 550; *Moore v. Hamerstag*, 109 Cal. 122, 41 Pac. 805, 18 Mor. Min. Rep. 256; *Moritz v. Lavelle*, 77 Cal. 10, 11 Am. St. Rep. 229, 18 Pac. 803, 16 Mor. Min. Rep. 236. After having analyzed a number of cases, to determine whether proof of the acquisition of the legal title to land by a member of a copartnership, for the purposes of the partnership and in pursuance of the partnership agreement, constitutes an independent equity lying beyond the scope and influence of the statute of frauds, Sir James Wigram, the vice chancellor, in *Dale v. Hamilton*, said: "The principle upon which I presume the above cases have proceeded has been partly the jurisdiction of the court in cases between

partners touching the partnership property, and partly its jurisdiction to relieve against the fraud of a partner who should avail himself of his legal rights in violation of his partnership contract, a fraud as against which no remedy, or no adequate remedy, could be had at law."

We think the evidence is sufficient to sustain Floyd's claim to an equal interest with Duffy in the land. Numerous witnesses testify to admissions by the latter. Some of these witnesses go so far as to say he admitted that they were equally interested in the land. This evidence is re-enforced by the conduct of the parties. Floyd was associated with Duffy in the very inception of the enterprise. He seems to have devised or arranged the plan under which the lots sold were to be disposed of. He was active in the sale of them. Other persons were employed to make the sales on a commission, and there is no intimation in the evidence that Floyd got any share of the commissions allowed them on the sales. Prospective purchasers were referred to him, upon disagreements as to price. He and Duffy together indorsed paper for McClung, and, in one instance, Duffy refused to indorse a note for McClung, because Floyd declined to do so. A ditch was made for the benefit of these lots and to promote the sale of them. It was agreed that the cost of the construction of this ditch should be divided equally among McClung, Duffy, and Floyd. Opposed to all this evidence is some conduct on the part of Floyd which counsel for the appellants regard as sufficient to outweigh it. While sales were being made by Duffy's attorney in fact, Floyd did not interfere, nor set up any claim to the land. These sales did not continue for a long period of time. The power of attorney was executed in November, 1901, and enough lots had been sold by July, 1902, to pay off Duffy's debts. There is no evidence of express disclaimer of interest on the part of Floyd. The evidence is that he made no claim of title, and said he was cultivating some of the lots by permission of Duffy, and desired protection of his crops in case of sale thereof. We do not see that he was under a positive duty to assert his title. The lots had been purchased for resale. He may have deemed Duffy's estate amply sufficient to reimburse him for such of his money as was appropriated to the payment of Duffy's debts; and he may have thought it the better policy to allow fair sales to be made; and he may have thought the rights of Duffy's creditors superior to his. An attempt was also made to weaken the testimony of some of the witnesses by showing conduct on their part inconsistent with their testimony. Here we have di-

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rect conflict in the testimony of witnesses, but it arises in respect to matters somewhat remote. The witnesses whose conduct is said to be inconsistent with their testimony adhere to their statements, and deny the conduct. Moreover, all of the witnesses for the plaintiff are not so affected. Documentary evidence is introduced to prove that Duffy paid McClung a large part of the purchase money by assignments to him of stocks, bonds, notes, and otherwise; and, on May 18, 1894, executed his note for \$6,697.96, covering the balance due on account of purchase money, and, on March 19, 1896, took a receipt in full from McClung. Checks given by Duffy to McClung and wife and others for them, or in payment of their debts, put in evidence, aggregate more than \$10,000. These facts are to be considered, of course, but they are by no means conclusive against Floyd. The sale money went into Duffy's hands, and he, in the nature of things, would pay McClung. If he could induce the latter to take stocks, bonds, notes, and property in lieu of money, that was perhaps to his advantage, and not to the detriment of Floyd. McClung says he had a tacit, if not express, agreement with Duffy to take equal interests with the latter in all his enterprises, and that Duffy took back from him some of the stocks and other property. As to the note for the balance, Duffy seems to have been already bound for the amount by indorsements of McClung's paper, but if he was not, his reluctance to reconvey the lots, and his confidence in their value, constituted a strong motive for extinction of McClung's equitable right for the common benefit of himself and Floyd. These transactions between Duffy and McClung, to which Floyd is not shown to have been a party, cannot alter or affect the original agreement, long antedating them. They are mere circumstances bearing upon the question of original intent, purpose, and agreement, and are not necessarily inconsistent with what the other testimony, facts, and circumstances indicate it to have been. On the whole, we think the evidence sustains Floyd's claim. In reaching this conclusion, we have not considered his testimony which we think is inadmissible. That the agreement between him and Duffy was either prior to the date of the deed, or coincident therewith, appears from the testimony of McClung and the circumstances he discloses.

Laches is also relied upon; but we think this defense not applicable under the circumstances. The trust was not repudiated nor disavowed until a very short time before the suit was brought, and this was before all the property had been sold. The trust had not then been fully executed.

A question of practice, remaining for disposition, has been postponed until now, under the belief that consideration thereof will be aided and simplified by the foregoing discussion of the facts and principles involved. The original bill sought an accounting for money arising from the sale of lots, and partition of the unsold lots. The object of the amended bill was to correct certain errors of fact in the original bill, relating to the consideration for the deed to Duffy and the physical condition of the property, to make it conform more nearly to the evidence. The latter did not mention the collateral agreement. It exhibited the deed, reciting payment of \$6,000 in cash and the execution of three notes for \$8,000 each as the consideration, without any express statement as to who paid the money or executed the notes. The bill alleged that Floyd and Duffy had agreed to purchase the land, for which they were to pay \$6,000 and execute three such notes. It alleged a joint purchase, and also a conveyance to Duffy for convenience. It also described the land conveyed as a tract of land. The amended bill, correcting these errors, did not change the nature of the demand, nor materially alter the basis thereof. The original bill set up an absolute joint purchase. As corrected, it set up a conditional joint purchase. In both instances, a joint purchase was alleged, establishing the same relation between the parties as regards the relief sought, the land having been fully paid for. Two of the defendants were nonresidents. As to them, there was an executed order of publication on the original bill, and process was served on one of them in the state. All the others were served. There was no process of any kind on the amended bill, but the administrator, as such, and in his own right as an heir, and two of the other heirs, appeared to it. Assuming that the original bill is not broad enough to let in the evidence and sustain the decree, failure to mature the amended bill is assigned as error, calling for reversal. We are of the opinion, however, that the variance of the evidence from the original bill is not material, and that the amended bill was not essential to the admissibility of the evidence or the decree. While, in equity, the *allegata* and *probata* must correspond, the rules for the enforcement of the principle are more liberal than those applied in actions at law. Agreement in matters of substance only is required in equity. If the cause made out by the bill and the evidence is substantially the same, relief will not be denied on the theory of a variance. Time and space need

not be consumed here in stating the reasons for this liberality, or the distinction between the practice at law and in equity. It suffices to refer to the authorities. *Wetherill v. McCloskey Bros.* 28 W. Va. 195; *Doonan v. Glynn*, 26 W. Va. 225; *Simpson v. Edmiston*, 23 W. Va. 675; *Floyd v. Jones*, 19 W. Va. 350; *Zane v. Zane*, 6 Munf. 406-416; *Anthony v. Leftwich*, 3 Rand. (Va.) 238, 263 (opinion of Judge Green). In some of the cases here cited, relief was denied on the ground of a total variance of the evidence from the bill, but they assert the general rule here applied. In others, it is both asserted and applied. See also *Hogg's Eq. Pro.* §§ 550, 551, and *Barton, Ch. Pr.* p. 276. For the proposition that the filing of an unnecessary amended bill does not preclude relief on a sufficient original bill, *Seabright v. Seabright*, 28 W. Va. 412, is authority.

An assignment of error is based on the allowance of the amendment of plaintiff's bill. An amendment of a bill or declaration will always be allowed when substantial justice will be thereby advanced. Even in this court cases are remanded with leave to amend, when the bill is bad and the evidence shows a good cause of action. The strict rule imposing duty to set up all known facts in an answer is not applied to bills, except in those instances in which an offer to amend comes after submission or decision. There the rule is somewhat strict, but this amendment was made before submission. The principal limitation upon the right of a plaintiff to amend his bill in this state, before submission, is that he shall not depart from the original cause of action or make a new case. That has not been done here. He may correct mistakes in his original bill by an amendment. *Burlew v. Quarrier*, 16 W. Va. 108; *Piercy v. Beckett*, 15 W. Va. 444; *Doonan v. Glynn*, 26 W. Va. 225; *Ratliff v. Sommers*, 55 W. Va. 30, 46 S. E. 712, 1 A. & E. Ann. Cas. 970. As to diligence, the degree required is in the discretion of the trial court, subject to review for abuse thereof. No abuse has occurred. While, as we have said, the amended bill is not essential to relief, no reason why the plaintiff should not be permitted to mature it is perceived. Hence this response to the objection to the filing thereof.

Perceiving no error in the decree complained of, we affirm it.

Petition for rehearing denied January 11, 1911.

NEW YORK COURT OF APPEALS.

GEORGE N. SMITH, Respt.,

v.

RUDOLPH DOTTERWEICH, Appt.

(200 N. Y. 299, 93 N. E. 985.)

Promissory note — condition — failure to meet — effect.

1. The maker of a promissory note may defeat an action thereon by the original payee by showing that it was executed as a premium for a life insurance policy, and that neither policy nor note was to be valid unless the payee secured for the maker a loan upon the policy, which was not done.

Evidence — condition for promissory note — admissibility.

2. Parol evidence is admissible to show that a promissory note which was signed and delivered was not to take effect until the payee had secured a loan for the maker.

Evidence — admissions of agent — admissibility.

3. Evidence is admissible in a suit on a renewal note of declarations and admissions of one having possession of the original, which was signed and delivered subject to a condition, made at the time he secured the renewal, to the effect that the condition existed, although it was made in the absence of the payee, and there is no proof that he had any authority to do anything except to get an unconditional renewal.

(January 3, 1911.)

APPPEAL by defendant from a judgment of the Appellate Division of the Supreme Court, Fourth Department, affirming a judgment of a Trial Term for Cattaugus County in plaintiff's favor in an action brought to recover the amount alleged to be due on certain promissory notes. Reversed.

The facts are stated in the opinion.

Mr. Adelbert Moot and Helen Z. M. Rodgers, with Mr. Allen J. Hastings, for appellant:

The notes in suit were delivered upon a condition precedent which has not been performed.

Jamestown Business College Asso. v. Allen, 172 N. Y. 291, 92 Am. St. Rep. 740, 64 N. E. 952; Smith v. Mussetter, 58 Minn. 159, 59 N. W. 995; Graham v. Rammel, 76 Ark. 140, 88 S. W. 899, 6 A. & E. Ann. Cas. 167; Mendenhall v. Ulrich, 94 Minn.

100, 101 N. W. 1057; A. H. Andrews & Co. v. Hess, 20 App. Div. 194, 46 N. Y. Supp. 796; Benton v. Martin, 52 N. Y. 570; Bookstaver v. Jayne, 60 N. Y. 146; Grierson v. Mason, 60 N. Y. 394; Reynolds v. Robinson, 110 N. Y. 654, 18 N. E. 127; Schmittle v. Simon, 114 N. Y. 176, 11 Am. St. Rep. 621, 21 N. E. 162; Blewitt v. Boorum, 142 N. Y. 357, 40 Am. St. Rep. 600, 37 N. E. 119; Higgins v. Ridgway, 153 N. Y. 130, 47 N. E. 32; Ware v. Allen, 128 U. S. 590, 32 L. ed. 563, 9 Sup. Ct. Rep. 174; Burke v. Dulaney, 153 U. S. 223, 38 L. ed. 698, 14 Sup. Ct. Rep. 816; Hartford F. Ins. Co. v. Wilson, 187 U. S. 467, 47 L. ed. 261, 23 Sup. Ct. Rep. 189.

The consideration for the notes failed.

Stewart v. Union Mut. L. Ins. Co. 155 N. Y. 257, 42 L.R.A. 147, 49 N. E. 876; Parker v. Bond, 121 Ala. 529, 25 So. 898.

The exclusion of the evidence of defendant and his witness as to the conversation with plaintiff's agent at the time the notes were renewed was reversible error.

Potts v. Hart, 99 N. Y. 168, 1 N. E. 605; Bedell v. Bedell, 37 Hun, 419; Cramsey v. Sterling, 111 App. Div. 576, 97 N. Y. Supp. 1082; Davis v. Bemis, 40 N. Y. 453, note.

Mr. William R. Daniels, for respondent:

The evidence of the defendant shows that the notes were delivered upon a condition subsequent, and as part of a collateral agreement not in writing; the evidence thus received tending to vary the terms of the contract in writing between the parties, the court was right in directing the verdict for the plaintiff.

Read v. Bank of Attica, 124 N. Y. 671, 27 N. E. 250; Jamestown Business College Asso. v. Allen, 172 N. Y. 291, 92 Am. St. Rep. 740, 64 N. E. 952; Southampton v. Jessup, 173 N. Y. 84, 65 N. E. 949; Stowell v. Greenwich Ins. Co. 163 N. Y. 298, 57 N. E. 480; Eighmie v. Taylor, 98 N. Y. 288; Engelhorn v. Reitlinger, 122 N. Y. 76, 9 L.R.A. 548, 25 N. E. 297; Mead v. Dunlevie, 174 N. Y. 108, 66 N. E. 658; Thomas v. Scutt, 127 N. Y. 133, 27 N. E. 961; McGarrigle v. McCosker, 83 App. Div. 184, 82 N. Y. Supp. 494; Gray v. Meyer, 88 App. Div. 359, 84 N. Y. Supp. 613; Mead v. National Bank, 89 Hun, 102, 34 N. Y. Supp. 1054.

There was a full and complete consideration for the notes.

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Note. — As to contemporaneous agreements and their breach as a defense to a promissory note, see note to American Gas & Ventilating Mach. Co. v. Wood, 43 L.R.A. 449. As to admissibility of parol evidence to show that bill or note was delivered upon condition, see note to Beach v. Nevins, 33 L.R.A.(N.S.)

18 L.R.A.(N.S.) 288. And as to admissibility of parol evidence that written instrument for the payment of money was executed in reliance upon parol promise that payment was subject to a condition not incorporated therein, see note to Gandy v. Weckerly, 18 L.R.A.(N.S.) 434.

N. Y. 257, 42 L.R.A. 147, 49 N. E. 876; Van Schoick v. Niagara F. Ins. Co. 68 N. Y. 434; Globe & R. F. Ins. Co. v. Robbins & M. Co. 109 App. Div. 530, 96 N. Y. Supp. 378; Hewitt v. American Union L. Ins. Co. 34 Misc. 738, 70 N. Y. Supp. 1012; Tooker v. Security Trust Co. 26 App. Div. 372, 49 N. Y. Supp. 814, affirmed in 165 N. Y. 608, 58 N. E. 1093; First Nat. Bank v. Tisdale, 84 N. Y. 655.

The agreement for the loan was indefinite, and void for uncertainty, and incapable of enforcement.

United Press v. New York Press Co. 164 N. Y. 406, 53 L.R.A. 288, 58 N. E. 527; Van Schaick v. Van Buren, 70 Hun, 575, 24 N. Y. Supp. 306; Baurman v. Binzen, 16 N. Y. Supp. 342; Snow v. Russel Coe Fertilizer Co. 58 Hun, 134, 11 N. Y. Supp. 492; Flaherty v. Cary, 62 App. Div. 116, 70 N. Y. Supp. 951, affirmed in 174 N. Y. 550, 67 N. E. 1082; Vilas Nat. Bank v. Barnard, 77 Hun, 554, 28 N. Y. Supp. 922.

Werner, J., delivered the opinion of the court:

On the 28th day of February, 1901, the defendant executed and delivered to the plaintiff a promissory note for \$3,740, payable in six months. When this note became due it was renewed by the four notes in suit, which were dated August 28, 1901, and payable in six months from that date. These renewal notes were not paid at maturity, and the plaintiff brought this action upon a complaint in the usual form. Upon the trial the plaintiff introduced evidence to show that the original note was given in payment of premiums upon two life insurance policies issued to the defendant by the John Hancock Life Insurance Company through the plaintiff, as its general agent.

The defendant interposed an answer, denying that the notes were given for value received and that the plaintiff was the lawful holder and owner thereof, and alleging an oral agreement under which neither the notes nor the insurance policies were to become valid and enforceable obligations unless the plaintiff should secure for the defendant a certain loan of money. The defendant's testimony in support of these allegations was to the effect that in February, 1901, he was visited in Olean by two insurance brokers named Marvin and Larabee, who solicited him to take some life insurance; that he at first replied that he did not want any; that he afterwards called Larabee into his private office in the Dotterweich Brewery and told him that he had an option to buy the stock of the brewing company, and wanted to raise \$70,000 to pay for it; that, if he could get a loan for

that amount on the life insurance and the brewing company's stock as collateral, he would take the insurance; that Larabee assured him that it could be done, and cited instances in which certain department stores in Buffalo had made loans under similar conditions. The defendant further testified that a week later the plaintiff, Larabee, and Marvin called; that after he had been introduced, the plaintiff said: "The boys have been talking—Mr. Larabee and Mr. Marvin have been talking—to you about taking out an insurance for a loan," and I said, "Yes." He says, "Do you want it?" I said, "I do, providing you can make the loan." "And Mr. Smith said that if I would take out an insurance he could make the loan for me, and that this company could take at least 50,000 and he knew where he could place the other 20. They even advised me to split up the policy, so that they wouldn't have any trouble making the loan." The defendant further testified that he met the plaintiff in Olean about ten days later, at which time the latter produced the policies; that he then told the plaintiff "that under no consideration could I take out a policy of that kind without he could guarantee to make me a loan;" that when the plaintiff handed the original note to the defendant, "I told him there was no use of my signing that note for a policy at the wages I was getting. I was getting \$75 a month, and I couldn't pay no \$100,000 insurance on \$75 a month, and he said, 'You sign this note, and I will hold it in my safe until this deal is closed, and if it is not closed, I return you the note and you return me the policy. I will hold this note in my safe and won't try to sell it.' He was to loan me \$70,000 at 5 per cent for five years or ten, and with the privilege of having it longer. He said, 'I can get you the \$70,000 loan, and I can get it for you at 5 per cent for five years or ten, with the privilege of having it longer.' He said unless I would sign the note to show that everything was in good faith, he couldn't make me the loan on the policy. He said there wouldn't be any effect in the policy; the policy would be null and void if he didn't get me the loan; that they would take the same chance as I."

These are the circumstances in which the defendant says he executed the original note and delivered it to the plaintiff, receiving at the same time two policies issued by the John Hancock Life Insurance Company for \$70,000 and \$30,000, respectively, together with receipts showing that the premiums for the first year had been paid.

The defendant sought to show what took place in August, 1901, between Marvin and himself, regarding the renewal of the orig-

inal note, but the learned trial court excluded the proffered evidence, upon the ground that Marvin's declarations and admissions could not bind the plaintiff, as there was no proof that Marvin had authority to do anything except to get an unconditional renewal. Then the defendant further testified that the plaintiff never procured the loan for him; that soon after the notes in suit became due, and before this action was commenced, he went to the plaintiff's office in Buffalo, and asked for a return of the notes and tendered back the policies.

When the defendant rested his case the learned trial court granted the plaintiff's motion for the direction of a verdict, and to this ruling the defendant duly excepted. The defendant also asked the court to submit to the jury the question whether the insurance policies were accepted by the defendant, and the original note was delivered to the plaintiff, upon condition that the same should be returned in case the plaintiff did not within a year procure a loan of \$70,000 for the plaintiff, with the insurance policies and the brewery stock as collateral. This motion was also denied, and the defendant took an exception.

We have quoted or cited only such parts of the evidence as bear directly upon the question whether the learned trial court erred in directing a verdict for the plaintiff. The case is characterized by a number of peculiarities which may, or may not, be influential in determining the ultimate result, but with these we have no present concern. The question now before us is whether the testimony of the defendant, supplemented by such legitimate inferences therefrom as are most favorable to him, is of sufficient weight and probative force to create a question of fact for the jury; and that question obviously depends upon the nature and effect of the oral agreement to which he testified. If that agreement, which for present purposes must be assumed to have been made, created a condition precedent, without the performance of which the notes never became valid obligations in favor of the plaintiff, then there is a question of fact for the arbitration of a jury. The converse of the proposition is equally simple. If the effect of that agreement was to ingraft upon a valid contract a condition subsequent, the learned trial justice was right in ruling that the issue was one of law for his decision. A careful analysis of the defendant's testimony has convinced us that he is right in the contention that the case should have been sent to the jury. He testified that he told the plaintiff that under no consideration would he take the insurance unless the

plaintiff would guarantee to make him the loan; that the plaintiff told him to sign the note, which would be held in the plaintiff's safe until the deal was closed; that if it was not closed, the note would be returned to the defendant and the policy would be returned to the plaintiff; that the policy would be null and void if the plaintiff did not get the loan for the defendant, and that both of them would be taking the same chance. If these statements mean anything, they plainly import a condition which was to be performed before the transaction, witnessed by the delivery of the note to the plaintiff and the delivery of the policies and receipts to the defendant, was to be regarded as consummated and binding. That condition was the procurement of the loan, which, concededly, was never made. Giving to the defendant's story a fair, natural, and unstrained interpretation, we have a case in which there is failure of the precise condition which must determine the existence or nonexistence of any contract between him and the plaintiff. We are not unmindful of the opposing facts and antagonistic inferences which other features of the transaction may suggest. These are not proper subjects for present discussion. We simply emphasize the controlling circumstance that, if the defendant's story is true, there is no binding contract between him and the plaintiff, and the issue of its truth or falsity is for the jury, and not for the court.

There is no subtlety or ambiguity in the law of the subject; but there is difficulty in applying it to some cases in which there may be uncertainty as to the effect of oral testimony upon contracts which are wholly or partly reduced to writing. When the oral testimony goes directly to the question whether there is a written contract or not, it is always competent; but when the effect of the oral testimony is to establish the existence of a written contract, which it is designed to contradict or change by parol, then the spoken word must yield to the written compact.

There are many decided cases upon this branch of the law, both in this state and in other jurisdictions, but we shall refer to only a few, as illustrating the line of cleavage between the case at bar and the case of *Jamestown Business College Assn. v. Allen*, 172 N. Y. 291, 92 Am. St. Rep. 740, 64 N. E. 952, upon which the respondent relies to support his contentions. In *Benton v. Martin*, 52 N. Y. 570, this court very clearly enunciated the rule which has always obtained in this state: "Instruments not under seal may be delivered to the one to whom upon their face they are made payable, or who by their terms is entitled

to some interest or benefit under them, upon conditions the observance of which is essential to their validity. And the annexing of such conditions to the delivery is not an oral contradiction of the written obligation, though negotiable, as between the parties to it, or others having notice. It needs a delivery to make the obligation operative at all, and the effect of the delivery and the extent of the operation of the instrument may be limited by the conditions with which delivery is made. And so also, as between the original parties and others having notice, the want of consideration may be shown." Page 574. This quotation sums up the whole of the law applicable to the case at bar in its present state, and outlines comprehensively the rule which has been followed in *Bookstaver v. Jayne*, 60 N. Y. 146, *Grierson v. Mason*, 60 N. Y. 394, *Reynolds v. Robinson*, 110 N. Y. 654, 18 N. E. 127, *Schmittler v. Simon*, 114 N. Y. 176, 11 Am. St. Rep. 621, 21 N. E. 162, and other cases, under a variety of circumstances.

The case of *Jamestown Business College Assn. v. Allen*, supra, is a salient illustration of the converse of this rule. There the promissory note was rendered effective and complete by an unconditional delivery. The payee agreed to release the maker, and to cancel the note, upon a future contingency which might or might not arise. That was clearly a condition subsequent, which brought the case within the general rule that a contract reduced to writing, and complete in its terms, cannot be varied and contradicted by oral testimony. *Eighmie v. Taylor*, 98 N. Y. 288; *Thomas v. Scutt*, 127 N. Y. 133, 27 N. E. 961; *Stowell v. Greenwich Ins. Co.* 163 N. Y. 298, 67 N. E. 480; *Mead v. Dunlevie*, 174 N. Y. 108, 66 N. E. 658. Thus, to state the difference most concretely, the case at bar is one in which the oral testimony tends to show that the writing purporting to be a contract is in fact no contract at all; while in the case of the *Jamestown Business College* the oral testimony was in direct contradiction of the written contract, as to the existence and validity of which there was no controversy.

We think the court erred in excluding the evidence offered by the defendant to show what took place between him and Marvin at the time when the original note was renewed by the notes in suit. It needs no argument to demonstrate that, if it was competent for the defendant to show under what conditions he delivered the original note, he must logically be permitted to show that the renewal notes were affected by the same conditions. Quite aside from this, there is enough in the record to make it a question for the jury whether Marvin

was or was not the *alter ego* of the plaintiff in the dealings with the defendant.

As there must be another trial, we have eliminated from this discussion everything that is not germane to the questions which are before us on this appeal. We have not referred to the defendant's counterclaim, which is manifestly inconsistent with his defense, or to the evidence relating to his asserted possession of options for the purchase of the brewery stock. These and various other features of the case may be of importance in determining the verdict of a jury, but they cannot affect our decision.

The judgment should be reversed and a new trial ordered, with costs to the appellant to abide the event.

Cullen, Ch. J., and Haight, Willard Bartlett, Hiscock, Chase, and Collin, JJ., concur.

ILLINOIS SUPREME COURT.

JOHN B. EDWARDS, Trustee, etc., of
Schillinger Brothers Asphalt Company,
v.

GUSTAV A. SCHILLINGER et al., Pliffs.
in Err.

(245 Ill. 231, 91 N. E. 1048.)

Pleading — demurrer — foreign law.

1. A demurrer admits an allegation concerning the laws of another state, since such allegation is one of fact.

Contract — to pay for corporate stock — right to enforce.

2. A corporation may enforce the promise of an assignee of its stock to his assignor, to pay unpaid subscriptions to the stock,

Note.—Right to enforce stockholders' liability outside of state of incorporation.

The earlier cases on this subject are given in a note to *Cushing v. Perot*, 34 L.R.A. 737. Only later cases are here included.

As to effect of assessment on stockholders made under order of court in another state, as *res judicata*, see note to *Mutual F. Ins. Co. v. Phoenix Furniture Co.* 34 L.R.A. 694.

The right to enforce the liability of members of mutual insurance companies is not considered. The right of a stockholder to set off a debt of the corporation due him is also omitted.

Right to enforce liability for unpaid subscription.

The liability of a stockholder on his subscription or the unpaid portion thereof being contractual (see *Fish v. Smith*, 73 Conn. 377, 84 Am. St. Rep. 161, 47 Atl.

whether liability for such subscriptions is imposed by the laws of the state or not.

Corporation — calls for stock subscriptions — necessity.

3. No call for unpaid subscriptions need be made by the corporation or the bankruptcy court, to enable a trustee in bankruptcy to maintain a suit against stockholders for unpaid subscriptions which are necessary to satisfy the claims of creditors.

Parties — omission of insolvent defendants — right to complain.

4. A stockholder of an insolvent corporation cannot complain that suit to enforce his unpaid stock subscriptions was not brought in a court where he could compel contribution by other stockholders, if they were insolvent so that they could not have been made to contribute even if they were brought into the proceeding.

Courts — jurisdiction — foreign corporations — suit to collect subscriptions.

5. Holders of unpaid stock in a foreign corporation cannot defeat an action by its

trustee in bankruptcy to set aside a fraudulent dividend applied in satisfaction of such subscriptions, and compel their payment, on the theory that it is an attempt to regulate the internal affairs of such corporation, which is not a party to the proceeding, where all solvent stockholders are parties, since the corporation and creditors are represented by the trustee, and all necessary parties are therefore before the court.

(Farmer, CH. J., Cooke, and Vickers, JJ., dissent.)

(April 21, 1910.)

ERROR to the Appellate Court, First District, to review a judgment affirming a decree of the Superior Court for Cook County in plaintiff's favor in a suit to enforce payment of unpaid stock subscriptions. Affirmed.

The facts are stated in the opinion.

711; Stoddard v. Lum, 159 N. Y. 265, 45 L.R.A. 551, 70 Am. St. Rep. 541, 53 N. E. 1108; Mountain Lake Land Co. v. Blair, 109 Va. 147, 63 S. E. 751), suit may be maintained to recover the amount of the subscription or the unpaid portion thereof, wherever the stockholder resides, even in the state courts of another state. Fish v. Smith, 73 Conn. 377, 84 Am. St. Rep. 161, 47 Atl. 711 (action at law by receiver); Lewisohn v. Stoddard, 78 Conn. 575, 63 Atl. 621 (suit in equity by creditor); Mountain Lake Land Co. v. Blair, 109 Va. 147, 63 S. E. 751.

A foreign corporation may maintain an action to recover unpaid calls against a resident stockholder personally served, although a temporary receiver *pendente lite* has been appointed for it in the state of its domicile. Signa Iron Co. v. Brown, 171 N. Y. 488, 64 N. E. 194.

In an action by an English corporation to recover from a stockholder residing in this country an unpaid subscription for stock, an express promise of such stockholder to pay need not be proved, since a promise is implied, in view of an English statute providing that all moneys payable by any member in pursuance of the articles of the company shall be deemed a debt due from such member of the company. Nashua Sav. Bank v. Anglo-American Land, Mortg. & Agency Co. 189 U. S. 221, 47 L. ed. 782, 23 Sup. Ct. Rep. 517.

—action by creditor.

The liability of a stockholder of a foreign corporation on his unpaid subscription, to creditors of that company, must be determined by the laws of the state of incorporation. Mountain Lake Land Co. v. Blair, 109 Va. 147, 63 S. E. 751.

Where, by the laws of a state where a corporation is organized, a stockholder is 33 L.R.A. (N.S.)

personally and individually liable to creditors of the corporation holding judgments against it, execution on which has been returned unsatisfied, such liability may be enforced by a creditor against a stockholder living in a different state. Williams v. Chamberlain, 123 Ky. 150, 94 S. W. 29.

Where the statutes of a state where a corporation is incorporated provide that "each stockholder of a corporation is individually and personally liable for the debts of the corporation, to the extent of the amount that is unpaid upon the stock held by him," and that "any creditor of the corporation may institute joint and several actions against any of the stockholders that have not wholly paid the capital stock held by him," such personal liability may be enforced in such an action in other states against stockholders living there. Latimer v. Citizens' State Bank, 102 Iowa, 162, 71 N. W. 225.

A suit in equity by the creditors of a dissolved corporation organized under the laws of one state, against its stockholders, to reach unpaid subscriptions, may be maintained in another state in which the majority of the stockholders reside. Lewisohn v. Stoddard, 78 Conn. 575, 63 Atl. 621.

The right of a creditor of a corporation to proceed individually against stockholders on their unpaid subscriptions is merged in a decree obtained by such creditor in a court of the state chartering the corporation, directing the collection of such claims by a receiver; nor does the creditor obtain the right to sue individually by joining the receiver as defendant, and by obtaining the latter's consent to the payment of the obligation to the creditor.

The unpaid subscription of a resident stockholder of a foreign corporation is property of such corporation, and as such liable to attachment by a creditor of the

Messrs. McCaskill & Son for plaintiffs in error.

Messrs. Harry D. Irwin and Carl J. Appell, with Messrs. Hoyne, O'Connor, Hoyne, & Irwin, for defendant in error:

The Missouri courts could not set aside a fraudulent declaration of dividends, or enforce an assessment on unpaid stock, without personal service upon the stockholders.

Great Western Teleg. Co. v. Barker, 56 Ill. App. 402; Peck v. Coalfield Coal Co. 11 Ill. App. 88; Ward v. Farwell, 97 Ill. 593; Re Knickerbocker, 121 Fed. 1004; Re Rochford, 59 C. C. A. 388, 124 Fed. 182; Hull v. Burr, 83 C. C. A. 61, 153 Fed. 945; Felker v. Sullivan, 34 Colo. 212, 83 Pac. 213;

Bardes v. First Nat. Bank, 178 U. S. 524, 44 L. ed. 1175, 20 Sup. Ct. Rep. 1000; Wall v. Cox, 181 U. S. 244, 45 L. ed. 845, 21 Sup. Ct. Rep. 642; Reed v. Whorton, 67 Fed. 434.

A suit to enforce a common-law liability may be brought wherever jurisdiction can be obtained of the necessary parties.

Mandel v. Swan Land & Cattle Co. 154 Ill. 187, 27 L.R.A. 313, 40 N. E. 462; Patterson v. Lynde, 112 Ill. 196; Bell v. Farwell, 176 Ill. 489, 42 L.R.A. 804, 68 Am. St. Rep. 194, 52 N. E. 346; Whitman v. National Bank, 176 U. S. 559, 44 L. ed. 587, 20 Sup. Ct. Rep. 477.

A suit to collect the assets of a bankrupt estate may be brought in any court of gen-

corporation. Cooper v. Adel Security Co. 122 N. C. 463, 30 S. E. 348.

A resident creditor of a foreign corporation may collect his debt by a foreign attachment suit in equity against a resident stockholder whose stock is partly unpaid. Mountain Lake Land Co. v. Blair, 109 Va. 147, 63 S. E. 751.

It was held in Parkhurst v. Mexican Southeastern R. Co. 102 Ill. App. 507, that the courts of Illinois had no jurisdiction to entertain a creditors' suit to enforce the liability of a resident stockholder of an insolvent foreign corporation on his unpaid subscription.

—action by receivers and assignees.

Where the laws of a state under which a corporation was created provided for the winding up of insolvent corporations through the agency of receivers, and for the calling in by the court of any unpaid balance of the capital stock which the corporations had neglected to call, the receiver becomes, in effect, the statutory successor of an insolvent corporation, and substituted promisee in the subscription contract, and can maintain an action to recover the unpaid balance on such subscription in the courts of another state. Fish v. Smith, 73 Conn. 377, 84 Am. St. Rep. 161, 47 Atl. 711; Stoddard v. Lum, 159 N. Y. 265, 45 L.R.A. 551, 70 Am. St. Rep. 541, 53 N. E. 1108.

An assignee in insolvency of a corporation, given by statute the right to wind up its affairs, and to maintain actions against stockholders to recover unpaid subscriptions, may maintain such action in a Federal court of another jurisdiction. Dunn v. Howe, 96 Fed. 160, reversed on different question in 47 C. C. A. 13, 107 Fed. 849.

But a receiver of a corporation appointed in another state should not be allowed, by an exercise of comity, to sue for the enforcement of the liability of stockholders on their unpaid subscriptions, when it would be in contravention of the rights of 33 L.R.A. (N.S.)

the citizens of the state, and operate to their injury. Wyman v. Eaton, 107 Iowa, 214, 43 L.R.A. 695, 70 Am. St. Rep. 193, 77 N. W. 865.

On the ground that comity did not require it, a receiver was not allowed, in Wyman v. Eaton, supra, to sue to enforce payment of the unpaid subscription in a foreign corporation, where the stock had previously been sold bona fide to another, and the indebtedness was not incurred in reliance on the subscription.

In Castleman v. Templeman, 87 Md. 549, 41 L.R.A. 367, 67 Am. St. Rep. 363, 40 Atl. 275, the court held that a receiver of a foreign corporation appointed by a court of the state of its domicile will be permitted by comity to enforce the payment of unpaid subscriptions where there are no creditors of the corporation residing in the state where suit is brought, and the rights of its own citizens would not be adversely affected.

An action against all the domestic shareholders of an Illinois corporation, who are the only solvent shareholders, to recover the unpaid balance of their subscriptions to the stock, or such *pro rata* share thereof as is necessary to pay the debts of the company, may be brought in New York by the Illinois assignee for creditors, since the cause of action is a contract liability which has for its foundation the principles of the common law, and is independent of the Illinois statute which provides for a suit in equity against all delinquent stockholders. Stoddard v. Lum, 159 N. Y. 265, 45 L.R.A. 551, 70 Am. St. Rep. 541, 53 N. E. 1108.

A receiver will not be appointed in the state of incorporation at the instance of a judgment creditor, to bring suit in a foreign state to enforce unpaid subscriptions to an insolvent corporation, where, by the law of the state of incorporation, creditors can enforce such liabilities by suit in their own names, and there is no allegation that they have not the same right in the foreign state. Forsell v. Pittsburg & M. Copper Co. 42 Mont. 412, 113 Pac. 479.

eral jurisdiction, and need not be brought in the bankruptcy court.

Bankruptcy Act, 1898, § 23b.

Bardes v. First Nat. Bank, 178 U. S. 524, 44 L. ed. 1175, 20 Sup. Ct. Rep. 1000; *Payson v. Dietz*, 2 Dill. 504, Fed. Cas. No. 10,861; *Skewis v. Barthell*, 152 Fed. 534; *Ward v. Jenkins*, 10 Metc. 583; *Stevens v. Mechanics' Sav. Bank*, 161 Mass. 109, 3 Am. Rep. 325; *Collier, Bankr.* 7th ed. 292.

The trustee in bankruptcy represents both the corporation and its creditors, and it is both his right and his duty to sue for the recovery of the assets of the bankrupt estate, whenever, in his judgment, suit is necessary.

Collier, Bankr. 7th ed. 389; *Sanger v. Upton*, 91 U. S. 56, 23 L. ed. 220; *Main v.*

Mills, 6 Biss. 98, Fed. Cas. No. 8,974; *Shockley v. Fisher*, 75 Mo. 498; *Chism v. Bank of Friars Point*, 5 Am. Bankr. Rep. 56; *Re Mersman*, 7 Am. Bankr. Rep. 46; *Re Mallory*, Fed. Cas. No. 8,990; *Re Baird*, 112 Fed. 960; *Bardes v. First Nat. Bank*, 178 U. S. 524, 44 L. ed. 1175, 20 Sup. Ct. Rep. 1000.

Unpaid stock subscriptions are debts to be collected like any other assets of the bankrupt estate, and no call or assessment is necessary before filing a bill in equity to collect the same.

Sanger v. Upton, 91 U. S. 56, 23 L. ed. 220; *Upton v. Tribilcock*, 91 U. S. 45, 23 L. ed. 203; *Ogilvie v. Knox Ins. Co.* 22 How. 380, 16 L. ed. 349; *Hatch v. Dana*, 101 U. S. 205, 25 L. ed. 885; *Upton v.*

Right to enforce statutory liability.

The liability of a stockholder to an additional amount equal to his stock, though created by statutory or constitutional provisions, is, by the weight of authority, held to be contractual in its nature, where the parties voluntarily form a corporation under such provisions, or become stockholders while such provisions exist. *Whitman v. National Bank*, 176 U. S. 559, 44 L. ed. 587, 20 Sup. Ct. Rep. 477; *Bernheimer v. Converse*, 206 U. S. 516, 51 L. ed. 1163, 27 Sup. Ct. Rep. 755; *Hutchings v. Lampson*, 82 Fed. 960; *Schiffer v. Columbia College*, 87 Fed. 166; *Western Nat. Bank v. Reckless*, 96 Fed. 70; *Kirtley v. Holmes*, 52 L.R.A. 738, 46 C. C. A. 102, 107 Fed. 1; *Whitman v. Citizens' Bank*, 49 C. C. A. 122, 110 Fed. 503, writ of certiorari denied in 183 U. S. 695, 46 L. ed. 394, 22 Sup. Ct. Rep. 932; *Burr v. Smith*, 113 Fed. 858; *Anglo-American Land, Mortg. & Agency Co. v. Lombard*, 68 C. C. A. 89, 132 Fed. 721, petition for writ of certiorari denied in 196 U. S. 638, 49 L. ed. 630, 25 Sup. Ct. Rep. 793; *Anglo-American Land, Mortg. & Agency Co. v. Wood*, 143 Fed. 683; *Goss v. Carter*, 84 C. C. A. 402, 156 Fed. 746, decision adhered to on later appeal in 99 C. C. A. 664, 175 Fed. 1019, writ of certiorari denied in 217 U. S. 605, 54 L. ed. 900, 30 Sup. Ct. Rep. 695; *Ferguson v. Sherman*, 116 Cal. 169, 37 L.R.A. 622, 47 Pac. 1023; *Love v. Pusey & J. Co.* 3 Penn. (Del.) 577, 52 Atl. 542; *Bell v. Farwell*, 176 Ill. 489, 42 L.R.A. 804, 68 Am. St. Rep. 194, 52 N. E. 346; *Pulsifer v. Greene*, 96 Me. 438, 52 Atl. 921; *Miller v. Spaulding*, — Me. —, 78 Atl. 358; *Howarth v. Lombard*, 175 Mass. 570, 49 L.R.A. 307, 56 N. E. 888; *Broadway Nat. Bank v. Baker*, 176 Mass. 294, 57 N. E. 603; *Western Nat. Bank v. Lawrence*, 117 Mich. 669, 76 N. W. 105; *Hanson v. Davison*, 73 Minn. 454, 76 N. W. 254; *Guerney v. Moore*, 131 Mo. 650, 32 S. W. 1132; *Pfaff v. Gruen*, 92 Mo. App. 560, 69 S. W. 405; *Howarth v. Angle*, 162 N. Y. 179, 47 L.R.A. 725, 56 N. E. 489; *Knickerbocker Trust Co. v. Iselin*, 109 App. Div. 688, 96 N. Y. Supp. 588, 33 L.R.A. (N.S.)

reversed in 185 N. Y. 54, 113 Am. St. Rep. 863, 77 N. E. 877; *Kulp v. Fleming*, 65 Ohio St. 321, 87 Am. St. Rep. 611, 62 N. E. 334. *Contra*: *Crippen, L. & Co. v. Loughton*, 69 N. H. 540, 46 L.R.A. 467, 76 Am. St. Rep. 192, 44 Atl. 538.

Because it is contractual it is transitory, and the liability of a stockholder to an amount equal to his stock may be enforced against him in some appropriate form of action wherever he resides, even in a state other than the domicile of the corporation. *Whitman v. National Bank*, 176 U. S. 559, 44 L. ed. 587, 20 Sup. Ct. Rep. 477; *Bernheimer v. Converse*, 206 U. S. 516, 51 L. ed. 1163, 27 Sup. Ct. Rep. 755; *Dexter v. Edmonds*, 89 Fed. 467; *Hale v. Haddon*, 37 C. C. A. 240, 95 Fed. 747; *Western Nat. Bank v. Reckless*, 96 Fed. 70; *Kirtley v. Holmes*, 52 L.R.A. 738, 46 C. C. A. 102, 107 Fed. 1; *Robinson v. Brown*, 126 Fed. 429; *Goss v. Carter*, 84 C. C. A. 402, 156 Fed. 746, decision adhered to on later appeal in 99 C. C. A. 664, 175 Fed. 1019, which has writ of certiorari denied in 217 U. S. 605, 54 L. ed. 900, 30 Sup. Ct. Rep. 695; *Ferguson v. Sherman*, 116 Cal. 169, 37 L.R.A. 622, 47 Pac. 1023; *Love v. Pusey & J. Co.* 3 Penn. (Del.) 577, 52 Atl. 542; *Bell v. Farwell*, 176 Ill. 489, 42 L.R.A. 804, 68 Am. St. Rep. 194, 52 N. E. 346; *Pulsifer v. Greene*, 96 Me. 438, 52 Atl. 921; *Miller v. Spaulding*, — Me. —, 78 Atl. 358; *Broadway Nat. Bank v. Baker*, 176 Mass. 294, 57 N. E. 603; *Converse v. Ayer*, 197 Mass. 443, 84 N. E. 98; *Western Nat. Bank v. Lawrence*, 117 Mich. 669, 76 N. W. 105; *Guerney v. Moore*, 131 Mo. 650, 32 S. W. 1132; *Pfaff v. Gruen*, 92 Mo. App. 560, 69 S. W. 405; *Howarth v. Angle*, 162 N. Y. 179, 47 L.R.A. 725, 56 N. E. 489; *Knickerbocker Trust Co. v. Iselin*, 109 App. Div. 688, 96 N. Y. Supp. 588, reversed in 185 N. Y. 54, 113 Am. St. Rep. 863, 77 N. E. 877; *Kulp v. Fleming*, 65 Ohio St. 321, 87 Am. St. Rep. 611, 62 N. E. 334. *Contra*: *Crippen, L. & Co. v. Loughton*, 69 N. H. 540, 46 L.R.A. 467, 76 Am. St. Rep. 192, 44 Atl. 538 (but see *Tompkins v. Blakey*, 70 N. H. 584, 49 Atl. 111, holding that where the stockholder's liability is considered con-

Hansbrough, 3 Biss. 417, Fed. Cas. No. 16,801; Parmelee v. Price, 208 Ill. 544, 70 N. E. 725; Schockley v. Fisher, 75 Mo. 498; Boeppler v. Menown, 17 Mo. App. 447.

Stockholders of an insolvent corporation are, to the extent of their unpaid subscriptions, liable for all its debts, and not merely its contractual debts.

Moore v. United States One Stave Barrel Co. 238 Ill. 544, 128 Am. St. Rep. 153, 87 N. E. 536; Coleman v. Howe, 154 Ill. 458, 45 Am. St. Rep. 133, 39 N. E. 725; Alling v. Wenzel, 133 Ill. 264, 24 N. E. 551.

The rule that all parties interested in the subject-matter of the litigation should be joined as parties to a suit in equity is a rule of convenience, which will be dis-

tractual in the state of the corporation's domicile, it will be enforced in New Hampshire, though not there considered contractual).

The contractual liability of a stockholder domiciled in a foreign jurisdiction, for debts of the corporation beyond the amount of stock subscription, may be enforced by courts of that jurisdiction, where the proofs show an assessment in the state of the creation of the corporation upon domestic stockholders to the full amounts of the stockholders' liability, and the testimony discloses the insolvency of the corporation and indebtedness in excess of the stockholders' liability, and an assessment is sought of exactly the same character as was enforced in the action brought in the domicile of the corporation. Kirtley v. Holmes, 52 L.R.A. 738, 46 C. C. A. 102, 107 Fed. 1 (action by receiver).

The construction of a statute imposing liability upon stockholders for debts of a corporation, made by the highest court of the state in which it was enacted, is binding upon the courts of another state in which it is sought to be enforced. Howarth v. Lombard, 175 Mass. 570, 49 L.R.A. 307, 56 N. E. 888; Converse v. Ayer, 197 Mass. 443, 84 N. E. 98; Pfaff v. Gruen, 92 Mo. App. 560, 69 S. W. 405.

The statutory liability of stockholders cannot be enforced outside the state of incorporation, where it does not appear that the statute of that state, as construed by its courts, has provided any remedy for its enforcement which can be made available outside that state. Miller v. Aldrich, 202 Mass. 109, 132 Am. St. Rep. 480, 88 N. E. 441.

If an original suit has been instituted in a court of the company's domicile, and all stockholders in the jurisdiction brought before that court, an account taken of the debts and resources of the company, the excess of the former ascertained, together with the solvency or insolvency of its different shareholders, and the sum in which each ought to be assessed, and an appropriate decree entered establishing these things, then an ancillary proceeding may 33 L.R.A. (N.S.)

pensed with when it ceases to be convenient and conducive to justice.

Story, Eq. Pl. § 77; Webster v. French, 11 Ill. 254; Whitney v. Mayo, 15 Ill. 252; Hale v. Hale, 146 Ill. 227, 20 L.R.A. 247, 33 N. E. 858; Kennedy v. Gibson, 8 Wall. 498, 19 L. ed. 476; 15 Enc. Pl. & Pr. p. 606.

Cartwright, J., delivered the opinion of the court:

The defendant in error, John B. Edwards, trustee in bankruptcy of Schillinger Brothers Asphalt Company, a corporation, filed his bill in the superior court of Cook county against the plaintiffs in error, Gustav A. Schillinger and A. C. Gumbinger, stockholders of the corporation, to set

be had in a foreign court against stockholders resident in that jurisdiction, who could not be brought before the domestic court in the original proceeding, to make them pay their proportionate dues as ascertained in the parent suit. Pfaff v. Gruen, 92 Mo. App. 560, 69 S. W. 405.

The courts will enforce the double liability of a stockholder of a foreign corporation created by the laws of a foreign state, where the liability is created without providing a remedy. Howarth v. Angle, 162 N. Y. 179, 47 L.R.A. 725, 56 N. E. 489.

If the statute upon which the personal liability of the stockholders is founded also provides a remedy for that liability, such remedy will be held to be exclusive, and will not be enforced in the courts of another state. Ibid. (*dictum*).

But in Shipman v. Treadwell, 200 N. Y. 472, 93 N. E. 1104, the court, in upholding the right of an Ohio receiver to sue in New York, said: "It is doubtless the rule that where a foreign statute which creates the liability of a stockholder also provides a remedy for the enforcement of that liability, such remedy is exclusive, and our courts will not intervene to enforce it. Lowry v. Inman, 46 N. Y. 119; Christensen v. Eno, 106 N. Y. 97, 60 Am. Rep. 429, 12 N. E. 648; Howarth v. Angle, supra. But it is also obvious that the remedy referred to in these cases is the remedy against the stockholder who is a resident of this state, and a nonresident of the state which is the domicile of the corporation, for if it were not so no proceeding could be instituted against stockholders residing in the domicile of a corporation, without cutting off any right of action against stockholders who reside outside of that domicile. The complaint herein does recite certain proceedings in the Ohio courts to which all the stockholders, including the defendants, were parties, but it is also set forth that the defendants were served by publication, and did not appear in the foreign tribunal, so that as to them the proceedings there were *in rem*, and not *in personam*. As to these defendants the only remedy which seems

aside a dividend declared by the directors in fraud of creditors, and applied by the stockholders in payment of unpaid balances of their subscriptions to the capital stock, and to compel plaintiffs in error to pay the amount of their subscriptions represented by the fraudulent dividend certificates. The defendants to the bill filed a general demurrer thereto, which was overruled by the court, and they were ruled to answer the bill within ten days. They failed to answer, but elected to stand by their demurrer, and were defaulted, and a decree was entered in accordance with the prayer of the bill, requiring the defendant Gustav A. Schillinger to pay to the complainant \$3,000, and the defendant A. C. Gumbinger to pay \$2,000, being

the portions of their unpaid subscriptions, which they had attempted to cancel by means of the fraud. The appellate court affirmed the decree on appeal, and a writ of error was sued out of this court to review the judgment of the appellate court.

The following are the material facts alleged in the bill and admitted by the demurrer: Schillinger Brothers Asphalt Company is a corporation organized on October 3, 1900, under the laws of the state of Missouri, with a capital stock of \$20,000, divided into shares of \$100 each. The original subscribers, with the amounts of their subscriptions, were as follows: B. J. Calking, 100 shares; Charles Mueller, Jr., 99 shares; and Henry Jacobson, 1 share. Money or property turned over to

to have been provided by the statutes of Ohio is the right of the court to authorize and direct the receiver to prosecute the stockholders' liability in other jurisdictions, and that is the precise remedy which the plaintiff is pursuing. It is true that neither the provisions of the foreign statute, nor the orders of the foreign courts, have any extraterritorial force, but it is equally true that the remedy thus provided is in fact no remedy, if it cannot be prosecuted in the state where the stockholder resides. For all practical purposes this case is no different from one in which it appears that the foreign statute has provided no remedy, and the foreign court has made no direction, and such a case falls directly within the rule of *Howarth v. Angle*."

No action will lie in courts out of the state of incorporation to enforce the statutory liability of stockholders for corporate debts, where the statutes imposing such liability provide a single method of enforcing it by one equitable suit in the state of incorporation, in favor of all creditors and against all stockholders, and the corporation of it has assets, since such method is exclusive. *Finney v. Guy*, 106 Wis. 256, 40 L.R.A. 486, 82 N. W. 595.

This was held even when all the creditors who joined in the action in the state of incorporation, and the receiver there appointed, joined as plaintiffs to recover against the nonresident stockholder not a party to such prior action. *Ibid*.

A judgment in a statutory proceeding to enforce the liability of stockholders for corporate debts, to which all stockholders within the jurisdiction are required to be parties, and in which all equities between stockholders are required to be settled, has been held to be a bar to any other action to enforce such liability, even against stockholders who were out of the jurisdiction, and therefor not parties to the action. *Ibid*.

The statutory liability of shareholders under a statute providing that the shareholders of all banking associations shall be individually responsible, equally and rata-

bly, and not one for another, for contracts, debts and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares, is secondary, and cannot be enforced until it has been first judicially determined what the assets and liabilities of the corporation are, and how much it will be necessary for stockholders to pay. Until this has been done, suit cannot be brought in another state by a receiver of such a corporation, or by an association of creditors, to enforce the liability of a stockholder there domiciled. *McLaughlin v. O'Neill*, 7 Wyo. 187, 51 Pac. 243.

Where a suit is brought to enforce the stockholders' statutory liability in a court of the state where the corporation is domiciled, in which all the stockholders, domestic and foreign, are nominally joined, but in which only the domestic stockholders are served and appear, and in which no judgment was rendered against foreign stockholders, a suit in a foreign state to enforce the statutory liability of stockholders domiciled therein cannot be maintained in a court of equity, on the theory that it is an ancillary or auxiliary proceeding brought in aid of and to enforce the equitable decree in the court where the corporation had its domicile. *Hale v. Allinson*, 188 U. S. 56, 47 L. ed. 380, 23 Sup. Ct. Rep. 244.

Whether a state court should permit an action to enforce the statutory liability of a stockholder of a foreign corporation, to be maintained therein on the principle of comity between the states, is a question exclusively for the court of that state to decide. *Finney v. Guy*, 189 U. S. 335, 47 L. ed. 839, 23 Sup. Ct. Rep. 558.

It is not necessary that the procedure to enforce the stockholders' statutory liability, provided by the statutes of the state of incorporation, should be that required by statute in another state, where it is sought to enforce such liability, in the case of its own domestic corporations, as that would frequently be impossible, and would with-

the corporation was accepted as half payment, and certificates were issued showing that the stock was only half paid for. The defendant Gustav A. Schillinger became the owner of 60 shares of the capital stock, and received a certificate showing upon its face that it was but half paid, and he assumed and agreed to pay to the corporation the balance of the subscription price when demanded. The defendant A. C. Gumbinger became the owner of 40 shares, and receive a certificate therefor showing on its face that said stock was but half paid, and he assumed and agreed to pay the corporation the balance of the subscription price when demanded. At a meeting of the board of directors held in the city of St. Louis, Missouri, on April 28, 1902, when

the corporation was wholly insolvent and unable to pay any dividend whatever upon its stock, the directors, for the purpose of relieving the stockholders from liability for the unpaid portion of the stock held by them, pretended to declare a dividend of \$8,920.65, and authorized the secretary to issue dividend certificates to Schillinger upon 60 shares, to Charles Mueller, Jr., upon 50 shares, to A. C. Gumbinger upon 40 shares, to Henry Jacobson upon 1 share, and to A. Maritzan upon 10 shares, and to receive said dividend certificates and the stock certificates held by each of said parties, and to issue to them, in lieu thereof, certificates of fully paid stock in the corporation. Dividend certificates were given to the above-named stockholders, who

hold the right of comity altogether. Howarth v. Angle, 162 N. Y. 179, 47 L.R.A. 725, 56 N. E. 489.

In Massachusetts it has been held that foreign statutes will not be enforced, which provide for bringing into court the creditors and stockholders of a foreign corporation in order to liquidate its affairs, or which impose, for the benefit of the creditors of a foreign corporation, a penal liability upon the stockholders. Coffing v. Dodge, 167 Mass. 231, 45 N. E. 928.

Where the indebtedness of a corporation is so great that it cannot be satisfied by anything less than the full par value of the shares held by each stockholder, equity is without jurisdiction, on the ground of the prevention of a multiplicity of suits, of a suit to enforce the statutory liability of the stockholders of a foreign corporation, in which all such stockholders in the jurisdiction of the court are joined, since joinder is not necessary to determine the amount each should pay, and the defense of each would probably be different. Hale v. Allinson, *supra*.

Full faith and credit are not denied to a judgment of a Minnesota court against resident stockholders of a domestic corporation, in an action to enforce their statutory liability, by the judgment of a court of another state denying the right to maintain a further action to enforce such liability outside the state of incorporation, where, under the Minnesota laws as construed by its courts, the only remedy provided for the enforcement of the liability of stockholders in domestic corporations is a suit in equity in that state, by a creditor in behalf of himself and all other creditors, against the stockholders who can be served with process. Finney v. Guy, 189 U. S. 335, 47 L. ed. 839, 23 Sup. Ct. Rep. 558, affirming 111 Wis. 296, 87 N. W. 255.

—action by creditor.

An action may be brought by a creditor of a corporation against a stockholder living in a foreign state, under a statute of the state of incorporation making every 33 L.R.A. (N.S.)

stockholder personally and severally liable to every judgment creditor of the corporation, to an additional amount equal to the stock held by him. Whitman v. National Bank, 176 U. S. 559, 44 L. ed. 587, 20 Sup. Ct. Rep. 477; Hancock Nat. Bank v. Far-num, 176 U. S. 640, 44 L. ed. 619, 20 Sup. Ct. Rep. 506, reversing 20 R. I. 466, 40 Atl. 341; Mechanics' Sav. Bank v. Fidelity Ins. Trust & S. D. Co. 87 Fed. 113; Dexter v. Edmands, 89 Fed. 467; Whitman v. Citizens' Bank, 49 C. C. A. 122, 110 Fed. 503, petition for writ of certiorari denied in 183 U. S. 695, 46 L. ed. 394, 22 Sup. Ct. Rep. 932; Kisseberth v. Prescott, 91 Fed. 611; Atlantic Trust Co. v. Osgood, 116 Fed. 1019; Ferguson v. Sherman, 116 Cal. 169, 37 L.R.A. 622, 47 Pac. 1023 (action at law); Love v. Pusey & J. Co. 3 Penn. (Del.) 577, 52 Atl. 542; Bell v. Farwell, 176 Ill. 489, 42 L.R.A. 804, 68 Am. St. Rep. 194, 52 N. E. 346; Pulsifer v. Greene, 96 Me. 438, 52 Atl. 921; Hancock Nat. Bank v. Ellis, 172 Mass. 39, 42 L.R.A. 396, 70 Am. St. Rep. 232, 51 N. E. 207; Broadway Nat. Bank v. Baker, 176 Mass. 294, 57 N. E. 603; Western Nat. Bank v. Lawrence, 117 Mich. 669, 76 N. W. 105; Guernsey v. Moore, 131 Mo. 650, 32 S. W. 1132; Kulp v. Fleming, 65 Ohio St. 321, 87 Am. St. Rep. 611, 62 N. E. 334; Blair v. Newbegin, 65 Ohio St. 425, 53 L.R.A. 644, 62 N. E. 1040. *Contra*: Crippen L. & Co. v. Leighton, 69 N. H. 540, 46 L.R.A. 467, 76 Am. St. Rep. 192, 44 Atl. 538.

A state statute making each stockholder personally and severally liable for an additional amount equal to his stock, to each judgment creditor of the corporation whose execution against it has been returned unsatisfied, does not offend the public policy of the United States, is not repugnant to justice or good morals, nor is it calculated to injure the United States or its citizens, and hence may be enforced in a Federal court in another state. Dexter v. Edmands, 89 Fed. 467; Western Nat. Bank v. Reckless, 96 Fed. 70.

Such a statute has also been held not opposed to the public policy of various states so as to prevent its enforcement in their

were the only holders of stock in the corporation, and said certificates, with the half paid certificates, were exchanged for certificates of fully paid stock. On November 8, 1902, the corporation was adjudged a bankrupt by the district court of the United States in Missouri, and the complainant was elected trustee of the estate and qualified as such. The trustee reduced to cash all of the assets except the liability of the stockholders and a claim that was in litigation, and has \$725.95, proceeds of such assets. Claims to the amount of \$7,194.10 were proved and allowed, payable out of the assets. The bankrupt corporation ceased doing business, and all the stockholders but the defendants are residents of the state of Missouri and are insolvent, and a judg-

ment against them, or either of them, would be uncollectable. By the laws of Missouri a transferee of stock is liable for any unpaid balance thereon.

The substantial ground upon which it is contended that the judgment of the appellate court was wrong is that the superior court had no jurisdiction to set aside the fraudulent dividend, or to order a call upon stockholders to pay unpaid subscriptions, because the dividend was declared by a corporation which was a resident of the state of Missouri, and the courts of that state, alone, had jurisdiction over it or its affairs. Counsel for plaintiffs in error regard the bankrupt corporation as a necessary party to the suit, and any interference with the action of

courts. *Love v. Pusey & J. Co.* 3 Penn. (Del.) 577, 52 Atl. 542; *Bell v. Farwell*, 176 Ill. 489, 42 L.R.A. 804, 68 Am. St. Rep. 194, 52 N. E. 346; *Pulsifer v. Greene*, 96 Me. 438, 52 Atl. 921; *Guerney v. Moore*, 131 Mo. 650, 32 S. W. 1132; *Kulp v. Fleming*, 65 Ohio St. 321, 87 Am. St. Rep. 611, 62 N. E. 334.

And even if the courts of such other state should decide that such a statute is repugnant to its public policy, such a decision would not be binding on a Federal court sitting therein. *Dexter v. Edmands*, supra.

The liability of a stockholder by virtue of a statute of the state creating the corporation, providing that "each stockholder of a corporation is individually and personally liable for such proportion of its debts and liabilities as the amount of stock or shares owned by him bears to the whole subscribed capital stock or shares of the corporation, and for a like proportion only of each debt or claim against the corporation," is enforceable by a creditor in any state where the stockholder may live. *Lanigan v. North*, 69 Ark. 62, 63 S. W. 62.

And where the statute further provides that "any creditor of the corporation may institute joint or several actions against any of its stockholders, for the proportion of his claim . . . for which each defendant is liable, and a several judgment must be rendered against each," the liability may be enforced by the creditor by an action at law, since, the liability of the stockholder being fixed by the law with absolute precision, there is no necessity to go into a court of equity. *Ibid*.

The courts of a state will not enforce the liability of resident stockholders in a foreign corporation, when to do so will place them in a worse position than stockholders living in such foreign state. *Abbott v. Goodall*, 100 Me. 231, 60 Atl. 1030; *Coffing v. Dodge*, 167 Mass. 231, 45 N. E. 928.

Thus, it has been held that a suit in equity by creditors of an insolvent Colorado corporation, suing on behalf of themselves and all other creditors who may join with them, to enforce against Maine stockholders only the double liability imposed by the 33 L.R.A. (N.S.)

Colorado statute which provides that "shareholders . . . shall be individually responsible for debts . . . in double the amount of the par value of the stock owned by them respectively," cannot be maintained in the court of Maine. *Abbott v. Goodall*, supra.

The reason assigned in the above case was that the statute contemplates only a *pro rata* contribution by all stockholders in proportion to the amount of their stock, to the extent necessary to pay the debts of the corporation; that this result could be brought about only by a suit in equity by or for all the creditors, and against all the stockholders and the bank itself, in which the amount of the creditors' claims and the extent of the deficiency of the corporate assets must be judicially ascertained and declared; since otherwise the defendants would be compelled to litigate these questions each time they sought to enforce contribution in another jurisdiction; that such a suit could be brought only in Colorado.

But it has been held that the right of a creditor to bring action against a stockholder living outside of the state of charter is not dependent upon the ability of the stockholders sued to enforce contribution in the jurisdiction in which he is sued, from the other stockholders, although contribution is provided for in the statute creating the double liability. *Kisseberth v. Prescott*, 91 Fed. 611.

Under a statute of the state of charter, providing that a creditor may enforce the stockholders' statutory liability jointly against all the owners of stock, in an action for the benefit of all the creditors of the corporation, and against all persons liable as stockholders, in which there shall be determined the amount payable by each person liable as stockholders on all the indebtedness of the corporation, a single creditor cannot enforce such statutory liability in a Federal court of a sister state against stockholders there residing, in an action in which neither all the stockholders, the corporation, nor all the creditors are made parties; since, without all these parties before the court, the ascertainment necessary to equitable

its directors, by setting aside the fraud, as beyond the jurisdiction of the courts of this state. The arguments touching that subject have taken a very wide range, and cover nearly all questions relating to the powers of courts over foreign corporations, or in any litigation where there affairs are in any manner involved.

The courts have never entertained any doubt of the right of a corporation to bring suits in other jurisdictions than that where it was created. When that question first arose in England, the argument that a foreign corporation was but an emanation of the foreign sovereignty, of which the laws of England would not take notice, and the courts might not sufficiently understand the foreign laws, did not prevail, and it was

held that such a corporation might sue in the English courts. *Henriques v. Dutch West India Co.* 2 Ld. Raym. 1532; *Dutch West India Co. v. Van Moses*, 1 Strange, 613. The law in this state on that subject was declared in the early case of *Bank of Washtenaw v. Montgomery*, 3 Ill. 422, where the court said: "It is supposed that nothing is better settled than that corporations may institute suits in the courts of other states and countries than those under whose laws they may have been established." The only rule consistent with that doctrine would be that a corporation permitted to enforce rights in this state should also be subject to have its liabilities enforced here; but, as a matter of fact, there was considerable conflict in the decisions

relief cannot be made. *State Nat. Bank v. Sayward*, 33 C. C. A. 564, 63 U. S. App. 20, 91 Fed. 443.

An action at law by a single creditor of a Maryland corporation cannot be maintained in New York against a single stockholder there resident, to enforce his statutory liability, under a statute of Maryland making stockholders individually responsible for the debts of the corporation equally and ratably, and not one for another, and further providing that the liability of such stockholders shall be an asset of the corporation for the benefit of all depositors and creditors, and enforceable only by a receiver, assignee, or trustee of such corporation. *Knickerbocker Trust Co. v. Iselin*, 185 N. Y. 54, 113 Am. St. Rep. 863, 77 N. E. 877.

The liability of shareholders of a foreign corporation, under a statute declaring that "shareholders . . . shall be held individually responsible for the debts . . . of said association, in double the amount of the par value of the stock owned by them respectively," cannot be enforced in another state against stockholders there living, by an action by part of the creditors; but only in an equitable action by, or on behalf of, all the creditors, and the corporation itself, and against all the shareholders. *Bates v. Day*, 198 Pa. 513, 82 Am. St. Rep. 811, 48 Atl. 407.

Where the statutes of a state imposing an additional liability on stockholders, as construed by its courts, contemplate that it shall be enforceable only as a liability of all stockholders to all creditors, and only so far as may be reasonably necessary to satisfy the claims of creditor desiring to take the benefit of it, in an equitable action in the home jurisdiction, where the corporation can be reached, it cannot be otherwise enforced either in another jurisdiction in a suit by a creditor against a stockholder, neither of whom were parties to the suit, or in the home jurisdiction. *Eau Claire Nat. Bank v. Benson*, 106 Wis. 624, 12 N. W. 604.

A bill in equity by part of the creditors of a corporation organized under the laws of another state, on behalf of themselves 33 L.R.A. (N.S.)

and all other creditors, cannot be maintained to enforce the statutory liability of a stockholder upon a claim not reduced to judgment against the corporation, where the corporation or its assignee and all the stockholders are not made parties to the suit; since the corporation would not be bound should the stockholder paying, whose liability is only secondary, seek to recover the amount paid from the corporation, which is primarily liable, out of any of its assets remaining. *Clark v. Knowles*, 187 Mass. 35, 105 Am. St. Rep. 376, 72 N. E. 352, 2 A. & E. Ann. Cas. 26.

A decision by the highest court of the state under whose laws a corporation is organized, that a suit in equity by creditors to enforce a stockholder's statutory liability may be brought without first reducing the creditors' claims to judgment, or joining the corporation or its assignee and all the stockholders, is not binding on the courts of another state. *Ibid.*

The courts of a state are bound to follow a decision of the highest court of another state, construing its own statute so as to uphold the right of one of the creditors of one of its corporations to proceed directly against a stockholder, although before such decision they had ruled that such an action could be maintained only by a receiver, and although the legislature of such foreign state subsequently changed the statute to conform to general equitable principles of collection and distribution; but after the rights of the creditors had accrued. *Ball v. Anderson*, 196 Pa. 86, 79 Am. St. Rep. 693, 46 Atl. 366.

No action can be maintained by a creditor to enforce the statutory liability of a stockholder in a foreign corporation, where there is no allegation that the liability is contractual, nor that it has been so construed by the courts of the state chartering it, nor allegations from which it can be seen that no injustice to others will be done. *Coffing v. Dodge*, 167 Mass. 231, 45 N. E. 928.

Where a double liability is imposed on stockholders of a corporation organized under the laws of one state, in favor of creditors, and an action is brought to enforce

in this country as to whether a foreign corporation could be sued outside of the state of its creation except upon a voluntary appearance, and perhaps more numerous decisions were that it could not. The view of many courts was that a corporation could not migrate beyond the boundaries of the state of its creation, so as to be there served with process. *Peckham v. North Parish*, 16 Pick. 274; *M'Queen v. Middletown Mfg. Co.* 16 Johns. 5; *Middlebrooks v. Springfield F. Ins. Co.* 14 Conn. 301.

The theory that a corporation can only have its existence in the state of its creation has long since been dispelled by the migratory corporations which have transacted the business of the country, and there

have always been courts which held that they could be sued wherever they could be served with process in accordance with the local law. Quite convincing reasons that they could be so sued were given in *Libbey v. Hodgdon*, 9 N. H. 394, where the court said: "If we admit and vindicate their rights, even-handed justice requires that we also enforce their liabilities, and not send our citizens to a foreign jurisdiction in quest of redress for injuries committed here." The Supreme Court of the United States, in *Barrows S. S. Co. v. Kane*, 170 U. S. 100, 42 L. ed. 964, 18 Sup. Ct. Rep. 526, commented on the manifest injustice resulting from permitting a foreign corporation to do business in a state and to bring suits in its courts, but not permitting

such liability in another state, the right to join different causes of action in one suit is governed by the laws of the state where the suit is brought. *Anglo-American Land, Mortg. & Agency Co. v. Wood*, 143 Fed. 683.

Hence, where the laws of the state of charter allow a creditor to enforce the liability, either when the corporation is bankrupt or when it is dissolved, though not necessarily bankrupt, and the laws of the state where suit is brought allow the joining of different actions of contract, both remedies may be joined in one statement of claim, since the stockholder's double liability, though statutory in origin, is contractual in its nature, and although joinder is not permitted in the state where the corporation is domiciled. *Ibid.*

In *Blair v. Newbegin*, 65 Ohio St. 425, 58 L.R.A. 644, 62 N. E. 1040, it was held that, under an Ohio statute providing that "one or more of the persons severally liable on an instrument may be included in the same action thereon," a creditor of a Kansas corporation could join several Ohio stockholders as parties defendant to a suit to enforce their statutory liability, provided for by a Kansas statute making stockholders severally and individually liable to creditors of the corporation who had obtained a judgment against the corporation, execution on which had been returned unsatisfied, although by Kansas practice joinder could not be had.

It was held in *Miller v. Spaulding*, — Me. —, 78 Atl. 358, that that part of the general practice act of Colorado providing that "when the question is one of a common or general interest of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue the defendant for the benefit of all, and the court may make an order that the action be so prosecuted or defended," was not a part of the statute creating the double liability of stockholders of corporations, that it had no reference to the enforcement of the liability of nonresident stockholders, and was no part of the contract entered into by the shareholders in subscribing for their stock; that it was 10-33 L.R.A. (N.S.)

cal, and not transitory, and would not be recognized in Maine; and hence that creditors of a Colorado corporation could not bring an action in Maine based on such practice act, to enforce the stockholders' double liability, where Maine had no such rule of practice. For a somewhat similar ruling, see *Miller v. Aldrich*, 202 Mass. 109, 132 Am. St. Rep. 480, 88 N. E. 441.

A creditor of a foreign corporation is not debarred from suing a local stockholder on his statutory liability, in an action of contract at law, because a local statute applicable only to domestic corporations provides for a different remedy. *Love v. Pusey & J. Co.* 3 Penn. (Del.) 577, 62 Atl. 542; *Bell v. Farwell*, 176 Ill. 489, 42 L.R.A. 804, 68 Am. St. Rep. 194, 52 N. E. 346.

—action by receiver.

Where the Constitution or statute of a state confers the right upon a receiver to be appointed by the court as a quasi assignee and representative of the creditors, to enforce the statutory liability of stockholders, both foreign and domestic, such receiver may enforce such liability in a foreign state against stockholders there domiciled. *Bernheimer v. Converse*, 206 U. S. 516, 51 L. ed. 1163, 27 Sup. Ct. Rep. 755; *Howarth v. Ellwanger*, 86 Fed. 54; *Hale v. Hardon*, 37 C. C. A. 240, 95 Fed. 747; *Burr v. Smith*, 113 Fed. 858; *Goss v. Carter*, 84 C. C. A. 402; 156 Fed. 746; decision adhered to on later appeal in 99 C. C. A. 664, 175 Fed. 1019, which has petition for writ of certiorari denied in 217 U. S. 605, 54 L. ed. 900, 30 Sup. Ct. Rep. 695; *Howarth v. Lombard*, 175 Mass. 570, 49 L.R.A. 301, 56 N. E. 888; *Howarth v. Angle*, 162 N. Y. 179, 47 L.R.A. 725, 56 N. E. 489 (if no injustice will be done to local stockholders); *Shipman v. Treadwell*, 200 N. Y. 472, 93 N. E. 1104 (if no injustice will be done to local stockholders).

A receiver appointed to enforce the statutory liability of stockholders of an insolvent corporation, who, under the statute, has legal title to the fund, as trustee for creditors, and who is the only person who can

the corporation to be sued there. It was said that such injustice had induced the passage of statutes in many states providing that a foreign corporation doing business within the state shall keep a place of business, and appoint an agent residing therein, upon whom process may be served; but it was held that a foreign corporation doing business in the state might be sued there without any such statute, and that the liability to be sued might be implied from the grant to do business in the state. In *Western U. Tele. Co. v. Pleasants*, 46 Ala. 641, it was held that a foreign corporation doing business in a state through a managing agent or employee may be sued there by obtaining service on such agent or employee, and a statute providing for

that method of service on corporations generally was applied to a foreign corporation.

It is a just and reasonable theory that a business corporation is constructively present outside of the state of its origin, wherever it has property and carries on its operations by means of agents. This court has maintained that doctrine from the beginning, and in *Mineral Point R. Co. v. Keep*, 22 Ill. 9, 74 Am. Dec. 124, which was an action of debt, with an attachment in aid, against a Wisconsin corporation, it was held that service upon an agent in this state was sufficient to give jurisdiction. The court said that it would be neither just nor wise to bestow upon foreign corporations having property within this state, and exercising powers and privileges here,

legally demand and collect the money, may bring actions against stockholders in his own name in courts of other states. *Howarth v. Lombard*, 175 Mass. 570, 49 L.R.A. 307, 56 N. E. 888.

A receiver of a foreign corporation; who, by the law of the state in which he is appointed, has title to the right of action against stockholders to enforce their statutory liability, may be allowed by comity to enforce such liability in another state where a stockholder resides, when the amount of the latter's liability has been definitely ascertained and is only his proportion of the ascertained deficiency of assets, and it does not appear that there is any other stockholder or any creditor of the corporation in that state, or that injury will be thereby done to any citizen of the state, or any established policy of the state thereby interfered with. *Howarth v. Angle*, 162 N. Y. 170, 47 L.R.A. 725, 56 N. E. 480.

Where the statutes of a state make stockholders of its corporations liable to the amount of stock held by them, and contemplate a proceeding in the nature of an equity proceeding in that state for the benefit of all the creditors, in which debts and assets will be ascertained, including the amount due on unpaid subscriptions, and that the avails of the stockholders' liability to creditors wherever found shall ultimately be drawn to the parent proceeding and distributed impartially, and where such statutes give the individual creditor no right of action to enforce the stockholders' liability, a receiver appointed by the court for the purpose of enforcing the stockholders' liability may sue in a Federal court of another jurisdiction. *Hale v. Hardon*, 37 C. C. A. 240, 95 Fed. 747; *Hale v. Tyler*, 104 Fed. 757.

A receiver of a foreign corporation duly appointed by a court of the foreign state, to bring suits to enforce the statutory liability of stockholders, can maintain an action for that purpose in New York against a single stockholder, under a statute providing that shareholders shall be individually and severally liable to the creditors of the corporation, and, on insolvency of the cor-

poration, may be compelled to pay such deficiency up to the amount of stock at its par value held by them respectively, in proportion to the amount of stock owned by the respective shareholders. *Wigton v. Kenney*, 51 App. Div. 215, 64 N. Y. Supp. 924.

A receiver appointed in a suit to enforce the statutory liability of stockholders in a corporation, for the benefit of creditors, may, without specific legislative authority, be empowered to maintain suits in his own name against foreign stockholders. *Kirtley v. Holmes*, 52 L.R.A. 738, 46 C. C. A. 102, 107 Fed. 1; *Hale v. Hilliker*, 109 Fed. 273, reversed in 54 C. C. A. 252, 117 Fed. 220; *Hale v. Coffin*, 114 Fed. 567, affirmed in 57 C. C. A. 528, 120 Fed. 470. *Contra*: *Wigton v. Bosler*, 102 Fed. 70; *Hilliker v. Hale*, 54 C. C. A. 252, 117 Fed. 220, petition for writ of certiorari denied in 188 U. S. 739, 47 L. ed. 677, 23 Sup. Ct. Rep. 848; *Covell v. Fowler*, 144 Fed. 535.

It was held in *Hale v. Coffin*, 114 Fed. 567, affirmed in 57 C. C. A. 528, 120 Fed. 470, that an equitable action could be maintained in a Federal court in another state by a receiver appointed by a court in the domicile of the corporation, to enforce the statutory liability of a stockholder, although his authority to sue came from the court, and not from the statute creating the liability, and although such action might not lie in a state court, since in equity Federal courts do not concern themselves with state practice.

But in *Wigton v. Bosler*, 102 Fed. 70, under a statute providing that shareholders shall be individually and severally liable to the creditors of the corporation over and above the stock by them held, to an amount equal to their respective shares so held, and shall be compelled to pay such deficiency in proportion to the amount of stock owned by each, in case the corporation should become insolvent and its assets be found insufficient to pay its debts, it was held that a receiver of a corporation appointed in the state of its domicile in the exercise of the general powers of the court, and not in the pursuance of a statute vesting in him the legal title to

immunity of exemption from observance of their contracts, or to deny to the people the usual facilities for collecting their debts against them. It was held that service of process could be had upon agents of foreign corporations within the state, in the same manner as on agents of local corporations. The same principle was stated in *Midland P. R. Co. v. McDermid*, 91 Ill. 170, where it was said that a foreign corporation doing business and having agents in this state may be sued and service had through its agents or officers doing business here the same as domestic corporations. Again, in *Italian-Swiss Agri. Colony v. Pease*, 194 Ill. 98, 82 N. E. 317, it was held that where a foreign corporation voluntarily extends its business into

the state, which it can only transact through an agent, it is presumed to do so with full knowledge that the statutes of the state authorize the courts to obtain jurisdiction of it by service of a copy of process on one of its agents. While a corporation is a resident of the state of its creation, there is no ground of distinction between it and an individual, so far as a suit or jurisdiction of courts is concerned. Even under that rule entire equality cannot be secured, since a foreign mercantile corporation may bring suits in our courts to collect debts arising from the sale and delivery of goods, though it has no general office in the state nor any agent upon whom process might be served, so that it

the corporate assets, cannot maintain an action against a stockholder in another state to recover the amount of an assessment on stock made by the court appointing him, in a proceeding in which such stockholder was not a party and did not appear.

A receiver of a foreign corporation cannot maintain an action at law in his own name, to enforce the statutory liability of a resident stockholder, though authorized by the court appointing him to sue in pursuance of a statute of the state of incorporation relating to insolvent corporations, where there is no allegation that the receiver has legal title in himself. *Murtey v. Allen*, 71 Vt. 377, 76 Am. St. Rep. 779, 45 Atl. 752; *Sparks v. Estabrooks*, 72 Vt. 101, 47 Atl. 394; *King v. Cochran*, 72 Vt. 107, 47 Atl. 394.

A judgment in favor of all the creditors of a corporation against all the stockholders, rendered in a receivership proceeding in the state of incorporation brought to enforce the stockholders' statutory liability, in which all the stockholders were personally served, may be enforced in another state against one of the stockholders served, who thereafter removed thither, in an action in which all the judgment creditors, and the receiver appointed in such judgment to collect the amount therein adjudged due by stockholders, are parties plaintiff. *Childs v. Blethen*, 40 Wash. 340, 82 Pac. 405.

A receiver for a corporation appointed in the state of its domicile will, as a matter of comity, be permitted to sue in another state in his own name, to enforce a stockholder's statutory liability, when no injustice will be done to stockholders living in the state where suit is brought. *Tompkins v. Blakey*, 70 N. H. 584, 49 Atl. 111.

Where a state statute allows suit to enforce a stockholder's statutory liability to be brought in the state only by a creditor of the corporation, it cannot be enforced outside of the state against a nonresident stockholder by a receiver appointed by the court for that purpose. *Evans v. Nellis*, 187 U. S. 271, 47 L. ed. 173, 23 Sup. Ct. 33 L.R.A. (N.S.)

Rep. 74; *Hale v. Allinson*, 188 U. S. 56, 47 L. ed. 380, 23 Sup. Ct. Rep. 240.

In *Hale v. Allinson*, supra, the court said: "The question of comity cannot avail in a case where the courts of the state in which the receiver was appointed hold that an action similar to the one brought in the foreign jurisdiction cannot be maintained by him in the courts of the state of his appointment."

—conditions precedent to right to sue.

A Federal court cannot enforce the statutory individual liability of a nonresident stockholder of a foreign corporation at the suit of a receiver of its assets, where the latter has not first taken the steps which the statutes of the state, as construed by its courts, make a prerequisite to any action against an individual stockholder; namely, that the receiver should have first brought suit against all the resident stockholders to collect the unpaid subscriptions, and to enforce the additional individual liability, and to ascertain the indebtedness of the corporation, and the amount each stockholder should pay. *Evans v. Nellis*, 187 U. S. 271, 47 L. ed. 173, 23 Sup. Ct. Rep. 74.

But when such steps have been taken, such statutory liability may be enforced by a receiver in the Federal courts sitting in another state. *Hale v. Hardon*, 37 C. C. A. 240, 95 Fed. 747.

A constitutional provision that "dues from corporations shall be secured by such individual liability of the stockholders, . . . as may be prescribed by law; but in all such cases, each stockholder shall be liable, over and above the stock by him or her owned, and any amount unpaid thereon, to a further sum at least equal in amount to such stock," is not self-executing, so as to be enforceable against a stockholder outside the state, where the legislature provided a procedure and stated a remedy which must be pursued, at least in the first instance, in the courts of such state of charter. *Middletown Nat. Bank v. Toledo, A. A. & N. M. R. Co.* 197 U. S. 394, 49 L. ed. 803, 25 Sup. Ct. Rep. 462.

cannot be sued here. *John Spry Lumber Co. v. Chappell*, 184 Ill. 539, 56 N. E. 794.

It may be that a suit cannot be maintained against a foreign corporation, because a court cannot obtain jurisdiction of the corporation. If a foreign corporation does no business in a state through agents or employees, and has no office there, jurisdiction cannot be obtained by serving the president accidentally within the state or passing through it. *Moulin v. Trenton Mut. L. & F. Ins. Co.* 24 N. J. L. 222. If a foreign corporation confines its operations to the state within which it was created, and does not transact any business in another state, and has no office or agent located there, jurisdiction cannot be obtained by serving process upon an of-

ficer or agent temporarily in the latter state. *Midland P. R. Co. v. McDermid*, and *Italian-Swiss Agri. Colony v. Pease*, supra. There are also cases where the court would have no jurisdiction of the subject-matter, an illustration of which is the power to decree a forfeiture of the franchise of a foreign corporation. *Society for Propagation of Gospel v. New Haven*, 8 Wheat. 464, 5 L. ed. 662. The courts of one state have no power to dissolve a foreign corporation and wind up its affairs; but it will retain its legal existence until dissolved by a proceeding in the state which created it; but even in that case assets, which are a trust fund for shareholders and creditors, will be administered by the domestic courts where they are found. *Life Asso. of Amer-*

Where a statute of a state gives to any creditor who has obtained a judgment against a corporation, and had execution returned unsatisfied, the right to sue any stockholder to recover the amount of his debt, not exceeding the par value of the stock held by such stockholder, in suing a stockholder in another state it is sufficient to allege the recovery of such judgment against the corporation, and the return of the execution unsatisfied, without averring the original debt, although such averment is required to be made and proved in the state where suit is brought; since it is not necessary to prove it in the state of charter, with reference to the laws of which such stockholder contracted. *American Freehold Land Mortg. Co. v. Woodworth*, 79 Fed. 951.

A creditor of an insolvent foreign corporation cannot enforce the stockholders' statutory liability in the state of the forum, where such creditor has not first obtained judgment against the corporation, and had execution thereon returned unsatisfied, as required by the law of the state of incorporation as a condition precedent to enforcing such liability. *Brookman v. Merchants' Sav. Bank*, 31 Misc. 191, 65 N. Y. Supp. 54.

An action at law will not lie by a receiver of an insolvent foreign corporation against a resident stockholder, to enforce the latter's statutory liability, where the statutes and decisions of the foreign state were not complied with, which contemplated a suit in equity in such foreign state in which all creditors and all debtor stockholders should be made parties in order that the entire indebtedness of the corporation and the amount stockholders should pay may be determined in one action. *Hazlett v. Woodhead*, 27 R. I. 506, 63 Atl. 952.

Collection may be made from stockholders wherever they may be found, after the preliminary proceedings required by the statute, and the adjustment of the rights and liabilities of the corporation, creditors, and stockholders under a statute imposing liability for corporate debts upon stock-

holders after proceedings showing the insolvency of the corporation and the need of payment by stockholders to satisfy the needs of creditors. *Howarth v. Lombard*, 175 Mass. 570, 49 L.R.A. 301, 56 N. E. 888.

Right to enforce tax against nonresident stockholder.

A receiver of a corporation who has paid the tax assessed against the shares of its stock by the city in which the corporation has its domicile cannot maintain an action in another state against a stockholder there residing, to recover the amount assessed against his shares; nor is such stockholder rendered liable because the statute imposing the tax declares that the situs of the stock shall be at the chief office of the corporation. *Mercantile Trust & Deposit Co. v. Mellon*, 20 Pa. Co. Ct. 25.

Right of state to impose personal liability on stockholder of foreign corporation.

The liability of a subscriber to stock in a foreign corporation is governed by the law of the domicile of the corporation. When, therefore, by the law creating a corporation its stockholders are not liable beyond the amount unpaid on their stock, stockholders living in the state creating it cannot be held to any greater liability by a statute of another state providing that every officer, agent, and stockholder of a foreign corporation which has not complied with certain requirements shall be jointly and severally personally liable on all contracts made by the company within the state while so in default. *Leyner Engineering Works v. Kempner*, 163 Fed. 605.

A stockholder living in one state, of a corporation organized under the laws of a second state and doing business in a third state, the Constitution and laws of which provide that each stockholder of a corporation shall be individually and personally liable for such proportion of all its debts and liabilities contracted or incurred during the time he was a stockholder, as the amount of stock owned by him bears to

ica v. Fassett, 102 Ill. 315. It is the duty of a state to keep the local assets for the satisfaction, in the first instance, of local claims. *Coombs v. Crane*, 236 Ill. 333, 86 N. E. 245; 18 Cyc. Law & Proc. p. 1229. Another class of cases is where the court cannot make any effective decree, as in a case of enjoining or compelling an act in a foreign state where the decree could only be enforced by proceedings for contempt, and the parties are beyond the jurisdiction. Courts of one state cannot exercise visitatorial powers over corporations of other states, such as requiring them to pay such dividends as, on an accounting of the affairs of the corporation, may appear to be proper, nor to determine whether a stockholder has been wrongfully excluded

from his privileges and matters of that kind.

If, however, a court has jurisdiction of the necessary parties and of the subject-matter, and has power to grant an effective remedy, there has never been any question about the existence of the jurisdiction; but the question has been as to the propriety of assuming jurisdiction in the exercise of a sound judicial discretion. In the exercise of such discretion the courts will not permit their tribunals to be used for the purpose of affording remedies denied to the parties in the foreign state, and which would operate with hardship on the citizens of the domestic state. *Rice v. Merrimack Hosiery Co.* 56 N. H. 114. How far foreign laws should be enforced

the whole of the stock, and that no foreign corporation shall be allowed to transact business within the state on more favorable conditions than are prescribed for domestic corporations, cannot be held personally liable to a creditor for debts incurred in such third state, since no contractual relation exists between the parties. *Thomas v. Matthiessen*, 170 Fed. 362.

In *Risdon Iron & Locomotive Works v. Furness* [1906] 1 K. B. 49, 93 L. T. N. S. 687, 75 L. J. K. B. N. S. 83, 54 Week. Rep. 324, 22 Times L. R. 45, 11 Com. Cas. 35, a limited liability company was formed for the purpose, as stated in the memorandum of association, *inter alia*, of acquiring and working mines in the United States and elsewhere. The articles of association empowered the directors to do all things necessary to comply with any statutory enactment, rule, or regulation in any country where the company might do business. The company did business in California, the laws of which made every stockholder individually and personally liable for debts of the corporation in an amount proportionate to the amount of stock held by him, and provided that foreign corporations should not do business on more favorable terms than domestic corporations. The company having become insolvent, and suit having been brought by a creditor against a stockholder living in England, it was held that the memorandum and articles of association did not constitute an authority by the shareholder to the company to pledge his personal credit for the company's debts, so as to increase his liability beyond the amount to which it was limited by the companies acts.

It was held in *Pinney v. Nelson*, 183 U. S. 144, 46 L. ed. 125, 22 Sup. Ct. Rep. 52, that California stockholders in a Colorado corporation whose charter specified that one purpose of the incorporation was the transaction of business by the corporation in California must be deemed to have contracted with reference to the provisions of the California Code imposing a personal 33 L.R.A. (N.S.)

liability upon stockholders of domestic corporations, and also imposing the same personal liability upon stockholders of foreign corporations doing business within the state as upon stockholders in domestic corporations, and are bound thereby, so far, at least, as such liability arises from the corporate business carried on in California, although the Colorado corporation law imposed no personal liability upon stockholders. The court said: "As then a corporation can have no legal existence outside of the state in which it is incorporated, the contract of the stockholders with one another, by which the corporation is created, is presumed to have been made with reference to the laws of that state, nothing being said in the charter to the contrary. But as comity permits a corporation to enter another state and do business therein, it is competent for the stockholders, in making their charter, to contract with reference to the laws of a state in which they propose the corporation shall do business. And in this case the stockholders in their charter specified that the purpose of the incorporation was partly business beyond the limits of Colorado, and that the principal part of such outside business should be carried on in California. Not content to rely upon the general authority which, by the rules of comity, the Colorado corporation would have to enter California and transact business therein, they in terms set forth that a part of the purpose of the incorporation was the transaction of business by the corporation in California. Now, when they in terms specified that they were framing a corporation for the purpose of having that corporation do business in California, is it not clear that they were contracting with reference to the laws of that state? Contracting with reference to the laws of that state, they must be assumed to know the provisions of those laws; that by them a personal liability was cast upon the stockholders in corporations formed under the laws of the state, and that that same liability was also imposed upon the stockholders of corporations formed under the laws of other states and doing business

under the doctrine of comity depends upon whether any wrong or injury will be done to citizens of the domestic state, whether the policies of its laws will be contravened or impaired, or whether the courts can do complete justice to those affected by the decree. *New Haven Horse Nail Co. v. Linden Spring Co.* 142 Mass. 349, 7 N. E. 773. In the case of *May v. Black*, 77 Wis. 101, 45 N. W. 949, it was considered that the foreign law was enforceable only in the foreign state and in a particular form of action, and for those reasons it was held that the Wisconsin court ought to decline to assume jurisdiction. It was there sought by a bill in equity to enforce the Constitution and statute of the state of Michigan, making stockholders liable for

labor performed for a corporation, by an action in assumpsit, and it appeared to the Wisconsin court that the corporation must be a party to the suit. The necessity of the corporation being a party, and an account being taken, and its affairs being wound up in order to do complete justice, was the basis of the decision in *Young v. Farwell*, 139 Ill. 326, 28 N. E. 845. In that case a bill was filed against two stockholders of a Michigan corporation residing in this state, to enforce payment of the amount of a judgment. The bill was dismissed as to one, and relief granted as to the other, and it appeared that it was necessary to take an account of the indebtedness, and wind up the affairs of the corporation, and apportion the indebtedness

within California. How can it be said that those laws do not enter into the contract, and control as to all business done in pursuance of that contract within the limits of California?"

The court in the above case did not "express any opinion upon the question whether the defendants could have been held liable under the California statutes independently of the provisions of the Colorado charter," saying: "All that we here hold is that when a corporation is formed in one state, and by the express terms of its charter it is created for doing business in another state, and business is done in that state, it must be assumed that the charter contract was made with reference to its laws; and the liabilities which those laws impose will attend the transaction of such business."

A similar ruling was made in *Peck v. Noe*, 154 Cal. 351, 97 Pac. 865, under facts almost identical.

The principal difference between *Risdon Iron & Locomotive Works v. Furness* and *Pinney v. Nelson* is that in the latter the charter expressed the purpose of the incorporation to be doing business in California, and, as the laws of that state imposed a personal liability on stockholders, they were presumed to have had that in mind when incorporating; whereas in the former case the stockholders would not know in what quarter of the globe and under what laws the corporation would do business, and could not reasonably have expected such a great extension of their liability.

Right of one stockholder to sue another for contribution outside state of incorporation.

A stockholder of a corporation, who, in accordance with the laws of the state of charter making stockholders liable to creditors to the amount of their unpaid subscriptions, has been compelled to pay a judgment against the corporation, can sue other stockholders similarly liable, for contribution in any state where they may be 33 L.R.A. (N.S.)

found. *Putnam v. Misochi*, 189 Mass. 421, 109 Am. St. Rep. 648, 75 N. E. 956, 4 A. & E. Ann. Cas. 733.

And this is true even where the stockholder seeking contribution after satisfying the judgment made no demand upon the corporation, and took no action against it. *Ibid.*

Impairment of obligation of stockholder's contract by change of remedy for enforcement of his liability in foreign jurisdiction.

The rights of one owing an obligation on a contract are not impaired by a statutory change in the remedy rendering it more efficacious. *Bernheimer v. Converse*, 206 U. S. 516, 51 L. ed. 1163, 27 Sup. Ct. Rep. 755.

Hence, where the Constitution of a state provides that every stockholder shall be liable to the amount of stock held or owned by him, and the legislature, to enforce such provision, passed a statute defective because only those who could be personally served in the state could be reached and rendered liable, whereby stockholders in other states were thus rendered immune, and the entire burden cast upon local stockholders, the contract of a foreign stockholder was not impaired because the legislature subsequently changed the law so as to provide for the appointment of a receiver having power to collect assessments from both domestic and foreign stockholders, and to sue the latter in the state of their domicile. *Ibid.*; *Converse v. Ayer*, 197 Mass. 443, 84 N. E. 98.

Nor was it impaired because the later statute imposed upon the stockholders the expense of suits to enforce the liability of stockholders outside the state of charter, so long as these expenses were kept within the amount of the original liability; since such expenses are incident to the ascertainment of the trust fund, which it is necessary to realize from the liability of stockholders. *Bernheimer v. Converse*, 206 U. S. 518, 51 L. ed. 1165, 27 Sup. Ct. Rep. 755; *Converse v. Ayer*, *supra*. *Contra*: *Con-*

among the solvent delinquent stockholders, and for that purpose to determine liabilities under the laws of Michigan, so that no decree entered in this state could do complete justice to those liable to be affected by it, and might do injustice to some. What was said in that case about a want of sufficient comprehension of the laws of Michigan, and the possibility of the supreme court of that state reaching a different conclusion from this court, is not applicable to this case, where the bill avers both the laws of Missouri and an express promise to pay the balance to the corporation. In *Tuttle v. National Bank*, 161 Ill. 497, 34 L.R.A. 750, 44 N. E. 984, it was held that the liability of stockholders under the Constitution of Kansas, and the

special remedy given by the statute of that state, must be applied within that jurisdiction; but afterward, in *Bell v. Farwell*, 176 Ill. 489, 42 L.R.A. 804, 68 Am. St. Rep. 194, 52 N. E. 346, the holding that a special remedy provided by the statutes of another state, not opposed to the legislation or public policy of this state, nor calling for forms of action unknown to our law, could not be enforced here, was distinctly disapproved. It was also there held that, where the laws of Kansas were pleaded, the stockholder's liability would be enforced in this state, and under that decision the possibility suggested in *Young v. Farwell*, that the supreme court of Michigan might reach a different conclusion from this court, ceases to have

verse *v. Aetna Nat. Bank*, 79 Conn. 163, 64 Atl. 341, — L.R.A. (N.S.) —, 7 A. & E. Ann. Cas. 75.

Where a creditor of a corporation is given by the laws of the state where it is organized a personal right of action against any of its stockholders to the amount of the stock held by him, in case of the insolvency of such corporation, a statute of another state which takes away such personal right of action, and substitutes another action in the nature of an equitable accounting for the proportionate benefit of all parties interested, to which such corporation and its legal representatives and all its creditors and stockholders shall be necessary parties, is contrary to a constitutional provision of the latter state that "the legislature shall not pass . . . any law impairing the obligation of contracts, or depriving a party of any remedy for enforcing a contract which existed when the contract was made." *Western Nat. Bank v. Reckless*, 96 Fed. 70.

Conclusiveness of order of assessment in domicile of corporation.

In the absence of fraud, stockholders are bound by a decree against their corporation in respect to corporate matters, even though not served, and though residents of another state; since the stockholders are to be deemed privy to the proceedings touching the body of which they are members. *Hancock Nat. Bank v. Farnum*, 176 U. S. 640, 44 L. ed. 819, 20 Sup. Ct. Rep. 506, reversing 20 R. I. 466, 40 Atl. 341; *Rood v. Whorton*, 67 Fed. 434, affirmed in 20 C. C. A. 332, 46 U. S. App. 6, 74 Fed. 118; *Dexter v. Edmands*, 89 Fed. 467; *Hale v. Hardon*, 37 C. C. A. 240, 95 Fed. 747; *Fish v. Smith*, 73 Conn. 377, 84 Am. St. Rep. 161, 47 Atl. 711; *Childs v. Cleaves*, 95 Me. 498, 50 Atl. 714; *Francis v. Hazlett*, 192 Mass. 137, 116 Am. St. Rep. 230, 78 N. E. 405.

And such a decree is not open to collateral attack. *Rood v. Whorton*, 67 Fed. 434, affirmed in 20 C. C. A. 332, 46 U. S. App. 6, 74 Fed. 118. 33 L.R.A. (N.S.)

Hence, an assessment by the court on stockholders on their unpaid subscriptions is binding, even as to stockholders residing outside the state and not served, as to the necessity of making such assessment and its amount. *Great Western Teleg. Co. v. Purdy*, 162 U. S. 329, 40 L. ed. 986, 16 Sup. Ct. Rep. 810; *Howarth v. Ellwanger*, 86 Fed. 54; *Hale v. Hardon*, 37 C. C. A. 240, 95 Fed. 747; *Fish v. Smith*, 73 Conn. 377, 84 Am. St. Rep. 161, 47 Atl. 711; *Castleman v. Templeman*, 87 Md. 546, 41 L.R.A. 367, 67 Am. St. Rep. 363, 40 Atl. 275; *Howarth v. Lombard*, 175 Mass. 570, 49 L.R.A. 307, 56 N. E. 888.

So, also, an adjudication by a court of the state where the corporation has its domicile, that an assessment be levied on all stockholders on account of their statutory liability, is binding on nonresident stockholders, though not personally made parties, both as to the necessity and the amount of the assessment. *Hale v. Hardon*, 37 C. C. A. 240, 95 Fed. 747; *Hale v. Coffin*, 114 Fed. 567; *Robinson v. Brown*, 126 Fed. 429; *Goss v. Carter*, 84 C. C. A. 402, 156 Fed. 746, decision adhered to on later appeal in 99 C. C. A. 664, 175 Fed. 1019, which has petition for writ of certiorari denied in 217 U. S. 605, 54 L. ed. 900, 30 Sup. Ct. Rep. 695; *Childs v. Cleaves*, 95 Me. 498, 50 Atl. 714; *Howarth v. Lombard*, 175 Mass. 570, 49 L.R.A. 301, 56 N. E. 888; *Francis v. Hazlett*, 192 Mass. 137, 116 Am. St. Rep. 230, 78 N. E. 405; *Converse v. Ayer*, 197 Mass. 443, 84 N. E. 98. *Contra*: *Wigton v. Bosler*, 102 Fed. 70; *Howarth v. Angle*, 162 N. Y. 179, 47 L.R.A. 725, 56 N. E. 489; *Converse v. Stewart*, 105 App. Div. 478, 94 N. Y. Supp. 310; *Finney v. Guy*, 106 Wis. 256, 49 L.R.A. 486, 82 N. W. 595.

Thus, a stockholder sued by a receiver in a state other than the state of incorporation, on his statutory liability, cannot show, contrary to an adjudication in the state of charter in which the corporation was a party, that the corporation had assets which could be used to pay corporate debts without resorting to the stockholders.

any weight. In *Young v. Farwell* the court cited and relied upon the decision of the Massachusetts court in *New Haven Horse Nail Co. v. Linden Spring Co.*, supra; but that court afterwards, in *Hancock Nat. Bank v. Ellis*, 166 Mass. 414, 55 Am. St. Rep. 414, 44 N. E. 349, held that a declaration alleging that, according to the law of Kansas, a stockholder in a corporation is liable to a judgment creditor as upon a contract, is a good declaration, and that requirement is satisfied by the bill in this case. In *Whitman v. National Bank*, 176 U. S. 559, 44 L. ed. 587, 20 Sup. Ct. Rep. 477, which was a suit to enforce the liability of a stockholder, it was held that the action, not being to enforce a penal statute of Kansas, but only to secure a

private remedy, could be maintained in any court of competent jurisdiction.

There is no reason in this case for declining to take jurisdiction on the ground that the laws of the state of Missouri are unknown. The laws of other states are pleaded in the courts of this state as facts, and our courts constantly take jurisdiction of cases where laws must be, and are, proved as facts. Our courts are perfectly competent to determine what the laws of other states are as matters of fact, and there is no reason for sending an applicant for the redress of wrong to another state to have a fact determined which is pleaded and may be proved in our courts. Counsel are in error in contending that the allegation concerning the laws of Mis-

Francis v. Hazlett, 192 Mass. 137, 116 Am. St. Rep. 230, 78 N. E. 405.

So, a judgment against the corporation in favor of a creditor, rendered in the state of its domicile, is conclusive evidence of the indebtedness of the corporation to such judgment creditor in a subsequent action by him in another jurisdiction, to enforce in his favor the individual statutory liability of a stockholder. *Hancock Nat. Bank v. Farnum*, 176 U. S. 640, 44 L. ed. 619, 20 Sup. Ct. Rep. 506; *Dexter v. Edmonds*, 89 Fed. 467; *Ferguson v. Sherman*, 116 Cal. 169, 37 L.R.A. 622, 47 Pac. 1023.

An assessment against shareholders to pay the debts of an insolvent foreign corporation, levied in accordance with a judgment of the foreign state, is conclusive against stockholders in the state of the forum, where it is held in the courts of the foreign state to be conclusive against stockholders, although such an assessment would not be held conclusive in the courts of the state of the forum; since otherwise full faith and credit would not be given to the judgments of other states. *Tompkins v. Blakey*, 70 N. H. 584, 49 Atl. 111.

A judgment against a corporation which, by the laws of the state in which it is rendered, is binding on stockholders, must be given by a court of another state the same conclusive effect against a stockholder who is sued therein on his statutory liability; and the only defenses which he can make against it are those which he could make in the courts of the state in which it was rendered. *Hancock Nat. Bank v. Farnum*, 176 U. S. 640, 44 L. ed. 619, 20 Sup. Ct. Rep. 506, reversing 20 R. I. 466, 40 Atl. 341.

It has been held that the findings in the parent action in the state where the corporation is domiciled, that the corporation is insolvent, that its assets are insufficient to meet its liabilities, that the deficiency amounts to so much, and that a certain sum must be raised from the shareholders, are only prima facie evidence against foreign shareholders who were not parties thereto, in ancillary actions in the state of their domicile. *Pfaff v. Gruen*, 92 33 L.R.A.(N.S.)

Mo. App. 560, 69 S. W. 405 (action to enforce statutory liability).

And in *Converse v. Aetna Nat. Bank*, 29 Conn. 163, — L.R.A.(N.S.) —, 64 Atl. 341, 7 A. & E. Ann. Cas. 75, it was held that an adjudication by a court of the state where the corporation was domiciled, that an assessment be levied on stockholders on account of their statutory liability, was not so conclusive on a nonresident stockholder not served, as to preclude him from showing that, in fixing the amount of the assessment, an unconstitutional item had been included.

A judgment against a corporation in an independent action on contract is not so conclusive on a stockholder, in an action by the judgment creditor to enforce such stockholder's individual liability for the corporate debts, under the constitution and laws of the state of charter, as to prevent him from showing that such contract was *ultra vires* and void under such Constitution and laws. *Ward v. Joslin*, 186 U. S. 142, 46 L. ed. 1093, 22 Sup. Ct. Rep. 807.

A statute of a state to the effect that a court of that state may, in a summary proceeding, fix the amount for which stockholders must respond upon their statutory liability, and the time when and the person to whom the same must be paid, and that the determination shall be regarded as a bar to every defense to such liability in any court anywhere, even by stockholders not served, will not be so enforced in another state as to prevent a resident stockholder not served in the original proceeding from setting up any defenses he may have. *Hunt v. Whewell*, 122 Wis. 33, 99 N. W. 599; *Converse v. Hamilton*, 136 Wis. 591, 118 N. W. 190; *Converse v. McCauley*, 136 Wis. 594, 118 N. W. 192.

Where, by the laws of such foreign state, a corporation is not a necessary party to a suit to enforce the statutory liability of stockholders, service upon it cannot be considered service upon stockholders, or in anyway binding upon those not notified or made parties to such suit. *Hazlett v. Woodhead*, 27 R. I. 506, 63 Atl. 952.

Where, under the law of the state in

missouri is a mere conclusion of law, not admitted by the demurrer. The averment is an averment of fact, which may be pleaded, admitted, or denied like any other fact. It is suggested that the allegation as to the laws of Missouri is not sufficient in form, but we see no objection to it. Furthermore, the liability for the unpaid balance need not rest upon any allegation as to the laws of Missouri, since the bill alleges a specific promise to pay to the corporation the unpaid balance on the stock. The objection that this promise might have been made to the persons from whom the stock was purchased has no force, for the reason that it makes no difference whether the promise was made directly to the corporation or to the assignor of the stock for its benefit.

It was not necessary that there should be any call made by the corporation or the bankruptcy court. The creditor of a corporation can proceed in equity without a call, and without taking any account of other indebtedness or making all stockholders defendant. The liability of a stockholder for unpaid subscriptions is several, and not joint, and the creditor is not bound to settle up the affairs of the corporation in order to obtain his dues. *Hatch v. Dana*, 101 U. S. 205, 25 L. ed. 885. A creditor of a corporation seeking satisfaction of his

debt need look no further than to find a solvent stockholder who is liable for it, and he sustains no relation to the corporation which requires him to adjust equities between stockholders or between the corporation and others. *Ogilvie v. Knox Ins. Co.* 22 How. 380, 16 L. ed. 349.

It was suggested in *Hatch v. Dana*, supra, that a stockholder, when sued, could, if he desired, file a cross bill, and bring in other stockholders and enforce contribution, and upon that suggestion counsel found an argument that this suit ought to have been brought in Missouri, so that the defendants could bring in other stockholders. Inasmuch as the Missouri court would have no jurisdiction of the defendants, and they could not be brought into that court, there would be no occasion for their filing any cross bill to bring in someone else, and, of course, it would be desirable for them to have the suit in a court that could render no decree against them. But whenever the suit might be brought, it would be of no avail to the defendants to bring in the other three stockholders who are insolvent, and from whom nothing could be recovered in the way of contribution.

Much is said about this suit relating to the internal affairs of a Missouri corporation, and that, because it relates to internal affairs, the courts of this state have no

which a corporation is chartered, a judgment by a creditor against the corporation is not conclusive against a stockholder residing in such state, when sued by the creditor to enforce the double statutory liability of such stockholder, if the judgment was obtained by fraud, neither is it conclusive on a nonresident stockholder under like circumstances; but such nonresident stockholder, when sued by the creditor in another jurisdiction, may set up as a defense that the judgment was obtained by fraud. *Ball v. Warrington*, 47 C. C. A. 447, 108 Fed. 472.

—to cut off individual defenses.

But although the general rule is that a stockholder, though out of jurisdiction, and not a party to an action in the state of incorporation to wind up the corporation's affairs and enforce the liability of stockholders, cannot question the findings of insolvency and the other foundations of an assessment upon the stockholders, yet this does not preclude the stockholder, when sued in another jurisdiction, from setting up defenses personal to himself. *Rood v. Whorton*, 67 Fed. 434, affirmed in 20 C. C. A. 332, 46 U. S. App. 6, 74 Fed. 118; *Childs v. Cleaves*, 95 Me. 498, 50 Atl. 714; *Tompkins v. Blakey*, 70 N. H. 584, 49 Atl. 111.

Hence, an adjudication of a court levying an assessment on unpaid subscriptions for the payment of creditors is not binding on 33 L.R.A. (N.S.)

a stockholder in another state, and not a party to the proceeding, to such an extent as to prevent him setting up as a defense to an action by a receiver to recover the amount unpaid on his stock, that he bought the stock in good faith as full paid. *Rood v. Whorton*, 67 Fed. 434, affirmed in 20 C. C. A. 332, 46 U. S. App. 6, 74 Fed. 118.

The whole effect of a call or order of assessment made by a court upon the stockholders of an insolvent corporation, to collect the amount due on unpaid assessments, is to fix the amount which any stockholder liable under his contract of subscription should pay, and to authorize the receiver to bring suits against stockholders for the same, but not to determine whether any particular stockholder is liable for anything, or to cut off defenses which any particular stockholder may have. *Great Western Teleg. Co. v. Purdy*, 162 U. S. 329, 40 L. ed. 986, 16 Sup. Ct. Rep. 810.

Hence, such an order of assessment made by a court of the state where the corporation is domiciled is not a judgment against a stockholder resident in another state, which is entitled to full faith and credit in the courts of the latter state, so as to preclude such stockholder, when sued by the receiver on his unpaid assessment, from setting up the defense of the statute of limitations. *Great Western Teleg. Co. v. Burnham*, 162 U. S. 339, 40 L. ed. 991, 16 Sup. Ct. Rep. 850. R. A. E.

jurisdiction to set aside the fraudulent scheme by which the balance of the unpaid subscriptions was nominally satisfied. The term "internal affairs" has no very definite or fixed meaning; but we do not think that it extends to cheating creditors, and it must be confined to relations affecting only the stockholders and the corporation among themselves. A contract of a corporation limiting the liability of its stockholders to a portion of the par value of their stock is void both as to creditors and the assignee in bankruptcy (*Upton v. Tribilcock*, 91 U. S. 45, 23 L. ed. 203), and the scheme in this case is admitted by the demurrer to have been a fraud. The relation of a stockholder who has not paid for his stock, to the corporation, is the ordinary one of debtor. *Parmelee v. Price*, 208 Ill. 544, 70 N. E. 725. If it was necessary that the corporation should be represented in the litigation, it was present in this case by the trustee in bankruptcy, who by the law represents and stands in the place of the corporation. The bankrupt corporation was in legal contemplation a party, and all the stockholders except those who are insolvent were defendants. The stockholders, except the defendants, were not necessary parties by reason of their insolvency, and, as the trustee represents both the creditors and the corporation (*Brandenburg Bankr. 737*; *Collier, Bankr. 389*), all the parties whose presence could in any manner affect the litigation were subject to the jurisdiction of the court. There was no lack of jurisdiction in the court to hear and determine the case, nor any reason for declining to assume jurisdiction. The courts of Missouri could not obtain jurisdiction of the defendants, and the courts of this state alone could grant relief. The controversy was between creditors through their representative, the trustee in bankruptcy, and the defendants, and the court could apply an effective remedy, which it did.

The judgment of the Appellate Court is affirmed.

Farmer, Ch. J., and Cooke, and Vickers, JJ., dissent.

Petition for rehearing denied June 8, 1910.

Petition for writ of certiorari denied by United States Supreme Court.
33 L.R.A.(N.S.)

TENNESSEE SUPREME COURT.

WILLIAM DE GLOPPER, by Next Friend,
v.
NASHVILLE RAILWAY & LIGHT COMPANY.

(— Tenn. —, 134 S. W. 609.)

Negligence — accident — res ipsa loquitur.

1. The maxim *Res ipsa loquitur* will not apply to establish on the part of a street car company liability for injury to a passer-by by a missile thrown from under a car, where both the act which caused the injury and the negligence of the street car company in relation thereto would have to be inferred from the accident.

Street railway — operation of car — accident to passer-by — liability.

2. The mere fact that the attempt to move a heavily loaded street car stalled on a steep grade caused the wheels to revolve rapidly without imparting motion to the car, but throwing a missile against a passer-by, to his injury, does not establish negligence on the part of the street car company which will render it liable for the injury.

(February 4, 1911.)

PETITION for a writ of certiorari to review a judgment of the Court of Civil Appeals reversing a judgment of the Circuit Court for Davidson County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Disallowed.

The facts are stated in the opinion.

Messrs. W. H. Washington and Thomas H. Andrews for plaintiff in error.

Mr. R. F. Jackson for defendant in error.

Lansden, J., delivered the opinion of the court:

This action was commenced in the circuit court of Davidson county to recover damages for personal injuries received by William De Glopper, a boy fourteen years of age, and there was a trial before the cir-

Note.—A search has failed to disclose other case involving the liability of a street railway company for injury to a traveler on the street from an attempt to move a stalled car.

As to the duty of a street railway company before starting a car to see that no one is in dangerous proximity to the side or rear of the car, see *Kiley v. Boston Elev. R. Co.* 31 L.R.A.(N.S.) 1153.

cuit judge and jury, and a verdict and judgment for plaintiff below in the sum of \$4,000. An appeal was taken to the court of civil appeals, and this judgment reversed, and the suit dismissed, to review which action of the court of civil appeals a petition for certiorari is filed in this court and errors assigned.

The plaintiff below states his cause of action in substance as follows: In the first count it is thus stated:

"At the time of said injuries, to wit, on the 27th day of October, 1906, the defendant was running a car towards the east on Church street, at and near its intersection with Ninth avenue north, on its West Nashville line. Said car was in charge of a motorman of defendant, and had underneath it the electrical machinery which moved and controlled it. At the time of said injuries, said electrical machinery was defective and out of repair, and the wheels of said car were defective, so that, when revolving rapidly upgrade, they would throw off slivers or pieces of iron or steel with great force."

"At said place there exists a heavy upgrade east on Church street, and on the day and year aforesaid, whilst said car with said defective electrical machinery and defective wheels was ascending said steep grade, the plaintiff, seated in a buggy, was driving upon the street, and was in the exercise of ordinary care, and when near the side of said car the motorman negligently managed, manipulated, and handled the electrical and propelling power of said car, which, together with the defective electrical machinery, caused the wheels of said car to revolve at a furious, excessive, and dangerous velocity at the same place upon the rails, without giving the car any perceptible movement forward. Said unusual, extraordinary, and dangerous velocity of the wheels, together with the defects in the material of which they were composed, caused pieces of sliver or material to be broken therefrom and from the rails of the track of defendant, which were defective, and to be thrown off at a tangent, with tremendous force, one of which struck the plaintiff in the eye, and cut, tore, and lacerated it so badly that it was necessary to take it out, which was accordingly thereafter done. The said injury and cut in plaintiff's eye was the direct and proximate result of the said negligence of defendant, and was directly due to the negligence of the motorman in failing to properly apply the electrical current, and to the negligence of defendant in having electrical machinery so defective as to cause the wheels to run away, get beyond control, and revolve at such excessive and tremendous velocity as to break and

wear away the wheels of said car, as well as the rails of the track at that point, which, by the negligence of defendant, were defective and wholly unfit to bear the excessively rapid revolutions of the wheels at the same place, and said injuries were thus directly and proximately due to the grinding and wearing of the metal upon metal, and to the friction upon the tracks, all directly brought about by the said negligence of defendant and its agent and servant, the motorman in charge of said car. The defective condition of said electrical machinery, wheels, and rails was known to defendant, or could have been known by ordinary care, and was unknown to plaintiff."

In the second count it is thus stated:

"At the time of said injuries, to wit, on the 27th day of October, 1906, whilst plaintiff was driving along Church street at and near Ninth avenue north, in Nashville, the defendant had negligently allowed and permitted its track at said point to become defective and dangerous, on account of the accumulation thereon of rock, gravel, *débris*, and other hard, sharp material, and on the day and year aforesaid, whilst plaintiff was driving along said street, seated in a buggy, a car of defendant was in such defective condition, and so negligently managed by the motorman of defendant in charge of it, that the wheels were thereby caused and permitted to run away and revolve in practically the same place at such excessive and dangerous velocity, in endeavoring to ascend a heavy grade at said point, as to grind up, take up, and throw off at a tangent said rock, gravel, *débris*, and other hard, sharp material and substance, and hurl it against and into the eye of plaintiff, whereby it was put out, and had to be cut out, thereby disfiguring and disabling him for life."

"From said injuries plaintiff suffered and still continues to suffer great pain and agony of body and mind, and was permanently injured, and lost much time, and expended considerable sums in nursing and doctor's bills."

"Before the happening of said injuries, defendant knew of the defects in the machinery of said car, which caused the wheels to revolve so rapidly at the same place upon the rails, as well as the defective condition of the surface of its track at said place, or might have known it by ordinary care, and it was unknown to plaintiff; and the said injuries were directly and proximately due to the said negligence of defendant, and the negligence of its motorman, in carelessly and negligently handling said car."

In the third count it is thus stated:

"At the time of the injuries set out in the

counts of the original and amended declaration, to which reference is made herein and which are made a part hereof, the said car was negligently overloaded for the place and grade, and this fact, to wit, because there was more load upon the car than it could safely carry at that place, was the direct and proximate cause of the stalling of the car, and the extremely rapid revolutions of the wheels, which caused said sliver of metal or hard substances to be thrown off with great force, and which struck plaintiff in the eye, inflicting the injuries described and set out in said amended declaration."

The facts of the case are as follows:

On the 27th of October, 1906, William De Glopper, with two boy companions, was driving west on Church street, near Ninth avenue, and they met a car of the defendant in error coming east on the same street. There is a sharp ascent in the grade of the street at this point, and the car of the defendant in error stalled. It was heavily loaded, and the motorman applied the power in such a way that the wheels of the car revolved very rapidly without moving the car, except that the car would lurch forward a few inches or a few feet, and would again stop, and the wheels would continue to revolve rapidly in the same place. The plaintiff in error was in a small buggy drawn by a pony, and was on the left-hand side of the buggy, next to the car, and when his position was somewhat in front of the rear truck, and west of the center of the car, he suddenly threw his hand to his eye and cried, "Stop! Something flew from under that car and hit my eye."

The plaintiff in error was struck in the lower left-hand corner of the eye with a triangular substance with a rough edge, which penetrated the eye and destroyed it. On the following day his eye was removed. There was no one on the street west, east, or south of plaintiff in error who could have thrown the substance inflicting the injury in the manner in which it was done, and the windows of the car, as well as the vestibules, were all closed in such a way that no one upon the car could have done so. The car was 28 feet long and 12 feet high, and thus it made it impossible for the injury to have been inflicted by a person to the south of plaintiff in error. The wind was not blowing.

A witness was introduced as an expert, who says that the probable effect of revolving the steel wheels of the car rapidly in the same place upon the steel rails of the track when the car is heavily loaded is to throw out slivers of steel, either from the rail or wheel, or both, with considerable force. This witness stated that he has seen this occur on different occasions, and that

it results from the nature of the wheel and the track, when subjected to the great friction that would be created by the rapid revolution of the wheels while the car is heavily loaded and stationary.

The track of defendant was examined at the place of the accident soon after it occurred, and particles of sand were found upon it; but the witness could not say that the servants of defendant in error were using sand just before or at the time of the accident. It is a custom of defendant in error to place sand on its track wherever needed to prevent the slipping of the wheels.

When the eye of plaintiff in error was examined soon after the accident, as well as when it was removed, no foreign substance was found in it. It was seen, however, that the cornea had been penetrated by a hard, rough, triangular shaped substance of sufficient weight to fall out of the eye. There is no other proof tending to show that either the machinery or the wheels of the car, or rails of the track, were defective. There is no proof tending to show that defendant in error had notice, or should have had notice by the exercise of due care, of any of the alleged facts. There is no proof of the negligent operation of the car, other than the facts stated,—that it was heavily loaded, and stalled at the ascent in the street, and the motorman, in applying the power to propel the car, caused the wheels to revolve very rapidly at the same place. The plaintiff in error was rightfully upon the street and in the exercise of due care.

The foregoing facts appear entirely from the testimony of the plaintiff in error. The defendant in error, at the conclusion of the testimony of plaintiff, moved the court to direct a verdict in its behalf, which was overruled, and the case was given to the jury without any further proof being offered.

In every action for damages resulting from injuries to the plaintiff, alleged to have been inflicted by the negligence of the defendant, it is incumbent upon the plaintiff to establish by a preponderance of the testimony, three propositions:

(1) A duty which the defendant owes to him.

(2) A negligent breach of that duty.

(3) Injuries received thereby, resulting proximately from the breach of that duty.

If he aver that the duty which the defendant owes him arises out of a particular relationship, or that the negligence constituting its breach consists of a particular act, omission, or thing, he must prove his case substantially as averred. This may be done either by direct testimony of witnesses who know the facts, or by direct proof of

indirect but correlated facts from which the duty owing him, the injury done him, the negligence of defendant, and its proximate causal connection with the injury, may be reasonably inferred. When such method of establishing liability is resorted to, negligence is never inferred from the mere fact of the injury; but the act which produced it, and defendant's negligence, and the injury, must all be shown, and the nexus between them must appear in the relationship of cause and effect. This indirect method of arriving at the negligence of defendant is generally expressed by the maxim *Res ipsa loquitur*. Literally translated, it means "the thing speaks for itself," and is merely a short way of saying that the circumstances attendant upon the accident are themselves of such a character as to justify a jury in inferring negligence as the cause of the injury. It in no wise modifies the general doctrine that negligence will not be presumed.

The mere fact of any injury never raises a presumption of negligence. *Benedick v. Potts*, 88 Md. 52, 41 L.R.A. 478, 40 Atl. 1061; *Chicago Union Traction Co. v. Giese*, 229 Ill. 263, 82 N. E. 232; *Snyder v. Wheeling Electrical Co.* 43 W. Va. 661, 39 L.R.A. 499, 64 Am. St. Rep. 922, 28 S. E. 733.

The general meaning of the maxim is well expressed by the supreme court of Illinois in *Chicago Union Traction Co. v. Giese*, 229 Ill. 263, 82 N. E. 232, as follows: "When a thing which has caused an injury is shown to be under the management of the party charged with negligence, and the accident is such as, in the ordinary course of things, does not happen if those who have the management use proper care, the accident itself affords reasonable evidence, in the absence of an explanation by the party charged, that it arose from the want of proper care."

This rule finds its most common application in cases where one, in passing along the street, is hurt by a barrel falling from a door above, or by a brick falling from a wall, or scaffold, or by a falling shutter or wall, or the like. The mere occurrences in themselves import negligence.

In *Snyder v. Wheeling Electrical Co.* 43 W. Va. 668, 39 L.R.A. 502, 64 Am. St. Rep. 922, 28 S. E. 735, supra, it is said that "where things of great danger are used in public highways, where multitudes constantly and lawfully pass, their very nature requiring the highest degree and constancy of care, and one is killed from its being out of place or defective, why may we not logically and fairly assume negligence, unless other plausible explanation appears?"

The limitations upon this doctrine are 33 L.R.A. (N.S.)

well defined and well understood, and are fully illustrated and fully expressed by this court in *East Tennessee & W. N. C. R. Co. v. Lindamood*, 111 Tenn. 457, 78 S. W. 99, where the court quoted the following from the supreme court of California with approval:

"Unless facts are shown from which negligence may be reasonably inferred, a jury should never be permitted to infer arbitrarily and without evidence that there was negligence. When a fact is established, some other fact may be justly inferred therefrom; but when a plaintiff, instead of presenting a fact or facts from which the negligence of the defendant may be reasonably inferred, gives to the jury only a presumption drawn from other facts, the jury are not to be allowed to infer negligence from such presumption. The inference cannot be drawn from a presumption, but must be founded upon some fact legally established."

Applying these principles to the present case, we find that plaintiff in error was passing the car mentioned when his face was about 6 feet from the car, with his left side to the car, when he was struck in the left eye with force by a hard substance coming from under the car, while the wheels of the car were revolving rapidly in the same place under a heavy load. The fact that the substance which struck plaintiff in error in the eye came from under the car is a fact which may reasonably be drawn from the whole circumstances of the accident by a fair inference from the situation of the parties at the time. It is not directly proven, and is arrived at by inference only. There is no direct, open, and visible connection between this inferred fact and the rapid turning of the wheels of the car at the same place. Whatever of connection there may be between the turning of the wheels and the striking of plaintiff in error arises only upon inference, and in order to make this connection between the operation of the car and the injury of plaintiff in error it must be inferred that the substance which struck plaintiff in error came from under the car, and from that fact it must be further inferred that it was thrown from under the car by the rapidly turning wheels, and there still must be superadded to these two inferences the further inference that the motorman was negligent in the operation of the car at the time, or that the wheels of the car were defective, or that the track was defective at the place of the accident, and that defendant in error had notice of the defects, or, by the exercise of due care, should have known of them.

If the act which caused the injury was shown by direct evidence, and all of the circumstances of the accident were shown

in the proof, and if the only reasonable explanation of the accident should give rise to an inference of negligence, then the rule of *Res ipsa loquitur* would apply; but there can be no foundation for the application of this maxim where both the act which caused the injury and the negligence of defendant in relation to the act must be inferred from the accident itself. You cannot well say that an act is negligent, unless you know what it is. It is said in one case that the maxim under consideration can have no application where the injured person and the alleged negligent person were both in the exercise of an equal right and were each chargeable with the same degree of care. *Sauer v. Eagle Brewing Co.* 3 Cal. App. 127, 84 Pac. 425.

The only fact that is directly proven, from which it is possible that negligence might be inferred, is the fact that the car was heavily loaded upon a steep ascent in defendant's track; so much so that it stalled and the application of the power to its machinery caused the wheels to slip and revolve rapidly. Nothing else appears than the facts stated. It is not proven that the car was overloaded, or carelessly loaded, or that the power was negligently or improperly applied. It is a matter of common knowledge that the wheels of a street car may turn rapidly at the same place upon the rails of the track, when both the wheels and the rails are in perfect condition and the motorman is in the exercise of due care.

Street cars are run for the accommodation of the public, as well as profit to the company, and the courts cannot say that the fact that the company permits a large number of passengers to occupy the car sufficient to load it heavily is an act of negligence. To so hold would work very great inconvenience to the traveling public and impair the efficiency of the car service.

One of the requirements of modern city life is rapid transit; and the public has demanded that the street cars at certain hours of the day be loaded to their utmost capacity. It is doubtful if the company could refuse to receive a passenger upon its car as long as there was room in the car for him. A tender to the company of the requisite fare and the ability of a passenger to find a place of safety upon the car would impose an obligation upon the company to receive and transport the passenger. Thus it appears that the jury could not infer negligence from the single statement that the car was heavily loaded and that there was a sharp ascent in the street. Cases illustrating the general doctrine stated in this opinion are the following: *Wood v. Wilmington City R. Co.* 5 Penn. (Del.) 33 L.R.A. (N.S.)

373, 64 Atl. 246; *Foulke v. Wilmington City R. Co.* 5 Penn. (Del.) 368, 60 Atl. 793; *Philadelphia, W. & B. R. Co. v. Anderson*, 20 Am. St. Rep. 493, note; *Wabash, St. L. & P. R. Co. v. Locke*, 112 Ind. 404, 2 Am. St. Rep. 193, 14 N. E. 391; *Hayes v. Michigan C. R. Co.* 111 U. S. 228, 28 L. ed. 410, 4 Sup. Ct. Rep. 369; authorities cited in *Lindamood's Case*, supra.

The negligence averred in the declaration as the proximate cause of the injury is: First. That the electrical machinery and wheels of the car were defective. Second. That the rails were worn and out of repair. Third. That the motorman was negligent and careless in the management and operation of the car. Fourth. The rocks and debris and other hard substances had been allowed to accumulate on the track. Fifth. That the car was overloaded.

There is no testimony in the record tending to establish either of the alleged acts of negligence, and from the facts proven, if it were permissible to infer the act which caused the injury, no inference points directly to one of the acts of negligence rather than any of the others. What caused the injury, and the defendant's negligent connection with it, are left entirely at large by the proof, and are matters of pure conjecture. Under all the cases cited, this is not sufficient.

It results that there is no error in the judgment of the Court of Civil Appeals, and the petition is disallowed.

MICHIGAN SUPREME COURT.

PEOPLE OF THE STATE OF MICHIGAN
v.

FRANK M. DICKERSON, Plff. in Err.

(164 Mich. 148, 129 N. W. 199.)

Witness — expert — appointment by court — validity.

A legislative attempt to confer upon the court the power in a criminal case to appoint experts in case they are needed, and acquaint the jury with the fact, who shall prepare themselves and give testimony in the case, is invalid, as tending to deprive the accused of due process of law.

(December 30, 1910.)

Note. — *Constitutionality of statute permitting court to appoint expert witnesses.*

It will be noticed that in *PEOPLE v. DICKERSON*, the section of the statute empowering the court in cases of homicide to appoint expert witnesses, not to exceed three in number, to investigate the issues raised, and testify at the trial, and also providing

ERROR to the Recorders' Court for the City of Detroit to review a judgment convicting defendant of murder. Reversed.

The facts are stated in the opinion.

Mr. Frederick E. McCain, for plaintiff in error:

Section 3 of act 175 of Public Acts of 1905 is invalid, as tending to deprive accused of "due process of law."

Ex parte Virginia, 100 U. S. 339, 25 L. ed. 676; Re Cox, 129 Mich. 635, 89 N. W. 440; Weimer v. Bunbury, 30 Mich. 213; Den ex dem. Murray v. Hoboken Land & Improv. Co. 18 How. 272, 16 L. ed. 372; Dartmouth College v. Woodward, 4 Wheat. 519, 4 L. ed. 630.

Mr. Ormond F. Hunt, *amicus curiæ*.

Messrs. Franz C. Kuhn, Attorney General, Philip T. Van Zile, and Arthur W. Kilpatrick, for the People.

Brooke, J., delivered the opinion of the court:

Respondent was convicted of murder in the recorder's court for the city of Detroit, and brings his case to this court for review. During the trial, it became apparent that the respondent claimed immunity from punishment because of alleged lack of mental capacity. The court thereupon, acting under the mandate contained in § 3 of act No. 175 of the Public Acts of 1905, proceeded to appoint two medical experts. The appointment was made known to the jury, and the experts gave testimony. The experts were appointed and their testimony received over the objection of respondent, and exceptions were duly taken. The only question raised upon this

record is the constitutionality of the act in question, which is as follows:

An Act to Regulate the Employment of Expert Witnesses.

The People of the State of Michigan enact:

Section 1. No expert witness shall be paid or receive as compensation in any given case, for his services as such, a sum in excess of the ordinary witness fees provided by law, unless the court before whom such witness is to appear or has appeared awards a larger sum; and any such witness who shall directly or indirectly receive a larger amount than such award, and any person who shall pay such witness a larger sum than such award, shall be guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding \$1,000, or by imprisonment in the county jail not to exceed one year, or both, in the discretion of the court, and may further be punished for contempt.

Sec. 2. No more than three experts shall be allowed to testify on either side as to the same issue in any given case except in criminal prosecutions for homicide: Provided, the court trying such case may in its discretion permit an additional number of witnesses to testify as experts.

Sec. 3. In criminal cases for homicide where the issues involve expert knowledge or opinion, the court shall appoint one or more suitable disinterested persons, not exceeding three, to investigate such issues and testify at the trial; and the compensation of such person or persons shall be fixed by the court and paid by the county

that the fact of appointment should be made known to the jury, and that the provision should not exclude the prosecution or defense from using other expert witnesses, was held unconstitutional in that it violated the due process of law provisions of the Constitution, and also because it attempted to confer a power upon the judicial branch of the government which, by the Constitution, belonged to the administrative department.

This seems to be a pioneer case upon the question of the constitutionality of such an act. The decision, under the existing conditions, seems to be sound. In case other statutes should be drawn in the future along the lines of this one, it would seem that they should contain a provision for giving the prosecution and the accused the names of the experts chosen before the opening of the trial, in order that some opportunity might be afforded to examine into the qualifications and standing of such witnesses.

The case of Houseman v. Montgomery, 58 Mich. 364, 25 N. W. 369, is perhaps of sufficient value upon the question of the infringement of the administrative power of the government by the judicial department 33 L.R.A.(N.S.)

to warrant its insertion. In that case it was held that a statute was invalid which authorized the court to appoint surveyors or other persons to make examinations or surveys to relevy taxes in place of invalid ones, since such acts pertained to the administrative branch of the government rather than the judicial. The court said: "The design of the Constitution is that each of the three branches of the government shall be kept, so far as practicable, separate, and that one of the departments shall not exercise powers confided by that instrument to either of the others. Any legislation, therefore, authorizing an invasion of this design, and conferring upon the judiciary the exercise of powers belonging to either of the others, cannot be regarded as valid."

See, in this connection, State v. Keener, 19 L.R.A.(N.S.) 615, and note as to powers or duties of a nonjudicial character with which judges of municipal or police courts may be vested or burdened; and Moore v. Nation, 23 L.R.A.(N.S.) 1115, and note as to power to impose upon judges the duty to assist in drawing jurors. J. T. W.

where indictment was found, and the fact that such witness or witnesses have been so appointed shall be made known to the jury. This provision shall not preclude either prosecution or defense from using other expert witnesses at the trial.

Sec. 4. This act shall not be applicable to witnesses testifying to the established facts or deductions of science, nor to any other specific facts, but only to witnesses testifying to matters of opinion.

Approved June 7th, 1905.

Sections 1, 2, and 4 of the act are not attacked, and we wish it to be understood that no opinion is hereinafter expressed as to the validity of those sections. Our attention is directed solely to the provisions of § 3, and that section alone will be discussed. The objections urged are set out in the people's brief as follows: 1. Is act No. 175, Pub. Acts 1905, unconstitutional (a) in that it embraces more than one object? or (b) is the title to the act sufficiently broad to embrace its object? (2) Does the act infringe upon the respondent's right to due process of law, as guaranteed him by the state and Federal Constitutions? (3) Does the act violate the provisions of § 16, art. 2, of the state Constitution? We will consider these objections in their order.

1. The title of the act is: "An Act to Regulate the Employment of Expert Witnesses." It will be noted that this title is extremely simple, general, and comprehensive. The word "regulate" has frequently received judicial interpretation, and under that term very broad powers have been exercised. *Westgate v. Adrian Twp.* 161 Mich. 333, 126 N. W. 422, and cases cited. But it is urged that the term, broad as it is, must have reference only to something which has theretofore existed,—that it imparts no power of creation. It is further argued that § 3 delegates to the judicial department of government a new and incongruous power, and in effect creates a new class of witnesses,—that this is in no sense regulation. In view of what we shall have to say later concerning the provisions of this section, we find it unnecessary to determine whether or not this contention of the respondent is correct.

2. Section 16 of article 2 of the Constitution of 1908, among other things, provides: "No person shall . . . be deprived of life, liberty, or property without due process of law." "Due process of law" has been variously defined. Mr. Cooley in his work on Constitutional Limitations, 7th ed., p. 502, adopts the definition given by Daniel Webster in the Dartmouth College Case, 4 Wheat. 519, 4 L. ed. 630, as fol-

lows: "By the law of the land is most clearly intended the general law,—a law which hears before it condemns; which proceeds upon inquiry and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society. Everything which may pass under the form of an enactment is not, therefore, to be considered the law of the land." This provision of the Constitution has been frequently discussed in the decisions of this court. Among those may be cited the following: *Parsons v. Russell*, 11 Mich. 113, 83 Am. Dec. 728; *Hamilton v. People*, 29 Mich. 173, 1 Am. Crim. Rep. 618; *Weimer v. Bunbury*, 30 Mich. 201; *Swart v. Kimball*, 43 Mich. 443, 5 N. W. 635; *Risser v. Hoyt*, 53 Mich. 185, 18 N. W. 611; *People v. Harding*, 53 Mich. 481, 19 N. W. 155; *Re Cox*, 129 Mich. 635, 89 N. W. 440. See also *Den ex dem. Murray v. Hoboken Land & Improv. Co.* 18 How. 272, 15 L. ed. 372; 8 Cyc. Law & Proc. pp. 1080 et seq., and cases there cited. From an examination of the authorities, it is apparent that this constitutional guaranty simply preserves to the people rights which had existed for centuries, and which had been enjoyed according to the course of the common law. It means such an exercise of governmental power as is sanctioned by settled maxims of law, under safeguards for the protection of individual rights as those maxims prescribed. It becomes pertinent, therefore, to ascertain what settled maxims and safeguards—what "general rules which govern society"—are applicable to a criminal prosecution such as is here under consideration. Wherever the common law is in force, the parties to a criminal action have been, upon the one side, the Crown or the people, and upon the other, the accused. In England and her colonies, the Crown is represented by an official duly appointed by it, whose duty it is to prosecute. In this country, the duties of this official have been assumed and discharged by the prosecuting attorney, who is himself a constitutional officer. Mich. Const. art. 8, § 3. From the foundation of our government it has been the duty of the prosecuting attorney to prepare the case for the people. He, and he alone, must determine what witnesses shall be sworn to establish the case he presents. In case of disability or the necessity for assistance, the statute provides for substitution or assistance as the case may be, upon proper application, but the principle of responsibility remains the same, though the service may, by reason of necessity, be temporarily performed by one

clothed with statutory authority. See Wigmore, Ev. §§ 1286 & 2483. We think it clear that the preparation for and conduct of the trial on behalf of the people are acts executive and administrative in character. Under our Constitution, which jealously separates the powers of government to legislative, executive, and judicial departments, the powers and duties properly belonging to one department cannot by statutory enactment be granted to or imposed upon another department. *Houseman v. Montgomery*, 58 Mich. 364, 25 N. W. 369; *Locke v. Speed*, 62 Mich. 408, 28 N. W. 917; *Manistee v. Harley*, 79 Mich. 238, 44 N. W. 603; *Allen v. State Auditors*, 122 Mich. 324, 47 L.R.A. 117, 80 Am. St. Rep. 573, 81 N. W. 113. The power of selecting and appointing witnesses who shall, after appointment, acquaint themselves with the matter in controversy, and testify concerning the same, is in no sense a judicial act, and, if exercised by the court in accordance with the mandate of § 3, would entirely change the character of criminal procedure, and would seriously endanger, if not absolutely destroy, those safeguards which our Constitution has so carefully enacted for the protection of the accused. The most cursory examination of § 3 will disclose its vice. The court is directed to appoint one or more suitable, disinterested persons to investigate and testify. This appointment is to be made without notice to either the prosecuting attorney or the accused. The reasons which impel the court to make the selection are not of record and can never be known. The names of the selected experts cannot be indorsed upon the indictment by the prosecuting attorney, as required by law, for he himself is as ignorant of their identity as is the accused. The right of one accused of crime to know in advance the names of the witnesses who will testify against him, and to examine into their character, means of knowledge, etc., in order that he may properly prepare his defense, is a right as ancient as our criminal jurisprudence. The court is commanded to make known to the jury the fact of the appointment, and that his appointees have been found by him to be suitable and disinterested. The section then provides that other experts may be sworn by either prosecution or defense. This is an idle provision, for, in the face of the certificate of character, fitness, and ability given to the court experts by the court, experts summoned by either side would receive but scant consideration at the hands of the jury,—their testimony would be swept aside in a breath. Juries are most anxious to ascertain the opinion of the court as to the guilt or innocence of the accused, and, ordinarily, more than willing to adopt that

opinion as their own. Trial courts therefore, in doubtful cases, have jealously guarded their own opinions in order that juries might determine controlling facts uninfluenced by the mental attitude of the judge.

The expert witnesses provided for by this section testify under a sanction which gives to their testimony practically the same weight as if it were delivered by the court itself, and if that testimony being against the accused, were either wilfully false or ignorantly mistaken, its baneful results would be appalling. To give to the testimony of a witness or witnesses this extraordinary certificate of candor, ability, and truthfulness, while the other testimony in the case must be judged by the jury by ordinary standards, is to subvert the very foundations of justice. In *People v. Vanderhoof*, 71 Mich. 158, 39 N. W. 28, this court said: "The charge of the court virtually put the evidence of these doctors and professors upon a higher plane than the other testimony, which was manifestly wrong." In *People v. Seaman*, 107 Mich. 348, 61 Am. St. Rep. 326, 65 N. W. 203, the following language is used: "An expert witness is to be judged from the same standpoint as any other witness." In *People v. Holmes*, 111 Mich. 364, 69 N. W. 501, we said: "When the question of insanity is to be submitted to the jury, the testimony which is offered to support the claim should be treated with the same respect as that offered to establish any other fact."

We do not overlook the fact that the statute here considered was designed to correct an evil long recognized as tending to bring the administration of the criminal law into disrepute, in cases where insanity is urged as a defense, but we are of opinion that the true remedy for this evil rests in the development of a livelier sense of responsibility to the public for the proper and decent administration of justice on the part of both the legal and medical professions, rather than in revolutionary legislation. That both professions recognize and deplore the existence of the evil, there can be no doubt, and recent activities in both lend reason for hoping that the scandal which has often attended the introduction of expert testimony will, in the future, cease to be a reproach in the administration of criminal law.

In view of our conclusions upon the second point discussed above, it is unnecessary to give attention to the third ground urged. We must hold § 3 unconstitutional. The judgment is reversed, and the respondent remanded to the custody of the sheriff of the county of Wayne, to be tried again.

MICHIGAN SUPREME COURT.

PARSONS BUSINESS COLLEGE
v.
CITY OF KALAMAZOO et al., Appts.

(— Mich. —, 131 N. W. 553.)

Tax — exemption — business college.

1. A business college, owned by a private corporation, giving short courses in book-keeping, penmanship, business law, shorthand, type-writing, correspondence, and grammar, and incorporated chiefly to avoid taxation, is not within the operation of a statute exempting from taxation real estate owned by educational institutions incorporated under the laws of the state.

Same — property devoted to other uses.

2. Property of an educational corporation, portions of which are occupied by a family, rented for election purposes and held as vacant property for a rise in value, is not within the operation of a statute exempting from taxation property of such corporations occupied solely for the purposes for which they were incorporated.

(June 2, 1911.)

A PPEAL by defendants from a decree in Chancery, of the Circuit Court for Kalamazoo County, in complainant's favor declaring its property exempt from taxation and restraining the defendant city and its assessor from assessing or levying taxes against it. Reversed.

The facts are stated in the opinion.

Mr. Marvin J. Schaberg, for appellants:

The property of complainant which, according to the testimony of its president and secretary, is not used for the purposes expressed in its articles of association, is subject to taxation.

Detroit Young Men's Soc. v. Detroit, 3 Mich. 172.

In order to entitle the complainant to exemption it must be organized solely and chiefly for educational purposes.

Atty. Gen. v. Detroit, 113 Mich. 388, 71 N. W. 632.

Mr. Dorr O. French for appellee.

Note.—The questions decided in *PARSONS BUSINESS COLLEGE v. KALAMAZOO* have already been annotated in this series: A note on the exemption of property used for a private school is appended to *Jackson v. Preston*, 21 L.R.A.(N.S.) 164; and the question whether a school which is also used for residential purposes by the proprietor and his family, or other persons connected with the school, is "exclusively" used for school purposes within the exemption statute, is considered in the note to *State ex rel. Spillers v. Johnston*, 21 L.R.A.(N.S.) 171.

33 L.R.A.(N.S.)

McAlvay, J., delivered the opinion of the court:

Complainant filed its bill of complaint against defendant city and its assessor to have its property declared exempt from taxation, and to restrain defendant city and its assessor perpetually from assessing, levying, or collecting any taxes against its property, for the reason that all said property is exempt from taxation under the provisions of chapter 218 of the Compiled Laws of 1897, entitled "An Act to Provide for the Incorporation of Institutions of Learning." An issue was joined between the parties and a hearing had before the court. A decree was granted in accordance with the prayer of the bill. Defendants upon appeal ask this court for a reversal.

It appears that Mr. Wm. F. Parsons entered upon this business at Kalamazoo in 1869 as a private business under the name of Parsons Business College, and continued it with a reasonable amount of success until 1893, when he purchased and moved upon the premises, the taxation of which is in question in this suit, under a land contract, and proceeded to and did erect the building, in part of which complainant now conducts business, and so continued until the year 1905, up to which year taxes were annually assessed against said property, and regularly paid. The undisputed proof is that this property is now of the value of about \$20,000. The property so purchased by Mr. Parsons was deeded directly to his wife, Mary P. Parsons. Up to 1905 the business had been conducted by Mr. Parsons, a son and a daughter, who "shared equally in the gains and losses, and each owned one third of the business college." In 1905 the business was incorporated under chapter 218 above cited.

Mr. Parsons testified:

I had the institution incorporated because I felt I ought to be exempt from taxes. That is one reason I had it incorporated, and another reason was that I was at the head of the institution, and, if anything happened to me, the institution could go along without any change in it at all, and I felt it was no more than right that I should be incorporated and be relieved from taxation.

Q. That was your principal reason, to avoid taxation, that you incorporated, was it not?

A. That was the principal reason.

The son, who is secretary and bookkeeper of the complainant, testified to the same effect. This was purely a stock corporation. The incorporators were the members of the Parsons family, who certified "that they in good faith subscribed and

paid in the sums set opposite their names for the purpose of founding and establishing a commercial and business school, viz., Mary P. Parsons, 80 shares, \$4,000; Wm. F. Parsons, 5 shares, \$250; Caroline Parsons, 5 shares, \$250." The cash paid in was in fact the property in question, and all the assets of the old business arbitrarily fixed at a valuation of \$5,000. They were named in the articles of incorporation as trustees, to hold office for the term of fifteen years. At the first meeting, Wm. F. Parsons was elected president, Caroline Parsons treasurer, and Wm. W. Parsons secretary, to hold these respective offices, and have so continued ever since. The articles of incorporation bear date January 19, 1906, and were filed with the secretary of state February 2, 1906. The deed of this property from Mary P. Parsons to the corporation bears date November 6, 1905, and was recorded March 3, 1908. At the first meeting of the stockholders, the president was voted a salary of \$2,500, the secretary \$2,000, and the treasurer \$2,000 per annum, respectively. These salaries have been drawn each year *pro rata* to the amount of cash available, and for the balance each has taken the note of complainant each year. The entire third floor of the building is occupied by the family as a residence, without payment of rent. The president testified: "We teach bookkeeping, penmanship, business law as used in the ordinary work of the school, shorthand, typewriting, correspondence, and grammar." The regulation course is twelve months, at \$75. Tuition is charged as follows: Three months', \$28. Six months' course, \$45. Nine months', \$60. The average attendance is 200. A total of \$150 has been received from the city for rent of room on election days. There has been no other income than as stated. This property is 5 rods by 12 rods, on one of the most valuable corners in Kalamazoo. The larger portion of it is not occupied by the building, and is held for a rise in its value. Taxes were not assessed against this property after 1905 until the present assessment in 1910.

An extended statement of what an uncontradicted record in this case shows has been considered necessary because of the importance of the question involved. Complainant's contention that it is exempt from taxation is founded upon the provisions of ¶ 4 of § 7, act 309, Pub. Acts 1909, as follows: "Fourth. Such real estate as shall be owned by library, benevolent, charitable, educational, and scientific insti-

tutions incorporated under the laws of this state, with the buildings and other property thereon, while occupied by them solely for the purposes for which they were incorporated." Complainant relies upon the case of *Detroit Home & Day School v. Detroit*, 76 Mich. 521, 6 L.R.A. 97, 43 N. W. 593, as decisive of the case at bar. The statute of which the one invoked is an amendment (Session Laws of 1887, p. 415) was under construction in that case. The words "educational" and "solely" have been added since that time. The court in that case, where the corporate purpose named in the charter was to establish, maintain, and conduct a seminary of learning, said: "Unless the term 'scientific institutions' includes educational corporations, there is no statute exempting from taxation any schools unless those in the hands of the public authorities, and those are only exempt by implication. And, if it does not include the seminaries of learning, there is practically nothing exempted, for there are no other scientific institutions, properly so called. But it is a matter of common knowledge that all general educational establishments have universally been known as 'scientific institutions,' and fall naturally and directly within it." Such construction brought within the terms of the exempting act educational corporations. The legislature later amended the law to include by express terms "educational" corporations. If this word had been included in the earlier law, the only question for the court in that case to determine would have been whether the institution claiming the exemption was within the class exempted. The majority opinion of the court in the case relied on by complainant was considering and passing upon "general educational establishments" in express terms, holding that it was a matter of common knowledge that such institutions have universally been known as "scientific institutions." The minority opinion shows that this was a school with kindergarten, primary, preparatory, and collegiate departments, with courses of instruction in all the elementary and advanced sciences, and ancient and modern languages. In the advanced departments there were the courses of instruction usual in the colleges of this state. The court determined that it was a general educational establishment. The disagreement in the opinions is not upon that question, but whether a stock corporation, organized and run for profit as a business venture, was within the legislative intent as expressed in the exemption law. The

court, without doubt, was correct in classifying that school as a general educational institution. This is the "educational institution" intended by the legislature in the statute under consideration in the instant case. We have, then, this standard, as interpreted by the court, by which to measure the institution of complainant which seeks the protection of exemption from taxes accorded to general educational institutions.

In our opinion it does not in any way measure up to the standard it has set up and claims for itself. It cannot be called a general educational institution. It is organized and conducted for special purposes only. It completes its courses in three, six, nine, and twelve months. The statute under which it is incorporated prohibits the granting of diplomas by it "unless candidates shall have pursued such course of study for at least two years." It is a matter of common knowledge that during the periods which complainant has fixed for the completion of the subjects indicated in the statement of facts, except type-writing and stenography, students could obtain but a mere smattering of knowledge. Not that this institution and similar ones are not useful and very beneficial to a large class, but to put them, as complainant suggests, in the same class with Hillsdale, Olivet, Albion, and Kalamazoo College, well-known institutions in this state, would be giving this statute a construction which the facts will not warrant, and which evidently was not within the legislative intent, and contrary to the former construction. It appears from the record that the incentive to incorporation was to avoid taxation, and not obtain recognition as a general educational institution.

Complainant is not entitled to the relief asked, for another reason, that the property for which exemption from taxation is claimed is not occupied "solely" for the claimed purposes for which it was incorporated. One entire story is used as a residence, and the larger portion of the lot is vacant and held for an advance in value. By this change in the law the legislature has restricted and narrowed the scope of the exemption. Complainant makes no showing as to any irregularity in the matter of the assessment and levy of the taxes in question by the defendant city and its assessor, but invokes the statute as exempting it from taxation.

Our conclusion is that it was not entitled to the relief granted. The decree of the Circuit Court is reversed, and set aside, and the injunction dissolved, and a decree will be entered dismissing the bill of complaint, with costs of both courts to defendants.

33 L.R.A. (N.S.)

KANSAS SUPREME COURT.

JOHN E. EDWARDS

v.

WILLIAM H. FLEMING et al., Appts.

(83 Kan. 653, 112 Pac. 836.)

Adverse possession — overlapping boundary.

1. The real test as to whether or not possession of real estate beyond the true boundary line will be held adverse is the intention with which the party takes and holds the possession. It is not merely the existence of a mistake, but the presence or absence of the requisite intention to claim title that fixes the character of the entry and determines whether the possession is adverse.

Same — presumptions.

2. Among the presumptions which usually obtain with respect to the possession of real estate are these: (1) It is presumed that the possession is in subordination to

Headnotes by PORTER, J.

Note. — Adverse possession due to ignorance or mistake as to boundary.

I. General principles.

- a. Introductory, 924.
- b. Claiming only to true line, 925.
- c. Claiming to visible boundary at all events, 926.

II. Cases holding the paper title the important element, 928.

III. Cases holding possession the important element.

- a. In general, 930.
- b. Mistake immaterial, 932.
- c. Recognition of visible line, 933.
- d. Buildings, 934.
- e. Iowa cases, 935.
- f. Wisconsin cases, 936.

IV. Agreements and joint building of fences.

- a. General rule, 937.
- b. Theory that mistake may be corrected, 939.
- c. Agreement to move fence, 939.
- d. Location for convenience, 939.

V. Miscellaneous, 940.

This note is supplemental to the note to *Preble v. Maine C. R. Co.* 21 L.R.A. 829.

For cases on the right of one in permissive possession of real property to acquire title by adverse possession, see the note to *McCutchen v. McCutchen*, 12 L.R.A. (N.S.) 1140.

For cases upon possession of part of a neighbor's land where the boundary is unknown or disputed, as raising the question of champerty in such neighbor's deed, see the note on the conveyance of land in adverse possession. *Huston v. Scott*, — L.R.A. (N.S.) —.

This note does not include cases where the tract inclosed by mistake is not merely an adjoining strip to one's own land, but an

the true title: (2) where one enters into possession under a deed, it is presumed that he claims only the title given him by his deed, and that his possession is restricted to the premises granted.

Same — intent to claim to fence.

3. Where a fence is believed to be the true boundary, and the claim of ownership is up to the fence as located, if the intent to claim title exists only on the condition that the fence is on the true line, the intention is not absolute, but conditional, and the possession is not adverse. If, however, in such a case there is a clear intention to claim the land up to the fence, whether it be the correct boundary or not, the possession will be held adverse.

Same — sufficiency of evidence.

4. In an action to quiet title, the plaintiff claimed under deeds to himself and

his immediate grantor, executed by the defendants, which described the land conveyed as bounded on the south by a hedge fence. The plaintiff and his grantor had been in the actual possession of the land, claiming title up to the fence, for more than fifteen years, during which time the defendants continued to own the land adjoining on the south, but made no claim to land north of the hedge fence. Held, that the evidence warranted a finding of adverse possession by the plaintiff, intention on the part of the defendants to fix the fence as the boundary, and acquiescence on their part sufficient to bar them from claiming that the fence was not the true boundary.

Same — survey — effect.

5. Where it appears that the plaintiff has acquired title by deed, adverse posses-

entirely different parcel; for example, where there is a mistake in the deed as naming one lot instead of another (see *Albert Hanson Lumber Co. v. Angelloz*, 118 La. 861, 43 So. 529). It also excludes cases where the grantor marks out and places the grantee in possession of a tract of the grantor's land, and the deed by mistake describes only a part of such tract, as in *Lee v. Wheat*, 33 Ky. L. Rep. 724, 111 S. W. 307; or confuses the land intended with other land of the grantor, as in *Moore v. Wiley*, 44 Kan. 736, 25 Pac. 200. See also in this connection, *Louisville Trust Co. v. Alford*, — Tenn. —, 53 S. W. 974.

Cases upon the accidental possession of part of premises as constructive possession of more than is in actual possession are excluded, as are cases dependent in whole or in part on statutes requiring those claiming under the statutes of limitations to have paid taxes.

The reader is reminded that admissions against interest in regard to the nature of possession are of no effect when made after the person making the admission has gained a title by adverse possession.

I. General principles.

a. Introductory.

The old idea that there could be no disseisin by mistake (see *Davis v. Furlow*, 27 Md. 536) is now abandoned. And the courts are now agreed that an entry by mistake will not prevent an adverse possession. It is generally said that there are two rules governing the question, which are thus stated in a recent case: "When a landowner, acting under a mistake as to the true boundary between his land and that of another, takes possession of land of another, believing it to be his own, incloses it, claims title to it, and holds possession for the statutory period, he becomes the owner; for such possession and claim of title, though founded on a mistake, would be adverse; but this would not be so if his intention was to claim only to the true line, wherever that may be, for then the 33 L.R.A. (N.S.)

possession would not be adverse beyond such line." *Shirey v. Whitlow*, 80 Ark. 445, 97 S. W. 444. See also *Liddon v. Hodnett*, 22 Fla. 442.

Similar statements are to be found in a great number of the cases.

Technically and logically these rules are well enough, and if each case afforded positive definite proof of intention, they might be accepted with the complacency shown in *Preble v. Maine C. R. Co.* 85 Me. 260, 21 L.R.A. 829, 35 Am. St. Rep. 366, 27 Atl. 149, where it was said of these two rules that the distinction between them "is neither subtle, recondite, nor refined, but simple, practical, and substantial. It involves sources of evidence and means of proof no more difficult or complex than many other inquiries of a similar character constantly arising in our court." But the fact is that actually in practice these rules afford no assistance in the majority of the cases which arise where the evidence of intention is not positive, but must be gathered from mere general circumstances of occupation to a visible boundary. Indeed, the occupation, perhaps, in the majority of cases, is without any positive intention one way or the other except that the possessor supposes that his boundary is correct. The result has been that, in the application of the rules, the courts have in effect, though not often so stating it, decided the case by opposite applications of the doctrine of presumption, some courts taking the view that the presumption is that the holding is in subordination to the paper title, others, and these are the fast-increasing majority, that after there has been occupation to a visible boundary for the period of the statute of limitations, the presumption is that the holding has been adverse. This is so far true that, as will be seen, the cases do not in general divide on the circumstantial evidence of intention. But it is to be remembered that in the true view these presumptions are not positive rules of law to override an actual showing that the possession was or was not adverse, nor to dispose of the circumstances in proof of the actual situation.

sion, and acquiescence in the boundary by the defendants, a survey afterwards made at the request of the defendants, under the provisions of § 2275, Gen. Stat. 1909, fixing a different boundary to the tract claimed by the plaintiff, furnishes no defense to an action to quiet plaintiff's title.

Real property — survey — effect on title.

6. A statutory survey may establish the permanent boundaries between two tracts of land, but cannot change the title to the land.

(January 7, 1911.)

APPEAL by defendants from a judgment of the District Court for Lyon County in plaintiff's favor in a suit to quiet title to certain real estate. Affirmed.

The facts are stated in the opinion.

The point of view of the majority of the recent decisions is indicated by the statement in *Searles v. De Ladson*, 81 Conn. 133, 70 Atl. 589, where the court said that it was held in *French v. Pearce*, 8 Conn. 439, 21 Am. Dec. 680, that "to render possession adverse it was not necessary that it should be with a wrongful intent to dispossess the true owner, or accompanied with a denial of his title, or with a claim of title in the person entering; and that where a person enters and takes possession of land as his own, taking the rents and profits to himself, and managing with it as an owner manages with his own property, the possession is adverse and a disseisin. The very act is held to be an assertion of his own title, and thus equivalent to a denial of the title of all others, and it does not matter that he was mistaken, and that, had he been better informed, he would not have entered on the land. This has since been adhered to as the law in this state, and still has our approval." *Searles v. De Ladson*, supra.

Some of the earlier cases contemplate a possibility of change in intention. Thus, in *Mather v. Walsh*, 107 Mo. 121, 17 S. W. 755, it was said: "The fact that a proprietor of land has taken possession (under a deed) of more land than its description calls for will not prevent his asserting, later, an adverse possession of, or title to, the excess beyond his paper title. Though his original taking may have been the outgrowth of mistake, or in ignorance of the true line, he may, notwithstanding, afterwards begin an adverse holding which the law will recognize when sufficiently long continued."

Where the defendant entered, the land being forest, and cleared a strip near the true line and built a fence, it was held that the jury were properly instructed that, to hold adversely, he must have so intended during the full period of the statute; that if he did not so enter, but changed his mind, his change of mind must continue for the statutory period. *Ayers v. Reidel*, 84 Wis. 276, 54 N. W. 588.

It has also been said that "adverse pos-

Messrs. L. B. Kellogg, John Madden, and C. M. Kellogg, for appellants:

Failure to perfect an appeal within the time and under the terms of the statute made the survey binding and conclusive.

Close v. Huntington, 66 Kan. 354, 71 Pac. 812.

The actual presence of plaintiff was equivalent to the statutory notice provided by law. In this case there was both notice and the actual presence of the landowner.

Shanline v. Wiltzie, 70 Kan. 177, 78 Pac. 436, 3 A. & E. Ann. Cas. 140; *Neary v. Jones*, 89 Iowa, 556, 56 N. W. 675.

Plaintiff's possession was not adverse.

Winn v. Abeles, 35 Kan. 85, 37 Am. Rep. 138, 10 Pac. 443; *Shanline v. Wiltzie*, 70 Kan. 177, 78 Pac. 436, 3 A. & E. Ann. Cas.

session depends upon the intention with which the possession is taken and held; and while the intention to claim title must be manifest, it need not be expressed. But whether or not a party takes possession by mistake, or without the intention of claiming title, is a question for the jury." *Haney v. Breeden*, 100 Va. 781, 42 S. E. 916.

b. Claiming only to true line.

Where the intention is not to hold to the visible boundary unless it is the true line, the possession is not adverse. *Humes v. Bernstein*, 72 Ala. 546; *Silver Creek Cement Corp. v. Union Lime & Cement Co.* 138 Ind. 297, 35 N. E. 125, 37 N. E. 721; *Heinz v. Cramer*, 84 Iowa, 497, 51 N. W. 173; *Mills v. Penny*, 74 Iowa, 172, 7 Am. St. Rep. 474, 37 N. W. 135 (as stating the rule); *Pollit v. Bland*, 15 Ky. L. Rep. 227, 22 S. W. 842; *Cresap v. Hutson*, 9 Gill, 278; *Cutter v. Waddingham*, 22 Mo. 206; *Keen v. Schnedler*, 92 Mo. 516, 2 S. W. 312; *Finch v. Ullman*, 105 Mo. 255, 24 Am. St. Rep. 383, 16 S. W. 863; *Kunze v. Evans*, 107 Mo. 487, 28 Am. St. Rep. 435, 18 S. W. 36 (*semble*); *Pharis v. Jones*, 122 Mo. 125, 26 S. W. 1032; *Roecker v. Haperla*, 138 Mo. 33, 39 S. W. 454; *King v. Brigham*, 23 Or. 262, 18 L.R.A. 361, 31 Pac. 601; *Bradford v. Guthrie*, 4 Brewst. (Pa.) 351; *Suksdorf v. Humphrey*, 36 Wash. 1, 77 Pac. 1071; *Wilcox v. Smith*, 38 Wash. 585, 80 Pac. 803; *Fieldhouse v. Leisburg*, 15 Wyo. 207, 88 Pac. 214.

Where one intended to claim only a certain depth in feet, and inadvertently inclosed too much, it was held that his possession was not adverse. *Murdock v. Stillman*, 72 Ark. 498, 82 S. W. 834.

In some cases the limited nature of the claim is clearly indicated. Thus, evidence of repeated offers by a party to purchase land inside his own fence from his neighbor will rebut a claim of adverse possession. *Kitchen v. Chantland*, 130 Iowa, 618, 105 N. W. 367, 8 A. & E. Ann. Cas. 81.

And where parties place a fence in ignorance of the true line, and the one holding an excess of land hires the other's lot, his

140; *Scott v. Williams*, 74 Kan. 451, 87 Pac. 550; *Crawford v. Hebrew*, 78 Kan. 401, 96 Pac. 348.

Messrs. Buck & Spencer for appellee.

Porter, J., delivered the opinion of the court:

Edwards sued the Flemings to quiet his title to a tract of land of about 10 acres. The defendants formerly owned the land, and, in 1891, conveyed the same to Floyd E. Fleming by warranty deed which described the tract as follows: "Commencing twenty (20) rods west of the northeast corner of northeast quarter ($\frac{1}{4}$) of section thirty-three (33), township twenty (20), range thirteen (13), thence west sixty (60) rods, thence south twenty-six rods to hedge fence, thence east sixty (60) rods, thence north to place of beginning, containing ten (10) acres more or less."

The petition alleged that Floyd E. Fleming was in possession of the land under this conveyance until 1908, when he conveyed by the same description to the plaintiff, and that the plaintiff has been in possession of the land ever since the conveyance to him. There was the further allegation that both deeds made the "hedge fence" an artificial boundary and a part of the de-

scription of the land conveyed. The plaintiff also alleged that he and his immediate grantor have been in the open, notorious, exclusive, and adverse possession of the tract of land and the whole thereof up to the hedge fence on the south for more than fifteen years preceding the beginning of the action; and further, that a short time before the action was brought, the defendants had entered upon the tract of land claimed by the plaintiff, and moved a wire fence, and are now claiming that the hedge fence is not the true boundary on the south, and claim to own the land that lies immediately north thereof. The defendants in their answer set up a survey made by the county surveyor on the 18th day of January, 1908, at their request, and upon due notice to the plaintiff, as required by the statute, and alleged that on the day appointed the plaintiff personally appeared at the time and place of survey; that the county surveyor duly surveyed and established the corners and boundaries between the lands of the defendants and the lands of the plaintiff; and that the report and plat of the survey so made were thereafter duly filed in the office of the county surveyor, and that the survey was acquiesced in both by the plaintiff and the defendants,

possession of the excess will not be adverse during the lease, unless on actual notice to the other party. *Wilson v. Lerche*, 90 Mo. 473, 2 S. W. 799.

Where, on a survey, one abandons his improvements extending over on his neighbor's land, and locates new improvements within the true lines of his lot, this abandonment taking place before the statute of limitations has given him title, he will not be deemed to have claimed to hold adversely the land of his neighbor so abandoned. *Noyes v. Douglas*, 39 Wash. 314, 81 Pac. 724.

In rough or wild lands the element of notice may be important. Thus, where a fence erected by owners on one side of a line had become overgrown with brush, and the land on the other side was unoccupied, and owned by a nonresident, it was held that there would not be presumed to be an acquiescence in the fence as a boundary. *Palmer v. Osborne*, 115 Iowa, 714, 87 N. W. 712.

In *King v. Wells*, 94 N. C. 344, the court said: "When there is a long line, running over a wild, broken, mountainous ridge, such as that was up to which the defendant obtained a possession, a small portion might be taken and held for years without anyone knowing whether there was a trespass or not. Therefore it has been held that when the extent of a wrongdoer's possession is so limited as to afford a fair presumption that the party mistook his boundaries, or did not intend to set up a claim within the lines of the deed of the other party, it would be a proper ground for saying that 33 L.R.A. (N.S.)

he had not the possession, or that it was not adverse."

c. Claiming to visible boundary at all events.

When the claim is to a visible boundary at all events, whether it is the true line or not, the possession is adverse. *Bayles v. Daugherty*, 77 Ark. 201, 91 S. W. 304; *Doolittle v. Bailey*, 85 Iowa, 398, 52 N. W. 337; *Byrd v. Rose*, 19 Ky. L. Rep. 1898, 44 S. W. 958; *Schieble v. Hart*, 11 Ky. L. Rep. 607, 12 S. W. 628; *Aikman v. South*, 29 Ky. L. Rep. 1201, 97 S. W. 4; *Richardson v. Watts*, 94 Me. 487, 48 Atl. 180; *Shotwell v. Gordon*, 121 Mo. 482, 26 S. W. 341; *Hedges v. Pollard*, 149 Mo. 216, 50 S. W. 889; *Pittman v. Weeks*, 132 N. C. 81, 43 S. E. 582; *Bell v. Whitehead*, — Tenn. —, 62 S. W. 213 (*semble*); *Hand v. Swann*, 1 Tex. Civ. App. 241, 21 S. W. 282; *Bisco v. Casper*, 14 Tex. Civ. App. 19, 36 S. W. 345; *Logan v. Meade*, 43 Tex. Civ. App. 477, 98 S. W. 210; *Daughtrey v. New York & T. Land Co.* — Tex. Civ. App. —, 61 S. W. 947.

"Where one of two adjoining land proprietors takes and holds possession up to a fence which he supposes is on the true line, claiming to the fence, his possession is adverse as to all the land within his inclosure. In such case it makes no difference that he was mistaken as to the location of the true line; nor does it make any difference that he did not intend to invade his neighbor's rights. The fact that he claimed to the fence, not simply to the true line when

and that no appeal therefrom was ever taken. To the answer there was attached a copy of the surveyor's report, and affirmative relief was asked, declaring the boundaries to be those established by the survey. In his reply the plaintiff alleged that there were no disputed corners or boundaries between the lands of the parties and there was no occasion for any survey. The reply also alleged that the notice served upon him by the county surveyor was insufficient because, in describing the land to be surveyed, it did not follow the description in the deeds under which he held, and that there were a number of other irregularities in the survey. At the conclusion of the evidence, the court made a number of special findings, and found generally for the plaintiff and against the defendants. A decree was entered quieting title in the plaintiff to the disputed tract of land. The defendants appeal.

Among the special findings are: That the plaintiff and his immediate grantor had been in the open, notorious, exclusive, and adverse possession of the tract of land claimed by him, and the whole thereof, for more than fifteen years, and that when the defendants conveyed the land in question to

Floyd E. Fleming they intended to and did convey to him a certain tract of land inclosed by four certain fences; to wit, a hedge fence on the north, a hedge fence on the west, a hedge fence on the south, and a post and wire fence extending from the hedge fence on the south and along the entire east side to the hedge fence on the north, and that the fences had remained substantially located in the same places from the time of their being built until some time during the month of March, 1909, and after the conveyance to the plaintiff.

The defendants offered testimony to show that the possession had not been adverse. But there was little conflict in the testimony. Defendant William H. Fleming testified that the hedge fence on the south was planted more than thirty years ago, not for the purpose of fixing any boundary line, but in order to fence off a pasture used by his father, who at that time owned the whole 80 acres. The plaintiff lived within a few rods of the land for forty-two years. He testified that he furnished the plants for the west and south hedge fences and helped the old gentleman, Fleming, then the owner, to set them out; that twenty-five

ascertained, is sufficient and will constitute a disseisin." *Goltermann v. Schiermeyer*, 111 Mo. 404, 19 S. W. 484, 20 S. W. 161.

In *Brown v. Clark*, 73 Vt. 233, 50 Atl. 1066, the court said: "Here, then, we have a line lived up to as the common boundary for more than fifteen years, each owner claiming all the while to own to the fence and beyond; that is, all the land he was occupying, and more. If the report could be read as meaning that each claimed to the true line, on whichever side of the fence it might fall, the occupation might not be adverse; but the finding is explicit that each claimed to own what he occupied."

Where part of defendant's barn was upon the disputed strip, and the rest of it was used as a garden, the court said: "The fact that the defendant or those under whom he claims may have entered upon the land and located the fence and barn by mistake and in ignorance of the location of the true boundary line, the fact that they had no intention of taking what did not belong to them, the fact that within their fences they may have inclosed a larger area than what they might have found out their deed called for if they had consulted the plat and had surveyed the lots, would not destroy the adverse character of their possession, if that possession was with the intention to hold and claim all that the fence inclosed." *Milligan v. Fritts*, 226 Mo. 189, 125 S. W. 1101.

Where the proprietors of a township made a grant to one who entered, built a house and cultivated the land, and his successors continued the occupation, and it was 33 L.R.A. (N.S.)

found that the land was, by the mistake of the proprietors, beyond the township boundary, it was held that while the possession of the proprietors would not be deemed adverse to their neighbors, the possession of their grantee was of such a character as to show that it was adverse. *Otis v. Moulton*, 20 Me. 205.

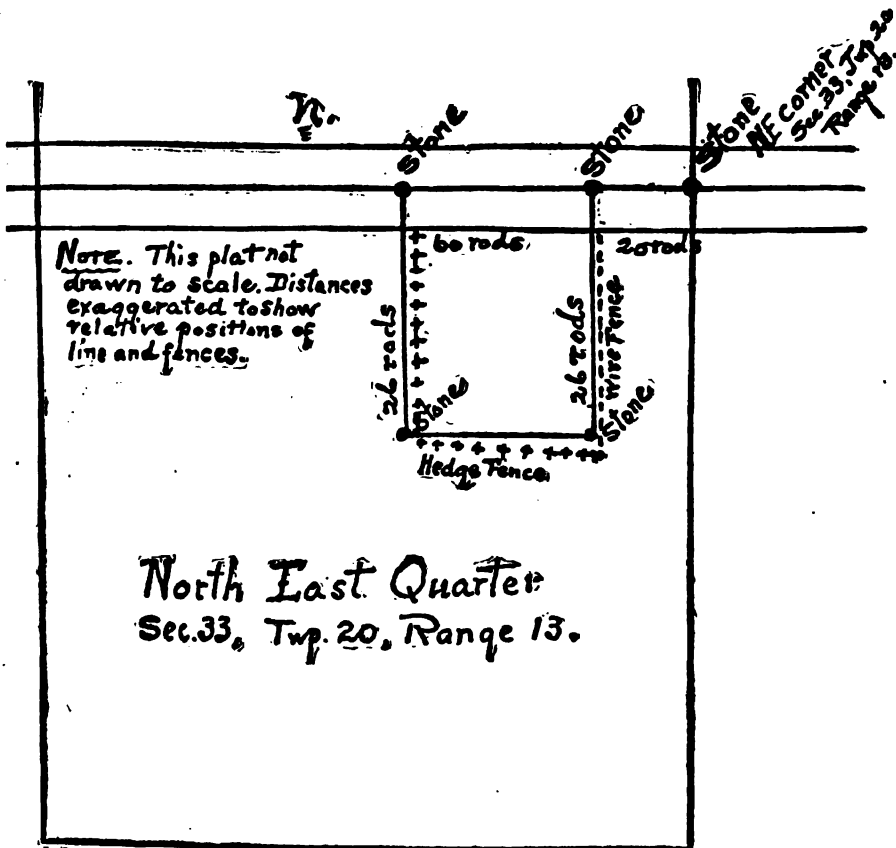
There is a class of cases illustrated by *Powers v. Bank of Oroville*, 136 Cal. 486, 69 Pac. 151, where the owner of a tract of land holds one part of it separated from the rest of his land by a fence, and sells it, and the purchaser enters; under these circumstances it is an almost irresistible conclusion that the property sold was that within the visible inclosure.

So, even stronger is the case where all the land covered by a building is not described. Thus, where it was found that 14 inches in width of a house, besides an adjoining area way, were outside the land description of a deed, and within the description of the adjoining property afterwards conveyed by the same grantor, the court said: "Here there is no mistake as to the line to which Mrs. O'Dell attempted to convey, but the mistake was in describing the land which both parties supposed to be included in the deed. That all parties concerned supposed and believed the deed conveyed all the land covered by the house is clear beyond reasonable doubt. For more than ten years they have acted in strict harmony with that understanding, and it would be grossly inequitable to permit the grantor or a subsequent purchaser of the adjoining tract to now reap any advantage from the mistake."

years ago a post and wire fence was built along the whole east side, inclosing the entire field; that the fences were on the same line when he bought the land in 1908.

Floyd E. Fleming testified that he had owned this tract of land, that he bought it from his brother, defendant William H. Fleming, and sold all he owned to the plaintiff; that he knew the boundaries of the tract; that it was fenced on the east with a wire fence, and on the north, west, and south by hedge fences; that during the

seventeen years in which he occupied the land the defendants never, to his knowledge, claimed to own any of the land inside these fences. There was testimony of a witness who had rented the land as the "Floyd E. Fleming tract," and who occupied it up to the south hedge, that the defendants never claimed to own any of the land within the fences until after the conveyance to the plaintiff. The findings of the court are fully sustained by a preponderance of the evidence. The following is a plat of the survey upon which the defendants rely:



Lougee v. Shuhart, 127 Iowa, 173, 102 N. W. 1125. See also *infra*, III. d.

II. Cases holding the paper title the important element.

Some of these cases emphasize the principle that the presumption, in the absence of evidence expressly or impliedly evincing that the possession is of a hostile character, is that it is in subordination to the legal title. *Lecroix v. Malone*, 157 Ala. 434, 47 So. 725.

"The possession by a coterminous owner up to a line erroneously believed to be the

true line is not presumably adverse." *Barrett v. Kelly*, 131 Ala. 378, 30 So. 824. See also to similar effect in an equitable action, *Phelps v. Henry*, 15 Ark. 297.

And that the claim must be as broad as the possession, see *Doolittle v. Bailey*, 85 Iowa, 398, 52 N. W. 337; where, however, it was held that there was sufficient possession and acquiescence.

The particular point of this class of cases is that claiming to a boundary believing it to be the true line is not enough. *Fisher v. Muecke*, 82 Iowa, 547, 48 N. W. 936; *Jordan v. Ferree*, 101 Iowa, 440, 70 N. W. 611; *Conrad v. Sackett*, 8 Kan. App. 635, 56

The plaintiff claims the land bounded on the north by the public road and on the west, south, and east by the dotted lines. The defendants own the land south and east of plaintiff's land, and the boundaries fixed by the surveyor gave to the plaintiff only the land included within the straight lines, amounting to 9.75 acres, which is 3.75 acres less than the plaintiff claims. The controversy, so far as the defendants are concerned, is over the location of the south and east boundaries of the tract. The defendants rest mainly upon the conclusiveness of the survey under § 2275 of the General Statutes of 1909 (Laws 1891, chap. 89, § 10), which provides that "the corners and boundaries established in any survey, . . . where no appeal is taken from the

surveyor's report, . . . shall be held and considered as permanently established, and shall not thereafter be changed."

Aside from the plaintiffs claim that the survey was irregular and void, his main contention is that he pleaded and proved his title by a deed and adverse possession for over fifteen years, and that the only defense offered to the trespass of the defendants was the record of the survey. In answer to this contention, the defendants insist that the possession of the plaintiff and his immediate grantor was through a misapprehension of the true boundary lines, and that the possession was therefore not adverse. The defendants rely upon the following decisions: *Winn v. Abeles*, 35 Kan. 85, 57 Am. Rep. 138, 10 Pac. 443;

Pac. 507; *Taylor v. Fomby*, 116 Ala. 621, 67 Am. St. Rep. 149, 22 So. 910 (*dictum*).

Where each neighbor cleared and cultivated up to a dividing hedge fence, it was held that the encroacher's honest belief in his boundary for much longer than the statutory period would not avail him. *Davis v. Caldwell*, 107 Ala. 526, 18 So. 103.

In *Walker v. Wyman*, 157 Ala. 478, 47 So. 1011, where there was cultivation up to a path, the court, in holding that there was no adverse possession, reviewed the Alabama cases, and stated that the doctrine of *Brown v. Cockerell*, 33 Ala. 38, is still in force in that state.

It was held in *Allen v. Reed*, 51 Cal. 362, that erecting a fence on what one supposes to be the true line, and inclosing part of the neighbor's lot within the fence, and occupying the land, will not make the possession adverse. Compare later California cases, *infra*, III.

So, where the encroacher set his fence on what he and the neighbors supposed to be the true line, it was held that there was no adverse possession. *McWilliams v. Samuel*, 123 Mo. 659, 27 S. W. 550. As to Missouri cases generally, see *infra*, III. a.

It as even been held that encroaching 18 inches with buildings and fences, with the belief that they are on one's own lot, will not support adverse possession. *Wacha v. Brown*, 78 Iowa, 432, 43 N. W. 269.

Where the claim was made "that, as the defendant accepted a conveyance which in apt terms excluded the land in controversy from the conveyance under which he claims, he is estopped from setting up color or claim of title," the court said: "We do not deem it necessary to determine the question just stated, but such question is entitled to weight and consideration in determining whether the defendant and his grantors took possession adversely to the true owners. The intent with which the possession was taken is material, and the facts relied on to prove it must be strictly proved. They cannot be presumed." But it does not appear what was the nature of the "apt term" excluding the land in controversy. *Weinig v. Holcomb*, 73 Iowa, 143, 33 L.R.A. (N.S.)

34 N. W. 787. For recent Iowa cases, see *infra*, III. e.

In *Williams v. Bernstein*, 51 La. Ann. 115, 25 So. 411, the court said: "The mere fact that parties owning adjoining property have cultivated lands up to a certain line or up to a certain fence, built either by one or by both, or built by one and repaired by the other, does not *per se* evidence an adverse possession up to the line or fence, or an acquiescence in or recognition of an adverse ownership. Neighbors constantly run up fences within or beyond the boundary lines and join their fences, doing so with the knowledge and understanding that such acts are merely temporary and done subsidiarily to and with reference to the right of both to ultimately ascertain and fix rights by an action of boundary or through a formal legal survey. Until this happens, the lands held by each are in the occupancy, and not in the adverse possession, of either; certainly so in the absence of a clear and direct claim advanced of adverse ownership and possession."

It will be seen by the opinion in *Edwards v. Fleming* that, notwithstanding the result of the case, the Kansas court continues to favor the paper title at the expense of the possessor. This is in accord with its earlier decisions.

In *Rasdel v. Shumway*, 6 Kan. App. 45, 49 Pac. 631, affirmed in 58 Kan. 818, 51 Pac. 285, the court said: "If the plaintiff can recover, it is purely and simply because there was a mistake as to the boundary line, under which mistake she and her grantors took possession, and have ever since held possession, of the strip of land in question. The plaintiff in error in the court below testified that she had always claimed to own to the fence, and beyond the boundary line of lot 11. But the court found that she had made no such claim, and, if she had any purpose to do so, she had never communicated it until a very short time previous to the beginning of this action," and it was held that the possession was not adverse; the court saying further that an intention to claim adversely, not communicated to the holder of the

Swarz v. Ramala, 63 Kan. 633, 66 Pac. 649; *Shanline v. Wiltsie*, 70 Kan. 177, 78 Pac. 436, 3 A. & E. Ann. Cas. 140; *Scott v. Williams*, 74 Kan. 448, 87 Pac. 550; *Crawford v. Hebrew*, 78 Kan. 401, 96 Pac. 348. These cases, however, recognize the doctrine that the character of the possession depends upon the intent with which it is taken and held. The reason why possession held under a mistake as to the true location of the boundary line is not adverse is stated to be, in *Shanline v. Wiltsie*, 70 Kan. 177, 78 Pac. 436, 3 A. & E. Ann. Cas. 140, cited with approval in *Scott v. Williams*, 74 Kan. 448, 87 Pac. 550, "that there is no intention on the part of the occupant to exercise, or on the part of the owner to suffer, any dominion beyond the true line,

legal title, was unavailing; and treated the entry of one who enters on a lot where the fence included more than the paper title as permissive as to the excess.

In an action in respect to the location of a highway, the court said: "As between the respective owners of adjoining lands, a physical possession held by one of them of a part of his neighbor's grounds, taken and held through a misapprehension of the location of the boundary line, is not adverse, and, however long continued, will not ripen into a title or set the statute of limitations in operation, for the reason that there is no intention on the part of the occupant to exercise, or on the part of the owner to suffer, any dominion beyond the true line, wherever it may be." *Shanline v. Wiltsie*, 70 Kan. 177, 78 Pac. 436, 3 A. & E. Ann. Cas. 140, quoted and followed in *Scott v. Williams*, 74 Kan. 448, 87 Pac. 550, where the plaintiff's occupation and farming of the disputed strip for the statutory period, supposing it to be his own, and only claiming it on that account, was held of no avail to him. (There was no fence in this case.)

And in *Crawford v. Hebrew*, 78 Kan. 401, 96 Pac. 348, where there was a dividing fence which the two neighbors supposed for the statutory period to be on the true line, and the defendant replied in the affirmative to the question: "All the years, Mr. Crawford, that you have occupied the land that you have testified to, you occupied it under the claim that that was the line? The line that divided you from these other pieces of land?" The court said: "Under this evidence the defendant occupied the strip under the mistake that the fence was on the true boundary line, and without any intention to hold the land beyond his true line, or to claim land which did not belong to him. Under these facts he cannot acquire title to such strip by adverse possession."

In Tennessee it has been held that "the accidental and unintentional inclosure of land lying near and along a line which is not clearly known constitutes no adverse possession." *East Tennessee Iron & Coal Co. v. Ferguson*, — Tenn. —, 35 S. W. 900. 33 L.R.A. (N.S.)

wherever it may be. In *Scott v. Williams*, supra, there was testimony to the effect that the plaintiff claimed no more land than was in the northeast quarter of the section, and, of course, the possession was held not to be hostile or adverse.

It would be impossible to reconcile the conflict in the authorities generally, respecting the effect of possession of real property taken and held under a mistake as to the true location of the boundary line. There are many cases which state the rule in general terms and apparently hold that under no circumstances can the possession be adverse where there was a mistake as to the true boundary. The better considered cases, however, recognize the existence of two rules; or, at least, they

See also to similar effect general dictum as to intention, in *Fuller v. Jackson*, — Tenn. —, 62 S. W. 274.

In *Erck v. Church*, 87 Tenn. 575, 4 L.R.A. 641, 11 S. W. 794 (quoted in the original note), the court emphatically declared on the side of the possession, holding that intent was not an essential element of disseisin.

But in *Kirkman v. Brown*, 93 Tenn. 476, 27 S. W. 709, where the owner of 40 acres entirely surrounded by his neighbor inadvertently built his house two thirds on his neighbor's land, and also cultivated one fourth of an acre of his neighbor's land, it was held that he acquired no title although he held for the statutory period.

In *Treece v. American Asso.* 58 C. C. A. 266, 122 Fed. 598, the court stated that the doctrine that accidental and unintentional possession of a strip does not operate to start the statute or give the encroacher any possessory right, however long such accidental possession might last, "seems to be settled by the most recent of the Tennessee decisions upon this subject. *Kirkman v. Brown*, supra. The prior case of *Erck v. Church*, supra, announced quite a contrary rule, and it is not referred to in *Kirkman v. Brown*. Being, however, a question of strictly local law, we deem it our duty to follow *Kirkman v. Brown*, as the most recent announcement." It does not seem clear, however, that the question was involved in the decision in the *Treece Case*.

For Iowa and Wisconsin cases see *infra*, III. f.

III. Cases holding possession the important element.

a. In general.

The trend of opinion is against disturbing him whose visible boundaries have existed for the period of the statute of limitations, which is illustrated in many cases where the possession has been held sufficient. *Johnson v. Elder*, 92 Ark. 30, 121 S. W. 1066 (fencing a triangle on the supposition that it was a part of one's tract); *Searles v.*

make an exception and hold that the general rule has no application where the party holds possession with intent to claim to the boundary line in any event. 1 Am. & Eng. Enc. Law, pp. 791 & 792. In 1 Cyc. Law & Proc. p. 1037, it is said that "the real test as to whether or not a title will be acquired by a holding for the period prescribed by the statute of limitations is the intention of the party holding beyond the true line. It is not merely the existence of a mistake, but the presence or absence of the requisite intention to claim title, that fixes the character of the entry and determines the question of disseisin." In *Preble v. Maine C. R. Co.* 85 Me. 260, 21 L.R.A. 829, 35 Am. St. Rep. 366, 27 Atl. 149, the court recognizes the existence of

the two rules, and in the opinion it was said: "The distinction between them is neither subtle, recondite, or refined, but simple, practical, and substantial. It involves sources of evidence and means of proof no more difficult or complex than many other inquiries of a similar character constantly arising in our courts."

Numerous cases illustrating both rules are referred to and collated in a note to that case in 21 L.R.A. 829. In the note the editor cites a large number of cases holding that one may acquire title by adverse possession by claiming and occupying up to a fence, notwithstanding by mistake he supposes the fence to be on the true line. Thus, in *Hitchings v. Morrison*, 72 Me. 331, it is held that if the title is claimed

De Ladson, 81 Conn. 133, 70 Atl. 589; *O'Flaherty v. Mann*, 196 Ill. 304, 63 N. E. 727 (planting of trees along the fence as important evidence); *Krause v. Nolte*, 217 Ill. 298, 75 N. E. 362, 3 A. & E. Ann. Cas. 1061; *Riggs v. Riley*, 113 Ind. 208, 15 N. E. 253 (building a fence and clearing and cultivating up to it); *Dyer v. Eldridge*, 136 Ind. 654, 36 N. E. 522 (occupation to a fence, of land as a part of the occupant's farm); *Pittsburgh, C. C. & St. L. R. Co. v. Stickley*, 155 Ind. 312, 58 N. E. 192 (placing a house conveniently with reference to a fence as the correct boundary); *Webb v. Rhodes*, 28 Ind. App. 393, 61 N. E. 735; *Brown v. Morgan*, 44 Minn. 432, 46 N. W. 913 (building fence and cultivating up to it); *Diers v. Ward*, 87 Minn. 475, 92 N. W. 402 (inclosing and cultivating); *Obernalt v. Edgar*, 28 Neb. 70, 44 N. W. 82 (cultivating to a road and setting out forest and fruit trees); *Bowenfield v. Bleekman*, 4 Neb. (Unof.) 443, 94 N. W. 714 (where there were no fixed monuments); *Andrews v. Hastings*, 85 Neb. 548, 123 N. W. 1035; *Sommer v. Compton*, 52 Or. 173, 96 Pac. 124, 1065; *Bruce v. Washington*, 80 Tex. 368, 15 S. W. 1104 (improvements and cultivation as "visible appropriation"); *Hesser v. Siepmann*, 35 Wash. 14, 76 Pac. 295 (a claim up to a street, believing that the correct boundary); *Cole v. Brunt*, 35 U. C. Q. B. 103 (occupation to a fence for thirty years).

In *Steers v. Shaw*, 1 Ont. Rep. 26, an occupation for many years along a runout line was held sufficient, the court finding some difficulty as to the parts not actually fenced, though occupied, but holding all sufficient, and there the line was considered as a division line by both parties. This case was followed in *McGregor v. Keiller*, 9 Ont. Rep. 681, where there were no fences, but the occupation was shown largely by the cutting of timber.

Where a farmer settled upon his homestead, placed a substantial dwelling house thereon, and barn and outbuildings, dug a well, planted an orchard, and built a fence, including by mistake some land of an adjoining proprietor, it was held that his pos-

session was notice that it was adverse. *Bowers v. Ledgerwood*, 25 Wash. 14, 64 Pac. 936.

When one takes possession of land under the belief that he owns it, incloses it, lays it off into town lots, and holds it continuously for the statutory period under claim of ownership, without any recognition of the possible right of another thereto on account of a mistake in the boundary line, his possession and holding are adverse. *Goodwin v. Garabaldi*, 83 Ark. 74, 102 S. W. 706.

In *Lucas v. Provenin*, 130 Cal. 270, 62 Pac. 509, where the purchaser of a lot on a city street took possession of an adjoining unseparated strip 2½ feet wide, inclosing it so as to be a part of the lot purchased, and ever since claimed and occupied it as her own property, it was held that the possession was adverse.

The Missouri cases, though perhaps at first in favor of the paper title, seem to show a drift towards the possession. While as recently as *McCabe v. Bruere*, 153 Mo. 1, 54 S. W. 450, we have the citation of earlier authorities that there can be no disseisin by mistake, which is explained to mean without intention to claim against the true owner, it will be seen *infra* that the expression of no intention to take more than one's paper title will not conclude the possessor in Missouri, and it has been recently held that one in possession for the statutory period is entitled to a verdict if there is no evidence that his claim of title is conditional on the subsequent ascertainment of the true line. *Milligan v. Fritts*, 226 Mo. 189, 125 S. W. 1101.

And in *Lemmons v. McKinney*, 162 Mo. 525, 63 S. W. 92, the court said: "When the possession up to the fence, under an apparent claim of ownership, has been held for the period covered by the statute of limitations, the burden is on the plaintiff to show that the holding was subject to future ascertainment of the true line."

Under the modern theory, the statement by the holder that he did not mean to claim anything more than was covered by his paper title will not conclude him. *Golter-*

clear to the fence, which was not on the true line, the title may be acquired by adverse possession, although by mistake it was supposed to be on the true line. In *Tamm v. Kellogg*, 49 Mo. 118, it was decided that if possession was held to a fence under the claim that it was the true line, and the other party acquiesced or failed to take steps to disturb possession, it was adverse. And, again, in *Handlan v. McManus*, 100 Mo. 124, 18 Am. St. Rep. 533, 13 S. W. 207, it was decided that if a fence is held as the true division line by one of the parties who claims to hold all land to the fence, his possession is adverse. To the same effect are *Wilson v. Hunter*, 59 Ark. 626, 43 Am. St. Rep. 63, 28 S. W. 419; *Ayers v. Reidel*, 84 Wis. 276, 54 N. W. 588;

Bunce v. Bidwell, 43 Mich. 542, 5 N. W. 1023; *Hockmoth v. DeGrand Champs*, 71 Mich. 520, 39 N. W. 737; *Watrous v. Morrison*, 33 Fla. 261, 39 Am. St. Rep. 139, 14 So. 805; *Alexander v. Wheeler*, 69 Ala. 332; *Fuller v. Worth*, 91 Wis. 406, 64 N. W. 995; *Graeven v. Dieves*, 68 Wis. 317, 31 N. W. 914; *Taylor v. Fomby*, 116 Ala. 621, 67 Am. St. Rep. 149, 22 So. 910; *Tex v. Pfug*, 24 Neb. 666, 8 Am. St. Rep. 231, 39 N. W. 839. See also note to *Finch v. Ullman*, 24 Am. St. Rep. 383.

In *Alexander v. Wheeler*, 69 Ala. 332, it is said: "The quo animo, or intention with which possession is taken and held by a defendant, must always constitute an essential consideration. . . . But the rule is different where the fence is believed to

mann v. Schiermeyer, 111 Mo. 404, 19 S. W. 484, 20 S. W. 161; *Wiess v. Goodhue*, 46 Tex. Civ. App. 142, 102 S. W. 793; *Schlossmacher v. Beacon Place Co.* 52 Wash. 588, 100 Pac. 1013. See also to similar effect, *Anderson v. Buchanan*, 139 Iowa, 676, 116 N. W. 694.

In *Layton v. Bailey*, 77 Conn. 22, 58 Atl. 355, the court said: "The fact that one of the defendants, while testifying on the trial, was asked upon cross-examination if, in occupying the land, he had the intention of holding adversely to and so acquiring title against the person to whom the land rightfully belonged, and answered that he did not, but that he occupied claiming that his father's deed gave title to the property, did not determine the question of adverse user, nor conclude the defendants from setting up title to the land through adverse possession."

Where a party, an ignorant woman, stated that she did not wish any more land than she was entitled to under a certain will, which was shown by repeated surveys to be 8 acres, but she had for upwards of twenty years cultivated 11 acres, and claimed that she was entitled to that under the will, it was held that she had title by adverse possession to as much land as she had cultivated. *Johnson v. Thomas*, 23 App. D. C. 141.

A party who enters upon land on purchasing it under the belief that a fence is the true boundary between himself and his neighbor, and who is so informed by a former owner of the land, will not be ousted of half his lot because he replies to a question by the court, "I suppose you had no intention of taking anybody else's land excepting your own, had you?" the answer, "No, sir," when he had occupied the land up to the fence for a period sufficient to give title under the statute of limitations. *Flynn v. Wacker*, 151 Mo. 545, 52 S. W. 342.

In *Davis v. Braswell*, 185 Mo. 576, 84 S. W. 870, where there was evidence that the defendant for twenty-seven years claimed up to the fence, as the correct line, cleared the line and built a house on the disputed 33 L.R.A. (N.S.)

strip openly and notoriously, with full knowledge of his neighbor, the court said: "The mere fact that he said he did not want his neighbor's land, when at all times he was claiming this was not his neighbor's, did not affect his adverse possession. He could make this defense under his general denial."

In *Webster v. Shrine Temple Co.* 141 Iowa, 325, 117 N. W. 665, where the plaintiff especially admitted on the stand that she never, at any time, intended to make any claim to the property other than such as belonged to her, and that she claimed up to the alleged boundary because she supposed it to be the correct line, it was held that her possession was not adverse. But it appeared in the case that there was no real acquiescence in any boundary line as being the actual boundary.

b. Mistake immaterial.

It is immaterial that the holder supposed the visible boundary to be correct. *Woodward v. Faris*, 109 Cal. 12, 41 Pac. 781; *Daily v. Boudreau*, 231 Ill. 228, 83 N. E. 218; *Richwine v. Presbyterian Church*, 135 Ind. 80, 34 N. E. 737; *Logsdon v. Dingg*, 32 Ind. App. 158, 69 N. E. 409; *Rowland v. Williams*, 23 Or. 515, 32 Pac. 402; *Moore v. Fowler*, — Or. —, 114 Pac. 472; *Jayne v. Hanna*, — Tex. Civ. App. —, 51 S. W. 296. See also to similar effect, *Williams v. Shepherdson*, 4 Neb. (Unof.) 608, 95 N. W. 827.

The occupation must be adverse to the true owner and all the world if it is not under a license. *Bayhouse v. Urquides*, 17 Idaho, 286, 105 Pac. 1066.

"In this state, when an owner of land, by mistake as to the boundary line of his land, takes actual, visible, and exclusive possession of another's land, and holds it as his own continuously for the statutory period of twenty years, he thereby acquires the title, as against the real owner. The possession is regarded as adverse, without reference to the fact that it is based on mistake; it being prima facie sufficient that actual, visible, and exclusive posses-

be the true line, and the claim of ownership is up to the fence as located, even though the established division line is erroneous, and the claim of title was the result of the mistake. In such case there is a clear intention to claim to the fence as the true line, and the possession does not originate in an admitted possibility of mistake." To the same effect is *Hoffman v. White*, 90 Ala. 354, 7 So. 816.

There must be an intention to claim the land within a certain boundary, whether it eventually be the correct one or not. Where, however, the intent to claim title exists only upon the condition that the fence is on the true line, the intention is not only absolute, but conditional, and the possession is not adverse. *Shanline v. Wiltsie*, 70 Kan. 177, 78 Pac. 436, 3 A. &

E. Ann. Cas. 140; *Scott v. Williams*, 74 Kan. 448, 87 Pac. 550; *Dow v. McKenney*, 64 Me. 138.

There is no evidence in this case, as there was in *Scott v. Williams*, supra, that the claim was a provisional one. Two presumptions always obtain with respect to the possession of real estate: (1) It is presumed that the possession is in subordination to the true title; (2) where there is a deed, it is presumed that the grantee entered into possession under his deed, claiming only the title given him by his deed, and that his possession was restricted to the premises granted. *Fuller v. Worth*, 91 Wis. 406, 410, 64 N. W. 995. Neither of these presumptions hinders and both help the claim of the plaintiff. If we look to the deeds

sion is taken under a claim of right." *Renner v. Shirk*, 163 Ind. 542, 72 N. E. 546.

In *Jordon v. Riley*, 178 Mass. 524, 60 N. E. 7, the court said, in affirming judgment for the tenant: "The demandant was disseised continuously for more than twenty years. Pub. Stats. chap. 196, § 1. It is not material, if it be a fact, that the successive occupants of the tenant's lot claimed the disputed strip only because they were under a mistake as to where the boundary line would fall when the deeds were applied to the land. *Harrison v. Dolan*, 172 Mass. 395, 52 N. E. 513; *Bond v. O'Gara*, 177 Mass. 139, 83 Am. St. Rep. 265, 58 N. E. 275."

In *Baty v. Elrod*, 66 Neb. 735, 92 N. W. 1032, 97 N. W. 343, the court said in disapproving the holding of *Grube v. Wells*, 34 Iowa, 148: "If one, by mistake, inclose the land of another, and claim it as his own, to certain fixed monuments or boundaries, his actual and uninterrupted possession as owner for the statutory period will work a disseisin and his title will be perfect."

In *Ramsey v. Ogden*, 23 Or. 347, 31 Pac. 778, the court said: "It was held in *Caulfield v. Clark*, 17 Or. 474, 11 Am. St. Rep. 845, 21 Pac. 443, that where a person, under a mistake as to the boundaries, enters and occupies land not embraced in his title, claiming it as his own for the requisite statutory period, he becomes invested with title thereto by possession, although his entry and possession were by a mistake."

Where it was argued that a possession by mistake as to boundary could not be adverse, the court said: "Every act of the defendant in entering and occupying this land was an assertion of title in himself. His actual, substantial inclosure of it was, both by the statute of Nevada and the general principles of law, decisive proof of his adverse possession. . . . The fence, together with the planting of the hedge and the shade trees, are acts evincing 'an intention of asserting ownership and possession,' and it is 'the intention which guides the entry and fixes its character.' . . . He marked out the boundary, not as a doubtful one, but as the true

one, and all his actions agree with this view." *Brown v. Leete*, 6 Sawy. 332, 2 Fed. 442.

c. Recognition of visible line.

Some of the cases emphasize the point that the adjoining proprietors have recognized the visible line as a division line. *Cornish v. Follis*, 20 Ky. L. Rep. 300, 45 S. W. 1050; *Grider v. Davenport*, 22 Ky. L. Rep. 1455, 60 S. W. 866; *Puntt v. Zimmer*, 8 Ohio C. C. N. S. 455, 29 Ohio C. C. 721; *Sullivan v. Michael*, 39 Tex. Civ. App. 564, 87 S. W. 1061.

In *Kron v. Daugherty*, 9 Pa. Super. Ct. 163, it was held to be error to refuse an instruction that "when adjoining owners have for twenty-one years recognized and adopted a marked line as their mutual boundaries, they are each protected by the statute of limitations, even though it is not the line mentioned in the deed."

In *Holmes v. Judge*, 31 Utah, 269, 87 Pac. 1009, the court said: "We do not wish to be understood as holding that parties may not claim to the true boundary, where an assumed or agreed boundary is located through mistake or inadvertence, or where it is clear that the line as located was not intended as a boundary, and where a boundary so located has not been acquiesced in for a long term of years by the parties in interest. But in all cases where the boundary is open, and visibly marked by monuments, fences, or buildings, and is knowingly acquiesced in for a long term of years, the law will imply an agreement fixing the boundary as located, and will not permit the parties or their grantees to depart from such line."

This case was followed in *Young v. Hyland*, — Utah, —, 108 Pac. 1124, where it was said: "Where the owners of adjoining lands occupy their respective premises up to a certain line which they recognized and acquiesced in as their boundary line for a long period of time, they and their grantees will not be permitted to deny that the boundary line thus recognized is the true line of division between their properties."

under which the plaintiff and his immediate grantor took and held possession, we find that they describe the land as bounded on the south by a hedge fence, so that his entry, his possession, and his claim of title are identical. As was said in *Tex v. Pflug*, 24 Neb. 686, 8 Am. St. Rep. 231, 39 N. W. 839, "He took possession to the line fixed by the surveyor, and designated as his boundary by his grantor, and held with reference to it, and to nothing else."

It may be observed that the findings, as well as the evidence, seem to preclude the possibility of the possession having been taken and held through a mistake as to the true location of the boundary line. There is no finding that the claim of the plaintiff and his immediate grantor was

provisional; that is, that they claimed to own up to the fence only upon the supposition that this was the true boundary. Nor is there any finding that the fence is not the true boundary. If we turn to the evidence, we find nothing to suggest that possession was taken and held up to the fence through a mistake, or that the fence was not the true boundary, except the evidence of the recent survey made a short time before the commencement of the suit. This survey was made at the request of the defendants, who owned the land on the south and east. The evidence is that they told the county surveyor to get the description of the land of the plaintiff from his recorded deed, and to serve him with proper notice. It appears, however, that in his

Where there was evidence tending to show that for more than half a century two farms had been continuously occupied by their respective owners, and that a fence had been maintained as a division or line fence between them, up to which each had claimed and occupied without the slightest objection on the part of the other, and improvements had been made along it on both sides, the court said: "The maintenance of a line fence between owners of adjoining lands by their acts, up to which each claims and occupies, is a concession by each of the open adverse possession by the other of that which is on his side of such division fence, which, after twenty-one years, will give title, though subsequent surveys may show that the fence was not exactly upon the surveyed line." *Reiter v. McJunkin*, 173 Pa. 82, 33 Atl. 1012.

See also *infra*, subd. IV.

d. Buildings.

As has been seen, the courts that favor the paper title do not consider the placing of buildings decisive evidence of adverse possession. See cases cited *supra* under subd. III, *viz.*, *Wacha v. Brown*, 78 Iowa, 432, 43 N. W. 269; *Kirkman v. Brown*, 93 Tenn. 476, 27 S. W. 709.

But there would seem to be no doubt that such evidence is conclusive. Possession is adverse if a party incloses and builds upon and holds land under the belief and claim that it is his own, even though the claim of title is the result of a mistake as to the boundaries of his own land. *Wilson v. Hunter*, 59 Ark. 626, 43 Am. St. Rep. 63, 28 S. W. 419, where about 20 inches of land had been built upon, and the jury held that the possession was adverse.

Where one claims the line on which he builds to be the true boundary of his lot, his possession of all that lies within this assumed line is necessarily hostile to the owner of the adjoining lot. The latter is at once put to his action, and the statute of limitations begins to run. *Neale v. Lee*, 8 Mackey, 5. See also to similar effect, *Ramsey v. Glenny*, 45 Minn. 401, 22 Am. St. Rep. 736, 48 N. W. 322.
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Where a party built one wall of his house so that it extended 4 inches on his neighbor's land, and so stood for over twenty years without objection by the neighbor, it was held that he had by adverse possession a title to the 4 inches. *Pearsall v. Westcott*, 30 App. Div. 99, 51 N. Y. Supp. 663. See also further appeal in the same case, 45 App. Div. 34, 60 N. Y. Supp. 816.

So, where there was proof to the effect that the defendant's predecessor in title had built a house upon the land in controversy more than twenty years before the commencement of the action, and that it had been openly occupied and used by him and his successors in title ever since without question on the part of anyone, until the suit was begun. *Stillwell v. Boyer*, 36 App. Div. 424, 55 N. Y. Supp. 358, affirmed in 165 N. Y. 621, 59 N. E. 1131. See also *Lougee v. Shuhart*, 127 Iowa, 173, 102 N. W. 1125, *supra*, I. c. See also to similar effect, *Davis v. Braswell*, 185 Mo. 576, 84 S. W. 870.

Where part of the width of the disputed strip was covered by a building the eaves of which covered the rest of the width, it was held that the entire width was adversely possessed. *Weeks v. Upton*, 99 Minn. 410, 109 N. W. 828.

So, where a party has built a house with the understanding and claim that she owns beyond its eaves the space necessary for the swing of the window blinds and an underground drain, and has occupied the same for twenty years, her possession will be deemed adverse to at least the space occupied by the eaves, drain, and blinds. *Atkins v. Pfaffe*, 136 Iowa, 728, 114 N. W. 187.

So, where one bought a city lot separated by a fence from the adjoining lot, and built a house thereon, and occupied the lot for more than the statutory period, the eaves of the house draining on a strip inside the fence, afterwards claimed by the neighbor, the court said: "Unless it is to be held that boundary lines cannot be determined by possession and claim of right upon the one side, and acquiescence upon the other, we know of no reason why the respondents may not claim title by adverse

notice to the plaintiff he did not describe all the land which the plaintiff claims. Neither in the notice nor the survey was any attention paid to the artificial boundaries mentioned in the deeds under which the plaintiff holds. The notice and the survey proceed upon the theory that the land he was to survey and establish the boundaries of was a tract of 10 acres more or less, commencing at a stone 20 rods west of the northeast corner of the quarter, "then west 60 rods, then south 26 rods, then east 60 rods, then north to place of beginning." The west line of the tract which the plaintiff claims to own is described in his deeds as running "south 26 rods to hedge fence, then east sixty (60) rods," etc.

The only evidence, therefore, of any mis-

possession, in this instance. The general rule, as we understand it, is that boundary lines may be determined by adverse possession." *Erickson v. Murlin*, 39 Wash. 43, 80 Pac. 853.

Where the line claimed is a straight line, the fact that a building placed up to the line does not cover the entire length of the boundary will not confine the recovery to the land actually covered by the building. *O'Callaghan v. Whisenand*, 119 Iowa, 566, 93 N. W. 579; *Yunker v. White*, 136 Iowa, 23, 111 N. W. 824.

Where forty years before the trial of the action, a building was erected mostly on the defendant's premises, but encroaching a foot and a half on the plaintiff's lot, this building being a frame building with a brick foundation, and a fence on the rear of the lot, in continuation of the line of the building, having been built more than twenty years before the action, upon the mistaken assumption that it was on defendant's premises, as was the building first mentioned, it was held that the defendant had title by adverse possession. *Roulston v. Stewart*, 40 App. Div. 200, 57 N. Y. Supp. 1061, following *Crary v. Goodman*, 22 N. Y. 170.

e. Iowa cases.

The Iowa court is now committed to the doctrine that "in the absence of other controlling circumstances, the inference is conclusive that the division line between adjoining tracts, definitely marked by the erection and maintenance of a fence or other monuments, recognized by the owners as such, and up to which they have occupied and cultivated the land on either side more than ten years (the statutory period of limitations), is the true boundary between them." *Miller v. Mills County*, 111 Iowa, 654, 82 N. W. 1038.

This case was followed in *Axmear v. Richards*, 112 Iowa, 657, 84 N. W. 686, where a party placed his fence on what he supposed was the true line of the highway, and this was acquiesced in by the public for thirty years, and it was held that his

take as to the south boundary, is that a survey not of the entire tract as described in the plaintiff's deeds, or as claimed to be owned by him, but of a different tract of land, shows a south boundary different from the hedge fence. It is altogether probable that the objections raised by the plaintiff to the validity of the survey, based upon the variance in the description of his land in the notice and the description in his deeds, would, in a proper case, be held to be a mere irregularity of which advantage could only be taken by an appeal from the survey. *Shanline v. Wiltzie*, 70 Kan. 177, 78 Pac. 436, 3 A. & E. Ann. Cas. 140. But this is not an action to set aside a survey, but to quiet title to a tract of land to which the plaintiff claims to have

title would be sustained (it appearing to be the law in Iowa that an individual may obtain title to part of a highway by adverse possession). It was also followed in *Lawrence v. Washburn*, 119 Iowa, 109, 90 N. W. 73, and *O'Callaghan v. Whisenand*, 119 Iowa, 566, 93 N. W. 579, also in *Klinker v. Schmidt*, 114 Iowa, 695, 87 N. W. 661, where the court said: "We apprehend the distinction between the doctrine of the cases which deny efficacy to an occupancy founded on mistake, and those which recognize occupancy to a line established by acquiescence, to be this: that in the one case the assertion of title is presumed to be limited to the premises covered by the grant under which possession is claimed, while in the other case there is a wholly independent basis for the assertion of title; to wit, acquiescence of the adjoining owner."

And in *Bradley v. Burkhart*, 139 Iowa, 323, 115 N. W. 597, 130 Am. St. Rep. 328, the court said: "The doctrine of adverse possession, strictly speaking, does not apply to the case, for the reason that plaintiff has failed to show any intent to claim more than his deed calls for. But a line may be established by recognition and acquiescence, although neither of the parties intends to claim more than his deed gives him. This is the doctrine established by *Miller v. Mills County*, supra, and recognized in almost innumerable cases since that time."

And in *Kennedy v. Niles*, — Iowa, —, 96 N. W. 772, it was said: "This court is fully committed to the doctrine that occupancy up to a marked division line, without questioning its correctness, for the statutory period of limitation, is such acquiescence therein as to defeat subsequent controversy as to its true location."

Thus, it is now held that occupation and cultivation by both parties up to a fence for twenty years make a boundary in absence of other proof. *Andrews v. Meredith*, 131 Iowa, 716, 109 N. W. 287.

In *Keller v. Harrison*, 139 Iowa, 383, 116 N. W. 327, the court said: "The jury were not told in any of the instructions, as they should have been, that, if defendant, by

held adverse possession for more than fifteen years; so that, in our view, the validity of the survey is not involved, and we only refer to the alleged defects therein to show that there is no evidence that the hedge fence on the south is not the true boundary of the land actually claimed by the plaintiff to be his.

The theory of the defendants, of course, is that a valid survey from which no appeal was taken has permanently fixed the boundaries between the two tracts, and determined that the hedge fence never was the true boundary, and that it necessarily follows that the possession of the plaintiff was acquired under a misapprehension as to its true location. If, however, we concede that such is the effect of the survey,

himself, employees, or tenants, marked by the planting of trees, grove, or other improvements, held to a visible division line, in good faith believing it to be the true boundary, and for more than ten years subsequent thereto occupied and made use of the land up to such line, and during such period the owners of plaintiff's land occupied and cultivated their land up to such line, then they will be conclusively presumed to have agreed thereto as a boundary line, and neither party can be heard to say that the division line so marked is not the true boundary line between them."

Boltz v. Colsch, 134 Iowa, 480, 109 N. W. 1106, is not inconsistent with the foregoing cases, as there it appeared, as to the claim of an old line, that overflow from a river frequently washed away a fence, which was not always replaced on the same line; and further, that afterwards there was a recognition of a new line by the party who complained of encroachment.

f. Wisconsin cases.

In Wisconsin the earlier cases seem to favor the paper title.

Thus, it was held in *Fuller v. Worth*, 91 Wis. 406, 64 N. W. 995, that where one enters under a deed, finding a fence apparently as a partition between him and a neighbor, and all that appears is that the one so entering occupied to the fence for over twenty years, if the fence is not on the true line, he will not hold by adverse possession any land on his side of the fence.

And in *Reilly v. Howe*, 101 Wis. 108, 76 N. W. 1114, it seems to be held that where there is occupancy to a fence, it must be shown that it was under claim of title; but the case was controlled by an estoppel.

But in *Wollman v. Ruehle*, 104 Wis. 603, 80 N. W. 919, it was said that the presumption is that possession is in subordination to the true title, and this is so by statute in Wisconsin, but it was held that where twenty years have run, the presumption is the other way. Citing *Grady v. Goodman*, 22 N. Y. 171; *Eldridge v. Kenning*, 35 N. Y. S. R. 190, 12 N. Y. Supp. 693.

And the later cases are now fully committal to the doctrine that possession is

still, under the authorities we have cited, the plaintiff's possession would be adverse, notwithstanding the mistake, if the intention was to take and hold to the fence in any event. Upon this theory we have deemed it necessary to review the cases holding that the test is not whether there was a mistake, but what was the intention of the person holding possession up to the mistaken boundary.

Viewed from still another aspect of the case, the judgment must be affirmed. The petition alleges and the evidence abundantly shows that the defendants, having by their deed fixed the hedge fence as an artificial boundary of the land conveyed, acquiesced in that being the true boundary for a period long enough to estop them from

mitted to the doctrine that possession is the important element. Thus it was said in *Bishop v. Bleyer*, 105 Wis. 330, 81 N. W. 413: "He entered into the possession of this land. He supposed that it was the land he purchased. He claimed the land between the lines of his fence, and held it in visible and notorious occupancy for more than forty years. The rule has frequently been asserted that unexplained occupancy, continued for twenty years, raises the presumption that such occupancy was under claim of right and adverse. *Carmody v. Mulrooney*, 87 Wis. 552, 58 N. W. 1109; *Wilkins v. Nicolai*, 99 Wis. 178, 74 N. W. 103; *Wollman v. Ruehle*, 100 Wis. 31, 75 N. W. 425; *Meyer v. Hope*, 101 Wis. 123, 77 N. W. 720; *Wollman v. Ruehle*, 104 Wis. 603, 80 N. W. 919. Such possession, when established, is conclusive as to the nature of the possession, unless rebutted or explained away by some satisfactory evidence."

So, in *Dreger v. Budde*, 133 Wis. 516, 113 N. W. 950, the court said: "It is contended that the evidence is undisputed that . . . (defendant's predecessor in title and possession) never claimed or occupied the strip in question as his land. The proof is clear that he and other owners of the land had occupied the strip for more than twenty years, had cleared parts of it and cultivated portions, and treated the line fence as the division line between the farms. These facts and circumstances are but slightly contradicted in the case. From this the inference is well-nigh irresistible that such open and notorious occupancy of the strip was adverse as to all the world, and at the expiration of twenty years ripened into an absolute title."

In *Ovig v. Morrison*, 142 Wis. 243, 125 N. W. 449, the court explains its present doctrine as follows: "The necessity for the system which is written into our Code in order to avoid confusion and uncertainty on the subject of adverse possession is significantly illustrated by the claim here made and another, which, until recent years, was often dignified as legitimate and is yet disturbing in the administration of

claiming the contrary. It is well settled that adjoining landowners may, either by writing or parol, agree upon the boundary between their lands, and that their possession on either side up to the boundary so agreed upon will be mutually adverse. *Steinhilber v. Holmes*, 68 Kan. 607, 75 1019; *Sheldon v. Atkinson*, 38 Kan. 14, 16 Pac. 68; *Alexander v. Wheeler*, 69 Ala. 332; *Yates v. Shaw*, 24 Ill. 367; *Cleveland v. Obenchain*, 107 Ind. 591, 8 N. E. 624; *McNamara v. Seaton*, 82 Ill. 498; *Watrous v. Morrison*, 33 Fla. 261, 39 Am. St. Rep. 139, 14 So. 805; *Clark v. Hulsey*, 54 Ga. 608. See also note to case in 21 L.R.A. 833, and note to case in 39 Am. St. Rep. 154; 1 Cyc. Law & Proc. p. 1036.

The purpose of the original proprietor

in planting the hedge throws on light upon the matter. He owned the land on the other side and did not intend the fence as a boundary line; but the defendants afterward in their deed expressly fixed upon this hedge as the south boundary line of the tract which they conveyed. Their situation is the same as though they had agreed with the adjoining landowner that this should be the boundary line. Their acquiescence in it as the true boundary line for a period even less than the statutory period for acquiring title by prescription would estop them. *Sheldon v. Atkinson*, 38 Kan. 14, 16 Pac. 68. Their acquiescence continued beyond the statutory period, and, under the circumstances of this case, should, upon every principle of justice and

justice. On the one hand it was claimed that adverse possession could not be grounded on possession as owner under mistake of boundaries, while, on the other, it was claimed that such possession must, to be effective, be characterized by good faith. The result was the theory that if a person, as owner, maintained exclusive, continuous occupancy by the location of his building or otherwise, partly within and partly without his true line, according to his paper title, for twenty years or any greater length of time, he was still in danger of being dispossessed of the latter portion because, if his occupancy was by mistake of boundaries, that was fatal to his claim of title, and if he intended to claim as owner regardless of the true boundary, or knowing that he was a trespasser, that was in bad faith and likewise fatal to his title. It is obvious that the only sensible, safe, and really equitable rule is to make the physical characteristics of possession—excluding all other persons—the sole test of adverse possession, and so it was written in the Code. It has been lost sight of at times. Experience has demonstrated, clearer and clearer as time has progressed and the importance of stability of titles has grown with increase in value of property, the wisdom of the Code makers in incorporating into their work the simple test of adverse possession indicated."

IV. Agreements and joint building of fences.

a. General rule.

It is a general rule that an agreement upon a disputed or uncertain boundary line, followed by possession for the limitation period, will prevent either party from disputing the location of the line. *Ivey v. Cowart*, 124 Ga. 159, 110 Am. St. Rep. 160, 52 S. E. 436; *Kincaid v. Vickers*, 217 Ill. 423, 75 N. E. 527; *Tritt v. Hoover*, 116 Mich. 4, 74 N. W. 177; *Ries v. Wolf*, 9 Ohio C. D. 255; *Gist v. Doke*, 42 Or. 225, 70 Pac. 704. See also *Dunnigan v. Wood*, — Or. —, 112 Pac. 531, where, however, it 33 L.R.A. (N.S.)

seemed probable that the line occupied was the correct original line.

In *Kitchen v. Chantland*, 130 Iowa, 618, 105 N. W. 367, 8 A. & E. Ann. Cas. 81, the court said: "The rule of law is well settled that if there be doubt or uncertainty, or a dispute as to the true location of a boundary line, the parties may by parol fix a line which will, at least, when followed by possession with reference to the boundary so fixed, be conclusive upon them, although the possession may not have been for the full statutory period."

Where an owner built a stone wall partly on his own land and partly on his neighbor's land, and there was evidence that there was a parol understanding that they would give and take land, the court stated that no title would pass by the mere force of such an agreement; "but an occupation according to the line thus adopted, if adverse and under a claim of right, and if sufficiently long continued, would effect a change of title." The kind of occupation to which the court referred was that sufficient to make a title under the statute of limitations. *Gray v. Kelley*, 190 Mass. 184, 76 N. E. 724.

"When owners of contiguous parcels of land, the boundary line between which is uncertain and unfixed, by parol agreement mutually establish a dividing line, and thereafter use and occupy their respective tracts according to such line for a considerable period of time, particularly when they so act for a period longer than the statutory period of limitations, and for such period maintain a fence on the line, such line cannot afterwards be controverted by the parties or their successors in interest. . . . By the fixing of a boundary line neither party attempts to convey land to the other; but, the boundary line being uncertain, they simply agree that, under their deeds, their respective lands extend to a certain common dividing line; 'after their boundary line is fixed by consent, they hold up to it by virtue of their title deeds, and not by virtue of a parol transfer.'" *Diersen v. Nelson*, 138 Cal. 394, 71 Pac. 466.

See also to similar effect, *Hess v. Rudder*,

equity, estop them from now claiming that the fence is not the true boundary.

It is unnecessary to consider whether the court erred in holding the survey void, for the reason that the judgment rests as well upon the findings of adverse possession by the plaintiff and acquiescence in the boundary line by the defendants. The latter is included in the general finding and is fully sustained by the evidence. This being an action to quiet title, the survey, however valid, cannot defeat the action. As held in *Swarz v. Ramala*, 63 Kan. 633, 66 Pac. 649, the title to real estate is not put in issue in a determination by the county surveyor of the true boundary line between two tracts of land. It was said in the opinion in that case: "Adverse possession may change the title to real property, but it cannot change the location of a quarter section line." Conversely, it may be said that a valid statutory survey may change the location of the boundary line between

two tracts of land, but it cannot change the title to the land itself. Suppose that, at the time the survey was made, the plaintiff held an unrecorded deed conveying to him a perfect title to the strip of land in controversy. It would hardly be contended that his failure to appeal from the survey vested the title to this intervening strip of land in the defendants, or prevented the plaintiff from asserting title by his deed. Conceding its validity, the only effect of the survey is to determine the quantity of land which the defendants deprived themselves of by agreeing in their deed upon a different boundary, and their long acquiescence in that and the other boundaries, and by the adverse possession of the plaintiff.

The judgment is affirmed.

All the Justices concur.

Petition for rehearing denied.

117 Ala. 525, 67 Am. St. Rep. 182, 23 So. 136; *Loustalot v. McKeel*, 157 Cal. 634, 108 Pac. 707; *Palmer v. Dosch*, 148 Ind. 10, 47 N. E. 176 (both parties purchasing with the understanding that the fence in question marked the true boundary); *Ernsting v. Gleason*, 137 Mo. 594, 39 S. W. 70; *Schwartz v. Gebhardt*, 157 Mo. 99, 57 S. W. 782; *Barnes v. Allison*, 166 Mo. 96, 65 S. W. 781.

Where the parties as adjoining owners maintain the boundary division fence for thirty years, and the claim of one of them is that the land on his side of the fence belongs to him, his possession is adverse. *Davis v. Waggoner*, 42 Ind. App. 115, '83 N. W. 381, 84 N. E. 1105.

In *Dyer v. Eldridge*, 136 Ind. 654, 36 N. E. 522, the court said: "The law is that the location of a division boundary fence, acquiesced in and acted upon, and the premises improved up to the line by each, for twenty years, becomes binding as the true line."

Where parties purchase lots on a city street, enter, build a division fence on the supposed boundary, and each improves on his side of the fence for the period of the statute of limitations, he will not be ousted on a discovery that the line is a mistake. *Thornely v. Andrews*, 45 Wash. 413, 88 Pac. 757.

So, in *Lindley v. Johnston*, 42 Wash. 257, 84 Pac. 822, the court said: "We think it is well established that where two adjoining landowners locate a division line between their farms and jointly build a fence thereupon, believing it to be the correct line, when, as a matter of fact, it is not, and continue said fence as their boundary line continuously for twenty-four years, each continuously occupying, cultivating, and exercising exclusive control and dominion over the land up to said fence, that it must, in the absence of positive evidence to the contrary, be inferred that said line was located 33 L.R.A. (N.S.)

and accepted by them pursuant to an agreement that it should be considered and treated as the division line."

In *Peters v. Reichenbach*, 114 Wis. 209, 90 N. W. 184, where it was held that the occupation must exist for the statutory period, the court said: "It is established that the building of a fence as a division line, if followed by undisturbed possession by both parties for more than twenty years, does not refute, but rather tends to establish, the adverse character of the holding, so that, if not overcome by other evidence, the statutory bar will establish ownership on each side of it, and it thereby becomes the true dividing line of ownership."

The principle that the statute of limitation will not begin to run in case of mistake until it is discovered by the party against whom the statute is invoked is inapplicable to a case where the statute is invoked against a party who purchased the land in 1884, and at whose instance the county surveyor ran out the lines of the survey, and made a mistake as to its boundaries which was not discovered until 1908. *Paterson v. Rector*, — Tex. Civ. App. —, 127 S. W. 561.

Even in Iowa prior to *Miller v. Mills County*, 111 Iowa, 654, 82 N. W. 1038, it was held that when each adjoining owner occupies up to a fence for over ten years with the understanding on both sides that the fence is the true boundary, their possession will be mutually adverse. *Fullmer v. Beck*, 105 Iowa, 517, 75 N. W. 366.

Foard v. McAnnelly, 215 Mo. 371, 114 S. W. 990, is an illustration of the class of cases where a question arises whether the agreement was as to the boundary, or whether it was an agreement to have a surveyor run a line for a fence; and it was held that there was no evidence for the jury that the parties agreed upon a boundary.

Some of the foregoing Missouri cases do

not confine the reason of the decision to the fact that the agreement had continued for the statutory period, which does not seem to be necessary in Missouri. See *Brummell v. Harris*, 148 Mo. 430, 50 S. W. 93; *Betts v. Brown*, 3 Mo. App. 20. Agreements which have not existed for the statutory period are without the scope of this note.

b. Theory that mistake may be corrected.

In a few cases it has been held that where a boundary is agreed upon through mistake, the mistake may be rectified on discovery.

Thus it has been held that the placing of fences by mutual consent, in mistake as to the real boundary, neither gives nor destroys title. *Frederick v. Brulard*, 6 La. Ann. 382.

And that an erroneous location of a boundary by both parties, manifestly not in accordance with the title, and fixed in error, will not support prescription. *Gaude v. Williams*, 47 La. Ann. 1326, 17 So. 844.

In *Randleman v. Taylor*, 94 Ark. 511, 127 S. W. 723, it was held that where an erroneous line is agreed upon by mistake, the party, on discovery of the mistake, may have the same set aside unless there is some evidence of estoppel; and that it is only where the true line is not capable of or is difficult of ascertainment, and the boundary agreement is a settlement of a vexatious dispute, that the agreement is binding. It does not appear whether the agreement had existed for the period of the statute of limitations.

In *Oldham v. Medearis*, 90 Tex. 506, 39 S. W. 919, where it appeared that the parties had made a verbal partition many years before, and then had the line run out by the surveyor and there was a material mistake made by the surveyor in running such line, it was held that if the aggrieved party exercised due diligence in discovering the mistake in the partition of the land and the shortage in the land set apart to him, the statutes of limitation would not apply and run against an equitable suit to correct said mistake and repartition the land.

In *Schraeder Min. & Mfg. Co. v. Packer*, 129 U. S. 688, 32 L. ed. 760, 9 Sup. Ct. Rep. 385, the court distinguishes between a mutual undertaking to adjust a doubtful and disputed dividing line and the mistaken marking of a boundary where there is no known conflict, and says: "The decisions . . . generally support the rule that owners of adjacent tracts of land are not bound by consent to a boundary which has been defined under a mistaken apprehension that it is the true line, each claiming only the true line, wherever it may be found, and that in such case neither party is precluded or estopped from claiming his own rights under the true one, when it is discovered."

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c. Agreement to move fence.

Where the parties build or leave a fence, agreeing to put it on the true line when ascertained, they do not hold against the true line. *Quinn v. Windmiller*, 67 Cal. 461, 8 Pac. 14; *Peters v. Gracia*, 110 Cal. 89, 42 Pac. 455; *Smith v. Roberts*, — Cal. —, 9 Pac. 104; *Pugh v. Schindler*, 127 Mich. 191, 86 N. W. 515; *Clark v. Thornburg*, 66 Neb. 717, 92 N. W. 1056; *Lowe v. Cunningham*, — Tenn. —, 39 S. W. 1052; *Thompson v. Slater*, — Tex. Civ. App. —, 34 S. W. 357; *Schaubach v. Dilleuth*, 108 Va. 86, 60 S. E. 745, 15 A. & E. Ann. Cas. 825; *Clinchfield Coal Co. v. Viers*, 111 Va. 261, 68 S. E. 976; *Phinney v. Campbell*, 16 Wash. 203, 47 Pac. 502.

If the agreement is to hold the land until the true boundary is ascertained, adverse possession does not begin until the agreement is repudiated or the true line ascertained. *Crosby v. First Presby. Church*, 45 Tex. Civ. App. 111, 99 S. W. 584.

But where a fence was on the same line for twenty-five years before the action, and twenty years before the action it was rebuilt by the defendant on the same line, and there was evidence that before the rebuilding it was agreed that when rebuilt it should be placed on the true line, it was held that the rebuilding was an entry by the defendant, and that his possession was adverse. *Mielke v. Dodge*, 135 Wis. 388, 115 N. W. 1099.

When the plaintiff's predecessor took from the defendants the following receipt: " . . . Received of W. G. Bender nineteen 50-100 dollars (\$19.50), the same being for the one-half interest in 720 varas of wire fence situated between my land and the land belonging to the said Bender, . . . and for the consideration of the said payment the said Bender is to have the use of said fence as long as it shall last,"—and joined his fence to that mentioned in the receipt, and no question was made as to the boundary for sixteen years (the statute bar being ten years), it was held that a verdict must stand which disregarded evidence that Bender told the defendants, about the time of the receipt, that they could move the fence whenever they knew the true line. *Mann v. Schueling*, — Tex. Civ. App. —, 68 S. W. 292.

d. Location for convenience.

Holding part of a neighbor's land inside one's fence where the fence is left in its position for the convenience of the parties is not an adverse possession. *West v. St. Louis, K. C. & N. R. Co.* 59 Mo. 510; *Reed v. Gilliam*, 140 Ky. 824, 131 S. W. 1034.

It has been said that the mere fact that a man "has set back his fence for his own convenience cannot affect his right and vest the title to the land in another." *Kron v. Daugherty*, 9 Pa. Super. Ct. 163.

Where for convenience the dividing fence

is built so as to avoid bushes and difficult places in a swamp, neither party will get adverse possession of the land. *Small v. Hamlet*, 24 Ky. L. Rep. 238, 68 S. W. 395.

V. Miscellaneous.

Where, twenty years after condemnation proceedings under which a railroad acquired a right of way, it complained that the report of the engineer in the condemnation proceedings did not give it as much land as was supposed, and it appeared that the contiguous owners had fixed their fences according to the engineer's report, and had occupied the land within those fences ever since, it was held that, the period of the statute of limitations having expired, the proprietors of the bounding lands owned their land within those fences free of any claim of the railroad. *Louisville & N. R. Co. v. Quinn*, 94 Ky. 310, 22 S. W. 221.

When the jury were instructed that "the fact that the land on either side of the division line has changed hands since the fence was built would not render a possession adverse as to the subsequent owners which was not adverse as between the parties who built the fence. The situation would remain the same as between subsequent owners, no matter how many times it might be conveyed, unless some acts were done or notice given by the subsequent possessors to change the character of the possession from a permissive to an adverse one," the appellate court, in criticizing the instruction, said: "If a grantee of Mr. Hopkins was informed at the time he made his purchase that the land he bought included all the land inclosed by the fence, and he entered into its occupancy without any knowledge that Mr. Hopkins's occupancy was permissive, and with the belief that he was the owner of the land, and with the intent to occupy as an owner, his intention to claim the land might thus be shown; and, if the occupancy in all other respects met the requirements of an adverse occupancy for the requisite time to acquire title, we think it would be sufficient." *Pugh v. Schindler*, 127 Mich. 191, 86 N. W. 515.

Where a purchaser of lots 1 and 2 attempted by measurement with a pole to locate the boundaries, and, supposing that he had done so, he built a fence on the lines so located, which fence, however, in fact only included parts of lots 1 and 2, but did include all of lot 3 and part of lot 4, the court said: "While it is true that Taylor originally made a mistake in fixing the lines, and by reason thereof unintentionally entered into the possession of lot 3 and part of lot 4, it is nevertheless apparent from the evidence that his possession thus obtained was immediately followed by a claim of right to the land: that he and his grantees erected a dwelling house and other buildings; that they planted fruit

trees and otherwise improved the place; that each of the subsequent purchasers, before buying, went upon the property, saw the inclosure and improvements, intended to acquire the identical land so inclosed and improved, and that their mistake was not as to the particular land claimed or purchased, but as to its true description. These acts, which continued without interruption for a period of more than ten years, and until the commencement of this action, certainly evinced an assertion of permanent proprietorship on the part of respondents and all of their grantors, . . . and constituted notice to the real owners." *McCormick v. Sorenson*, 58 Wash. 107, 107 Pac. 1055.

It has been held in Iowa that the fact that the public, in the use of a highway, by mistake actually traveled several feet away from the record lines of the highway as legally established, will not secure to the public a right as against the landowner, as the use does not correspond with the claim of right. *State v. Welpton*, 34 Iowa, 144; *State v. Schilb*, 47 Iowa, 611.

Conversely, the owner will not, by mistake, obtain by possession the right to hold lands in the highway, as he will not hold adversely. *Bolton v. McShane*, 79 Iowa, 26, 44 N. W. 211.

Where there has been no actual possession up to any definite line, and no proof of acquiescence in a boundary, there has been no adverse possession to give title beyond the true line. *Liddle v. Blake*, 131 Iowa, 165, 105 N. W. 649.

In *Gordon v. Booker*, 97 Cal. 586, 32 Pac. 593, where the defendant testified that the strip of land in controversy had been lying open, unfenced and uncultivated, and that he never claimed anything except what was actually embraced on his side of the line, the location of which was in controversy, it was held that there could be no constructive possession beyond the true line under the circumstances.

In a case where the defendant's grantor had built a fence which excluded some of his timber land, and maintained it for fifty years, the court said: "It was uncleared land, and if the plaintiff sometimes trespassed upon it to take timber, the verdict proves that he had no such possession of it as would be title under the statute of limitations. . . . So long as there is no actual entry and ouster, a man is constructively in possession of all the lands his titles cover, wherever his fences may be built." *Potts v. Everhart*, 26 Pa. 493.

"What constitutes adverse possession is for the court to determine; but the facts which establish it are for the jury, and the question of the character of the possession is generally submitted to them. *Gross v. Welwood*, 90 N. Y. 638." *Ayers v. Reidel*, 84 Wis. 276, 54 N. W. 588.

B. B. B.

NEVADA SUPREME COURT.

RE WILLIAM H. SCHNITZER.

(— Nev. —, 112 Pac. 848.)

Attorney — disbarment — advertising for divorce case.

1. Publishing advertisements in other states, and sending pamphlets there, for the purpose of attracting their citizens to the state for the purpose of instituting divorce proceedings in its courts, and giving employment to the one doing the advertising, is misconduct on the part of an attorney within the meaning of a statute permitting his disbarment or suspension therefor.

Same — ceasing to offend — effect.

2. Ceasing advertising for divorce business among nonresidents upon complaint of the bar association may, in case of a first delinquency, be ground for leniency on the part of the court in fixing punishment therefor.

(January 26, 1911.)

PETITION for the disbarment of an attorney at law. Judgment of suspension.

Statement Per Curiam:

The respondent, William H. Schnitzer, was admitted to practise in all the courts of this state upon the 18th day of January, 1907, upon motion based upon a license to practise in the courts of the state of New York, and upon a showing of good moral character. Respondent filed a demurrer to the petition filed by the Reno Bar Association, praying for his disbarment, which was overruled, whereupon he interposed an answer. The main facts upon which the petition is based are not denied, but certain allegations in the petition based upon such facts are denied.

The following are the principal facts upon which the proceeding is based:

Prior to the institution of these proceedings, the respondent caused to be published in the programs of the Orpheum Theater of

San Francisco advertisements reading as follows:

DIVORCE LAWS OF NEVADA.

Have you Domestic troubles,

Are you seeking DIVORCE

Do you want quick and reliable action?

Send for my booklet

Contains Complete Information FREE

Shortest Residence

Address

Counsellor, P. O. Box 263, Reno, Nevada.

Correspondence Strictly Confidential.

DIVORCE LAWS OF NEVADA.

Send for my booklet

Contains information FREE

Address:

Counsellor, P. O. Box 263, Reno, Nevada.

(W. Shafer)

Correspondence Strictly Confidential.

DIVORCE LAWS OF NEVADA.

Have you Domestic Troubles

Are you seeking DIVORCE

Do you want quick and reliable action?

SEND FOR MY BOOKLET.

Contains Complete Information FREE

Shortest Residence

Address

W. H. SCHNITZER

Counsellor, P. O. Box 263, Reno, Nevada.

Correspondence Strictly Confidential.

Upon certain days during the month of April, 1909, the respondent caused to be inserted in the Brooklyn Daily Eagle of Brooklyn, New York, and in the Washington Post of Washington, District of Columbia, newspapers of large circulation, the following advertisement: "Divorce Laws of Nevada. Complete Information Mailed Free by Attorney William K. Shafer, Reno, Nevada." The "W. Shafer" and the "William K. Shafer" mentioned in the foregoing advertisements were intended for a certain William B. Shafer, who for a time was in the office of the respondent, but who was not an attorney of this court.

In January, 1909, the respondent pub-

Note.—Advertising as ground of disbarment.

The early cases upon the question of advertising as a ground of disbarment are gathered in the note to *Ingersoll v. Coal Creek Coal Co.* 9 L.R.A. (N.S.) 282, and the present note includes only the cases which have passed upon the question since the writing of that note.

In *People ex rel. Deneen v. Smith*, 200 Ill. 442, 93 Am. St. Rep. 206, 66 N. E. 27, it was held that the insertion by an attorney in a newspaper of an advertisement reading, "Loyal, wealthy attorney guarantees family freedom in a month; no advance costs; witnesses quietly volunteered," violated an act 33 L.R.A. (N.S.)

punishing the offense of advertising for divorces, and showed such a lack of good moral character and such unfitness for the practice of law as to justify his disbarment.

In *Re Wilson*, 79 Kan. 450, 100 Pac. 75, it was held a cause for disbarment, for attorneys to carry on a scheme to defraud under the disguise of doing a real estate business, the scheme being carried out by advertising extensively that they had numerous correspondents in many places, and that they could sell real estate wherever located, and in charging a fee for each tract listed, and in thereafter making little or no effect to sell the property listed.

J. T. W.

lished a twenty-four-page pamphlet for general distribution, the title page of which reads:

DIVORCE PRACTICE AND PROCEDURE.

Under the Laws of the State
of Nevada, with Notes
and Decisions.

Compiled and Digested by
WILLIAM H. SCHNITZER
of the Nevada Bar.

Published at Reno, Nevada,
January, 1909.

The preface to the pamphlet reads:

"Preface.

"The purpose of this treatise is to briefly, tersely, concisely, and clearly present to the reader the divorce practice and procedure under the laws of the state of Nevada.

"While the laws of the eastern and middle west states generally contain some provision for the dissolution of the marriage tie, it is obvious to the reader that in cases where extreme cruelty, desertion, and neglect to provide form the basis of the grievance, the law in such states offers no substantial relief to the aggrieved party, because the requirements of proof, duration of offense, corroboration of plaintiff, and procedure under court rules, are so exacting and irksome that the desired relief sought by applicant is rendered impossible of attainment.

"Summing up the situation as it exists in the eastern states, respecting the domestic relation law, the client, when consulting local counsel, is almost invariably advised that upon the facts submitted he or she is without remedy.

"Here, in Nevada, the applicant, without deception or fraud, upon almost any charge from which lack of harmonious relations may be reasonably inferred, may apply to our courts and secure prompt results by decree of absolute divorce, valid and binding in law. The next few pages will contain the statutes of Nevada applicable, together with a brief interpretation supported by supreme court decisions, clearly indicating the superior advantages afforded applicant under the law and procedure of Nevada.

"William H. Schnitzer."

The pamphlet is divided into subjects under the following headlines: "Divorce Statutes." "Causes." "Cruelty as Interpreted by Judicial Decisions." "Residence." "Summons and Service; How Made Upon Defendant." "Service of Non-Resident by Publication." "Appearance of Defendant." "Testimony and Hearings Before the 33 L.R.A. (N.S.)

Court." "Alimony and Custody and Support of Children." "Decree of Divorce Shall Provide." "The City of Reno, Nevada." "Summary." "Your Selection of Lawyer." "My References."

Without setting forth a copy of the pamphlet in full, the following extracts will serve to show its general import:

"Residence.

"Under the provisions of § 22 of the marriage and divorce act, the plaintiff must reside in the state for a period of at least six months. This is not construed to mean that, in order to fully comply with the statute, party must remain here continuously for said period. So, if a party comes to Nevada, and in good faith takes up a residence, party may leave the state at any time after establishing residence, may go and travel when and wherever party chooses, and may return to the state whenever inclination prompts, and yet, such temporary absence would not in anywise affect the legality of the residence established, but party would be entitled, under the law, to bring suit any time after the lapse of six months from the date residence was originally established, notwithstanding party's absence from the state during said period.

"Upon a careful reading of § 22 (page 5) the reader will note several exceptions to the rule requiring a residence in the state of six months, viz.: In any case where the defendant may be found or may reside within the state. The residence of the plaintiff is immaterial, and it is not necessary to prove any period of residence on the part of plaintiff; so, in cases where defendant is willing to facilitate the plaintiff, and will come to Nevada and remain here long enough to enable plaintiff to procure the service of the summons on defendant personally within the state, then, in that case, suit may be filed at once, regardless of the duration of plaintiff's residence here, and under such circumstances the court will acquire complete jurisdiction."

"Appearance of Defendant.

"A defendant shall be deemed to appear in an action when he answers, demurs, or gives the plaintiff or her attorneys written notice of his appearance, or when an attorney gives notice of appearance for him.

"Compiled Laws of Nevada, § 3594.

"A voluntary appearance of defendant shall be equivalent to personal service of summons upon him.

"Compiled Laws of Nevada, § 3130.

"In many cases the voluntary appearance of defendant may be procured, thereby saving the time and avoiding the tedious delays incident to service of process and proofs of service. To that end I am in

position to recommend to my clients the names of reputable attorneys in the state, who, upon written instructions from defendant, will enter an appearance in his or her behalf, which practice is frequently resorted to for the purpose of bringing the main issue speedily before the court."

"Testimony and Hearings Before the Court.

"After the completion of the service of the summons upon the defendant as herein set forth, and his time to appear for answer has expired, the plaintiff may at once proceed with hearing before the court. Our courts are always in session to hear testimony in uncontested divorce proceedings, and the hearing can be set for any day, on motion of counsel. In all such cases where there is no real contest, the oral testimony of plaintiff, without corroborative testimony (usually required in other states), before the judge in private chambers, in support of the allegations of the complaint, is deemed sufficient.

"This rule of practice is in line with the provisions of § 26 of the domestic relation act, Laws of Nevada."

"The City of Reno, Nevada.

"Important questions that will appeal to many before deciding to leave their present domicil, and coming to this western country, are: What sort of a place is Nevada with respect to climate, comfort, and convenience of life, and opportunity of engaging in business, or securing lucrative employment?

"To fully cover this ground, and to do justice to the grandeur and industrial enterprises of this great—greatest—mineral state, would alone require a volume. I will only reply briefly and tersely to these interrogatories, and for further and more complete information on the subject will be pleased to reply by letter to special inquiry.

"Reno, the commercial metropolis of Nevada, is beautifully situated on the Truckee river, at an elevation of 4,495 feet above sea level, and is on the main line of the Southern Pacific Railroad, overlooking the majestic Sierra Nevada mountains, and is just 26 miles easterly from the borders of California; just two hours' ride from Lake Tahoe, the most beautiful and picturesque lake in America, and the mecca of society and fashion; the climate is dry, healthy, and invigorating; is especially favorable to the treatment of bronchial and pulmonary troubles; there are no sudden extremes of heat and cold.

"Reno is the seat of the state university, 33 L.R.A. (N.S.)

has public library, seven churches of all religious denominations, five banks with combined deposits of over \$6,000,000, three theaters, four modern up-to-date fire-proof hotels, 6½ miles of street railway operated through the leading streets, beautiful public and office buildings, and magnificent homes.

"The cost of living in Nevada, all things being considered, is as low as any part of the country, and employment in all branches of labor is readily obtained at good wages. Steady and industrious mechanics should experience no difficulty in securing employment at a high rate of wages."

"Summary.

"Summarizing all that has been herein submitted to the reader, and as sound reasons why the greatest advantages and facilities are afforded under the law and practice of Nevada, to those seeking speedy release from the marital relations, we submit as follows:

"1. The shortest period of residence, *viz.*, six months.

"2. In special instances, when defendant may be found in the state, suit may be filed at once without a delay of six months.

"3. The great number of grounds, *viz.*, seven distinct and separate grounds.

"4. The simplest and least difficult grounds to prove: (Reading carefully citations under subdivision of 'Cruelty').

"5. No delays after time for defendant to answer has expired, our courts being always in session to hear testimony in uncontested cases.

"6. Under the charge of extreme cruelty, plaintiff may allege and prove any facts or acts producing mental anguish and threatening health.

"7. Under the practice of our courts, where no real contest exists, parties are not subject to embarrassing cross-examinations.

"8. In all uncontested cases parties may, on application of counsel, have hearings conducted in private chambers of the judge, and thereby avoid embarrassing publicity and exposure to the public.

"9. Unlike the practice and rule in most states, the sole testimony of plaintiff, without corroborative proofs, is sufficient to establish the allegations of the complaint in all undefended actions.

"10. A decree absolute is granted immediately, after proofs are submitted, so that party receiving same may marry again at once, and is not obliged to wait for any period thereafter, as is the law in many states.

"11. Here in Nevada, we have up-to-date cities where one may enjoy all the comforts,

conveniences, and luxuries of an eastern metropolis, and may indulge in little journeys into the adjoining state, California, which is justly styled the land of 'sunshine and flowers.'"

"Your Selection of a Lawyer.

"Lastly, but most importantly, is the question for you to determine: Who shall I select as my attorney to conduct my proceedings? Naturally you want the best, the most skilful and reliable talent obtainable, one in whose judgment and advice you will place implicit confidence, before you incur the expense and time in traveling to this state to establish your new residence.

"It may sound somewhat boastful to shout my own praise, but under the circumstances it is necessary that I tell you frankly who I am, and how I stand in this community.

"The writer has had twenty years' experience in the actual practice of the law at the New York and Nevada bar. I pride myself in being able to state, with perfect frankness and candor, that during the three years of active practice at the Nevada bar I have earned and won the friendship, respect, and esteem of my colleagues at the bar and the judges on the bench.

"I have made it a rule of my conduct to always make my word good and deal on the square with everybody. I am a member of the executive committee of the state Democratic organization.

"A sense of modesty impels the writer to refrain from further self-aggrandizement; but with the consciousness of my own record in this commonwealth, and with a full realization that those who know me will be willing to say a kind word for me, and will testify to my good reputation and high standing, I unhesitatingly submit to the inquirer a few of my references."

Under the heading of "My References," the respondent appends the names of judges, a United States Senator, the acting governor of the state, attorneys, editors, and prominent business men of the state, at least one of whom is shown to have repudiated the use of his name in such manner.

The concluding page of the pamphlet reads as follows:

WILLIAM H. SCHNITZER,
Attorney and Counsellor-at-Law,
Rooms 10, 11, 12 and 13,
Gazette Building,
Reno, Nevada.

Branch Offices:
Goldfield, Nevada,
Carson City, Nevada,
Tonopah, Nevada,
Rawhide, Nevada.

33 L.R.A. (N.S.)

Commercial and Mining Practice and Litigation in all State and Federal Courts. Depositions carefully taken. Correspondence in Reference to Financial Standing of Parties will receive prompt attention.

For reference, see page 18.

Twenty years' active experience in commercial litigation and practice.

Messrs. Sylvester S. Downer, Charles R. Lewers, James T. Boyd, W. A. Massey, and Cole L. Harwood for petitioners. Messrs. Platt & Gibbons for respondent.

Per Curiam:

That the purpose of the pamphlet published by respondent was to attract persons residing outside the state of Nevada, and citizens of other states and countries, to come to this state for the ultimate purpose of applying to its courts for divorce, through the agency of the respondent as an attorney, in order that he might profit financially thereby, is too manifest to require other than the bare statement. That the object of the advertisements quoted was to extend the circulation of the pamphlet is equally obvious. This method of advertising is highly reprehensible and contrary to the ethics of the legal profession, as universally recognized. Even if statements contained in the pamphlet were not open to question, either as to fact or law, nevertheless the purpose for which the pamphlet was issued and the advertisements published merits a severe rebuke. The pamphlet, however, contains statements that, to say the least, are misleading. It is not true that the laws of this state permit a divorce "upon almost any charge from which lack of harmonious relations may be reasonably inferred." It is not true that the testimony of the plaintiff in a divorce case, whether or not there be a "real contest," can be heard "before the judge in private chambers." The testimony in divorce proceedings must be before the court. An action for the dissolution of the bonds of matrimony, whether contested or not, is not a proceeding that a judge can hear in chambers. Even if we were to accept the explanation of respondent, that he only intended to convey the information that in uncontested cases the court could hold sessions in the private chambers of the judge, nevertheless that would not be the meaning which the layman would naturally place upon the language used.

Petitioners have attacked the correctness of a number of statements contained in respondent's pamphlet as to the law of this state upon the subject of divorce; but we do not deem it essential in this proceeding

to determine these questions. It would be sufficient to rest our condemnation of the conduct of the respondent upon the pamphlet and advertisements, upon a bare recital of the same without comment. They speak for themselves; and are unworthy the high calling that respondent has followed, as he says, for twenty years. The courts of Nevada were established and are maintained for the protection of her citizens, and citizens of other states and countries having dealings with the citizens of this state. An attorney who, for purposes of personal gain, seeks to make the courts of this state a clearing house for the domestic woes, real or imaginary, of the country at large, is certainly guilty of misconduct. *Comp. Laws*, § 2625; *People ex rel. Maupin v. MacCabe*, 18 Colo. 186, 19 L.R.A. 231, 36 Am. St. Rep. 270, 32 Pac. 280; *People ex rel. Colorado Bar Assn. v. Taylor*, 32 Colo. 250, 75 Pac. 914; *Ingersoll v. Coal Creek Coal Co.* 117 Tenn. 263, 9 L.R.A. (N.S.) 282, 295, 119 Am. St. Rep. 1003, 98 S. W. 178, 10 A. & E. Ann. Cas. 829; *People ex rel. Moses v. Goodrich*, 79 Ill. 148; 4 Cyc. Law & Proc. p. 911.

In *People ex rel. Maupin v. MacCabe*, supra, the supreme court of Colorado, by Mr. Justice Elliott, said: "The ethics of the legal profession forbid that an attorney should advertise his talents or his skill as a shopkeeper advertises his wares. An attorney may properly accept a retainer for the prosecution or defense of an action for divorce, when convinced that his client has a good cause. But for anyone to invite or encourage such litigation is most reprehensible. The marriage relation is too sacred; it affects too deeply the happiness of the family, it concerns too intimately the welfare of society; it lies too near the foundation of all good government,—to be broken up or disturbed for slight or transient causes. In the present case we are not called upon to deal with a matter of ordinary advertising, but with a peculiar kind of advertising. Respondent did not advertise for business openly, giving his name and office address. His advertisement was anonymous, and well calculated to encourage people to make application for divorces who might otherwise have refrained from so doing. When a lawyer advertises that divorces can be legally obtained very quietly, and that such divorces will be good everywhere, such advertisement is a strong inducement, a powerful temptation, to many persons to apply for divorces who would otherwise be deterred from taking such a step from a wholesome fear of public opinion. . . . The advertisement published by respondent, to the effect that divorces could be legally obtained very quietly which

should be good everywhere, was the more mischievous because anonymous. Such an advertisement is against good morals, public and private; it is a false representation and a libel upon the courts of justice. Divorces cannot be legally obtained very quietly which shall be good anywhere. To say that divorces can be obtained very quietly is equivalent to saying that they can be obtained without publicity. Every lawyer knows that to obtain a legal divorce a public record must be made of the proceeding; the complaint must be filed; the summons must issue; process must be served upon the defendant either personally or by publication in a public newspaper; proof must also be taken; and a decree must be publicly rendered by the court having jurisdiction of the proceeding. All these public proceedings the statute imperatively requires, and for a lawyer, by an advertisement, to indicate that such public proceedings can or will be dispensed with by the courts having jurisdiction of such cases is a libel upon the integrity of the judiciary that cannot be overlooked when brought to our notice.

"In the case of *People ex rel. Skelton v. Brown*, 17 Colo. 431, 30 Pac. 338, this court said: 'When this court grants a license to a person to practise law, the public, and every individual coming in contact with the licensee in his professional capacity, have a right to expect that he will demean himself with scrupulous propriety, as one commissioned to a high and honorable office. A person enjoying the rights and privileges of an attorney and counselor at law must also respect the duties and obligations of the position.'

"The case of *People ex rel. Moses v. Goodrich*, 79 Ill. 148, was a disbarment proceeding under statutes from which ours were undoubtedly borrowed. Among other things, the complaint against Goodrich set forth that he had published advertisements without signature, representing that he could procure divorces without publicity, and by such advertisements solicited business of that character by communication through a particular postoffice box. The Goodrich Case, though similar to the one before us, was more aggravated in some respects. Mr. Justice Breese, in delivering the opinion of the court, said: 'This court, having power by express law to grant a license to practise law, has an inherent right to see that the license is not abused, or perverted to a use not contemplated in the grant. In granting the license, it was on the implied understanding that the party receiving it should, at all times, demean himself in a proper manner, and, if not reflecting honor upon the court appointing him, by his pro-

fessional conduct, he would at least abstain from such practices as could not fail to bring discredit upon himself and the courts.

. . . The *morale* of defendant's professional conduct deserves special notice. He makes divorce cases a specialty. How many persons in our broad land weary of the chain that binds them? How many are eager to seize upon the slightest twig that may appear to aid them in escaping from a supposed sea of troubles in which wedded life has immersed them? How many are fretting under imaginary ills and what better devices than those practised by this defendant could be contrived to increase these disquietudes, and stimulate to effort, by perjury if need be, to free themselves from their supposed unhappy condition? Is it desirable that divorce cases should accumulate in our courts? If so, the defendant is justified in the means he has used, and is using, to that end. An honorable, high-toned lawyer will always aid a deserving party seeking a divorce, as coming strictly within his professional duties. He will render the aid, not solicit the case; and he will, in all things regarding it, act the man, and respect not only his own professional reputation, but the character of the courts, and discharge the unpleasant duty in all respects as an honorable attorney and counselor should do."

While this proceeding presents to the court a situation demanding punitive action, and while the higher interests of the public must not be underestimated, the effect upon the respondent of any action by this court must not be lost sight of, and should be given impartial consideration. An attorney is required to spend years in preparation for the practice of his profession, and this, together with his years of experience, is very often his greatest asset.

Chief Justice Marshall, in *Ex parte Burr*, 9 Wheat. 529, 6 L. ed. 152, covered the situation fully in the following apt words: "On the one hand, the profession of an attorney is of great importance to an individual, and the prosperity of his whole life may depend on its exercise. The right to exercise it ought not to be lightly or capriciously taken from him. On the other, it is extremely desirable that the respectability of the bar should be maintained, and that its harmony with the bench should be preserved. For these objects, some controlling power, some discretion, ought to reside in the court. This discretion ought to be exercised with great moderation and judgment; but it must be exercised; and no other tribunal can decide, in a case of

removal from the bar, with the same means of information as the court itself."

As some extenuation of the respondent's unprofessional conduct, it appears that when the bar association of Reno called his attention to the fact that his methods of advertising were condemned by the association, he discontinued the objectionable advertising in newspapers and theater programs, and has since refrained from the same. As this is the first case of this character that has been brought to the attention of this court, we are disposed to be lenient with the respondent.

It is ordered that the respondent be, and he hereby is, suspended from the practice of the law for a period of eight months, and until further order of this court, and that he pay the costs of this proceeding.

WASHINGTON SUPREME COURT.

STATE OF WASHINGTON, Resp't.,

v.

C. T. EAID, Appt.

(55 Wash. 302, 104 Pac. 275.)

Indictment — common law — statutory crime.

1. A common-law indictment for perjury is sufficient to support a conviction for the statutory crime, where the common law and statutory crimes are substantially the same.

Same — sufficiency.

2. An indictment for perjury is sufficient which sets forth the substance of the controversy in which the crime was committed, in what court the oath alleged to be false

Note. — Sufficiency of common-law indictment for perjury to support conviction for a similar statutory offense.

Since all that an indictment for perjury is required to do is to describe the offense with such reasonable certainty as to appraise the accused of the offense for which he is sought to be punished, and to state everything necessary to constitute the offense with certainty, it would seem that where the statute is merely declaratory of the common-law crime, and substantially the same, there would, as is stated in *STATE v. EAID*, be no reason why a common-law indictment for perjury would not support a conviction for the corresponding statutory offense. On the other hand, if the statute uses technical words to describe the offense, or if the statutory differs from the common-law crime, the common-law indictment might not be sufficient. It certainly would not where the crimes differed in essential elements, and where technical words are used in the statute it might be necessary to follow strictly the statute in order to fully and certainly describe the statutory

was taken, and that such court had authority to administer the oath, with proper allegations of the falsity of the matter on which the perjury is assigned.

Same — duplicity — election.

3. The state need not be required to elect on which charge it will rely under an indictment for perjury charging false testimony that accused did not know of the execution of a contract, and that a named person claimed to be the owner of a specified piece of machinery.

Evidence — perjury — interest of witnesses.

4. One on trial for perjury alleged to have been committed in a civil action, the parties to which are witnesses against him, may show the status of such action for the purpose of showing that such parties would profit by his conviction, because the action is still pending and his conviction would render him incompetent to testify in it.

(October 19, 1909.)

APPEAL by defendant from a judgment of the Superior Court for Thurston County convicting him of perjury. Reversed.

The facts are stated in the opinion.

Mr. J. A. Hoshor, for appellant:

As the statute has changed the common-law definition of perjury, it must be followed strictly in pleading.

2 Bishop, New Crim. Proc. 4th ed. § 925(2); State v. Smith, 3 Wash. 14, 27 Pac. 1028; State v. Morse, 1 G. Greene, 503; State v. Guse, 21 Wash. 269, 57 Pac. 831.

The court erred in denying defendant's motion to have the two charges in the indictment separated.

Wharton, Crim. Pl. & Pr. 4th ed. § 243; Bishop, New Crim. Proc. § 442(4); People v. Cooper, 53 Cal. 647; State v. Bliss, 27 Wash. 464, 68 Pac. 87; State v. Snider, 32 Wash. 299, 73 Pac. 355.

The interest and feeling of a witness are always material elements to be considered by the jury in weighing his testimony, and the same may be shown by cross-examination or by other evidence.

offense, especially if other terms could not be substituted for the technical terms which would exactly express their meaning.

The rule that a common-law indictment for perjury will not support a conviction for the statutory offense where technical terms are used in the statute is well illustrated by the case of Allen v. State, 42 Tex. 12, where it is held that an indictment for perjury sufficient at common law was not good under the Texas Code, under which the statement upon which the perjury was assigned must be averred as having been "deliberately and wilfully" made.

And that a common-law indictment is not 33 L.R.A. (N.S.)

30 Am. & Eng. Enc. Law, p. 1088; People v. Gregory, 120 Cal. 16, 52 Pac. 41; Beck v. Hood, 185 Pa. 32, 39 Atl. 842; Dillon v. Folsom, 5 Wash. 439, 32 Pac. 216; Stowe v. La Conner Trading & Transp. Co. 39 Wash. 28, 80 Pac. 856, 81 Pac. 97; State v. Griffin, 43 Wash. 591, 86 Pac. 951, 11 A. & E. Ann. Cas. 95.

The allegations in the indictment are not sufficiently direct, positive, and certain as to the crime charged, and do not specify with sufficient particularity the acts and circumstances necessary to constitute the crime of perjury.

Leonard v. Territory, 2 Wash. Terr. 381, 7 Pac. 872.

Mr. John M. Wilson for respondent.

Rudkin, Ch. J., delivered the opinion of the court:

The appellant was convicted of the crime of perjury, and the present appeal is prosecuted from the final judgment and sentence of the court. A demurrer interposed to the indictment was overruled, and upon this ruling the first error is assigned.

The charging part of the indictment, so far as material to the present inquiry, is in these words: ". . . And whether or not the said C. T. Eaid was aware of and knew on the 21st day of October, 1907, and subsequently thereto knew, that one E. T. Young was the owner, or claimed to be the owner, of a certain donkey engine mentioned and set forth and described in the said contract, and the said witness, C. T. Eaid, did then and there upon his oath taken as aforesaid in the said cause, feloniously, wilfully, falsely, and corruptly and knowingly, and contrary to such oath, depose and swear, among other things, in substance, to the effect following, that is to say, that he, the said witness, C. T. Eaid, did not know of the prior execution of the said contract on or about October 21, 1907, and did not know that the said E. T. Young was the owner, or claimed to be the owner, of the said donkey logging engine, together with float and appurtenances, set forth in the said instrument in writing, to wit, the said contract

sufficient where the common law and statutory crimes are not substantially the same is shown by Wile v. State, 60 Miss. 260, wherein it was held that the statutory provision that when any act is criminal, both by statute and at common law, it may be set out in an indictment in either the statutory or the common-law form, does not apply where the act charged as perjury is a misdemeanor at common law, and a felony by statute, it being further held that in such case the indictment must aver the statutory crime by charging that the act was done feloniously. See also State v. Morse, 1 G. Greene, 503. G. J. C.

hereinabove set forth on or about October 21, 1907, whereas in truth and fact the said witness, C. T. Eaid, did know of the prior execution of the said instrument and contract in writing on or about October 21, 1907, and was present at the time and place when the said instrument in writing and contract was signed and executed, and did actively participate and take part in the preparation and execution thereof, and did know at the said time of the execution of the said contract, to wit, on the 21st day of October, 1907, that the said E. T. Young was the owner, and claimed to be the owner, of the donkey logging engine, with float and appurtenances, as set forth and described in the said instrument in writing, and that the said witness, C. T. Eaid, feloniously, wilfully, falsely, and corruptly and knowingly, contrary to the said oath as aforesaid, in the manner and form as aforesaid, did then and there commit the crime of perjury, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the state of Washington." The particular objection urged in support of the demurrer is that the indictment fails to charge that the appellant stated as true the facts or matters upon which the perjury was assigned. Section 7185, Ballinger's Anno. Codes & Statutes (Pierce's Code, § 1695), defines the crime of perjury as follows: "Every person who, having taken an oath that he will testify, declare, depose, or certify truly before any competent tribunal, officer, or person in any of the cases in which such an oath may by law be administered, wilfully and contrary to such oath, states as true any material matter which he knows to be false, is guilty of perjury." The requisites of an indictment or information for perjury are thus stated: "In an indictment or information for perjury, or subornation of perjury, it is sufficient to set forth the substance of the controversy or matter in respect to which the crime was committed, and in what court or before whom the oath alleged to be false was taken, and that the court or person before whom it was taken had authority to administer it, with proper allegations of the falsity of the matter on which the perjury is assigned; but the indictment or information need not set forth the pleadings, record, or proceedings with which the oath is connected, nor the commission or authority of the court or person before whom the perjury was committed." Ballinger's Anno. Codes & Statutes § 6857 (Pierce's Code, § 2110). Other sections of the Code bearing on the question under consideration are the following: Section 6849 (§ 2102): "Words used in a statute to define a crime need not be strictly pursued in

the indictment or information, but other words conveying the same meaning may be used." Section 6850 (§ 2103): "The indictment or information is sufficient if it can be understood therefrom. . . . (6) that the act or omission charged as the crime is clearly and distinctly set forth in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended; (7) [that] the act or omission charged as the crime is stated with such a degree of certainty as to enable the court to pronounce judgment upon a conviction, according to the right of the case." Section 6851 (§ 2104): "No indictment or information is insufficient, nor can the trial, judgment, or other proceedings thereon be affected, by reason of any of the following matters, which were formerly deemed defects or imperfections: . . . (4) For any surplusage or repugnant allegation, or for any repetition, when there is sufficient matter alleged to indicate clearly the offense and the person charged; nor (5) for any other matter which was formerly deemed a defect or imperfection, but which does not tend to the prejudice of the substantial rights of the defendant upon the merits." Our statutory definition of perjury does not differ materially from the definitions found in Hawkins, Bacon, Blackstone, and other common-law writers. Blackstone defines it as "a crime committed when a lawful oath is administered in some judicial proceeding, to a person who swears wilfully, absolutely, and falsely in a matter material to the issue or point in question." 4 Cooley's Bl. Com. 137. See also 1 Hawk. P. C. chap. 69, § 1; Bacon, Abr. title "Perjury."

There is, perhaps, this difference between perjury as defined by § 7185, Ballinger's Anno. Codes & Statutes, and perjury at common law. Under the statute the testimony itself must be false, while the common law punished the taking of a false oath, and a person was guilty of perjury if he swore to a fact of which he knew nothing, whether it be true or false. Section 7191, Ballinger's Anno. Codes & Statutes (Pierce's Code, § 1701), provides that "an unqualified statement of that which one does not know to be true is equivalent to a statement of that which one knows to be false," and, when the two sections are construed together, the common law and statutory crimes are substantially, if not identically, the same. If so, we see no reason why a common-law indictment should not be good under the statute, and the indictment under consideration follows the approved common-law forms. See 2 Archbold, Crim. Pr. & Pl. 1738; Bishop, Directions &

Forms, §§ 871 et seq., and authorities cited. Furthermore, the act or omission charged as a crime is clearly and distinctly set forth in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended. The indictment sets forth the substance of the controversy in which the crime was committed, in what court the oath alleged to be false was taken, that the court before which the oath was taken had authority to administer it, with proper allegations of the falsity of the matter on which the perjury is assigned. This in our opinion satisfies all the requirements of the law. A doubt as to the sufficiency of an information charging the crime of perjury in almost the identical language of this indictment was suggested in *State v. Guse*, 21 Wash. 269, 57 Pac. 831, but the point was not decided, and further consideration convinces us that the doubt was not well grounded.

The indictment charged that the appellant testified that he did not know "of the prior execution of the said contract on or about October 21, 1907, and did not know that the said E. T. Young was the owner, or claimed to be the owner, of said donkey engine." At the commencement of the trial, the appellant moved the court to require the prosecution to elect upon which charge it would rely, but the motion was overruled, and, upon this ruling, the second error is assigned. "An indictment for perjury may embrace in a single count all the particulars in which defendant is alleged to have sworn falsely; but each fact sworn to should be stated in definite and separate assignments, and each traversed, so that, if either assignment is proved, the indictment may be sustained. If one assignment of perjury is sufficient, an improper assignment in connection with it will not vitiate the indictment. The fact that an indictment states two distinct false statements under oath does not render the indictment bad, if the statements were both given under one oath and in one proceeding." 30 Cyc. Law & Proc. p. 1439. There was no error in the ruling complained of.

The appellant at the trial offered to prove the status of the civil action in which the false testimony is alleged to have been given, but an objection interposed by the state was sustained. This ruling was erroneous and prejudicial. The defendants in the civil action were the principal witnesses against the appellant on the trial of the criminal prosecution. If the judgment appealed from is affirmed, the appellant is rendered incompetent to testify in the civil action or any other case, unless he shall receive a pardon. *Ballinger's Anno. Codes & 33 L.R.A. (N.S.)*

Statutes, § 5992 (*Pierce's Code*, § 938). The defendants in the civil action would profit by the conviction of the appellant to that extent, and it was clearly competent to show that fact, and to have the jury properly instructed as to the effect of the conviction. In practice a prosecution for perjury is frequently continued until the proceeding in which the perjury is alleged to have been committed is ended. 30 Cyc. Law & Proc. p. 1324. But, if not continued, and the parties to the pending civil action are witnesses against the accused on the trial of the criminal action, the accused has an unquestionable right to show that they will profit by his conviction. For some reason the civil cause had not been decided at the time of the trial of the present action,—perhaps because of the death of the presiding judge,—and the appellant was permitted to show that fact; but he had a right to go further, and show that the civil action was still pending and for trial.

Reversed and remanded.

Gose, Morris, Chadwick, and Fullerton, JJ., concur.

ARKANSAS SUPREME COURT.

THOMAS C. McRAE, Admr., etc., of Dozier
L. Boswell, Deceased, Appt.,
v.

L. M. WARMACK.

(— Ark. —, 135 S. W. 807.)

Life insurance — assignment to one paying premium — wager.

1. An agreement by which an uncle undertakes to pay the premiums on policies of insurance to be taken out by his nephew in his own name, and assigned to the uncle with the privilege of redeeming one of them,

Note. — Validity of assignment of interest in life insurance policy to one paying premiums.

This question is discussed in the note to *Metropolitan L. Ins. Co. v. Ellison*, 3 L.R.A. (N.S.) 935, in which the earlier cases will be found collected. Since the preparation of that note it was held in *Bendet v. Ellis*, 120 Tenn. 277, 18 L.R.A. (N.S.) 114, 127 Am. St. Rep. 1000, 111 S. W. 795, that a contract whereby one of the parties thereto was to procure insurance on his life, and assign the same to the other parties, who had no insurable interest in the first party's life, and the assignees were to pay the premiums upon the policies, was invalid so far as it provided for an interest in the insurance in the assignees.

And even where the assured obtained a policy of insurance upon his life in good faith, and years after assigned the same to

but the uncle to have one policy absolutely, and in case the nephew does not pay the premiums to have the proceeds of both upon the nephew's death, is void, and the uncle cannot compel the nephew's administrator to account for the proceeds of the policy after he has collected them.

Same — insurable interest — uncle and nephew.

2. An uncle has not, merely because of his relationship, an insurable interest in the life of his nephew.

Same — setting aside assignment — recovery of premiums.

3. One who has paid the premiums of an insurance policy upon another's life, under an agreement for an assignment of the policy, may, in case the assignment is annulled as contrary to public policy, recover the premiums paid.

(February 27, 1911.)

APP^{EAL} by defendant from a judgment of the Circuit Court for Nevada County in plaintiff's favor in an action brought to recover the proceeds of a life insurance policy which had been collected by the administrator of the assured. Reversed.

The facts are stated in the opinion.

Messrs. Thomas C. McRae, W. V. Tompkins, and D. L. McRae, for appellant:

A policy issued to a beneficiary who has no insurable interest in the life of the assured is a wagering policy and void.

Joyce, Ins. § 149; Ruse v. Mutual Ben. L. Ins. Co. 23 N. Y. 516; Metropolitan L. Ins. Co. v. Elison, 3 L.R.A.(N.S.) 934 & note, 72 Kan. 199, 115 Am. St. Rep. 189, 83 Pac. 410, 7 A. & E. Ann. Cas. 909; Deal v. Hainley, 135 Mo. App. 507, 116 S. W. 1; 25 Cyc. Law & Proc. p. 705; Steinback v. Diepenbrock, 153 N. Y. 24, 44 L.R.A. 417, 70 Am. St. Rep. 424, 52 N. E. 662; Bromley v. Washington L. Ins. Co. 122 Ky.

402, 5 L.R.A.(N.S.) 747, 121 Am. St. Rep. 467, 92 S. W. 17, 12 A. & E. Ann. Cas. 685; Tate v. Commercial Bldg. Asso. 97 Va. 74, 45 L.R.A. 245, 75 Am. St. Rep. 770, 33 S. E. 382; Warnock v. Davis, 104 U. S. 779, 26 L. ed. 924; Matlock v. Bledsoe, 77 Ark. 60, 90 S. W. 848; Griffin v. Equitable Assur. Soc. 119 Ky. 856, 84 S. W. 1164; Ruth v. Katterman, 112 Pa. 251, 3 Atl. 833; Bendet v. Ellis, 120 Tenn. 277, 18 L.R.A.(N.S.) 114, 127 Am. St. Rep. 1000, 111 S. W. 795; Gordon v. Ware Nat. Bank, 67 L.R.A. 550, 65 C. C. A. 580, 132 Fed. 444; Rylander v. Allen, 125 Ga. 206, 6 L.R.A.(N.S.) 128, 53 S. E. 1032, 5 A. & E. Ann. Cas. 355; Bromley v. Washington L. Ins. Co. 122 Ky. 402, 5 L.R.A.(N.S.) 747, 121 Am. St. Rep. 467, 92 S. W. 17, 12 A. & E. Ann. Cas. 685; Matlock v. Bledsoe, 77 Ark. 60, 90 S. W. 848; Martin v. Hodge, 47 Ark. 378, 58 Am. Rep. 763, 1 S. W. 694.

Messrs. Hamby & Haynie, for appellee:

The fact that the assignee had no insurable interest in the life insured is neither conclusive nor prima facie evidence that the transaction was illegal.

Bursinger v. Bank of Watertown, 67 Wis. 75, 58 Am. Rep. 848, 30 N. W. 290; Mutual L. Ins. v. Allen, 138 Mass. 24, 52 Am. Rep. 245; Clark v. Allen, 11 R. I. 439, 23 Am. Rep. 496; Connecticut Mut. L. Ins. Co. v. Schaefer, 94 U. S. 457, 24 L. ed. 251; Heinlein v. Imperial L. Ins. Co. 25 L.R.A. 630 and note, 101 Mich. 250, 45 Am. St. Rep. 409, 59 N. W. 615; Brooks v. Martin, 2 Wall. 70, 17 L. ed. 732; Re T. H. Bunch Co. 180 Fed. 519.

Frauenthal, J., delivered the opinion of the court:

This was an action instituted by L. M. Warmack, the plaintiff below, to recover the proceeds of the collection of an insurance policy issued on the life of Dozier

out without an insurable interest in his life, in consideration of the latter paying the premiums, it was held in Russell v. Grigsby, — L.R.A.(N.S.) —, 94 C. C. A. 61, 168 Fed. 577, and Evans v. Moore, 28 Ohio C. C. 1, that such an assignment was invalid, except to the extent of the money actually disbursed in the matter by the assignee.

So, in Smith v. Agnew, 137 Ky. 83, 122 S. W. 231, it was declared that the assignment of a policy of insurance, with an agreement that the assignee should pay the premiums, and out of the proceeds retain the amount so paid and one half or any other part of the surplus, was void "as a wagering and speculative contract of insurance."

In Sullivan v. Maloney, 76 N. J. Eq. 104, 73 Atl. 842, Vice Chancellor Garrison said that he found it unnecessary to consider or decide the validity of an assignment of an

insurance policy to one not having an insurable interest in the life of the insured, with an agreement that the assignee pay the premiums, "because of my opinion with respect to the other point involved, which is dispositive of the case."

In Waters v. Kopp, 34 App. D. C. 575, the court upheld the assignment by a father to his daughter of a policy of insurance, upon her agreement to pay the premiums, no question, of course, being raised as to the assignee's insurable interest in the life of the assured.

In Woods v. Riner, — Ky. —, 19 L.R.A.(N.S.) 233, 113 S. W. 79, it was held that a policy taken out by a son on the life of his mother was not invalidated, so far as the rights of the son were concerned, by a contract with a cousin to pay a portion of the premiums and share in the proceeds of the policy.

J. A. C.

L. Boswell, by reason of an alleged assignment thereof by said Boswell to him. Upon the death of said Boswell, the company issuing the policy agreed to make payment thereof, but, the administrator of said Boswell and the plaintiff both claiming to be entitled to the payment, the company threatened to institute an action of interpleader, whereupon the parties agreed that payment of the policy might be made by it to the administrator without affecting any right that plaintiff might have thereto. The plaintiff then presented to the administrator his duly verified claim against the estate for \$2,500, the amount of said policy, and instituted this suit for the recovery thereof against said administrator. The sole defenses made by the administrator against a recovery by plaintiff were (1) that the assignment of the policy by Boswell to plaintiff was invalid because it was in the nature of a wagering contract; and (2) that plaintiff had surrendered to Boswell prior to his death the policy and all his interest therein. Upon the trial of the case, the court held that the assignment of the policy to plaintiff was not in the nature of a wagering contract, but was valid, and submitted to the jury the sole question as to whether or not plaintiff had surrendered the policy and his interest therein to Boswell prior to his death. The jury answered said question in the negative, and thereupon the court rendered judgment in favor of plaintiff for the full amount of \$2,500.

The testimony relative to the issuance and assignment of the policy is practically undisputed, and presents the following case: In May, 1907, D. L. Boswell and plaintiff entered into a verbal contract whereby it was agreed that said Boswell should apply to the insurance company for two policies of \$2,500 each upon his life, and that plaintiff should pay the two first premiums thereon, and take an assignment of the policies with an understanding that one of the policies should be payable to plaintiff and the other to the estate of Boswell upon his death. In pursuance of the agreement, application for the policies was made, and, upon the receipt thereof, the verbal agreement was reduced to writing, and is as follows:

Bodcaw, Ark., July 2d, 1907.

This writing witnesses that Dozier L. Boswell, who has this day accepted from the State Mutual Life Insurance Company of Rome, Georgia, two policies of insurance Nos. 18,811 and 18,812, of \$2,500 each, on his life for his estate does hereby assign unto Lawrence M. Warmack the above named and numbered policies. It also is 33 L.R.A.(N.S.)

agreed that Lawrence M. Warmack shall pay the first and second premiums on the above named and numbered policies. It is further agreed that Dozier L. Boswell may release from this assignment policy Number 18,811 after two years, by assuming the payments of the annual premiums on both of the above named and numbered policies. It is also agreed that should Dozier L. Boswell fail to pay the third or any subsequent annual premium, policy No. 18,811 reverts back to Lawrence M. Warmack. It is also agreed that should the death of Dozier L. Boswell occur during the first two years after that time, while the policies are being sustained by the insured, then \$2,500 of the insurance, or policy No. 18,811, will be payable to the estate of the insured only.

[Signed] D. L. Boswell.

[Signed] L. M. Warmack.

The policies were, on the receipt thereof, turned over by Boswell to plaintiff under the above written contract, and plaintiff paid the first two premiums on both policies, amounting to \$262. Before the third premiums matured, Boswell died. Shortly before his death, the plaintiff turned over the policies to Boswell, in order, as he claimed, that Boswell might show them to his wife, and they remained in his possession until his death. It appears that plaintiff was the uncle of Boswell, but in no way dependent upon him, and upon the trial of the issue as to whether or not he had surrendered the policies to Boswell, there was some testimony indicating that Boswell was indebted to him, but the testimony as to the nature and extent of that indebtedness was not fully developed. It was only introduced for the purpose of showing whether or not the plaintiff had surrendered the policies, and released all his interest therein when he turned same over to Boswell.

It is urged by counsel for defendant that plaintiff had no insurable interest in the life of Boswell, and that the contract for the assignment of the policies to him was a mere wager by which he was directly interested, not in his life, but in his early death, and on this account such assignment was against public policy and invalid. The principle upon which life insurance is based is that one who has a reasonable expectation of benefits and advantage growing out of the continuance of the life of the assured has such an interest in his life that he may insure the same; but where one is not thus interested in the life of the assured, but by insuring such life is rather interested in his early death, the contract of insurance is a mere wager, and against a sound public policy. Such contracts, it

has been thought, would, if upheld, result in a mere traffic in human life, and would lend a great incentive to one thus disinterested in the life, but interested in the death, of the assured, to shorten that life. It is therefore well settled that the issue of a policy to one who has no insurable interest in the life of the insured, but who pays the premiums for the chance of collecting the policy, is invalid because it is a wagering contract, and against a sound public policy. *Cammack v. Lewis*, 15 Wall. 643, 21 L. ed. 244; *Connecticut Mut. L. Ins. Co. v. Schaefer*, 94 U. S. 457, 24 L. ed. 251; *Warnock v. Davis*, 104 U. S. 775, 26 L. ed. 924; *Gilbert v. Moose*, 104 Pa. 74, 49 Am. Rep. 570; *Corson's Appeal*, 113 Pa. 438, 57 Am. Rep. 479, 6 Atl. 213; *Deal v. Hainley*, 135 Mo. App. 507, 116 S. W. 1; *Bromley v. Washington L. Ins. Co.* 122 Ky. 402, 5 L.R.A.(N.S.) 747, 121 Am. St. Rep. 467, 92 S. W. 17, 12 A. & E. Ann. Cas. 685; *Gordon v. Ware Nat. Bank*, 67 L.R.A. 550, 65 C. C. A. 580, 132 Fed. 444; *Metropolitan L. Ins. Co. v. Elison*, 72 Kan. 199, 3 L.R.A.(N.S.) 934, and note, (72 Kan. 199, 115 Am. St. Rep. 189, 83 Pac. 410, 7 A. & E. Ann. Cas. 909); *Ruse v. Mutual Ben. L. Ins. Co.* 23 N. Y. 516; 1 *Cooley, Briefs on Insurance*, 246. And for the same reason it has been held by the great weight of authority that the assignment of a policy of insurance to one having no insurable interest in the life of the insured, though issued to one having such insurable interest, will be ineffective and invalid if such assignment was made in pursuance of an agreement made at the time of the issuance of the policy. *Connecticut Mut. L. Ins. Co. v. Schaefer*, 94 U. S. 457, 24 L. ed. 251; *Warnock v. Davis*, 104 U. S. 775, 26 L. ed. 924; *Gordon v. Ware Nat. Bank*, 67 L.R.A. 550, 65 C. C. A. 580, 132 Fed. 444. See also cases cited in 1 *Cooley, Briefs on Insurance*, 273. In the case of *Warnock v. Davis*, 104 U. S. 775, 26 L. ed. 924, it is said: "The assignment of a policy to a party not having an insurable interest is as objectionable as the taking out of a policy in his name. . . . If there be any sound reason for holding a policy invalid when taken out by a party who has no interest in the life of the assured, it is difficult to see why that reason is not as cogent and operative against a party taking an assignment of a policy upon the life of a person in which he has no interest. The same ground which invalidates the one should invalidate the other." There are a great many respectable authorities which hold that a policy which is valid at its inception is assignable like any other chose in action, and one should be permitted to dispose of a valid policy of insurance ef-

fect in good faith upon his own life. See cases cited in *Gordon v. Ware Nat. Bank*, 67 L.R.A. 550, 132 Fed. 444, 65 C. C. A. 580, at page 583, and in 1 *Cooley, Briefs on Insurance*, 273. But even by these authorities it has been held that an assignment made in pursuance of an agreement to that effect at the time of the issuance of the policy, to one who has no insurable interest in the insured, and who agrees to pay the premiums, is tainted with a wagering element, and is invalid.

It is not necessary for the purposes of this case to discuss or determine the various relations and circumstances which will be sufficient to constitute an insurable interest in the life of another. It has been uniformly held that the relationship of uncle and nephew is not in itself sufficient to constitute such insurable interest, where there is no reasonable ground of expectation of support to be furnished by the assured to the other. 2 *Joyce, Ins.* § 1069; *Corson's Appeal*, 113 Pa. 438, 57 Am. Rep. 479, 6 Atl. 213; 25 *Cyc. Law & Proc.* p. 705; *Singleton v. St. Louis Mut. Ins. Co.* 66 Mo. 63, 27 Am. Rep. 321; *Metropolitan L. Ins. Co. v. Elison*, 72 Kan. 199, 3 L.R.A.(N.S.) 934, 115 Am. St. Rep. 189, 83 Pac. 410, 7 A. & E. Ann. Cas. 909. It was not claimed by plaintiff that he had any expectation of support being furnished him by Boswell, or that he was in any way dependent on him, nor can such a claim be gathered from the contract under which the assignment was made. The right to the policy, and the validity of the assignment thereof, must be determined by the contract under which it was made. The object and purpose of the assignment, and the consideration therefor, are plainly set forth in this contract. According to that agreement, the assignment was made not in consideration of any debt that Boswell owed to the plaintiff, nor for the purpose of insuring any interest that plaintiff had as a creditor in his life, nor to insure the benefit that he would receive from any support from him. As alleged in the complaint, the sole reason why this assignment was made was that Boswell concluded to have his life insured, but was unable to pay the premiums therefor, and, in order to get the plaintiff to pay the premiums on both policies, he agreed that plaintiff should receive the proceeds of one of the policies upon his death.

It is urged that Boswell effected these policies himself upon his own life, in which he had an insurable interest, and that the policies were therefore valid at their issuance; and, being valid at their inception, it is insisted by counsel for plaintiff that a valid assignment of the policies could be

made to one, although he had no insurable interest in the life of the insured. But, according to this contract, at the very inception of the purpose to apply for the policies, and at and before the issuance thereof, it was agreed that this assignment should be made to plaintiff. The policies, it is true, were issued in the name of and to the assured, who had an insurable interest in his own life, but immediately upon their issuance they were assigned, pursuant to this previous agreement, to the plaintiff, who had no insurable interest in the life of the insured. As has been seen above, such an assignment is as ineffective and invalid as if the policies had been made payable to plaintiff at their execution. Nor do the terms of the agreement providing that one of the policies should go to Boswell's estate, and the other only to plaintiff, in consideration of the payment by plaintiff of the premiums on both policies, make this assignment any the less a wagering contract. *West v. Sanders*, 104 Ga. 727, 31 S. E. 619. As before stated, the theory and validity upon which a contract of life insurance is based is that the person to whom the policy is payable is interested in the continuance of the life of the insured, whether such policy is made payable to him at its issuance or becomes payable to him by assignment thereof. He must be so related to the assured that the continuance of the life of the assured will be an advantage to him. And it is this interest resulting from that benefit or advantage which he would lose by the death of the insured, that he is permitted to insure. Because the estate of the insured would receive the proceeds of one of these policies upon the death of Boswell did not make the plaintiff interested in the continuance of his life; nor did it make such an assignment valid because the assured received some consideration therefor. The plaintiff was no more interested in the continuance of the life of Boswell whether the assignment was made with or without price. His insurable interest in the life of Boswell could only be grounded upon his relation to him, pecuniary or of near kin, none of which he possessed. Without such insurable interest in Boswell's life, the plaintiff, by the above contract, simply agreed to pay the premiums of the policies upon the chance of making a profit upon the money thus invested. That profit would more quickly come to him by the early death of Boswell. By this contract he stood to make \$2,500 upon the payment of two premiums, if Boswell did not outlive him. The contract for the assignment of these policies was in the nature of a mere wager, under the terms of which the plain-

tiff was directly interested in the early death of Boswell, rather than in the continuance of his life. The assignment was therefore contrary to public policy, and was invalid.

But the contract for the assignment of the policies was not designed for the purpose of perpetrating a fraud upon anyone, and its execution did not involve any moral turpitude, and the assignment made in pursuance thereof was not void for any of these reasons. The ground for holding the assignment invalid is that such a transaction is not only in the nature of a gaming contract, but that it is against public policy, because it creates an interest in the early death of the insured on the part of the assignee, who has no corresponding interest in his life. The speculative or gaming feature of the contract of assignment consists in the assignee obtaining the full payment of the policy solely on the advancement of the premiums, and with no further interest therein. If, therefore, this speculative feature of the transaction is eliminated, the reason for declaring such assignment invalid would cease. To the extent that the assured was actually indebted to the assignee, and to the extent that he advanced the premiums on the policies, the assignee had an actual interest therein. Above such sums only was the contract of assignment speculative. It was lawful for the plaintiff to advance the premiums on the policies as they became due to the company, and it was lawful for the assured to assign to plaintiff the policies as security for the payment of those advances and all indebtedness due by him to the plaintiff. By the reimbursement of plaintiff for these sums only, any feature of the contract of assignment which otherwise might be of a wagering nature or against public policy would be eliminated. The plaintiff would thereby receive only the debt that was actually due to him, and would not receive any profit based upon a wager on human life. In the case of *Warnock v. Davis*, supra, the court, in speaking of an assignment of a policy made to one who had no insurable interest in the life of the insured, but who paid the premiums thereon, said: "Although the agreement between the trust association and the assured was invalid as far as it provided for an absolute transfer of nine-tenths of the proceeds of the policy upon the conditions named, it was not of that fraudulent kind with respect to which the courts regard the parties as alike culpable, and refuse to interfere with the results of their action. No fraud or deception upon anyone was designed by the agreement, nor did its execution involve any moral turpi-

tude. It is one which must be treated as creating no legal right to the proceeds of the policy beyond the sums advanced upon its security. . . . The assignment was only invalid as a transfer of the proceeds of the policy beyond what was required to refund those sums." In the case of *First Nat. Bank v. Terry*, 99 Va. 194, 37 S. E. 843, it was held that an assignment of a life policy to a creditor who pays subsequent premiums entitled the assignee to the amount of his debt and the premiums paid, even if the assignment was absolute, and that to limit the recovery of the assignee to these sums would prevent any speculation in insurance on human life. *Helmetag v. Miller*, 76 Ala. 183, 52 Am. Rep. 316; *Culver v. Guyer*, 129 Ala. 602, 29 So. 779; *Beard v. Sharp*, 100 Ky. 606, 38 S. W. 1057; *Cawthon v. Perry*, 76 Tex. 383, 13 S. W. 268; *Tate v. Commercial Bldg. Asso.* 97 Va. 74, 45 L.R.A. 243, 75 Am. St. Rep. 770, 33 S. E. 382.

In the case at bar we think that the above contract for the assignment of the policies was invalid in so far as it made an absolute transfer of the proceeds of the insurance policies, because to that extent it was a wagering contract; but we also think that the plaintiff is entitled to recover the amount which the assured actually owed to him and the premiums which he paid on account of the contract. The court therefore erred in holding that the contract for the assignment of the policy of insurance to plaintiff was valid, and that thereby the plaintiff was entitled to recover the entire proceeds thereof. He is only entitled to recover of the estate the amount which Boswell actually owed to him and the premiums advanced by him.

The judgment is accordingly reversed, and the cause remanded for a new trial.

KANSAS SUPREME COURT.
CENTRAL MERCANTILE COMPANY

v.

OKLAHOMA STATE BANK, Appt.

(83 Kan. 504, 112 Pac. 114.)

Draft — against bill of lading — liability of purchaser.

1. Where the seller of goods ships them
Headnotes by MASON, J.

Note. — As to whether a purchaser of a draft with bill of lading attached assumes the liability of the seller of the goods toward the purchaser, see notes to *Finch v. Gregg*, 49 L.R.A. 679; *Haas v. Citizens' Bank*, 1 L.R.A.(N.S.) 242; *Mason v. Nelson*, 18 L.R.A.(N.S.) 1221; and *Cosmos Cotton Co. v. First Nat. Bank*, 32 L.R.A.(N.S.) 1173.
33 L.R.A.(N.S.)

and makes a draft upon the purchaser, with the bill of lading attached, one who buys the draft and receives payment thereof from the drawee is not liable for the return of any portion of the proceeds on account of any defect in the quality of the goods.

Same — guaranty — description of goods.

2. This rule is not affected by the fact that the draft was bought in reliance upon a written guaranty of its payment, in which the bill of lading was described as covering goods of a designated quality.

Same — garnishment — intervention.

3. Where, under the circumstances stated, the drawee, after paying the draft to a collecting agent, seeks to hold the proceeds by garnishment as the property of the drawer, the owner waives no rights by intervening and asserting his title.

(December 10, 1910.)

APPEAL by defendant from a judgment of the District Court for Reno County, in plaintiff's favor, in a garnishment proceeding to recover, because of defect in quality of the property purchased, the proceeds of a draft which had been drawn against a bill of lading purchased by the defendant bank, and paid to its agent. Reversed.

The facts are stated in the opinion.

Messrs. S. E. Gidney and J. U. Brown for appellant.

Messrs. Prigg & Williams for appellee.

Mason, J., delivered the opinion of the court:

H. A. Paul, of Muskogee, Oklahoma, sent out a circular soliciting business as a shipper of potatoes. The Central Mercantile Company, of Hutchinson, Kansas, receiving a copy, wired Paul, asking him to quote price on a car. In the course of resulting correspondence he reported in effect that he had two cars of choice stock, and asked for a bank guaranty. Thereupon, at the request of the company, the Citizens' Bank of Hutchinson, on June 17, 1908, sent a telegram to the Oklahoma State Bank of Muskogee, reading: "We guarantee draft bill of lading attached, two cars choice potatoes for Central Mercantile Company, H. A. Paul, shipper." Two days later Paul shipped two cars of potatoes to Hutchinson, and drew upon the company for the agreed price, making two drafts, payable to the Oklahoma State Bank, which he delivered to that bank, with the bill of lading attached. The Oklahoma Bank sent the drafts and bill of lading to the Citizens' Bank with directions to collect and remit. The Mercantile Company paid the drafts to the Citizens' Bank, and received the

potatoes. Before the money was remitted, the company sued Paul, principally on account of the quantity of dirt found in the potatoes, and served a garnishment summons on the Citizens' Bank. The bank filed an answer as garnishee, setting out that it still had the proceeds of the drafts, but did not know whether they belonged to Paul or to the Oklahoma Bank. The Oklahoma Bank was made a party and claimed the fund. The plaintiff in a reply maintained that the Oklahoma Bank had acted only as the agent of Paul, and also that its conduct made it a guarantor of the quality of the potatoes. Upon the trial the plaintiff was given judgment for \$308.42, which was ordered paid out of the proceeds of the drafts. The Oklahoma Bank appeals.

Paul testified, in substance, that, in his business of marketing potatoes, not having sufficient capital to make purchases outright himself, he found it necessary for the buyer either to advance him the money, or to furnish him with a bank guaranty by means of which he could procure it, inasmuch as the grower always required payment before shipment; that in the present instance the Oklahoma Bank paid the price of the potatoes to the grower, and received in return the two drafts on the Mercantile Company, with the bill of lading attached; that the bank was the sole owner of the drafts, Paul retaining no interest in them. The testimony of an officer of the Oklahoma Bank was to the same effect. There was no evidence to the contrary. Therefore the transaction must be treated as what it appears to have been on its face. The contention that the bank was acting merely as the agent of Paul, and that the proceeds of the drafts belonged in whole or in part to him, is not substantiated. Consequently the plaintiff's attempt to enforce its claim against Paul by garnishment has failed.

In behalf of the plaintiff the argument is made that the telegram it caused to be sent amounted to a conditional acceptance of the drafts, the condition being that the potatoes covered by the bill of lading should be "choice," that the rights of the Oklahoma Bank are the same as though it were seeking to collect the drafts, that the use of the word "choice" in the telegram prevented it from being an innocent purchaser of them, and that the Mercantile Company can recover against the Oklahoma Bank whatever amount it could have recouped had Paul sued it for the agreed price of the potatoes. Whatever effect the word "choice" might have in an action founded upon the telegram, it can have none here. The Oklahoma Bank is not suing the Citizens' Bank upon its guaranty, or the Mercantile Company upon an acceptance of the

drafts. The drafts have been paid by the Mercantile Company, the drawee, to the Citizens' Bank as agent for the Oklahoma Bank, the payee. No occasion arose to look to the guarantor. The act of the drawee in paying the drafts placed the payee in at least as good a position as though there had been an unqualified acceptance. The situation is the same as though payment had been made to the Oklahoma Bank directly. The proceeds of the drafts have become its property as effectually as though it had their actual possession. The plaintiff cannot hold any part of them unless upon a showing that it had a valid cause of action against the Oklahoma Bank. Unless the Oklahoma Bank was in collusion with Paul (and of that there is no evidence), it conducted an ordinary business transaction in an ordinary way, not being in fault in any respect. We perceive no ground of liability on its part, unless one who purchases and collects a draft with a bill of lading attached is deemed to guarantee the character or quality of the goods shipped. A few cases have so held, but two of the principal ones (*Landa v. Lattin Bros.* 19 Tex. Civ. App. 246, 46 S. W. 48; *Finch v. Gregg*, 126 N. C. 176, 49 L.R.A. 679, 35 S. E. 251), have been recently overruled (*S. Blaisdell, Jr. Co. v. Citizens' Nat. Bank*, 96 Tex. 626, 62 L.R.A. 968, 97 Am. St. Rep. 944, 75 S. W. 202; *Mason v. A. E. Nelson Cotton Co.* 148 N. C. 492, 18 L.R.A. (N.S.) 1221, 128 Am. St. Rep. 635, 62 S. E. 625). The general doctrine to the contrary is well settled. See notes in 49 L.R.A. 679; 1 L.R.A. (N.S.) 242; 18 L.R.A. (N.S.) 1221; 91 Am. St. Rep. 212. In *Hall v. Keller*, 64 Kan. 211, 215, 216, 62 L.R.A. 758, 91 Am. St. Rep. 209, 67 Pac. 518, 519, it was said: "If the banks in whose favor such bills are drawn are made liable for damage on account of the defective quality of the property shipped and covered by the bill of lading, . . . a serious impediment would be placed in the way of shippers who need a part or all of the price of the commodity sold before its arrival in the market to which it is consigned."

In the plaintiff's brief it is suggested that, because the Oklahoma Bank has come into this case and litigated its rights to the money held by the garnishee, its situation is the same as though it were suing the Mercantile Company for the value of the potatoes. We cannot agree to this. The bank is not seeking to collect the drafts, but to hold the proceeds which have already been paid to its agent for its benefit. The statute (Gen. Stat. 1909, § 5834 [Code Civ. Proc. § 241], provides that, where the answer of a garnishee discloses that any

other person than the defendant claims the indebtedness or property in his hands, the court may order the claimant to be made a defendant, and notice to be served upon him. Here the plaintiff made the Oklahoma Bank a defendant by so designating it in an amended petition. If the bank entered an appearance without waiting to be served with summons, its rights were in no way prejudiced thereby.

The judgment is reversed and the cause remanded, with direction to order the money paid to the Oklahoma State Bank.

All the Justices concur.

KANSAS SUPREME COURT.

RE M. G. GARDNER.

(84 Kan. 264, 113 Pac. 1054.)

Carrier — limiting rates — constitutionality.

Chapter 198 of the Laws of 1895, providing that the officers and men of the Kansas National Guard shall, when in the performance of military duty, be transported on all railroads of the state at the rate of 1 cent per mile, denies to the railroad companies the equal protection of the laws guaranteed by the 14th Amendment to the Constitution of the United States.

(March 11, 1911.)

A PPLICATION by petitioner for a writ of habeas corpus to secure his release from the custody of the sheriff of Shawnee County to which he had been committed until payment of the fine and costs after his arrest for refusal to furnish transportation in accordance with the terms of a statute. Petitioner discharged.

The facts are stated in the opinion.

Messrs. R. W. Blair, H. A. Scandrett, and B. W. Scandrett, for petitioner:

There was no authority of law to place

Headnote by BURCH, J.

Note. — *Power to require carriers to transport persons in public service at reduced rates.*

The only case other than RE GARDNER which discusses this question seems to be *Lake Shore & M. S. R. Co. v. Smith*, 173 U. S. 684, 42 L. ed. 858, 19 Sup. Ct. Rep. 565, which is cited in RE GARDNER, and so fully commented on as to make unnecessary further reference thereto.

Upon the general question as to the power to require carriers to give reduced rates to classes of persons, see *Com. v. Interstate Consol. Street R. Co.* 11 L.R.A. (N.S.) 973, and note.
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members of the Kansas National Guard in a class by themselves, and favor them with one-third rates as compared with the rates prescribed by the general law for the public generally.

Tucker v. Missouri P. R. Co. 82 Kan. 225, 108 Pac. 89; *Gulf, C. & S. F. R. Co. v. Ellis*, 185 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; *Ex parte Young*, 209 U. S. 123, 52 L. ed. 714, 13 L.R.A. (N.S.) 932, 28 Sup. Ct. Rep. 441, 14 A. & E. Ann. Cas. 764; *Re Williams*, 79 Kan. 217, 98 Pac. 777; *Lake Shore & M. S. R. Co. v. Smith*, 173 U. S. 684, 42 L. ed. 858, 19 Sup. Ct. Rep. 565; *Atchison, T. & S. F. R. Co. v. Campbell*, 61 Kan. 439, 48 L.R.A. 251, 78 Am. St. Rep. 328, 59 Pac. 1051.

Messrs. John S. Dawson, Attorney General, S. N. Hawks, Charles D. Shukers, John Marshall, and E. R. Simon, for respondent:

The state may require the railroads to transport some persons for less than it transports other persons.

Com. v. Interstate Consol. Street R. Co. 11 L.R.A. (N.S.) 973 & note, 187 Mass. 436, 73 N. E. 530, 2 A. & E. Ann. Cas. 419; affirmed in 207 U. S. 79, 52 L. ed. 111, 28 Sup. Ct. Rep. 26, 12 A. & E. Ann. Cas. 555; *Wilcox v. Consolidated Gas Co.* 212 U. S. 19, 53 L. ed. 382, 29 Sup. Ct. Rep. 192, 15 A. & E. Ann. Cas. 1034; *Heath & M. Mfg. Co. v. Worst*, 207 U. S. 354, 52 L. ed. 243, 28 Sup. Ct. Rep. 114; *Ozan Lumber Co. v. Union County Nat. Bank*, 207 U. S. 256, 52 L. ed. 197, 28 Sup. Ct. Rep. 89.

Burch, J., delivered the opinion of the court:

Chapter 198 of the laws of 1895 provides that, whenever it may be necessary for any or all of the officers or men of the Kansas National Guard or Kansas Reserve Militia to travel upon any railroad of the state under orders from competent authority to perform military duty, the transportation shall be furnished at the rate of 1 cent per mile for the distance traveled by each person. Orders for transportation issued by the adjutant general must be honored in lieu of fare, and then be presented to the military board to be audited and paid at the fixed rate. Wilful refusal on the part of the agent of a railroad company to observe the terms of the act is punishable by fine. In June, 1909, the petitioner, as agent of the Union Pacific Railroad Company at Topeka, refused a requisition duly made for the transportation of Major Arthur Mills, of the Kansas National Guard, at the statutory rate. The petitioner was arrested, convicted, and fined, and ordered committed to the jail of Shawnee county until the fine and costs should be paid. After the

time for an appeal had expired, he instituted this proceeding in habeas corpus to secure his release from custody under a commitment issued upon the judgment. The principal question raised upon the sheriff's return to the writ of habeas corpus is whether the statute denies the railroad company the equal protection of the laws guaranteed by the 14th Amendment to the Constitution of the United States.

In 1883 the legislature fixed 3 cents per mile as the maximum rate for carrying adult passengers, and this rate has not since been changed by law. In 1907 the board of railroad commissioners issued an order fixing the maximum rate at 2 cents per mile. The order is still in force, and at all times material to the controversy was being observed by the railroad companies. These measures were adopted pursuant to the power of the state to regulate rates, and protect the traveling public from unjust exactions, and they reflect the judgment of the constituted authorities as to what is reasonable for the railroads to charge, and for the people to pay. Presumably 2 cents per mile is a reasonable rate for all adult passengers, or it would not have been promulgated, and would not be maintained. Ordinarily, when the rate-making power of the state has been exercised, and a reasonable maximum fare for people generally has been established, it is not then competent for the legislature to compel the railroad companies to make exceptions in favor of certain individuals. The legislature of the state of Michigan amended the general railroad law of that state so that it required the sale of 1,000-mile tickets at a reduced rate, required such tickets to be issued on request to the purchaser, his wife, and children, and made them valid for two years from the date of purchase. The Supreme Court of the United States held this law to be in violation of that portion of the Constitution of the United States which forbids the taking of property without due process of law, and which secures the equal protection of the laws. *Lake Shore & M. S. R. Co. v. Smith*, 173 U. S. 684, 692, 43 L. ed. 858, 862, 19 Sup. Ct. Rep. 565, 568. The views of the court are indicated in the following extracts from the opinion: "The power of the legislature to enact general laws regarding a company and its affairs does not include the power to compel it to make an exception in favor of some particular class in the community, and to carry the members of that class at a less sum than it has the right to charge for those who are not fortunate enough to be members thereof. This is not reasonable regulation. . . . If the general power exist, then the legislature can direct the com-

pany to charge smaller rates for clergymen or doctors, for lawyers or farmers or school teachers, for excursions, for church conventions, political conventions, or for all or any of the various bodies that might desire to ride at any particular time or to any particular place. If the legislature can interfere by directing the sale of tickets at less than the generally established rate, it can compel the company to carry certain persons or classes free. If the maximum rates are too high in the judgment of the legislature, it may lower them, provided they do not make them unreasonably low, as that term is understood in the law; but it cannot enact a law making maximum rates, and then proceed to make exceptions to it in favor of such persons or classes as, in the legislative judgment or caprice, may seem proper." At page 694 of 173 U. S. "The legislature having fixed a maximum rate at what must be presumed, *prima facie*, to be also a reasonable rate, we think the company then has the right to insist that all persons shall be compelled to pay alike, that no discrimination against it in favor of certain classes of married men or families, excursionists, or others, shall be made by the legislature. If otherwise, then the company is compelled at the caprice or whim of the legislature to make such exceptions as it may think proper, and to carry the excepted persons at less than the usual and legal rates, and thus to part in their favor with its property without that compensation to which it is entitled from all others, and therefore to part with its property without due process of law. The affairs of the company are in this way taken out of its own management, not by any general law applicable to all, but by a discrimination made by law to which the company is made subject. Whether an act of this nature shall be passed or not is not a matter of policy to be decided by the legislature. It is a matter of right of the company to carry on and manage its concerns subject to the general law applicable to all, which the legislature may enact in the legal exercise of its power to legislate in regard to persons and things within its jurisdiction." Page 696. "In this case there is not an exercise of the power to fix maximum rates. There is not the exercise of the acknowledged power to legislate so as to prevent extortion or unreasonable or illegal exactions. The fixing of the maximum rate does that. It is a pure, bald, and unmixed power of discrimination in favor of a few of the persons having occasion to travel on the road, and permitting them to do so at a less expense than others, provided they buy a certain number of tickets at one time. It is not legislation for the safety,

health, or proper convenience of the public, but an arbitrary enactment in favor of the persons spoken of, who, in the legislative judgment, should be carried at a less expense than the other members of the community. There is no reasonable ground upon which the legislation can be rested, unless the simple decision of the legislature should be held to constitute such reason." At page 698 of 173 U. S.

This court is not inclined to the view that the power of the legislature is completely exhausted by a maximum rate regulation, and does not so interpret the decision quoted. But members of the National Guard cannot be segregated from the body of the state's citizens, and made a preferred class, unless they sustain some relation to transportation by rail which, in the nature of things, indicates they should have the benefit of an exceptional rate. Classification to be valid must be based upon differences in character, condition, or situation which lead to that difference in regulation which the statute undertakes to make. Thus, in the case involving a reduced rate for school children on street cars (*Com. v. Interstate Consol. Street R. Co.* 187 Mass. 436, 11 L.R.A.(N.S.) 973, 73 N. E. 530, 2 A. & E. Ann. Cas. 419), the considerations which moved the court to sustain the rate were, among others, that pupils go to and from the public schools at hours when other persons make little use of the cars; that they are of such a size and age that they occupy much smaller spaces than other passengers; and that the difference in rate was of so much importance to parents that twice as many pupils would ride at half rate as at full rate, so that the revenues of the carrier would not be materially reduced. This court neither approves nor disapproves the conclusion reached in that case, but the method employed for testing the classification upon which the rate was based is sound. In accordance with the principle recognized, the legislature might no doubt require that precedence be given to the transportation of troops over other traffic, that special facilities for the movement of troops be supplied, that special schedules be adopted, and that other exceptional services be rendered whenever the public interest demands them. But the law in question has no such basis for the discrimination which it makes. Major Mills stood upon precisely the same footing, so far as the expected service to him was concerned, as any other individual. The times when members of the National Guard will travel are as uncertain as for other people. The number who will travel at any particular time is wholly indefinite. They come to the railroad stations singly, in groups, or

in larger bodies, just as other citizens come singly, in groups, or in crowds sufficient to load the cars of one or more trains. They occupy the same space, and have the same privileges, as other persons. Their movements are controlled by duty, and not by special inducements, and the matter of rate can have no effect upon the volume of traffic. They are taken up, carried, and set down without any mark or circumstance whatever to distinguish them from the general public, or to distinguish the subject of their transportation from that of the general public, except that they carry orders for transportation without payment of fare and at reduced rates. Without any ground, therefore, for the classification, and without any regard to the reasonableness or unreasonableness of the regulation, the state simply demands that its troops be transported by rail at a purely arbitrary rate, which, so far as the principle involved is concerned, might be 1 cent per hundred miles, or nothing at all. No other corporation or individual in the state is obliged to conduct business upon any such partial and unequal conditions, or to make any such sacrifice for the support of the National Guard or any other public institution or purpose. Therefore the act denies the railroads the equal protection of the laws.

So far, the act in question has been regarded as one relating in some way to the subject of railroad regulation. That is not its true character. It is a revenue measure which seeks to protect the treasury and keep down the rate of taxation upon the general property of the state, by levying a special assessment upon railroad companies for the maintenance of the military department of the government. Viewed from this standpoint, the statute selects railroad companies from among other common carriers, corporations, and property owners of the state. places them in a class by themselves, and imposes upon them a specific burden, supposedly for the public welfare. In many instances this may be done, but it cannot be done where the exaction is made to defray an expense having no more relation to the business of railroading than it has to any other business enterprise conducted within the state. This limitation was clearly stated by Justice Field in the case of *Charlotte, C. & A. R. Co. v. Gibbs*, 142 U. S. 386, 391, 35 L. ed. 1051, 1053, 12 Sup. Ct. Rep. 255, 256. The state of South Carolina created a board of railroad commissioners charged with a variety of duties respecting the conduct of railroad affairs, and assessed the expenses and salaries of the members of the board to the railroad companies. The court held that the existence and presence of the railroad com-

panies and their property in the state, and the exercise of the privileges and franchises which they enjoyed, created the necessity for the supervisory board, that the services of the board were rendered for the benefit of the railroads as well as for the public, and, consequently, that the cost of the service might lawfully be imposed upon the railroads. But the opinion reads: "If the tax were levied to pay for services in no way connected with the railroads, as, for instance, to pay the salary of the executive or judicial officers of the state, whilst railroad corporations were at the same time subjected to taxation upon their property equally with other corporations for such expenses, and other corporations were not taxed for the salaries mentioned, there would be just ground of complaint of unlawful discrimination against the railroad corporations, and of their not receiving the equal protection of the laws."

The principle involved has been applied in many cases. A railroad company may be required to build fences and cattle guards (*Missouri P. R. Co. v. Humes*, 115 U. S. 512, 29 L. ed. 463, 6 Sup. Ct. Rep. 110); to erect gates, plank crossings, and maintain flagmen (*Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581); and to bear the whole cost of making changes of grade at crossings (*New York & N. E. R. Co. v. Bristol*, 151 U. S. 556, 38 L. ed. 269, 14 Sup. Ct. Rep. 437), because the expenditure is necessary for the protection of persons and property otherwise endangered by the operation of the road, and because the company itself is specially benefited by the greater security which it obtains for the prosecution of its business. Examinations of railway employees may be required, and the fees therefor be charged to the railway companies. (*Nashville, C. & St. L. R. Co. v. Alabama*, 128 U. S. 96, 32 L. ed. 352, 2 Inters. Com. Rep. 238, 9 Sup. Ct. Rep. 28. Fees for quarantine inspection are regarded as compensation for services rendered to the vessel. *Morgan's L. & T. R. & S. S. Co. v. Board of Health*, 118 U. S. 455, 30 L. ed. 237, 6 Sup. Ct. Rep. 1114. Fees charged for the inspection of mines may be charged to the owner. *Consolidated Coal Co. v. Illinois*, 185 U. S. 203, 46 L. ed. 872, 22 Sup. Ct. Rep. 616. The salaries and expenses of a board of commissioners of electrical subways may be charged to the companies whose business renders the creation of the board a necessity, and for whom, as well as the public, the services of the board are performed. *New York ex rel. New York Electric Lines v. Squire*, 145 U. S. 175, 36 L. ed. 666, 12 Sup. Ct. Rep. 880. In all such cases, and many 33 L.R.A. (N.S.)

more might be cited, there is no denial of the equal protection of the laws. It can scarcely be claimed, however, that the National Guard is maintained because of anything occasioned by the existence or operation of railroads in the state, or that the railroads derive any benefit from the existence of the National Guard which is not shared by every other person in the state. The presence in the state of this body of men is beneficial to the railroads just as the government of the state, the various municipal governments, the courts, and the whole body of public functionaries, are beneficial to them, and no other way; and the equal protection of the laws requires not only that all persons brought within the influence of a statute shall be treated alike, but that a classifying statute must bring within the equal influence of its provisions all persons who are under the same conditions.

An effort is made to justify the statute as an exercise of the military power of the state to preserve peace, to suppress riots and insurrections, and to repel invasion. These are ends which every sovereignty must have the power to attain, and every citizen holds his property upon the implied condition that it must be surrendered when needed for the preservation of the government. Fields and farms may be traversed and occupied, subsistence, stores, and other movables may be appropriated, and transportation lines may be seized and operated, under the stress of due occasion, just as city blocks may be demolished to arrest the progress of a fire. Doubtless, in cases where neither the power of taxation nor the credit of the government would avail, a forced loan could be effected by the seizure of money itself. The power exercised in such cases is lawful, although not derived from Constitutions or statutes. It rests upon the principle that every sovereignty may in time of peril adopt such extreme measures as may be necessary for its existence and perpetuity. But it is limited to emergencies which cannot wait upon due process of law. The law governing military impressment of private property was well stated by Chief Justice Taney in the case of *Mitchell v. Harmony*, 13 How. 115, 14 L. ed. 75, as follows: "There are, without doubt, occasions in which private property may lawfully be taken possession of or destroyed to prevent it from falling into the hands of the public enemy; and also where a military officer charged with a particular duty may impress private property into the public service or take it for public use. Unquestionably, in such cases, the government is bound to make full compensation to the

owner; but the officer is not a trespasser. But we are clearly of the opinion that in all of these cases the danger must be immediate and impending, or the necessity urgent for the public service, such as will not admit of delay, and where the action of the civil authority would be too late in providing the means which the occasion calls for. It is impossible to define the particular circumstance of danger or necessity in which this power may be lawfully exercised. Every case must depend on its own circumstances. It is the emergency that gives the right, and the emergency must be shown to exist before the taking can be justified. In deciding upon this necessity, however, the state of the facts, as they appeared to the officer at the time he acted, must govern the decision; for he must necessarily act upon the information of others as well as his own observation. And, if, with such information as he had a right to rely upon, there is reasonable ground for believing that the peril is immediate and menacing, or the necessity urgent, he is justified in acting upon it; and the discovery afterwards that it was false or erroneous will not make him a trespasser. But it is not sufficient to show that he exercised an honest judgment, and took the property to promote the public service. He must show by proof the nature and character of the emergency, such as he had reasonable grounds to believe it to be, and it is then for a jury to say whether it was so pressing as not to admit of delay, and the occasion such, according to the information upon which he acted, that private rights must for the time give way to the common and public good. . . . The case mentioned by Lord Mansfield in delivering his opinion in *Mostyn v. Fabrigas*, Cowp. pt. 1, p. 180, illustrates the principle of which we are speaking. Captain Gambier, of the British navy, by the order of Admiral Boscawen, pulled down the houses of some sutlers on the coast of Nova Scotia, who were supplying the sailors with spirituous liquors; the health of the sailors being injured by frequenting them. The motive was evidently a laudable one, and the act done for the public service. Yet it was an invasion of the rights of private property, and without the authority of law, and the officer who executed the order was held liable to an action, and the sutlers recovered damages against him to the value of the property destroyed. This case shows how carefully the rights of private property are guarded by the laws of England; and they are certainly not less valued, nor less securely guarded, under the Constitution and laws of the United States." At page 134 of 13 How.

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When, however, the government is in no extremity in fact which requires the suspension, in whole or in part, of the civil laws, contributions to its support cannot be levied upon private persons or corporations, except pursuant to laws which prescribe the occasions, modes, conditions, and agencies for the appropriation, and which bear equally upon all those who are similarly situated.

The petitioner is discharged.

All the Justices concur.

KENTUCKY COURT OF APPEALS.

J. R. WATKINS MEDICAL COMPANY,
Appt.,
v.

A. L. BRAND et al.

(143 Ky. 468, 136 S. W. 867.)

Guaranty — employee's faithfulness — notice of acceptance — necessity.

Notification of acceptance of the guaranty is not necessary to bind persons who sign an agreement to be responsible for the faithful performance of his contract by one about to be reappointed as salesman for the obligee for another year, since the guaranty is absolute, and not conditional, and it is immaterial that the contract has not been signed by either employer or employee when the sureties put their names to the guaranty which is attached to it.

(May 4, 1911.)

Note. — Necessity of notice of acceptance to bind guarantor.

As is stated in the note to *William Deering & Co. v. Mortell*, 16 L.R.A. (N.S.) 352, of which this note is a continuation, notice to the guarantor is usually held necessary in case of offers of guaranty, as distinguished from contracts of guaranty, in which case notice is generally not required.

That notice of acceptance of guaranty is not necessary where the contract is absolute and unqualified, but that such a guaranty becomes effective as soon as acted upon by the guarantee, see *Acorn Brass Mfg. Co. v. Gilmore*, 142 Ill. App. 567 (guaranty of indebtedness for chattels to be sold); *People's Bank v. Stewart*, 152 Mo. App. 314, 133 S. W. 70 (written order to bank to "cash checks for R. & Company till next week. Will see it paid"—is absolute guaranty as to amount R. & Company were allowed upon the strength of the guaranty to overdraw); and *Bond v. John V. Farwell Co.* 96 C. C. A. 546, 172 Fed. 58 (writing executed to obtain credit, guaranteeing payment in full for all merchandise sold to a certain firm, not to exceed a specified amount, and to continue till notice of dis-

APPEAL by plaintiff from a judgment of the Circuit Court for Graves County in defendants' favor in an action on a guaranty bond for the faithfulness of plaintiff's salesman. Reversed.

The facts are stated in the opinion.

Messrs. R. N. Stanfield and Tawney, Smith, & Tawney for appellant.

Mr. B. C. Seay, with Messrs. Robbins & Thomas, for appellees:

The contract of guaranty was condition-

continuance,—is absolute guaranty, binding on delivery of goods in reliance thereon).

So, where the terms of a proposed guaranty contemplate acceptance by the delivery of merchandise on credit to a third person, the offer can be accepted by the furnishing of merchandise pursuant to the terms of the guaranty, the contract becomes complete when credit is actually so furnished, and no notice of acceptance is necessary where not called for by the offer. *Sheffield v. Whitfield*, 6 Ga. App. 762, 65 S. E. 807; *Sheppard v. Daniel Miller Co.* 7 Ga. App. 760, 68 S. E. 451.

And where the guaranty acknowledges the receipt of a valuable consideration, the mutual assent is considered proved, and the delivery of the guaranty completes the contract, rendering notice of acceptance unnecessary. *Emerson Mfg. Co. v. Rustad*, — N. D. —, 120 N. W. 1094; *Bank of California v. Union Pkg. Co.* 60 Wash. 456, 111 Pac. 573.

And where prior arrangements are made whereby a bank is to extend credit to a third party on the guarantor's order, and such third party is permitted to overdraw on such orders, notice of acceptance of such orders is not necessary in order to bind the guarantor, as he completed the contract by delivering the order. *People's Bank v. Stewart*, 152 Mo. App. 314, 133 S. W. 17.

And no notice of acceptance of a guaranty is required where the guaranty was made pursuant to a request therefor by the guarantee. *J. L. Mott Iron Works v. Clark*, — S. C. —, 69 S. E. 227 (goods shipped to corporation on corporation officer's personal guaranty); *Tilt-Kenney Shoe Co. v. Hagarty*, 43 Tex. Civ. App. 335, 114 S. W. 386 (goods shipped to buyer on faith of third person's guaranty); *Hili Mercantile Co. v. Rotan Grocery Co.* — Tex. Civ. App. —, 127 S. W. 1080 (goods shipped to corporation on guaranty of officer); *Fraser v. Douglas*, 16 Manitoba L. Rep. 484 (goods shipped on furnishing of guaranty, as requested). But that such a guaranty merely amounts to an offer where approval is expressly stated as being necessary, see *Detroit Free Press v. Pattengill*, infra.

And where the making of a contract of sale and an absolute contract of guaranty incorporated in it are contemporaneous, and the sale and extension of credit in reliance on the guaranty are treated as one connected transaction, further notice of acceptance of the guaranty is not necessary, as it would be a vain act. *Cumberland* 33 L.R.A. (N.S.)

al, and by its very terms guaranteed the performance of certain stipulations and undertakings of the said R. L. High, and hence, notice of its acceptance is required.

Greer Mach. Co. v. Sears, 119 Ky. 697, 66 S. W. 521; 14 Am. & Eng. Enc. Law, 2d ed. p. 1146; *Steadman v. Guthrie*, 4 Met. (Ky.) 147; *Goff v. Janeway & Carpenter*, 26 Ky. L. Rep. 525, 82 S. W. 267; *Gano v. Farmers' Bank*, 103 Ky. 514, 82 Am. St. Rep. 596, 45 S. W. 519; *Kincheloe*

Glass Mfg. Co. v. Wheaton, — Mass. —, 94 N. E. 803. But although the guaranty of the payment for goods sold was contemporaneous with the making of the contract of sale by the purchaser and the seller's agent, if the contract requires the approval of the seller for whom the agent was acting, notice of acceptance is necessary to bind the guarantor. *J. S. Rowell Mfg. Co. v. Isaacs*, 144 Mo. App. 58, 128 S. W. 760.

There is an exception, however, to the general rule that notice of acceptance is not necessary where the guaranty is absolute, and that is where there is a binding obligation to do the thing in respect of which the creditor is to be guaranteed, it being held in such case that notice that the guaranty has become operative must be given within a reasonable time. See *Lascelles v. Clark*, 204 Mass. 362, 90 N. E. 875.

That notice of acceptance of a guaranty is necessary to complete the guaranty where the undertaking is merely a contingent offer to become responsible, see *Cumberland Glass Mfg. Co. v. Wheaton*, — Mass. —, 94 N. E. 803 (sale on credit of manufactured articles); *Detroit Free Press v. Pattengill*, 155 Mich. 272, 118 N. W. 927 (guarantor signed in response to request of guarantee for guaranty of the payment of goods to be furnished upon approval by the guarantee of the guarantor); *Brown v. Spiegel*, 156 Mich. 138, 120 N. W. 579 (proposition by a debtor to guarantee payment of certain notes if his creditor would accept them); *Burns v. Poole*, 106 Minn. 69, 118 N. W. 156 (rule assumed); *J. S. Rowell Mfg. Co. v. Isaacs*, 144 Mo. App. 58, 128 S. W. 760; *People's Bank v. Stewart*, 152 Mo. App. 314, 133 S. W. 70 (order on bank to cash checks on third party, stating that payment would be guaranteed—amounts simply to proposal to guarantee); and *Columbia Baking & Mfg. Co. v. Schissler*, 35 Pa. Super. Ct. 621 (writing—"To whom it may concern: This is to certify that the undersigned faithfully agrees to act as security" for a certain agent in a certain amount—is a guaranty of a future liability, where the agent owed nothing at the time, and therefore merely an offer of guaranty).

But in *Lascelles v. Clark*, 204 Mass. 362, 90 N. E. 875, it was held that in case of offers of guaranty, notice is necessary only where the act to be done is of such a kind that knowledge of it will not come quickly to the guarantor, the case forming an exception to the general rule. G. J. C.

v. Holmes, 7 B. Mon. 5, 45 Am. Dec. 41; Lowe v. Beckwith, 14 B. Mon. 189, 58 Am. Dec. 659; Thompson v. Glover, 78 Ky. 195, 39 Am. Rep. 220.

Hobson, Ch. J., delivered the opinion of the court:

The J. R. Watkins Company had in its service R. L. High as a traveling salesman, and took from him annually a bond for the faithful discharge of his duties. The last bond was executed on December 19, 1906, and High having failed to pay over to the company \$705.04, which he had received for it under the bond, this action was brought by the company against A. L. Brand and G. R. Allen, who, by a written indorsement on the bond, guaranteed his faithfulness. The company's headquarters are at Winona, Minnesota. It mailed the bond to R. L. High at La Center, in Ballard county, Kentucky. He, without signing it, mailed it to a friend in Graves county to procure the signatures of Allen and Brand, who lived there and had signed his previous bonds. His friend took it to them, and they signed it. He then returned it to High, who then signed it and returned it to the company. The company accepted the bond, but did not notify Allen and Brand thereof. They defended the suit on the ground that they were only guarantors, and were not bound, as they had received no notice from the company that their guaranty was accepted. The circuit court sustained this defense, and dismissed the petition. The plaintiff appeals.

The writing consists of three parts: The first is a statement of what the company shall do, and a promise by High to perform his part of the agreement printed on the back. At the end of this are printed these words as a signature, "The J. R. Watkins Medical company, by _____, President." Following this, and under it, High placed his name. Just under this are the words which Allen and Brand signed, as follows:

For and in consideration of the appointment of the above-mentioned traveling salesman, we hereby agree to be jointly and severally responsible to said the J. R. Watkins Medical Company for the faithful performance of this contract on the part of said traveling salesman (as outlined on the back of this agreement), and for the payment of any balance that may be due said company by him at the date of the acceptance of this contract.

G. R. Allen, Mayfield, Kentucky.

A. L. Brand, " "

On the back of the agreement is a statement as to certain things that the sales-

man agrees to do, and this also was signed by High. When Allen and Brand signed the paper, there were no other signatures to it; and after High had signed it, and returned it to the company, the vice president wrote his name in the blank left for the president's.

The circuit court seems to have based his judgment upon the case of Greer Mach. Co. v. Sears, 119 Ky. 697, 66 S. W. 521. In that case the Greer Machine Company proposed to C. B. Chandler to appoint him their agent to sell certain implements. The proposition was made upon a printed form used by the company. It contained, among other things, a provision that it was not to be "binding until signed by the president of the Greer Machine Company." Chandler accepted the writing by an indorsement on it, and on the same day Sears signed a writing guaranteeing that Chandler would comply with the contract. The paper was then sent to Knoxville, Tennessee, where it was approved by the president of the Greer Machine Company, and the contract closed. But Sears had no notice of this. It was held that he was not bound unless he knew the contract was accepted; that actual notice to him was unnecessary if he in fact knew the contract was accepted, or that Chandler had been appointed agent and the goods consigned to him under the contract.

But the ruling in that case is rested upon the peculiar language of the contract. The court said: "In this case the contract was not completed at the time of the execution and delivery to the Greer Machinery Company of the writing signed by appellee. It expressly stipulated that it was not to be binding until signed by their president, and it was understood by all the parties that the contract was to be sent to appellant's president for his approval or rejection, and until it was signed by him it was not a contract at all. We think this stipulation makes the guaranty of appellee a conditional one, and that he was entitled to notice of his acceptance before liability attached."

There is no such language in the contract before us. A contract more like this was before us in White Sewing Mach. Co. v. Powell, 25 Ky. L. Rep. 94, 74 S. W. 746. In that case the appellees executed to the machine company a written obligation by which they agreed to pay it any sums of money in which its agents, Willis & Willis, might become indebted to it. Suit was brought on the contract to recover of the sureties on account of an indebtedness of Willis & Willis to the company, and they insisted that they were only guarantors,

and were not bound, as the company had failed to give them notice of its acceptance of the guaranty. The court held the defense not good. It said: "The writing sued on shows an absolute guaranty on their part. In 14 Am. & Eng. Enc. Law, 2d ed. p. 1141, it is said: "An absolute guaranty is an unconditional promise of payment or performance on default of the principal. To bind the guarantor it is not necessary that there should be notice of acceptance of the guaranty, or notice of default of the principal, or that any steps should be taken to enforce the contract guaranteed against the principal.'"

No written contract is closed until it is executed and accepted. If appellees are not bound, because they were not notified that appellant had accepted the contract, then such notice in every case is necessary, and the rule that notice is unnecessary in the case of an absolute guaranty has no application. The promise not being conditional, to hold that the rule does not apply to it is practically to repudiate the rule.

It is insisted, however, that the rule does not apply because here the sureties signed the paper when there were no other signatures to it. But we cannot see that the order in which the names were placed on the paper is material. The company sent the bond to High. When he had procured the signatures of his friends and added his own, he sent it back to the company. When the company received the paper from High, it was not called upon to inquire in what order the names had been placed upon the paper. If it had simply accepted the paper as High returned it to it, and the vice president had not inserted his name in the blank left in it, the instrument would have been valid. The sureties, when they signed the paper leaving blanks in it, by necessary implication gave authority for the filling of the blanks in the usual way; that is, it was implied, when they signed the paper and returned it to High, that High was to sign it and return it to the company. When the company received it from High, and accepted it, it became an absolute contract. There was no act to be done by the company before the obligation would become absolute. Appellees agreed by the paper, for the consideration named, to be responsible to the company for the faithful performance of the contract by High. It is an absolute guaranty of High's faithfulness. It is not a conditional contract, but an unconditional undertaking. The order in which the names were placed upon the paper in no wise affects its legal character. If High had signed the paper before he sent it to Allen and Brand, and

they had then signed it and returned it to him to return to the company, the legal effect of the transaction would be unchanged. The vice president's putting his name in the blank left for it was only to show the acceptance of the contract. If the contract had been accepted without his filling the blank, the effect would have been the same. High was notified of the acceptance of the contract, and received credit by virtue of it. He was the proper person to return it to the company. Notice to the defendants of the acceptance of the absolute guaranty was unnecessary. On the facts found by the circuit court, he should not have entered a judgment for the defendants.

Judgment reversed, and cause remanded for further proceedings consistent herewith. If the evidence is the same on another trial, judgment should be entered in favor of the plaintiff.

MARYLAND COURT OF APPEALS.

NATIONAL EXCHANGE BANK OF BALTIMORE, Appt.,

v.

EDWIN GINN et al., Trading as Ginn & Company.

(114 Md. 181, 78 Atl. 1026.)

Banks — payment of insolvent's check — recovery.

1. A bank which pays its customer's check on funds in its possession, in ignorance of the drawer's insolvency, will not be permitted to compel a return of the funds by the payee merely to enable it to utilize

Note. — Right of bank to recover amount paid on check in ignorance of insolvency of drawer, who was indebted to it.

The decision in NATIONAL EXCH. BANK v. GINN, to the effect that a bank which has paid a check on a deposit in ignorance of the drawer's insolvency cannot compel the payee to return the funds merely to enable it to set off such funds against indebtedness of the depositor to it on the ground that the insolvency of the drawer matured his indebtedness, in consequence of which there was no money to pay the check, wherefore the check was paid as the result of a mistake as to the true condition of the drawer's account, is supported by American Nat. Bank v. Miller, 185 Fed. 338, which seems to be the only additional case directly involving the question under annotation. In the latter case the drawee bank, in ignorance of insolvency of the drawer, who was indebted to it, credited, which was equivalent to payment, the amount of the check to the payee bank, which acted in good faith in presenting the check for payment, and it was held that the

v. Holmes, 7 B. Mon. 5, 45 Am. Dec. 41; Lowe v. Beckwith, 14 B. Mon. 189, 58 Am. Dec. 659; Thompson v. Glover, 78 Ky. 195, 39 Am. Rep. 220.

Hobson, Ch. J., delivered the opinion of the court:

The J. R. Watkins Company had in its service R. L. High as a traveling salesman, and took from him annually a bond for the faithful discharge of his duties. The last bond was executed on December 19, 1906, and High having failed to pay over to the company \$705.04, which he had received for it under the bond, this action was brought by the company against A. L. Brand and G. R. Allen, who, by a written indorsement on the bond, guaranteed his faithfulness. The company's headquarters are at Winona, Minnesota. It mailed the bond to R. L. High at La Center, in Ballard county, Kentucky. He, without signing it, mailed it to a friend in Graves county to procure the signatures of Allen and Brand, who lived there and had signed his previous bonds. His friend took it to them, and they signed it. He then returned it to High, who then signed it and returned it to the company. The company accepted the bond, but did not notify Allen and Brand thereof. They defended the suit on the ground that they were only guarantors, and were not bound, as they had received no notice from the company that their guaranty was accepted. The circuit court sustained this defense, and dismissed the petition. The plaintiff appeals.

The writing consists of three parts: The first is a statement of what the company shall do, and a promise by High to perform his part of the agreement printed on the back. At the end of this are printed these words as a signature, "The J. R. Watkins Medical company, by _____, President." Following this, and under it, High placed his name. Just under this are the words which Allen and Brand signed, as follows:

For and in consideration of the appointment of the above-mentioned traveling salesman, we hereby agree to be jointly and severally responsible to said the J. R. Watkins Medical Company for the faithful performance of this contract on the part of said traveling salesman (as outlined on the back of this agreement), and for the payment of any balance that may be due said company by him at the date of the acceptance of this contract.

G. R. Allen, Mayfield, Kentucky.
A. L. Brand, " "

On the back of the agreement is a state-
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ment as to certain things that the salesman agrees to do, and this also was signed by High. When Allen and Brand signed the paper, there were no other signatures to it: and after High had signed it, and returned it to the company, the vice president wrote his name in the blank left for the president's.

The circuit court seems to have based his judgment upon the case of Greer Mach. Co. v. Sears, 119 Ky. 697, 66 S. W. 521. In that case the Greer Machine Company proposed to C. B. Chandler to appoint him their agent to sell certain implements. The proposition was made upon a printed form used by the company. It contained, among other things, a provision that it was not to be "binding until signed by the president of the Greer Machine Company." Chandler accepted the writing by an indorsement on it, and on the same day Sears signed a writing guaranteeing that Chandler would comply with the contract. The paper was then sent to Knoxville, Tennessee, where it was approved by the president of the Greer Machine Company, and the contract closed. But Sears had no notice of this. It was held that he was not bound unless he knew the contract was accepted; that actual notice to him was unnecessary if he in fact knew the contract was accepted, or that Chandler had been appointed agent and the goods consigned to him under the contract.

But the ruling in that case is rested upon the peculiar language of the contract. The court said: "In this case the contract was not completed at the time of the execution and delivery to the Greer Machinery Company of the writing signed by appellee. It expressly stipulated that it was not to be binding until signed by their president, and it was understood by all the parties that the contract was to be sent to appellant's president for his approval or rejection, and until it was signed by him it was not a contract at all. We think this stipulation makes the guaranty of appellee a conditional one, and that he was entitled to notice of his acceptance before liability attached."

There is no such language in the contract before us. A contract more like this was before us in White Sewing Mach. Co. v. Powell, 25 Ky. L. Rep. 94, 74 S. W. 746. In that case the appellees executed to the machine company a written obligation by which they agreed to pay it any sums of money in which its agents, Willis & Willis, might become indebted to it. Suit was brought on the contract to recover of the sureties on account of an indebtedness of Willis & Willis to the company, and they insisted that they were only guarantors,

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Judgment reversed, and cause remanded for further proceedings consistent herewith. If the evidence is the same on another trial, judgment should be entered in favor of the plaintiff.

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the funds so paid as a set-off upon its claim against the depositor, on the theory that the payment was made under a mistake.

Same — clearing house rules — effect on payee.

2. Failure of a bank to comply with the rules of a clearing house association, necessary to enable it to compel a return by another member of the association of funds paid upon a worthless check, does not destroy its right to compel a return by the payee of the check after they reach his hands, since his rights or liabilities are not affected by such rules.

(November 30, 1910.)

A PPEAL by plaintiff from a judgment of the Superior Court of Baltimore City in defendant's favor in an action brought to recover money paid on the check of a depositor under an alleged mistake of fact. Affirmed.

The facts are stated in the opinion.

Messrs. Charles G. Baldwin and G. Ridgely Sappington, for appellant:

The paper, passing through the clearing house, could not be regarded as accepted or paid before the debtor bank makes its settlement with the clearing house.

Mt. Morris Bank v. Twenty-third Ward Bank, 172 N. Y. 244, 64 N. E. 810.

Until that time the check could be returned as a matter of right under the rules.

Guthrie Nat. Bank v. Gill, 6 Okla. 560, 54 Pac. 434; 4 Am. & Eng. Enc. Law, 2d ed. p. 212; German Nat. Bank v. Farmers' Deposit Nat. Bank, 118 Pa. 294, 12 Atl. 303; National Union Bank v. Earle, 93 Fed. 330.

Whenever a banker advances money to a customer, he has a lien on all the securities in his hands for the amount of the balance, and an equitable set-off against any funds on deposit to the credit of the customer.

drawee bank was not entitled to rescind the payment and credit the amount thereof against the drawer's indebtedness to it. The court said that when the amount was credited to the payee's deposit account, the check was paid, and the completed transaction could not be rescinded except for fraud or mutual mistake, and that the doctrine of mutual mistake did not apply, although the drawee had made a mistake and by it lost the opportunity to exercise the option whether to pay the check, or to refuse it for the purpose of offsetting the deposit account against the indebtedness of the drawer to it.

As to the right of a bank to recover amount paid on check or other paper drawn upon or payable at it, under mistaken belief that there were sufficient funds to meet it, 33 L.R.A. (N.S.)

Miller v. Farmers' & M. Bank, 30 Md. 392.

Immediately upon the appointment of receivers on the ground of insolvency, the notes of the National Exchange Bank were matured and the National Exchange Bank became entitled to set off the amount of these notes against the deposit of the Du-laney Company.

Willson v. Williams, 108 Md. 522, 70 Atl. 409; Dubreuil v. Gaither, 98 Md. 541, 56 Atl. 965; Marshall v. Cooper, 43 Md. 60; Levy v. Steinbach, 43 Md. 212; Scott v. Scott, 17 Md. 91; Colton v. Drovers' Perpetual Bldg. & L. Asso. 90 Md. 85, 46 L.R.A. 388, 78 Am. St. Rep. 431, 45 Atl. 23; People v. St. Nicholas Bank, 44 App. Div. 313, 60 N. Y. Supp. 719; Waterman, Set-off, pp. 150-152; Guthrie Nat. Bank v. Gill, 6 Okla. 560, 54 Pac. 434; German Nat. Bank v. Farmers' Deposit Nat. Bank, 118 Pa. 294, 12 Atl. 303; National Union Bank v. Earle, 93 Fed. 330; Mt. Morris Bank v. Twenty-third Ward Bank, 172 N. Y. 244, 64 N. E. 810.

Money paid under a mistake may be recovered.

George's Creek Coal & I. Co. v. Allegany County, 59 Md. 255; Citizens' Bank v. Graf-fin, 31 Md. 507, 1 Am. Rep. 66; Baltimore v. Lefferman, 4 Gill, 425, 45 Am. Dec. 145; Merchants' Bank v. Bank of Commerce, 24 Md. 12; Second Nat. Bank v. Western Nat. Bank, 51 Md. 128, 34 Am. Rep. 300; Carley v. Potter's Bank, — Tenn. —, 46 S. W. 328; First Nat. Bank v. Behan, 91 Ky. 560, 16 S. W. 368; Merchants' Nat. Bank v. National Eagle Bank, 101 Mass. 281, 100 Am. Dec. 120; Merchants' Nat. Bank v. National Bank, 139 Mass. 513, 2 N. E. 89; Baltimore & S. R. Co. v. Faunce, 6 Gill, 68, 46 Am. Dec. 655; Buchanan v. Pue, 6 Gill, 112; Woodruff v. H. B. Claffin Co. 198 N. Y. 470, 28 L.R.A. (N.S.) 440, 91 N. E. 1103, 19 A. & E. Ann. Cas. 791; Kingston Bank v.

see notes to Citizens' Bank v. Schwarzschild & S. Co. 23 L.R.A. (N.S.) 1092, and Spokane & E. Trust Co. v. Huff, post, 1023.

As to the right of those other than banks to recover back overpayment made in ignorance or forgetfulness of previous payments, see note to Simms v. Vick, 24 L.R.A. (N.S.) 517.

As to the right of bank to apply deposit to its own claim against adverse claimant, see note to Jaselli v. Riggs Nat. Bank, 31 L.R.A. (N.S.) 765.

As to right of drawee of forged check or draft to recover money paid thereon, see notes to First Nat. Bank v. Bank v. Wyndmere, 10 L.R.A. (N.S.) 49; Title Guarantee & T. Co. v. Haven, 25 L.R.A. (N.S.) 1308; and American Exp. Co. v. State Nat. Bank, ante, 188. G. J. C.

Eltinge, 40 N. Y. 391, 100 Am. Dec. 516; Koontz v. Central Nat. Bank, 51 Mo. 275; Gilman v. First Nat. Bank, 63 Hun, 48; De Nayer v. State Nat. Bank, 8 Neb. 104; Fidelity Sav. Bank v. Reeder, 142 Iowa, 373, 120 N. W. 1029; Boyer v. Pack, 2 Den. 107; Worley v. Moore, 97 Ind. 15; Clark v. Sylvester, — Me. —, 13 Atl. 404; Johnson v. Saum, 123 Iowa, 145, 98 N. W. 599; Holmes v. Lucas County, 53 Iowa, 211, 4 N. W. 918.

Ginn & Company, not being members of the clearing house, can neither be bound by the rules thereof nor take advantage of the rules.

Manufacturers' Nat. Bank v. Thompson, 129 Mass. 438, 37 Am. Rep. 376; Merchants' Nat. Bank v. National Bank, 139 Mass. 513, 2 N. E. 89; Overman v. Hoboken City Bank, 30 N. J. L. 61; Citizens' Cent. Nat. Bank v. New Amsterdam Nat. Bank, 128 App. Div. 554, 112 N. Y. Supp. 973; Preston v. Canadian Bank, 23 Fed. 179; Watson, Clearing House Law, 45; Madderom v. Heath & M. Mfg. Co. 35 Ill. App. 588; Carley v. Potter's Bank, — Tenn. —, 46 S. W. 328; Kingston Bank v. Eltinge, 40 N. Y. 391, 100 Am. Dec. 516.

Messrs. Bond, Robinson, & Duffy, for appellees:

It is the duty of a bank to know the state of its depositor's account, and if it makes a mistake in this respect, it must abide the consequences.

Manufacturers' Nat. Bank v. Swift, 70 Md. 515, 14 Am. St. Rep. 381, 17 Atl. 336; Commercial & F. Nat. Bank v. First Nat. Bank, 30 Md. 11, 96 Am. Dec. 554; National Bank v. Berrall, 70 N. J. L. 757, 66 L.R.A. 599, 103 Am. St. Rep. 821, 58 Atl. 189, 1 A. & E. Ann. Cas. 630; Citizens' Bank v. Schwartzschild & S. Co. 109 Va. 539, 23 L.R.A.(N.S.) 1092, 64 S. E. 954; Behring v. Somerville, 63 N. J. L. 568, 49 L.R.A. 578, 44 Atl. 641.

Urner, J., delivered the opinion of the court:

This is an action by a bank to recover money paid on the check of a depositor, and recovery is sought upon the ground that the payment was made under a mistake of fact.

It appears, without contradiction, from the record that on October 19, 1909, the William J. C. Dulaney Company drew its check on the National Exchange Bank of Baltimore, the appellant, payable to the order of Ginn & Company, the appellees, for the sum of \$5,000. The check was mailed to the appellees in New York, and was by them deposited on October 20, 1909, in the National Park Bank of that city. On the same day it was forwarded by that bank to

the Farmers' & Merchants' National Bank of Baltimore for collection. It was received by the latter bank on the morning of October 21st, and about 9 o'clock on that morning the check was passed through the clearing house, and was paid about 11 o'clock by the appellant in the regular course of its clearance settlements. At 10 o'clock, approximately, on the same morning receivers were appointed for the Dulaney Company upon a bill alleging, and its answer admitting, its insolvency. The company's deposits with the appellant just prior to the payment of the check in question amounted to \$9,019.18. It was indebted to the appellant in the aggregate sum of \$21,020.80, including \$5,000 upon a promissory note which matured that day, and \$5,792.02 upon a demand note. The appellant might have set off the Dulaney Company's indebtedness against its deposit credits, but, supposing it to be solvent, and in ignorance of the receivership, the bank honored the \$5,000 check when it was presented in due course for payment. About fifteen minutes before 12 o'clock, and within an hour after it paid the check, the appellant learned for the first time of the appointment of receivers for the Dulaney Company and of its insolvency. One of the officers of the appellant thereupon immediately offered to return the check to the Farmers' and Merchants' Bank, and requested repayment. This was refused, and the appellant then proceeded against the appellees as nonresident debtors, and attached, in the hands of the Farmers' & Merchants' Bank as garnishee, the funds which had been paid on the check. The suit against the appellees was tried upon issue joined on general issue pleas to the common counts in assumpsit, including account for money had and received and resulted in a verdict for the defendants under the direction of the court. There is but one exception in the record, and that refers to the action of the trial court in thus withdrawing the case from the jury.

Upon the undisputed facts we have stated, the question to be determined is whether the appellant, because of its ignorance of the drawer's insolvency at the time of the payment of the check, is entitled to recover the amount paid to the holder, in order that the bank's right of set-off against the drawer may be utilized. It is to be observed that this very interesting and important question is not here complicated by any of the elements of deception or imposition which are sometimes found in cases of erroneous payments. The conduct of every party concerned was characterized by absolute good faith. When the check was given, the drawer had ample funds in the bank

on which it was drawn. It was issued in the usual course of business, and was used in payment of a valid claim. It was honored solely in consequence of a mistake as to the existence of a condition which, if known, would have induced a contrary course of action. It was correctly assumed in the argument that the receivership created for the Dulaney Company could not under the circumstances be regarded as influencing the result of this suit, because not only was the payment of the check made without knowledge of that proceeding, but it is clear that the appellant has a right of set-off which would absorb the fund if recovered. *Colton v. Drivers' Perpetual Bldg. & L. Asso.* 90 Md. 94, 46 L.R.A. 388, 78 Am. St. Rep. 431, 45 Atl. 23; *Dubreuil v. Gaither*, 98 Md. 544, 56 Atl. 965. As the suit is directly against the payee of the check, the situation is not affected by the rules of the clearing house through which it was presented and collected. One of these rules provides "that errors in exchange and claims arising from the return of checks or other causes are to be adjusted by 11 o'clock A. M., directly between the banks which are parties thereto, and not through the clearing house," and that, "upon request made before 11 o'clock A. M., every bank shall extend until 12 o'clock the time for returning to its checks 'not good.'" When the offer was made at about a quarter to 12 o'clock to return the check under consideration, it was refused upon the ground that it was made after 11 o'clock, and that there had been no request prior to that hour for an extension of time. It is well settled that such a regulation is binding only upon the members of the Clearing House Association. Its rules are designed exclusively for their convenience and protection as among themselves, and have no effect upon the rights or liabilities of other parties. 5 Cyc. Law & Proc. p. 614; *Merchants' Nat. Bank v. National Bank*, 139 Mass. 518, 2 N. E. 89; *Overman v. Hoboken City Bank*, 30 N. J. L. 61. The failure of the appellant to offer to return the check and to demand repayment within the time prescribed by the rules of the clearing house would therefore not impair its claim against the payee for the restoration of the fund, if its right of recovery should be found to be otherwise perfect. So far as the purposes of this case are concerned, the situation is precisely the same as if the appellees had in person presented the check to the appellant, and had received the money over its counter. Whether they are liable to repay it under the circumstances of the case is the sole question to be considered.

The appellant's theory is that the insol-
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veny of the Dulaney Company matured its obligations to the bank, that the deposits of the company thereupon became applicable to its indebtedness, and that consequently there was no money really available for the payment of the check when it was presented. It is argued, therefore, that the check was paid as the result of a mistake as to the true condition of the drawer's account. In the case of *Manufacturers' Nat. Bank v. Swift*, 70 Md. 515, 14 Am. St. Rep. 381, 17 Atl. 336, a check was paid by the bank on which it was drawn, although the drawer "had no funds in the bank at the time of payment properly applicable to this purpose." The check was originally drawn against an account opened by the drawer in his name as sole trustee, by the indorsement and deposit in that form of a check payable to the order of himself and another as trustees jointly. The payment accomplished by the check given by the trustee had no relation to the trust estate to which the deposit really belonged, but the bank was misled into the contrary belief by an order of court which had been brought to its attention, permitting the trustee who made the deposit, on account of the absence of his cotrustee, "to act as fully in all matters pertaining to said trust, as if both were present and acting." Under the misapprehension thus induced, the acting fiduciary was allowed to add to the check given by him as sole trustee the name of his cotrustee as a drawer. The deposit account being also changed so as to stand in the name of the two trustees, it was then charged with the check as corrected. The bank having been required to restore the funds thus misappropriated from the trust estate, on the ground of its actual, though unintentional, participation in the breach of trust (*Swift v. Williams*, 68 Md. 236, 11 Atl. 835), brought suit against the payee of the check; but recovery was denied by this court because the bank had been neglectful of its means of knowledge, and because "it is the duty of a bank to know the state of its depositor's account, and, if it makes a mistake in this respect, it must abide the consequences. The presentation of a check is a demand for payment. If it is paid, all the rights of the payee have been satisfied, and he is not entitled to ask any questions. It would forever destroy the character of a bank in all commercial circles if, when it was ready and willing to pay a check, it permitted the holder to inquire if the drawer had funds there to meet it. It is a matter with which he has no concern. In the absence of fraud on the part of the holder, the payment of a check by a bank is regarded as a finality. And the fact that the drawer had no funds on de-

posit will not give the bank any remedy against the holder." One of the decisions cited in the Swift Case as an authority in support of the proposition we have quoted was that of *Oddie v. National City Bank*, 45 N. Y. 735, 6 Am. Rep. 160. There the check was presented for deposit to the bank on which it was drawn, and was credited to the payee's account. This was treated as equivalent to payment of the check by the bank, and it was held that "when a check is presented to a bank for deposit, drawn directly upon itself, it is the same as though payment in any other form was demanded. It is the right of the bank to reject it, or to refuse to pay it, or to receive it conditionally; . . . but, if it accepts such a check and pays it, either by delivering the currency or giving the party credit for it, the transaction is closed between the bank and such party, provided the paper is genuine."

In a situation somewhat analogous to the present, the supreme court of Michigan, speaking through Judge Cooley, said: "This case is certainly novel and peculiar. The drawees seek to recover from the payees the amount of a bill which they have accepted and paid, and the genuineness of which is not disputed. The ground upon which they plant their right of recovery is that they have paid under a mistake of fact. The mistake consisted in their security from the drawer of the bill being fictitious, when they supposed it to be genuine and reliable. Admitting this to be so, how does the fact concern the payees? Do they assume to guarantee the fairness of the dealings of the drawers with the drawees, or the adequacy of any security upon which the dealings are based? Not, certainly, in ordinary cases. . . . What is peculiar in the present case is that the security which was sent forward with the bill proved to be fictitious. It is said that the drawees relied upon this security, and would not have paid the bill but for a belief that it was valid. It is in this that the mistake consists on which they rely for a recovery. If a mistake regarding their security will authorize the drawees to recall the payment made to the payee, no reason is perceived why a mistake regarding the responsibility of the drawer, or regarding his honesty and integrity, or anything else upon which they relied for protection in their dealings, should not justify the like action. If they suppose the drawer to be responsible when he is not, is not this as genuine a mistake of fact on their part as if they supposed a security to be good where it is fictitious?" The learned judge then proceeded to declare that "it would be an exceedingly unsafe doctrine in commer-

cial law, that one who has discounted a bill in good faith, and received in its payment the strongest possible assurance that it was drawn with proper authority, should afterward hold the money subject to such a showing as the drawee might be able to make as to the influences operating upon his mind to induce him to make payment. The beauty and value of the rules governing commercial paper consist in their perfect certainty and reliability. They would be worse than useless if the ultimate responsibility for such paper, as between payee and drawee, both acting in good faith, could be made to depend on the motives which influenced the latter to honor the paper." *First Nat. Bank v. Burkham*, 32 Mich. 328.

The New Jersey court of errors and appeals, in *National Bank v. Berrall*, 70 N. J. L. 757, 68 L.R.A. 599, 103 Am. St. Rep. 821, 58 Atl. 189, 1 A. & E. Ann. Cas. 630, had under consideration a case in which the bank inadvertently paid a check drawn upon it after payment had been countermanded by the drawer, and it was held that "where a bank receives in the ordinary course of business a check drawn upon it and presented by a bona fide holder, who is without notice of any infirmity therein, and the bank pays the amount of the check to such holder, it finally exercises its option to pay or not to pay, and the transaction is closed as between the parties to the payment."

The same rule was applied by the Virginia supreme court of appeals to the payment of coupons by a bank on bonds of one of its depositors, under the erroneous belief that there were funds on deposit available for that purpose. *Citizens' Bank v. Schwarzschild & S. Co.* 109 Va. 539, 23 L.R.A. (N.S.) 1092, 64 S. E. 954. In a note to the last mentioned case, as reported in 23 L.R.A. (N.S.) 1092, it is stated to be the "general rule that, in the absence of fraud, the payment of a check or note by a bank upon which it is drawn or at which it is payable, under the mistaken belief that the drawer of the check or the maker of the note has sufficient funds to his credit to pay it, cannot be recovered by the bank;" and numerous authorities are collected in support of this proposition.

A similar principle has been recognized by this court in cases where payments of forged checks have been made by banks upon the supposition that they were genuine. *Commercial & F. Nat. Bank v. First Nat. Bank*, 30 Md. 11, 96 Am. Dec. 554; *Hardy v. Chesapeake Bank*, 51 Md. 562, 34 Am. Rep. 325.

If, therefore, in the present case the appellant had actually set off the Dulaney

Company's indebtedness against its deposits, thus producing an overpayment, and had then inadvertently paid the check in question, it would clearly, under the authorities cited, have no right of action against the appellees. This is not in reality the precise condition with which we are now dealing, but we see no reason for applying to the case at bar a different rule from that which governed the cases to which we have referred. The mistake of paying the check of a drawer who has no funds to meet it is just as much due to ignorance of the real facts as is the mistake of making such payment in consequence of the erroneous assumption of the drawer's solvency. In every such instance the error results from a misconception which may have been more or less readily avoidable according to the particular circumstances. In the case of a check drawn against an insufficient deposit, the bank has immediately at hand the means of learning the true state of the account, while in a case like the present, where its action is influenced by consideration of the financial responsibility of a customer, the usual sources of information may not be equally convenient. But whether the mistake relates to the condition of a drawer's deposit, as in the *Swift Case*, or as to the value of a security, as in the *Michigan* decision from which we have quoted, or as to the credit of a borrower, as in the case before us, it is occasioned by misapprehension as to facts which might have been ascertained, and with which a bank is presumed to have the ability to acquaint itself in the prosecution of its business. In the present instance it was not the appointment of receivers for the *Dulaney Company*, but the insolvency which that proceeding demonstrated, that made it desirable for the appellant to apply the company's deposits to its notes, instead of honoring its checks. Insolvency without a receivership would have produced the same situation. It does not appear from the record how long the company was in failing circumstances prior to the payment now sought to be revoked. But, if mere ignorance of the insolvency could be held to be a sufficient ground of recovery, it would make no difference in principle for what period of time that condition had existed. If the rule contended for by the appellant were to prevail, "no one," to use the language of this court in the *Swift Case*, "could know when he could safely receive payment of a check." There does not seem to us to be any sound or reasonable basis upon which to distinguish this case from those we have cited, in the application of the rule they announce, and to require the payees of the check here involved, who were in a

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much less favorable position than the appellant for knowing the responsibility of the drawer, to restore the money they have received in satisfaction of a bona fide debt. In order that the appellant may be relieved of the necessity, to which they would then be subjected, of resorting to the insolvent estate of the debtor.

The appellant relied upon the general rule that money paid under a mistake of fact may be recovered. There are, of course, many cases in which recovery has been permitted on the ground of mistake, such as *George's Creek Coal & I. Co. v. Allegany County*, 59 Md. 255; *Baltimore & S. R. Co. v. Faunce*, 6 Gill, 68, 46 Am. Dec. 655; *Citizens' Bank v. Grafflin*, 31 Md. 507, 1 Am. Rep. 66; *Buchanan v. Pue*, 6 Gill, 112; *Baltimore v. Lefferman*, 4 Gil. 425, 45 Am. Dec. 145, and other authorities cited by the appellant. In all of these the facts were quite different from those presented in cases like the one now before us, which involve exceptional considerations relating to the convenience and certainty of commercial transactions as dependent upon reliability and finality in the disposition of negotiable paper, and which accordingly constitute an exception to the general rule. The case of *Second Nat. Bank v. Western Nat. Bank*, 51 Md. 128, 34 Am. Rep. 300, was cited by the appellant as supporting its contention that such a mistake as the one here shown may be corrected. In that case the bank was permitted to cancel its certification of a note for payment, where it had been so marked contrary to a written order of the maker which had been overlooked, and where no rights or liabilities had been incurred or losses sustained in consequence of the error. We do not find this case at all inconsistent with that of *Manufacturers' Nat. Bank v. Swift*, supra, establishing the doctrine which must control our present decision. The cases from other jurisdictions cited by the appellant were mainly suits between members of clearing house associations, and were largely concerned with their regulations.

The court below in our opinion committed no error in directing a verdict for the defendants in accordance with their prayer, and its judgment will be affirmed.

Judgment affirmed, with costs.

TEXAS COURT OF CRIMINAL APPEALS.

EX PARTE JOSEPH E. FARNSWORTH.
(— Tex. Crim. Rep. —, 135 S. W. 535.)

Initiative and referendum — power of legislature to confer on municipality. The legislature cannot confer upon the

residents of a municipal corporation the power to enact ordinances by initiative and referendum, where the Constitution delegates to it the legislative power, and merely reserves to the people the right to assemble and apply to those invested with the powers of government for redress of grievances, while it forbids any change in the form of government.

(March 1, 1911.)

APPPLICATION for a writ of habeas corpus to secure release from custody to which applicant had been committed for alleged violation of an ordinance for the establishment of telephone rates. Applicant discharged.

The facts are stated in the opinion.

Messrs. A. P. Wozencraft, W. S. Bramlett, and D. A. Frank, for relator:

The act of the legislature, if it does so, vesting in the voters of the city of Dallas the power to initiate and adopt by their votes ordinances regulating the rates of telephone companies, is unconstitutional, as no provision is made therein or can be made for an investigation to determine the reasonableness of such regulation.

Aqua Pura Co. v. Las Vegas, 10 N. M. 6, 50 L.R.A. 224, 60 Pac. 208; Home Teleph. & Teleg. Co. v. Los Angeles, 211 U. S. 280, 53 L. ed. 185, 29 Sup. Ct. Rep. 50; Horton v.

Newport, 27 R. I. 283, 1 L.R.A. (N.S.) 512, 61 Atl. 759, 8 A. & E. Ann. Cas. 1097; Werner v. Galveston, 72 Tex. 39, 7 S. W. 726, 12 S. W. 159; Johnson v. Martin, 75 Tex. 39, 12 S. W. 321; Stanfield v. State, 83 Tex. 321, 18 S. W. 577; State v. Harris, 2 Bail. L. 598; State v. Swisher, 17 Tex. 441.

Mr. C. E. Lane for the State.

Davidson, P. J., delivered the opinion of the court:

This is an original writ of habeas corpus.

Applicant was arrested for violating a city ordinance of the city of Dallas, which was put into operation under what is termed the "initiative and referendum" clause contained in the charter of said city. The ordinance in question fixed rates for telephone service. The city charter of Dallas (Sp. Acts 30th Leg. Chap. 71) grants authority to the board of commissioners to determine and regulate charges, fix fares and rates of persons, firms, and corporations enjoying franchises or other privileges in that city, and to prescribe the service to be rendered. The charter also provides that this "board of commissioners," known as the "city council," shall fix and regulate the rates of water, gas, electric lights, and regulate and fix fares, tolls, and charges of local telephones and exchanges. These powers are

Note. — Initiative and referendum.

The constitutionality of this principle of government is discussed in the note to *Ex parte Pfahler*, 11 L.R.A. (N.S.) 1192. Since the preparation of that note, it has been held in *Ex parte Wagner*, 21 Okla. 33, 95 Pac. 435, 18 A. & E. Ann. Cas. 197, following *Kaddery v. Portland*, 44 Or. 119, 74 Pac. 710, 75 Pac. 222, set forth in the note above referred to, that the initiative and referendum provisions of the Oklahoma Constitution were not in conflict with that provision of the Federal Constitution which guarantees to every state a republican form of government.

In *State v. Pacific States Teleph. & Teleg. Co.* 53 Or. 162, 99 Pac. 427, the court declared that whether the initiative and referendum provision of the Oregon Constitution was invalid because repugnant to provisions of the Federal Constitution was thoroughly considered in *Kaddery v. Portland*, supra, and the views of the court then and now were indicated in that opinion, and that it was needless to restate them.

In *Kiernan v. Portland*, — Or. —, — L.R.A. (N.S.) —, 112 Pac. 402, a provision of the Constitution of Oregon that the initiative and referendum powers reserved to the people by the Constitution were "further reserved to the legal voters of every municipality and district as to all local, special, and municipal legislation, of whatever character, in or for their respective municipalities and districts," was not viola-

tive of that provision of the Federal Constitution guarantying to the states a republican form of government.

In *Hartig v. Seattle*, 53 Wash. 432, 102 Pac. 408, it was held that, under the provision of the Constitution of Washington authorizing the cities of that state to frame a charter for their own government, consistent with and subject to the Constitution and laws of the state, a city, subject to such limitation, could undoubtedly adopt and carry into effect the initiative and referendum plan of government; "for," said the court, "it can scarcely be contended that this plan is inconsistent with a republican form of government, the central idea of which is a government by the people."

In *Eckerson v. Des Moines*, 137 Iowa, 452, 115 N. W. 177, the court, in discussing the initiative and referendum features of a general statute providing for the government of certain cities, said that the contention that it would be violative of that clause in the Federal Constitution guarantying a republican form of government to the states, was sufficiently disposed of by the fact that this guaranty was intended to be to the states as such, and was not intended to have any relation to systems of local government provided by the several states for the regulation of municipalities or other subdivisions. The reasoning in this case was relied upon in *Walker v. Spokane*, — Wash. —, 113 Pac. 775, in arriving at the same conclusion.

J. A. C.

by the terms of the charter to be exercised by the mayor and the four commissioners, unless otherwise provided. The initiative and referendum" is also provided for in the charter. When an ordinance has been voted into operation under the referendum clause, it is also provided that said ordinance cannot be repealed or amended except by a vote of the people. This is a sufficient statement of the case.

We may condense applicant's main contention into one general proposition, to wit: The legislature is without authority to authorize a city to carry on its affairs as a municipal corporation under what is known as the "initiative and referendum," especially as applied to the fixing of rates, fares, etc. As applicant was arrested for violating the particular ordinance put into operation by the "referendum vote," its validity is the essential basis for his prosecution. Without that ordinance this prosecution could not be had. We find upon an inspection of the Constitution that the people have reserved to themselves in article 1, § 27, the right, in a peaceable manner, to assemble together for their common good, and "apply to those invested with the powers of government" for redress of grievances or other purposes by petition, address, or remonstrance. We find by the provisions of § 29 of the same article that all the powers delegated by the Constitution are "excepted out of the general powers of government," and declared to be "forever inviolate," and everything contrary thereto "shall be void." That our citizenship may do the things specified in § 27, supra, is, we think, not to be questioned, inasmuch as they expressly reserve to themselves, and have excepted out of the "general powers of the government" the matters therein specified. Under our theory of government "all power is inherent in the people," as especially set out in article 1, § 2, of the Bill of Rights. The people do not by the provisions of § 27, supra, undertake the resumption of their latent and inherent or any delegated power, but, on the contrary, provide that they may make known their wishes by assembling themselves together, or by petition, address, or remonstrance. When these matters go unheeded, the people are not without ample power to resume their original authority or control those invested with authority. The Constitution can be amended and changed to suit occasion, and their "inherent power" thus exercised. Under the provisions of article 15 of the Constitution, the higher state officials may be impeached and ousted from office. At recurring elections, the people may set aside official incumbents, and invest "the powers of government" in those who will faithfully execute the delegated trust and instruct legislators for the changing of unjust, op-

pressive, or undesirable legislation. If those "invested with the powers of government" are not included within the rule of impeachment, they may be charged with dereliction, incompetency, or corruption, and tried before such proper tribunal as is provided by the Constitution or legislation thereunder.

In the way provided in § 27, art. 1, and to this extent, the "initiative" may be considered as within the contemplation of the Constitution, but it is not therein provided that the people may resume their original and "inherent power." Such idea is excluded by the language employed in § 27, supra. The resumption of such inherent power is provided for and to be exercised under the terms of article 17 of the Constitution. In article 2 of the Constitution we find it ordained that the powers of government shall be divided into three distinct departments, with delegation of power to the legislature to enact law; and in article 3 these matters of legislation are amplified, and in article 1, § 27, we ascertain how the people make known their wishes to "those invested with the powers of government." All authority in Texas acts from delegated power, and is to be controlled in official action by such authority. The people themselves are bound by the Constitution until changed as provided in the instrument itself. In other words, the Constitution furnishes the rule and basis for the action, not only of the people who made it, but "those who are invested with the powers of government" under it. While § 27 of article 1 may be considered in the nature of a qualified "initiative," it does not confer upon the legislature the authority to inaugurate and put into operation what is known as the "referendum." On the contrary, it refutes and excludes such conclusion. Under the terms of this section, legislation cannot be referred to the people for enactment by their vote. That the referendum is adverse to our constitutional form of government as a means of putting into operation enactments by the legislature has been expressly decided in this state as early as *State v. Swisher*, 17 Tex. 441. That case has been recognized and followed in subsequent decisions. See *Stanfield v. State*, 83 Tex. 317, 18 S. W. 577, and also *Werner v. Galveston*, 72 Tex. 22, 7 S. W. 726, 12 S. W. 159. In the last-cited case, Judge Gaines, writing the opinion, uses this language: "It is a well-settled principle that the legislature cannot delegate its authority to make laws, by submitting the question of their enactment to a popular vote." These decisions have been followed by this court in its decisions. In *Ex parte Massey*, 49 Tex. Crim. Rep. at page 67, 122 Am. St. Rep. 784, 92 S. W. at page 1089, Judge Henderson uses this language: "As early as the case of *State v.*

Swisher, *supra*, it was held that the legislature could not delegate to voters or the people the power to pass laws, in the absence of some constitutional provision authorizing this." In the Swisher Case, *supra*, this language is found: "But, besides the fact that the Constitution does not provide for such reference to the voters to give validity to the acts of the legislature, we regard it as repugnant to the principles of the representative form of government by our Constitution. Under our Constitution, the principle of lawmaking is that laws are made by the people, not directly, but by and through their chosen representatives. By the act under consideration, this principle is subverted, and the law is proposed to be made at last by the popular vote of the people, leading inevitably to what was intended to be avoided,—confusion and great popular excitement in the enactment of laws."

It is equally certain that the people cannot be reinvested by the legislature with the functions of legislation conferred by them on a department of government, nor can the legislature render the enactment of a law dependent upon the acceptance by the people by popular vote. See cases already cited. *Ex parte Wall*, 48 Cal. 279, 17 Am. Rep. 425; *Morford v. Unger*, 8 Iowa, 82; *Santo v. State*, 2 Iowa, 165, 63 Am. Dec. 487; *State v. Beneke*, 9 Iowa, 203; *State ex rel. Dome v. Wilcox*, 45 Mo. 458; *Gibson v. Mason*, 5 Nev. 283; *Cincinnati, W. & Z. R. Co. v. Clinton County*, 1 Ohio St. 77. This inability arises no less from the joint principle applicable to every delegated authority requiring knowledge, discretion, and rectitude in its exercise, than from the positive provisions of the Constitution itself. The people in whom the power resided have voluntarily transferred its exercise, and have positively ordained that it shall be invested in the legislature. To allow the legislature to cast it back on the people would be a subversion of the Constitution, and would change its distribution of power without the action or consent of those who created the Constitution. See *Cincinnati, W. & Z. R. Co. v. Clinton County*, 1 Ohio St. 77. *Locke's Appeal*, 72 Pa. 508, 13 Am. Rep. 716, is authority for the clearly stated proposition that, if the legislature can delegate the lawmaking to a majority of the voters, it can as well confer such power upon the minority. This doctrine would inevitably lead to the conclusion that the legislature has as much authority to refer such question to a single individual as to the whole people. If the power to refer is conceded, the number to whom referred would make but little or no difference. At least, it would but resolve itself into a question of legislative policy. There is to be noted, however, a real or an apparent exception to this rule or 33 L.R.A. (N.S.)

doctrine. However, when correctly viewed, if it is an exception, it is an innovation on the general principle which serves to emphasize and accentuate the truth of the main doctrine announced. This apparent exception is an innovation always to be found in the Constitution itself, and notably in those provisions of that instrument which relate to local option laws in regard to the sale of intoxicating liquors and preventing stock running at large. Where this is the case, the referendum is the only rule of final enactment. The people under such exception by majority adopt or vitalize a legislative act in the territory to be affected. Unless expressly authorized so to do, these laws cannot be enacted. *State v. Swisher*, *supra*, and cases already cited. Referring to the people for their approval, the matters provided in such exceptions serve to emphasize the fact that in no other contingencies can such referendum be had. These exceptions manifest the correctness, certainty, and exactions of the general rule that the laws must be enacted by the legislature. This doctrine also flows from the very framework of our form of government. It is the basic principle and theory of republican form of government as set out in the Constitution, and right here it may be observed that there is a wide distinction to be noted between the "right of petition and remonstrance," provided for in the Bill of Rights, and the referring to a vote of the people the enactment of laws. Ours is a government of division and distribution of powers and authority. Ours is also a representative democracy; that is, it is republican in form of government as contradistinguished from a social or pure democracy on one hand, and a government by the minority on the other, and excludes all others save and except one by the people through their selected representatives. The transfer of the enactment of laws to the people, to be made operative by their votes, is therefore directly subversive of our constitutional form of government, and can only be upheld when expressly authorized by some provision to be found in the Constitution itself.

Article 1, § 2, of the Bill of Rights, prohibits any change in our ordained form of government, even by the people themselves, which would be destructive of a republican form of government, and they expressly there reserve to themselves the "inalienable right" and authority to alter, change, or abolish such ordained form of government. Therefore, not only was there no power granted to the legislature to in any manner change the form of government, but it is expressly withheld and retained by the people in themselves exclusively. One of the most dangerous, if not fatal, propositions to our form of government, is that the

legislative department may "change from an immediate state of procuration and delegation of power to a course of acting as from original power." This, it has been said, "is the way in which all magistracies have been perverted from their purpose." Any change by any department of government from that ordained in the Constitution is a pure assumption of power in conflict with and directly subversive of the Constitution. If the legislature may authorize referendum, then the result of such referendum would or could suspend legislative acts or even the Constitution itself. This is not to be entertained. The legislature only may suspend laws by virtue of article 1, § 28, of the Constitution, but it cannot suspend the Constitution, nor can it authorize any other department of the government—municipal or state—to suspend any law. And attempt to authorize a municipal body to suspend a law would be in plain derogation of said § 28. To hold that a law could be suspended by the referendum, or enacted by the referendum, would or might easily result in the deprivation of our citizenship of life, liberty, or property without due process of law. The ordinance in question may be a fair illustration and verification of that statement. Such a proceeding would condemn without charges or specifications, without a hearing, or the forms of a trial, in the absence of evidence, without a jury and even without a court, to be exercised only by the secret inquisition of the ballot box. The referendum not only sets at defiance these constitutional guaranties, but it as well destroys the purpose and authority of the legislative department; or, on the other hand, may make that body omnipotent and superior to the Constitution, from which its authority is derived. It would reinvest the people with the functions of legislation conferred upon that department of government. It is also a direct attack upon the judicial system provided by the Constitution. The courts were ordained for the purpose of the trial of causes, awarding to the citizenship tribunals in which their matters may be tried and adjusted. Referendum refuses a hearing. It takes the place of the constituted judiciary, and tries the rights of property through the ballot box. By this means every officer in the state from governor to constable may be ousted from office and declared incompetent or corrupt, without charges, evidence, or trial. The property of the citizen may be confiscated, and he made a bankrupt without a hearing and without due process of law. Successful revolt from a monarchical form of government eliminated the idea of minority rule, and the provisions of the constitutional form of government discarded the

idea of a pure democracy and rejected it as vicious. These matters were all discussed at the inception of the government, and fully decided. The referendum, therefore, is wrong, first, as being directly subversive of the principles of republican government; second, violative of the Constitution itself, and not to be entertained, unless expressly provided in the Constitution; and, third, its most insidious and far-reaching danger may be found in the fact, that it is made to begin at the bottom of our framework of government, in the small divisions, and thence will undermine the entire fabric. It is in the small divisions of territory and their local governments that we expect to find the sentiment of our people, as a rule, formed and crystallized into definite shape, and it is there the most dangerous and insidious attacks are engendered and made on existing plans of government. The consequences of constantly or oft-recurring local elections incident to the referendum plan should be avoided as most dangerous. They engender unnecessary strife and bitterness, bring confusion which destroys the peace of the community, and this generally without hope of corresponding good results. They have the tendency to bring disgust with existing conditions, which sooner or later may, and probably will, end in or produce the occasion for a movement to substitute for the present form of representative government a much stronger one to be dominated by a minority rule at the hands of a select few or even a single individual. What has been said may also be said as to the baneful effect the referendum would have in its destructive influence on local self-government. Local self-government is that, and that only, which is provided or authorized by the Constitution, is to be found in the delegation of authority, is based on the idea of representative government, and cannot under any circumstances under our Constitution be a pure democracy. All government with us finds its initial source in the Constitution, not outside of it, and any government that is in contravention or subversive of the Constitution is necessarily vicious and void. Our municipal government is to be upheld in consonance and conformity with the general plan of government and in harmony with it. If what has been stated is correct, then the ordinance in question is void. It deprives those whom it affects of their constitutional rights and their rights as citizens to be heard when their property is sought to be taken or hampered with such rates and charges as would prove destructive. Any law, state or municipal, which would undertake to deprive a man of his life, liberty, or property without giv-

ing him a hearing, or in any manner affect his rights without a hearing, would necessarily be vicious and unconstitutional. Ours is a country of law, and, whenever a man is affected in his life, liberty, or property, he has the right to resort to some legal tribunal where those matters can be honestly and fairly adjudicated.

The ordinance being void, it is ordered that applicant be discharged from custody.

INDIANA SUPREME COURT.

JOSEPH W. SELVAGE, Appt.,

v.

HENRY M. TALBOTT.

(— Ind. —, 95 N. E. 114.)

Broker — written employment — police power.

1. The police power extends to requiring contracts to compensate one for procuring a purchaser for real estate to be in writing.

Constitutional law — requiring broker's contracts to be in writing.

2. A statute requiring the employment of one to secure a purchaser of real estate to be in writing is not in conflict with a constitutional provision that no person's property or particular services shall be taken without just compensation.

Same — equal privileges and immunities.

3. No unequal grant or privileges or immunities, contrary to the Constitution, is effected by a statute requiring contracts to make compensation for procuring a purchaser for real estate to be in writing.

Same — Federal Constitution — interference with state police power.

4. A state statute requiring contracts to make compensation for procuring purchasers for real estate to be in writing is not forbidden by the 14th Amendment to the Federal Constitution, since that Amendment was not intended to interfere with the police power of the states.

Contract — implication — statutory requirement.

5. No contract to compensate one for services can be implied where the statute requires an express contract to do so to be in writing.

Note. — Power of legislature to require that contracts for commissions for finding a purchaser for real estate shall be in writing.

Although statutory provisions of the kind in question exist in several states, apparently the only other decisions as to their constitutionality are *Baker v. Gillan*, 68 Neb. 368, 94 N. W. 615, and *Ross v. Kaufman*, 48 Wash. 678, 94 Pac. 641, the portions of the opinions in which, bearing upon the question, are set forth in *SELVAGE v. TALBOTT*.

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Same — quantum meruit.

6. No recovery can be had on *quantum meruit* for services rendered in procuring a purchaser for real estate, where there is no written contract to make compensation, as required by statute.

(May 23, 1911.)

A PPEAL by plaintiff from a judgment of the Superior Court for Marion County in defendant's favor in an action to recover for services rendered in procuring a purchaser for real estate. Affirmed.

The facts are stated in the opinion.

Mr. Robert W. McBride for appellant.

Messrs. Charles W. Smith, John S. Duncan, Henry H. Hornbrook, and Albert P. Smith, for appellee:

The real estate brokerage business furnishes a reasonable classification for the regulation imposed by the statute.

Zimmerman v. Zehendner, 164 Ind. 466, 73 N. E. 920, 3 A. & E. Ann. Cas. 655; *Phillips v. Jones*, 39 Ind. App. 626, 80 N. E. 555; *Price v. Walker*, 43 Ind. App. 519, 88 N. E. 78; *Wysong v. Sells*, 44 Ind. App. 238, 88 N. E. 954; *Stout v. Humphrey*, 69 N. J. L. 436, 55 Atl. 281; *Allen v. Hall*, 64 Neb. 256, 89 N. W. 803; *Spence v. Ap-ley*, 4 Neb. (Unof.) 358, 94 N. W. 109; *Baker v. Gillan*, 68 Neb. 368, 94 N. W. 615; *Covey v. Henry*, 71 Neb. 118, 98 N. W. 434; *Danielson v. Goebel*, 71 Neb. 300, 98 N. W. 819; *Myres v. Surryhne*, 67 Cal. 657, 8 Pac. 523; *Shanklin v. Hall*, 100 Cal. 26, 34 Pac. 636; *McGeary v. Satchwell*, 129 Cal. 389, 62 Pac. 58; *Dolan v. O'Toole*, 129 Cal. 488, 62 Pac. 92; *King v. Benson*, 22 Mont. 258, 56 Pac. 280; *Goldstein v. Scott*, 76 App. Div. 78, 78 N. Y. Supp. 736; *Crossman v. Caminez*, 79 App. Div. 15, 79 N. Y. Supp. 900; *Whiteley v. Terry*, 83 App. Div. 197, 82 N. Y. Supp. 89; *Frank L. Fisher Co. v. Woods*, 187 N. Y. 90, 12 L.R.A. (N.S.) 707, 79 N. E. 836; *Woolley v. Mears*, 226 Mo. 41, 136 Am. St. Rep. 637, 125 S. W. 1112; *Perkins v. Cooper*, — Cal. —, 24 Pac. 377; *Mendenhall v. Rose*, — Cal. —, 33 Pac. 884; *Logan v. McMullen*, 4 Cal. App. 154, 87 Pac. 285; *Crowell v. Ewing*, 4 Cal. App. 358, 88 Pac. 285; *Marshall v. Trerise*, 33 Mont. 28, 81 Pac. 400; *Tracy v.*

Cases which consider the bearing of such statutes upon the right of an agent not authorized in writing to purchase or sell real property, to recover compensation for his services, may be found in a note to *Friedman v. Suttle*, 9 L.R.A. (N.S.) 933.

Statutes of the kind under consideration in the foregoing cases are to be distinguished from those which prohibit the offering of another's realty for sale without written authority, the constitutionality of which is considered in a note to *Fisher v. Woods*, 12 L.R.A. (N.S.) 706. E. S. O.

Dean, 77 Neb. 382, 109 N. W. 505; Briggs v. Bounds, 48 Wash. 579, 94 Pac. 101; Schuller v. Farquarson, — Cal. —, 6 Pac. 86; Kent v. Phenix Art Metal Co. 69 N. J. L. 532, 55 Atl. 256; Platt v. Butcher, 112 Cal. 634, 44 Pac. 1060; Zeimer v. Antisell, 75 Cal. 509, 17 Pac. 642; Keith v. Smith, 46 Wash. 131, 89 Pac. 473, 13 A. & E. Ann. Cas. 975; Ross v. Kaufman, 48 Wash. 678, 94 Pac. 641; Bagnole v. Madden, 76 N. J. L. 255, 69 Atl. 967.

While statutes in derogation of the common law are to be strictly construed, the common law will not make a contract by implication between the parties, which the parties could not have made themselves under the statute, except in writing.

Beahler v. Clark, 32 Ind. App. 225, 68 N. E. 613; Rodenbrock v. Gress, 74 Neb. 409, 104 N. W. 758; Barney v. Lasbury, 76 Neb. 701, 107 N. W. 989; Goldstein v. Scott, 76 App. Div. 78, 78 N. Y. Supp. 736; McCarthy v. Loupe, 62 Cal. 299; Blair v. Austin, 71 Neb. 401, 98 N. W. 1040; Jamison v. Hyde, 141 Cal. 109, 74 Pac. 695; McPhail v. Buell, 87 Cal. 115, 25 Pac. 266; Smith v. Aultz, 78 Neb. 453, 110 N. W. 1015; Kent v. Phenix Art Metal Co. 69 N. J. L. 532, 55 Atl. 256; Leimbach v. Regner, 70 N. J. L. 608, 57 Atl. 138; Keith v. Smith, 46 Wash. 131, 89 Pac. 473, 13 A. & E. Ann. Cas. 975.

Morris, J., delivered the opinion of the court:

Appellant sued appellee for services, on an oral contract, in negotiating a sale of real estate. The complaint is in three paragraphs, the first of which declares on an agreement for a commission of 2½ per cent on the amount of the sale price, the second on an agreement for a reasonable compensation, and the third is based solely on the *quantum meruit*. The latter paragraph alleges the rendition of services by plaintiff to defendant at his special instance and request in finding for him a purchaser of certain real estate, the reasonable value of the services, and that the claim is due and unpaid. To each paragraph of complaint the lower court sustained a demurrer for insufficient facts. This action of the court is here assigned as error.

It is conceded by appellant that the lower court did not err in sustaining the demurrer to the first and second paragraphs of complaint of § 1 of the act of March 5, 1901, relating to contracts for services in selling real estate, is a valid enactment, but appellant claims that this section is unconstitutional and void because it conflicts with §§ 21 and 23 of article 1 of the Constitution of Indiana, and also with the 14th Amendment to the Constitution of the United

States. Appellant further insists that, even though the act in controversy is constitutional, it applies only to express contracts, and therefore the third paragraph of complaint, which is on an implied obligation, is sufficient to repel a demurrer.

Appellee contends that the statute in controversy is valid, and that the contract sued on is invalid because not in writing. The section of the statute in question reads as follows: "That no contracts for the payment of any sum of money, or thing of value, as and for a commission or reward for the finding or procuring, by one person, of a purchaser for the real estate of another, shall be valid, unless the same shall be in writing, signed by the owner of such real estate, or his legally appointed and duly qualified representative." Acts 1901, p. 104; Burns's Stat. 1908, § 7463. Section 21, art. 1, of our Constitution, is as follows: "No man's particular services shall be demanded without just compensation. No man's property shall be taken by law without just compensation; nor, except in case of the state, without such compensation first assessed and tendered." Section 23 of the same instrument reads as follows: "The general assembly shall not grant to any citizen or class of citizens privileges or immunities which, upon the same terms, shall not equally belong to all citizens."

At the outset, it may be conceded that this statute is in derogation of the common law, and therefore must be strictly construed. *Thornburg v. America Strawboard Co.* (1895) 141 Ind. 443, 50 Am. St. Rep. 334, 40 N. E. 1062.

It may be further conceded, as appellant contends, that, when the general assembly makes a classification of the subjects of legislation, it must have some reasonable basis on which to stand, and must operate equally upon all within the class; that the reason for the classification must inhere in the subject-matter, and must be natural and substantial. A proper classification treats all brought under its influence alike under the same conditions, and must embrace all within the class to which it is naturally related. *Bedford Quarries Co. v. Bough*, 163 Ind. 671, 14 L.R.A. (N.S.) 418, 80 N. E. 529, and cases cited.

But it cannot be questioned that the state, under its police power, has the right to regulate any and all kinds of business, to protect the public health, morals, and welfare, subject to the restrictions of reasonable classification. *Walker v. Jameson* (1894) 140 Ind. 591, 28 L.R.A. 679, 49 Am. St. Rep. 222, 37 N. E. 402, 39 N. E. 869; *Adams Exp. Co. v. State* (1903) 161 Ind. 706, 67 N. E. 1092; *Seelyville Coal & Min. Co. v. McGlosson* (1906) 166 Ind. 561, 117

Am. St. Rep. 396, 77 N. E. 1044, 9 A. & E. Ann. Cas. 234; Knight & J. Co. v. Miller (1909) 172 Ind. 27, 87 N. E. 823, 18 A. & E. Ann. Cas. 1146. Several states have laws similar to the one in controversy. In Baker v. Gillan, 68 Neb. 368, 94 N. W. 615, the supreme court of Nebraska, in deciding a case involving the matter in issue here, used the following language: "The only question suggested by the petition in error and discussed in the briefs is whether an oral agreement like the one upon which plaintiff relies is valid and enforceable. The first section of the act of 1897 (Sess. Laws 1897, chap. 57, p. 304) is as follows: 'Every contract for the sale of lands, between the owner thereof and any broker or agent employed to sell the same, shall be void, unless the contract is in writing and subscribed by the owner of the land and the broker or agent, and such contract shall describe the land to be sold, and set forth the compensation to be allowed by the owner in case of sale by the broker or agent.' It is conceded that the case falls within the provisions of this section, and that, if the law is constitutional, the judgment is right. We think the law is constitutional, and that the argument in support of the claim that it is special legislation is obviously unsound. It is, of course, competent for the legislature to classify objects of legislation, and if the classification is reasonable, and not artificial or arbitrary, it will be upheld as a legitimate exercise of legislative power. The statute here considered is only a new instance of the exercise of that power. It may be that it is without exact precedent, but it has many familiar analogies in the legislation of this and other states. It is no more special legislation than are those provisions of the statute of frauds which require certain contracts to be evidenced by writing. It is in fact a virtual extension or enlargement of the statute of frauds, and like that statute, was designed to prevent the bringing of actions which experience had shown were often conceived in fraud and maintained by perjury. It purports to be, and it is, a general law. Its operation is uniform throughout the state. It affects alike all persons under the same conditions and circumstances, and its object being the suppression of an evil believed to be peculiarly connected with the class of contracts with which it deals, it is not, in our judgment, open to the constitutional objection urged against it." In Ross v. Kaufman (1908) 48 Wash. 678, 94 Pac. 641, the supreme court of the state of Washington, in passing on the constitutionality of a statute similar to ours, said: "The appellants argue here that the act of 1905 (Laws 1905, p. 110), which requires contracts of

this kind to be in writing, is unconstitutional because, first, it is class legislation; and, second, it is an unwarranted interference with the rights of contract. Neither of these reasons requires extended notice. All class legislation is not prohibited by the Constitution. . . . This statute does not affect the right of contract further than to require certain contracts to be in writing; and this is without doubt within the legislative power. Otherwise the legislature could require no contract to be in writing. We think the act is constitutional." It is a matter of common knowledge that before the enactment of this statute numerous suits were being instituted from time to time by agents and brokers who claimed commissions in sales of land on the ground that they had been instrumental in procuring purchasers, and these claims were often resisted by the defendants, because, as alleged, there was absolutely no basis for the same; on the other hand, brokers and agents complained that owners, when sales were once effected by the agents, often after an expenditure of great effort, were given to the repudiation of their honest obligation. An examination of court records will reveal the contradictory testimony of the interested parties in such cases, and show the extreme difficulty imposed on courts and juries in ascertaining the truth. No doubt the principal motive which actuated the members of the general assembly in enacting the statute was to put an end to such disputes and prevent fraud and perjury, and we believe the enactment is well within the police powers of the state.

Appellant maintains that the classification in this act is purely artificial and arbitrary; that it singles out a particular class of agents,—those engaged in real estate sales,—and imposes restrictions on them not imposed on any other class of agents; that, in fact, it only applies to those real estate agents engaged in the selling, and not to those engaged in the purchase, of real estate. In regard to the latter claim, it is sufficient to say that it is a matter of common knowledge that brokers usually look to the owner of the real estate for compensation, rather than to the purchaser. This is a sufficient reason to warrant the exclusion of agency contracts for the purchase of land from the operation of the law. The act in controversy is not in conflict with either § 21 or § 23 of article 1 of our Constitution. New Albany v. New Albany Street R. Co. 172 Ind. 487, 87 N. E. 1084.

Nor is this statute in conflict with the 14th Amendment to the Federal Constitution. This Amendment, broad as it is, was not designed to interfere with the police power of the state to regulate business and

occupations for the promotion of the peace, morals, and welfare of the people. *Knight & J. Co. v. Miller* (1909) 172 Ind. 27, 87 N. E. 823, 18 A. & E. Ann. Cas. 1146; *Cincinnati, I. & W. R. Co. v. Connersville*, 170 Ind. 316, 83 N. E. 503; *Inland Steel Co. v. Yedinak*, 172 Ind. 423, 87 N. E. 229; *Smith v. Stephens*, 173 Ind. 564, 30 L.R.A. (N.S.) 704, 91 N. E. 167.

No error was committed by the lower court in sustaining the demurrer to the third paragraph of complaint. Where the law makes an express oral contract for services invalid, it will not create, by implication, a liability for such services. It is admitted by counsel for appellant that this rule is declared in *Beahler v. Clark* (1903) 32 Ind. App. 222, 68 N. E. 613, but counsel claims it is erroneous. Where the question has been raised in other injunctions, a similar rule has been adopted. *Blair v. Austin*, 71 Neb. 401, 98 N. W. 1040; *Leimbach v. Regner*, 70 N. J. L. 608, 57 Atl. 138; *Jamison v. Hyde*, 141 Cal. 109, 74 Pac. 695; *Keith v. Smith*, 13 A. & E. Ann. Cas. 975, and note (46 Wash. 131, 89 Pac. 473). In *Zimmerman v. Zehendner*, 164 Ind. 466, 73 N. E. 920, 3 A. & E. Ann. Cas. 655, this court said: "In short, the contract, in so far as it relates to this action, is only partially in writing. The important feature—the amount of commission to be paid—is to be ascertained by parol testimony in regard to an understanding which may prove to be a misunderstanding,—the exact thing which the statute was designed to prevent."

A contract partly written and partly verbal is a parol contract, and contracts required by law to be in writing must be wholly written to be enforceable.

Under this statute, no recovery can be had on the *quantum meruit*.

There is no error in the record. Judgment affirmed.

KENTUCKY COURT OF APPEALS.

COMMONWEALTH OF KENTUCKY,
App't.,
v.
W. T. BERRY.

(141 Ky. 477, 133 S. W. 212.)

Obstructing justice — spiriting away witness.

One who persuades a person having knowledge of the commission of a crime to leave the jurisdiction of the court without disclosing his knowledge to the grand jury is guilty of obstructing justice, although such person had not been subpoenaed and

was under no obligation to appear before the grand jury.

(January 10, 1911.)

APPEAL by the Commonwealth from a judgment of the Circuit Court for Hickman County sustaining a demurrer to, and dismissing, an indictment charging defendant with obstructing justice. Reversed.

The facts are stated in the opinion.

Messrs. James Breathitt, Attorney General, Tom B. McGregor, and Robert L. Smith for the Commonwealth.

Hobson, Ch. J., delivered the opinion of the court:

W. T. Berry was indicted in the Hickman circuit court for the offense of obstructing justice. The circuit court sustained his demurrer to the indictment, and dismissed it. The commonwealth appeals.

The offense is set out in the indictment in these words: "The said W. T. Berry in

Note. — Procuring one having knowledge of offense to leave the jurisdiction.

This note does not include cases where the person in question had been subpoenaed or recognized to appear as a witness.

It seems to be well settled, although the decisions are not numerous, that one who procures a person having knowledge of an offense to leave the jurisdiction of the court to avoid giving evidence is guilty of obstructing public justice, although such person has not been subpoenaed or bound by recognizance to appear as a witness. This offense being one against the very object and purposes for which courts are established, and not merely against their process, it is immaterial that the person procured to absent himself had not been regularly summoned or legally bound to attend as a witness. The case relied on in the decision of *Com. v. Berry* are sufficiently set out in the opinion therein.

The question as to the effect of the fact that a person procured to absent himself had not been subpoenaed or recognized to appear as a witness has more often arisen in cases under statutes designed to prevent interference with witnesses.

Thus, one who offers and pays to the prosecuting witness in a pending criminal proceeding a sum of money to leave the county and go beyond the jurisdiction and process of the court, and not appear against the defendant or testify as a witness against him, is guilty of the statutory offense of attempting to corrupt a witness, although it is not alleged that such witness was either subpoenaed or recognized to appear and testify as a witness in the case. *Christman v. State*, 18 Neb. 107, 24 N. W. 434, 6 Am. Crim. Rep. 175.

And one who attempts, by bribing, to induce a witness to absent himself for the

the said county of Hickman on the 11th day of February, 1910, and before the finding of this indictment, did unlawfully obstruct the action of the grand jury of Hickman county, Kentucky, which was duly impaneled and sworn as such and engaged in investigating the commission of crimes in Hickman county, Kentucky, by persuading, contriving, and intending to impede and obstruct said investigation, did then and there unlawfully and corruptly entice, solicit, and persuade one T. J. Moore to absent himself from Hickman county, and to get beyond the jurisdiction of the Hickman circuit court, and not appear before the said grand jury, and give evidence before them concerning crimes they were then and there investigating, and which was known to the said T. J. Moore, and said T. J. Moore having appeared in Hickman county at the request of the circuit judge of the Hickman circuit court to give said evidence, and this fact was well known to the said W. T. Berry at the time he solicited and persuaded the said T. J. Moore to leave Hickman county, and said persuading, enticing, and soliciting was done for the unlawful purpose of obstructing said grand jury in their investigation

of said crimes, against the peace and dignity of the commonwealth of Kentucky."

No brief has been filed for the appellee, but it seems that the circuit court sustained the demurrer to the indictment on the ground that it does not show that the witness had been subpoenaed or was legally bound to appear before the grand jury. Grand juries are impaneled to inquire into offenses committed in their counties. If persons may, with impunity, spirit away the witnesses before they can be legally summoned, the effectiveness of grand juries would be practically destroyed. Those who conduct gaming houses and the like may anticipate that the grand jury will investigate these matters, and, if they may spirit away the witnesses just before the grand jury meets, legal prosecutions of these matters may be thus stifled. The obstruction of legal justice was a misdemeanor at common law, and the spiriting away of a witness to prevent him from testifying was always regarded as a phase of the offense. In *State v. Keyes*, 8 Vt. 66, 30 Am. Dec. 455, the supreme court of Vermont had before it the precise question, and in disposing of it the court, by Judge Redfield said: "If the respondent knew of his being

purpose of avoiding giving evidence in a certain pending criminal case, is guilty of the statutory offense of bribing "any witness," although the person sought to be bribed had not been summoned as a witness. *State v. Biebusch*, 32 Mo. 276.

Under the United States statute providing for the punishment of "every person who corruptly . . . endeavors to influence . . . any witness . . . in any court of the United States in the discharge of his duty, or corruptly . . . obstructs or impedes, or endeavors to obstruct or impede, the due administration of justice therein," one is guilty who has procured another to leave the country to evade the service of an outstanding grand jury subpoena. *Heinze v. United States*, 104 C. C. A. 510, 181 Fed. 322.

But in *United States v. Bittinger*, Fed. Cas. No. 14,598, it was held that one who corruptly influences another to secrete or so dispose of himself as to prevent process to be served on him as a witness is not guilty under such statute, unless he knows that the person so influenced has been designated as one to be used as a witness, either by the issuing of a subpoena, or by the indorsement of his name on a complaint lodged with a United States commissioner, charging an offense against the laws of the United States.

In Texas, it has been held that one who offers to give a material and important witness in a pending criminal case a certain sum of money if he will leave the county, and keep out of the way, and not appear as a witness in such case, is guilty of the statutory offense of offering to bribe

a witness to avoid the service of a subpoena, although no subpoena or other legal process for such witness has yet been issued. *Jackson v. State*, 43 Tex. 421; *Scoggins v. State*, 18 Tex. App. 298.

But in *State v. Hughes*, 43 Tex. 518, it was held that an indictment charging merely that defendant, knowing a certain person to be a witness, offered him certain money and property to secrete himself and be absent from the court at a certain term, and not be a witness before the grand jury at that term nor a witness against the defendant in the court at that term, does not charge such statutory offense of offering to bribe a witness "to disobey a subpoena or other legal process, or to avoid the service of the same by secreting himself, or by any other means."

In *Com. v. Bailey*, 26 Ky. L. Rep. 583, 82 S. W. 299, it was held that one who offers a witness on an indictment certain property if he will absent himself from the court, and not testify as a witness on the trial, is guilty of bribery, although the witness sought to be bribed has not been summoned or recognized as a witness.

In *Com. v. Reynolds*, 14 Gray, 87, 74 Am. Dec. 665, it was held that the summoning of the witness, being alleged only by way of inducement to the substance of a charge of dissuading, hindering, and preventing him from appearing pursuant to a summons to give evidence of what he knows relating to the matter of a certain complaint against the defendant, need not be alleged with the same certainty as to time and place as the substance of the charge.

A. C. W.

a witness and about to be compelled, in due course of law, to attend the trial, and endeavored to dissuade and hinder him therefrom, in the language of the indictment, his offense is complete. In this case, knowledge is carried home to both. It will not do for a moment to admit that the respondent might anticipate the officers of justice, and secrete, bribe, or intimidate the state witnesses from attending the trial of public prosecutions, and not be liable for any act done until a subpoena had been legally served upon the witness. This view will leave untouched the most corrupting field for offenses of this character."

This case was followed by the court of errors and appeals of Delaware in *State v. Horner*, 1 Marv. (Del.) 511, 26 Atl. 73, 41 Atl. 139. The court by Robinson, Chief Justice, said: "The contention is that, in order to constitute the offense of spiriting away a witness, the party persuaded must have been summoned or recognized to appear. It is not denied that offense of spiriting away a witness is an indictable offense at common law. It was early recognized as being absolutely essential to the existence of courts and their efficiency in performing the functions for which they were created, that such offenses against them should be punishable as crimes. The great object of their existence is the ascertainment of truth in its relations to the transactions of men, and they can only do so fairly and impartially when all persons having knowledge of the transactions inquired of are brought or allowed to come before them for examination without let or hindrance from anyone. . . . Nor do we think that this offense can only be committed where the witness has been legally summoned or is at the time bound by recognition to appear. The offense is committed, not against the process of the courts, but against the sole object and purpose of their existence and the reason of their being, which, as we have said before, is the ascertainment of the truth; and it is indictable, because it is an attempt to stifle the truth, and not because it is a contempt of any process of the courts."

The same rule was followed by the supreme court of Maine in *State v. Holt*, 84 Me. 509, 24 Atl. 951, where the defendant had gotten a witness drunk to prevent him from testifying. A conviction was sustained, although the witness had not been subpoenaed. The court said: "Intentionally and designedly to get a witness drunk, for the express purpose of preventing his appearance before the grand jury, or in open court, is such an interference with the proceedings in the administration of justice as will constitute an indictable offense, and

one for which the guilty party ought to be promptly and severely punished. And it is important that it should be understood that the suppression of evidence by such, or by any similarly wicked and corrupt means, cannot be practised with impunity."

In *State v. Desforges*, 47 La. Ann. 1201, 17 So. 814, the supreme court of Louisiana, having the same question before it under a statute which was only declaratory of the common law, said: "If the prosecution is in contemplation, and, aware that it is about to be begun, a party, with the view to defeat the investigation, approaches one known to be an indispensable witness, and by bribes and persuasion attempts to prevent him from appearing or giving testimony, in our view the crime of guilty persuasion is accomplished."

The supreme court of Washington, in *State v. Bringgold*, 40 Wash. 20, 82 Pac. 132, 5 A. & E. Ann. Cas. 716, reached the same conclusion, and in this opinion it is stated that there are no decisions to the contrary. See also Wharton, *Crim. Law*, § 2287.

The course of public justice must not be impeded. The gist of the offense is not a contempt of the court, or an abuse of its process, but the obstruction of justice. He who knows that another will be witness, or has reason to know it, and, so knowing, causes the witness to absent himself for the purpose of preventing his testifying, is guilty of obstructing justice, although the witness may not have been subpoenaed, or his testimony, if given, would not have been important. The law does not tolerate that its proceedings shall be stifled, and the running off of a witness to stifle a prosecution is none the less an offense because it is done before the grand jury is impaneled. We therefore conclude that the court erred in sustaining the demurrer to the indictment.

Judgment reversed, and cause remanded, with directions to the circuit court to overrule the demurrer.

MASSACHUSETTS SUPREME JUDICIAL COURT.

FREDERIC PARKER et al., Exrs., etc., of
Herbert F. Hanson, Deceased,
v.

RUTH H. COBE.

(— Mass. —, 94 N. E. 476.)

Will — annuity — right to principal.

1. The beneficiary is entitled to receive the principal of a fund in due course of administration, where the will directs the

laying out by trustees of a certain sum in the purchase of an annuity for him.

Executor — annuity — interest.

2. A bequest of a certain fund to be expended in the purchasing of an annuity for the legatee carries interest from the expiration of the period applicable to bequests generally, and not from the death of the testator.

Party — right of legatee — dispute as to interest.

3. To a proceeding by executors to determine whether or not a legatee is entitled to immediate possession of a sum devised for the purchase of an annuity for him, the residuary legatees are not necessary parties, where the only question in which they are interested is the matter of interest on the bequest, as to which there is no dispute between them and the annuitant.

(March 3, 1911.)

Note. — Right of legatee for whose benefit the purchase of annuity is directed to receive the principal in lieu thereof.

It is the well-settled rule that a direction to purchase an annuity entitles the beneficiary to receive the principal in lieu thereof, provided the annuity be absolute and unqualified. *PARKER v. COBE*; *Reid v. Brown*, 54 Misc. 481, 106 N. Y. Supp. 27; *Re Brunning* [1909] 1 Ch. 276, 78 L. J. Ch. N. S. 75, 99 L. T. N. S. 918; *Re Robbins* [1907] 2 Ch. 8, 76 L. J. Ch. N. S. 531, 96 L. T. N. S. 755, 10 A. & E. Ann. Cas. 485, affirming [1906] 2 Ch. 648, 75 L. J. Ch. N. S. 751, 95 L. T. N. S. 779; *Re Ross* [1900] 1 Ch. 162, 69 L. J. Ch. N. S. 192, 48 Week. Rep. 264, 81 L. T. N. S. 578; *Re Mabbett* [1891] 1 Ch. 707, 60 L. J. Ch. N. S. 279, 64 L. T. N. S. 447, 39 Week. Rep. 537; *Hicks v. Ross*, L. R. 14 Eq. 141, 41 L. J. Ch. N. S. 677, 26 L. T. N. S. 470; *Kerr v. Middlesex Hospital*, 2 De G. M. & G. 576, 22 L. J. Ch. N. S. 355, 17 Jur. 49, 1 Week. Rep. 93; *Carr v. Ingleby*, 1 De G. & S. 362; *Wakeham v. Merrick*, 37 L. J. Ch. N. S. 45, 17 L. T. N. S. 134, 16 Week. Rep. 73; *Yates v. Yates*, 28 Beav. 637, 29 L. J. Ch. N. S. 872, 6 Jur. N. S. 1023, 3 L. T. N. S. 9; *Re Brown*, 27 Beav. 324; *Ford v. Batley*, 17 Beav. 303, 23 L. J. Ch. N. S. 225; *Palmer v. Craufurd*, 3 Swanst. 482, 2 Wils. 79; *Yates v. Compton*, 2 P. Wms. 308; *Bayley v. Bishop*, 9 Ves. Jr. 6, 7 Revised Rep. 132; *Barnes v. Rowley*, 3 Ves. Jr. 305; *Dawson v. Hearn*, 1 Russ. & M. 606, Tamlyn, 465, 9 L. J. Ch. 249.

And even where discretionary power only was given the trustees to lay out a sum in purchasing an irredeemable annuity, it has been held that the trustees properly paid the principal to the annuitants. *Messeena v. Carr*, L. R. 9 Eq. 260, 39 L. J. Ch. N. S. 216, 22 L. T. N. S. 3, 18 Week. Rep. 416.

It has been said that the giving of an absolute and unqualified annuity is the same in effect as giving a legacy of a sum 33 L.R.A. (N.S.)

RESERVATION by the Supreme Judicial Court for Suffolk County for the determination of the full bench, of a petition by the executors of the will of Herbert F. Hanson, deceased, for the construction of that part of the will containing provision for respondent. Decree for respondent.

The facts are stated in the opinion.

Mr. Frank K. Linscott, for petitioners: The doctrine followed by the courts of England, that, under certain circumstances, an annuitant has the right to elect to receive payment of the fund in full, or to receive only the payment of the annuity, does not apply here.

Wemyss v. White, 159 Mass. 484, 34 N. E. 718; *Gray, Restraints on Alienation of Property*, 2d ed. § 85a.

The trust in the hands of the executors is not a dry one that should be terminat-

that will purchase the annuity. *Re Brunning* [1909] 1 Ch. 276, 78 L. J. Ch. N. S. 75, 99 L. T. N. S. 918; *Re Robbins* [1907] 2 Ch. 8, 76 L. J. Ch. N. S. 531, 96 L. T. N. S. 755 10 A. & E. Ann. Cas. 485; *Dawson v. Hearn*, 1 Russ. & M. 606, Tamlyn, 465, 9 L. J. Ch. 249; *Bayley v. Bishop*, 9 Ves. Jr. 6, 7 Revised Rep. 132.

And the basis of the decisions allowing the annuitant to receive the corpus in lieu of the annuity is that it would be idle form for the court to direct the purchase of an annuity where the annuitant might, by reselling immediately, render the direction and act nugatory, and the court will not compel the performance of vain acts. This rule is expressly applied in the following cases: *PARKER v. COBE*; *Reid v. Brown*, 54 Misc. 481, 106 N. Y. Supp. 27; *Re Brunning* [1909] 1 Ch. 276, 78 L. J. Ch. N. S. 75, 99 L. T. N. S. 918; *Re Mabbett* [1891] 1 Ch. 707, 60 L. J. Ch. N. S. 279, 64 L. T. N. S. 447, 39 Week. Rep. 537; *Yates v. Yates*, 28 Beav. 637, 29 L. J. Ch. N. S. 872, 6 Jur. N. S. 1023, 3 L. T. N. S. 9; *Ford v. Batley*, 17 Beav. 303, 23 L. J. Ch. N. S. 225; *Dawson v. Hearn*, 1 Russ. & M. 606, Tamlyn, 465, 9 L. J. Ch. 249; *Barnes v. Rowley*, 3 Ves. Jr. 305.

But where the annuity is not absolute, there seems to be a conflict as to whether the annuitant is entitled to receive the principal in lieu of the purchase of the annuity.

Thus, in *Wright v. Callender*, 2 De G. M. & G. 652, 21 L. J. Ch. N. S. 787, 16 Jur. 647, where the testator directed the investment of funds sufficient to produce an annuity for life, and then the same to fall into the residue, it was held that the annuitant was not entitled to have the annuity valued and the amount of the valuation paid to him, it being said that the annuitant, as against those entitled to the residuary estate, could not demand such valuation and payment over.

And in *Re Grove*, 1 Giff. 74, 28 L. J. Ch. N. S. 536, 5 Jur. N. S. 855, 7 Week.

ed, and no good reason has been shown why it should be.

Clafin v. Clafin, 149 Mass. 19, 3 L.R.A. 370, 14 Am. St. Rep. 393, 20 N. E. 454; Young v. Snow, 167 Mass. 287, 45 N. E. 686; Danahy v. Noonan, 176 Mass. 467, 57 N. E. 679; Hoffman v. New England Trust Co. 187 Mass. 205, 72 N. E. 952.

To terminate the trust and pay to the beneficiary the fund *in toto* would defeat the intention of the testator, and would be contrary to the principles of law.

Saunderson v. Stearns, 6 Mass. 37; Young v. Snow, 167 Mass. 287, 45 N. E. 686;

Rep. 522, it was held that a gift to executors of money to purchase an annuity, with directions to pay the same for the sole and separate use of the annuitant, did not entitle him to the corpus of the fund. The decision was upon the ground that there was nothing in the will to indicate an intention to give the legatee such corpus, and that there must be a declaration to that effect before the annuitant can have a sufficient sum appropriated to answer the annuity, the court proceeding upon the presumption that an annuity is for life only, unless otherwise provided.

But in Kerr v. Middlesex Hospital, 2 De G. M. & G. 576, it was held that a direction to purchase an annuity out of an estate renders the annuity perpetual, and entitles the annuitant to the corpus. The principle upon which the Grove Case was decided was referred to and distinguished in the following language by the lord chancellor: "It is perfectly settled that if an annuity be given *simpliciter*, that is, to one generally, a life interest only passes. It is equally, I believe, undisputed, that if an annuity be directed to be provided out of the proceeds of property, or out of property generally, if an annuity is to be brought into existence by the application of property, and that annuity is given to a party generally, he will take the property appropriated to purchase the annuity, and therefore the annuity in perpetuity, if purchased."

A conflict of authority also arises as to the effect of a stipulation for forfeiture of an annuity upon the happening of certain contingencies.

Thus, in Hatton v. May, L. R. 3 Ch. Div. 148, 24 Week. Rep. 754, where it was expressly provided that the annuitant should not elect to receive the price or value of the annuity in lieu thereof, and that it should cease and be void if he should in any manner dispose of or anticipate it or any part thereof, it was held that such restrictions were effectual, and that the annuitant was not entitled to the value of the annuity. Power v. Hayne, L. R. 8 Eq. 262, 17 Week. Rep. 782, and Re Draper, 57 L. J. Ch. N. S. 942, 58 L. T. N. S. 942, 36 Week. Rep. 783, are to the same effect. See also Carr v. Ingleby, 1 De G. & S. 362, where the annuity was given subject to the happening of a con-

Brown v. Wright, 168 Mass. 506, 47 N. E. 413.

The testator, by using the word "annuity," made his intention sufficiently clear that respondent, Cobe, should not have the sum in gross; in using the word "annuity," he used it, not as it is understood in England, but as it is understood in Massachusetts.

Cummings v. Cummings, 146 Mass. 501, 16 N. E. 401; Re Hooper, 120 Mass. 102.

If the court shall find that the respondent, Cobe, is entitled to payment of said sum outright as a legacy, then she will be

tingency, and it was held that the annuitant was not entitled to the corpus. These decisions are upon two grounds: first, that the intention of the testator must govern; and, second, that if the corpus were paid over and the annuitant violated the forfeiture clause, the executors would be liable over again to the testator's estate.

But in Day v. Day, 1 Drew, 569, 22 L. J. Ch. N. S. 878, 17 Jur. 586, it was held that such a restriction on alienation and anticipation did not affect the question, and that the annuitant's representatives were entitled to the corpus where the annuitant died without having violated the forfeiture clause. But this case was severely criticized in the Hearn and Power Cases.

And again in Hunt-Foulston v. Furber, L. R. 3 Ch. Div. 285, 24 Week. Rep. 756, where it was directed that the annuitant should not be entitled to have the value of his annuity in lieu thereof, and that it should cease and revert upon any attempt to sell, it was held that the annuitant was absolutely entitled to the annuity, the court saying: "Where a testator makes an absolute gift by will to an individual, he cannot take it away in a subsequent part of the will, unless he uses clear and distinct language to that effect. No doubt there was an intention to prevent the annuitant from selling the annuity, and also an attempt to make the fund form part of the residuary estate; but there being a previous absolute gift, the latter intention is inconsistent with the gift itself."

And to the same effect is Stokes v. Cheek, 28 Beav. 620, 29 L. J. Ch. N. S. 922, where it was held that a provision following a direction to purchase an annuity, that the annuitant should not "be allowed to accept the value of the annuity in lieu thereof," was ineffectual, and that the annuitant was entitled to receive the principal instead of the annuity. (Quoted with approval in Reid v. Brown, 54 Misc. 481, 106 N. Y. Supp. 27.)

And in Woodmeston v. Walker, 2 Russ. & M. 197, 9 L. J. Ch. 257, where the annuity was given without power to sell or assign the same by anticipation, a similar conclusion was reached, but there was no gift over, and the naked prohibition was not guarded by any clause of forfeiture.

G. J. C.

entitled to interest thereon at the legal rate from one year after the decease of the testator, less such amounts as the petitioners have already advanced her on account thereof.

Kent v. Dunham, 106 Mass. 586; Ogden v. Pattee, 149 Mass. 82, 14 Am. St. Rep. 401, 21 N. E. 227; Welch v. Adams, 152 Mass. 86, 9 L.R.A. 244, 25 N. E. 34; Thayer v. Paulding, 200 Mass. 98, 85 N. E. 868.

Messrs. A. A. Folsom and H. M. Burton also for petitioners.

Messrs. William M. Noble and Herbert R. Morse, for respondent:

Where a will expresses an intention that a legacy be paid at the death of the testator, the amount of the legacy carries interest from the date of death.

Kent v. Dunham, 106 Mass. 586; Welch v. Adams, 152 Mass. 74, 9 L.R.A. 244, 25 N. E. 34; Claffin v. Holmes, 202 Mass. 157, 88 N. E. 664.

Respondent has the right to elect to be paid the entire sum, with interest.

Ford v. Batley, 17 Beav. 303, 23 L. J. Ch. N. S. 225; Dawson v. Hearn, 1 Russ. & M. 606, Tamlyn, 465, 9 L. J. Ch. 249; Re Robbins [1907] 2 Ch. 8, 76 L. J. Ch. N. S. 531, 96 L. T. N. S. 755, 10 A. & E. Ann. Cas. 485; Re Brunning [1909] 1 Ch. 276, 78 L. J. Ch. N. S. 75, 99 L. T. N. S. 918; Reid v. Brown, 54 Misc. 481, 106 N. Y. Supp. 27; Sears v. Choate, 146 Mass. 395, 4 Am. St. Rep. 320, 15 N. E. 786; Huber v. Donoghue, 49 N. J. Eq. 125, 23 Atl. 495; Smith v. Harrington, 4 Allen, 569.

Loring, J., delivered the opinion of the court:

It is settled law of England that a bequest of money to be used in the purchase of an annuity gives the legatee a right to the money, and he can insist that the annuity shall not be bought. Yates v. Compton, 2 P. Wms. 308; Barnes v. Rowley, 3 Ves. Jr. 305; Bayley v. Bishop, 9 Ves. Jr. 6, 7 Revised Rep. 132; Dawson v. Hearn, 1 Russ. & M. 606, Tamlyn, 465, 9 L. J. Ch. 249; Kerr v. Middlesex Hospital, 2 De G. M. & G. 576, 22 L. J. Ch. N. S. 355, 17 Jur. 49, 1 Week. Rep. 93; Ford v. Patley, 17 Beav. 303, 23 L. J. Ch. N. S. 225; Stokes v. Cheek, 28 Beav. 620, 29 L. J. Ch. N. S. 922; Re Mabbett [1891] 1 Ch. 707, 60 L. J. Ch. N. S. 279, 64 L. T. N. S. 447, 39 Week. Rep. 537; Re Robbins [1907] 2 Ch. 8, 76 L. J. Ch. N. S. 531, 96 L. T. N. S. 755, 10 A. & E. Ann. Cas. 485. For further cases, see 2 Am. & Eng. Enc. Law, 2d ed. p. 399. In the United States there is a decision to the same effect by an inferior court (Reid v. Brown, 54 Misc. 481, 33 L.R.A. (N.S.)

106 N. Y. Supp. 27), and so far as we know, no case to the contrary.

This rule has found its most frequent application in case of bequests to be laid out in the purchase of annuities. But it is a general rule, applicable to a bequest to be laid out in the purchase of any object. See, for example, Barlow v. Grant, 1 Vern. 255; Nevill v. Nevill, 2 Vern. 431; Barton v. Cooke, 5 Ves. Jr. 461; Lonsdale v. Berchtoldt, 3 Kay & J. 185, 3 Jur. N. S. 328.

The reasoning on which the rule is established is that the legatee can sell the particular object as soon as it is bought, and the law will not require the performance of a nugatory act. Consequently it is of no consequence that the particular object is to be bought by the executor, and not by the legatee. See for example Dawson v. Hearn, 1 Russ. & M. 606, Tamlyn, 465, 9 L. J. Ch. 249; Ford v. Batley, 17 Beav. 303, 23 L. J. Ch. N. S. 225; Stokes v. Cheek, 28 Beav. 620, 29 L. J. Ch. N. S. 922; Re Robbins [1907] 2 Ch. 8, 76 L. J. Ch. N. S. 531, 96 L. T. N. S. 755, 10 A. & E. Ann. Cas. 485; Re Brunning [1907] 1 Ch. 276, 78 L. J. Ch. N. S. 75, 99 L. T. N. S. 918; Reid v. Brown, 54 Misc. 481, 106 N. Y. Supp. 27.

The case at bar is not a case where \$75,000 was left upon the trust that the income of it should be paid to Ruth Cobé during her life, but it is a case where the \$75,000 was to be laid out by trustees in the purchase of an annuity for Ruth Cobé during her life. For that reason it is not a case within the rule of Claffin v. Claffin, 149 Mass. 19, 3 L.R.A. 370, 14 Am. St. Rep. 393, 20 N. E. 454.

The \$75,000 was to be laid out in the purchase of an annuity in the case at bar by trustees, and not by executors. In our opinion that makes no difference. Where the only duty to be performed by a trustee is to buy a particular piece of property for the *cestui que trust*, which piece of property the *cestui que trust* can sell as soon as it is bought, the rule of a bequest for a particular object applies, and the *cestui que trust* is entitled to the money. The purchase is as much a nugatory act in case of a trust as it is in case of a bequest, and the same rule governs both cases.

We are of opinion that interest should be paid on the \$75,000 from the expiration of one year from the testator's death, under the usual rule, as to which see Thayer v. Paulding, 200 Mass. 98, 100, 85 N. E. 868, where the cases are collected, and Claffin v. Holmes, 202 Mass. 157, 88 N. E. 664. The bequest in the case at bar was a bequest of \$75,000 to be laid out in the purchase of an annuity; not the bequest

of such sum as would purchase an annuity of a specified annual amount as was the case in *Re Robbins* [1907] 2 Ch. 8, 76 L. J. Ch. N. S. 531, 96 L. T. N. S. 755, 10 A. & E. Ann. Cas. 485, where it is held that the annuity ran from the death of the testator.

The question decided in the case at bar was a question between Ruth Cobe and the executors. The only possible interest which the residuary legatees could have had in the matter was in the payment of interest on the \$75,000. It affirmatively appears that there was no difference between them on that point. There was no occasion for making them parties defendant.

A decree should be entered directing the plaintiffs to pay to Ruth Cobe \$75,000 with interest from the expiration of a year from the death of the testator.

So ordered.

MISSISSIPPI SUPREME COURT.

HATTIE GRIMES, Appt.,
v.
STATE OF MISSISSIPPI.

(— Miss. —, 54 So. 839.)

Assault — threatening gestures with weapon.

Making threatening gestures towards another with an ax does not constitute an assault if one is not within striking distance of him, or sufficiently near to put him in fear of being struck.

(April 17, 1911.)

APPEAL by defendant from a judgment of the Circuit Court for Forrest County convicting her of assault. Reversed.

The facts are stated in the opinion.

Mr. D. M. Watkins for appellant.

Mr. James R. McDowell, for the State:

The use of the deadly weapon by defendant is *prima facie* evidence of an intent.

Jeff v. State, 37 Miss. 321, 39 Miss. 593.

Note. — *Assault: demonstration of force or violence outside of range of actual injury.*

This note does not cover the question of whether actual or apparent ability is sufficient to constitute an assault. Its scope is confined to cases similar to *GRIMES v. STATE*, where the defendant was not within striking distance, or sufficiently near to put the person upon whom the assault was alleged to have been committed in fear of being struck.

In 2 Am. & Eng. Enc. Law, 2d ed. p. 95, it is said: "The present apparent ability to execute the unlawful intent is absolutely 33 L.R.A. (N.S.)

An assault has been held to be "any attempt to commit a battery, or any threatening gesture showing in itself, or by efforts accompanying it, an immediate intention coupled with the ability to commit a battery."

Garnet v. State, 1 Tex. App. 605, 28 Am. Rep. 425; *McKay v. State*, 44 Tex. 43, 1 Am. Crim. Rep. 46; *State v. Wyatt*, 76 Iowa, 328, 41 N. W. 31.

Defendant was guilty of assault with intent to kill.

Alvarez v. State, — Tex. Crim. Rep. —, 58 S. W. 1013, 13 Am. Crim. Rep. 137; *Smith v. State*, 83 Ala. 26, 3 So. 531.

Anderson, J., delivered the opinion of the court:

The appellant was indicted for an assault with an ax with intent to kill and murder, was convicted of an assault, and appeals to this court.

It is said in 2 Bishop's New Criminal Law, p. 19, §§ 31 and 32: "One who rushes upon his adversary to strike, though not near enough for the blow to take effect, commits the offense [assault], provided he is sufficiently near to create in a person of ordinary firmness a fear of immediate violence unless he strikes in self-defense."

There is no need for the party assailed to be put in actual peril, if only a well-founded apprehension is created. For his suffering is the same in the one case as in the other, and the breach of the public peace is the same." Applying this rule to the undisputed facts of this case, it is clear the appellant is not guilty of the charge of which she was convicted. The evidence shows without conflict that the appellant was not in striking distance with the ax of the state's witness Natalie Kelly, nor was she sufficiently near to put her in fear of being struck, nor was she prevented by any person, or other means, from striking. The court below, on the motion for a new trial, should have set aside the verdict, and discharged the appellant.

Reversed and remanded.

necessary to constitute an assault, or in other words the act and the means must be reasonably adapted to the end."

As would be expected, few courts seem to have been called upon to consider the question under discussion.

In *Lott v. State*, 83 Miss. 609, 36 So. 11, where it was impossible for defendant to see or shoot the person whom he was charged with having assaulted, or for such person to see the defendant because of a sand house between them, it was held that he was not guilty of an assault with intent to kill.

And in *Thomas v. State*, 99 Ga. 38, 26 S. E. 748, where it was held that there need be no actual present ability to commit a

battery, but that a demonstration of violence, coupled with an apparent ability to inflict the injury, so as to cause the person against whom it was directed reasonably to fear the injury unless he retreat was sufficient to constitute an assault, the court implied that where there was no actual or apparent ability to commit a battery, there could be no assault.

In *People v. Lilley*, 43 Mich. 521, 5 N. W. 982, the defendant was not within striking distance, and it does not appear that he was near enough to put the one against whom the assault was alleged to have been committed in fear. It was held that, in order to constitute the crime of assault with intent to murder, the attempt must be made within striking distance, and that if the defendant before he got within striking distance stopped and voluntarily abandoned his purpose, or before coming within such distance was stopped by others and then voluntarily abandoned his purpose, he would not be guilty of an assault with intent to murder.

And where defendant, after threatening to blow prosecutor's brains out, went into the house and took down his rifle, and worked the lever as though throwing a shell into the chamber, after which his wife took the rifle from him, he being all the while invisible to the prosecutor, it was held that he was not guilty of an assault under a statute making it a simple assault to use any dangerous weapon or the semblance thereof in an angry or threatening manner, with intent to alarm another, and under circumstances calculated to effect that object. *Spradling v. State*, — Tex. Crim. Rep. —, 71 S. W. 17.

For note on pointing unloaded firearm as assault, see *Price v. United States*, 15 L.R.A. (N.S.) 1272. J. T. W.

NEBRASKA SUPREME COURT.

MARY FITZGERALD, Admr., etc., of
Martin Fitzgerald, Appt.,
v.

UNION STOCK YARDS COMPANY, Limited.

(— Neb. —, 131 N. W. 612.)

Joint tortfeasors — several actions.

1. Several actions may be brought and several judgments recovered against several wrongdoers, although but one satisfaction can be had.

Same — satisfaction by one.

2. If one of several joint wrongdoers makes full payment of damages caused by injury done, there can be no further recovery for the same injury.

Release — joint tortfeasors — payment by one.

3. If one of several joint wrongdoers

makes settlement with the injured party, and pays him damages, which he agrees to receive and does receive as full compensation for all damages sustained, it will release all of the joint wrongdoers.

Same — partial settlement.

4. Settlement with one of several joint wrongdoers and payment of damages is not a defense to an action against another, unless it was agreed between the parties to the settlement that such payment was in full of all damages suffered. If the settlement is in writing, oral evidence is competent to show the intention of the parties thereto in an action against one not a party to the settlement. Affixing a private seal to such writing is without effect.

Trial — conflicting evidence — question for jury.

5. If the evidence is substantially conflicting upon a material issue, it presents a question for the jury. Evidence in this case is found to be insufficient to justify the court in directing the verdict.

(May 23, 1911.)

Note. — Right to show by extrinsic evidence that payment of judgment against, or consideration for release of, alleged joint tortfeasor, was not a satisfaction of claim.

The present note is supplemental to one on the same subject in 14 L.R.A. (N.S.) 330. As therein remarked, instances in which extrinsic evidence has been received to show the nature of a settlement with an alleged joint tortfeasor are more frequently met with than judicial discussions of the question.

That parol evidence is admissible to show the intention of the parties to a release given to one joint wrongdoer is, however, expressly held in *El Paso & S. W. R. Co. v. Darr*, — Tex. Civ. App. —, 93 S. W. 166, in which the court said: "We are unable to perceive that more sanctity attaches to a release of a wrongdoer than to a deed or mortgage, and if parol testimony is permissible to show the intent of the parties to the instruments last named, it is proper in regard to such release. There was no attempt to vary the terms of the release, but evidence was introduced merely to show the circumstances under which it was executed, and to more fully explain the intent of the parties as set out in the written instrument."

An instance in which extrinsic evidence was received may be found in *Atchison, T. & S. F. R. Co. v. Classin*, — Tex. Civ. App. —, 134 S. W. 358, in which plaintiff was permitted to testify that a release of other corporations from liability by reason of the injury for which suit was brought, and which recited that the payment was not to be construed as an acknowledgment of liability, was signed with the distinct understanding that it did not debar plaintiff from bringing an action for damages against the defendant.

In *Thompson v. Nashville, C. & St. L. R.*

APPPEAL by plaintiff from a judgment of the District Court for Douglas County in favor of defendant in an action brought to recover damages for the death of plaintiff's intestate alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Messrs. Smyth, Smith, & Schall, for appellant:

The Union Stock Yards Company was not a joint tort feisor with the Burlington Company.

Chicago, R. I. & P. R. Co. v. Zernecke, 59 Neb. 689, 55 L.R.A. 610, 82 N. W. 26; Lucas v. New York C. R. Co. 21 Barb. 245; Grant v. McCarty, 38 Iowa, 468; Hinkle v. Davenport, 38 Iowa, 355; Dailey v. Houston, 58 Mo. 361; Greene v. Nunnemacher, 36 Wis. 50; Pittsburgh R. Co. v. Chapman, 76 C. C. A. 418, 145 Fed. 886; Livesay v. First Nat. Bank, 36 Colo. 526, 6 L.R.A.(N.S.) 598, 118 Am. St. Rep. 120, 86 Pac. 102; King v. Chicago, M. & St. P. R. Co. 80 Minn. 83, 50 L.R.A. 161, 81 Am. St. Rep. 238, 82 N. W. 1113; Warax v. Cincinnati, N. O. & T. P. R. Co. 72 Fed. 637; Hukill v. Maysville & B. S. R. Co. 72 Fed. 745; Campbell v. Portland Sugar Co. 62 Me. 552, 16 Am. Rep. 503; Chesapeake & O. R. Co. v. Dixon, 179 U. S. 131, 45 L. ed. 121, 21 Sup. Ct. Rep. 67; Clark v. Fry, 8 Ohio St. 358, 72 Am. Dec. 590; Williard v. Spartanburg, U. & C. R. Co. 124 Fed. 796; Bliss, Code Pl. 3d ed. § 83.

Parol evidence is admissible to explain the release.

Greenl. Ev. § 279; Jones, Ev. 2d ed. § 434, p. 546; O'Shea v. New York, C. & St. L. R. Co. 44 C. C. A. 601, 105 Fed. 562; Norman v. Waite, 30 Neb. 302, 46 N. W. 639; Barnett v. Pratt, 37 Neb. 349, 55 N. W. 1050; Luce v. Foster, 42 Neb. 818, 60 N. W. 1027.

The release of the Burlington Company did not release the Stock Yards Company, because it was not the intention to do so.

Bloss v. Plymale, 3 W. Va. 393, 100 Am.

Dec. 752; Frink v. Green, 5 Barb. 405; Robertson v. Trammell, 37 Tex. Civ. App. 53, 83 S. W. 258; Louisville & E. Mail Co. v. Barnes, 117 Ky. 860, 64 L.R.A. 574, 111 Am. St. Rep. 273, 79 S. W. 261; O'Shea v. New York, C. & St. L. R. Co. 44 C. C. A. 601, 105 Fed. 559; Carey v. Bilby, 63 C. C. A. 361, 129 Fed. 203; Gilbert v. Finch, 173 N. Y. 455, 61 L.R.A. 807, 93 Am. St. Rep. 623, 66 N. E. 133; 24 Am. & Eng. Enc. Law, p. 307; Home Teleph. Co. v. Fields, 150 Ala. 306, 43 So. 712; El Paso & S. W. R. Co. v. Darr, — Tex. Civ. App. —, 93 S. W. 166; Chicago v. Babcock, 143 Ill. 358, 32 N. E. 271; Robertson v. Trammell, 37 Tex. Civ. App. 53, 83 S. W. 258.

Messrs. Greene, Breckenridge, & Mat-
ters, for appellee:

Assuming the negligence of the Stock Yards Company, the Railroad Company and it were joint tort feisors.

Leddy v. Barney, 139 Mass. 394, 2 N. E. 107; Cleveland, C. C. & St. L. R. Co. v. Hilligoss, 171 Ind. 417, 131 Am. St. Rep. 258, 86 N. E. 485; Tompkins v. Clay Street R. Co. 66 Cal. 163, 4 Pac. 1165; Hubbard v. St. Louis & M. River R. Co. 173 Mo. 249, 72 S. W. 1073; Hartigan v. Dickson, 81 Minn. 284, 83 N. W. 1091; Drown v. New England Teleph. & Teleg. Co. 80 Vt. 1, 66 Atl. 801; Seither v. Philadelphia Traction Co. 125 Pa. 397, 4 L.R.A. 54, 11 Am. St. Rep. 905, 17 Atl. 338; Snyder v. Mutual Teleph. Co. 135 Iowa, 215, 14 L.R.A.(N.S.) 321, 112 N. W. 776; Dufur v. Boston & M. R. Co. 75 Vt. 165, 53 Atl. 1068.

If it be conceded that it is competent to show by parol that an instrument executed and delivered to one of two joint tort feisors, though in its form a release of all damages, was intended as a partial satisfaction only, the evidence in this record wholly fails to overcome the recital of the release.

Doane v. Dunham, 4 Neb. 135, 89 N. W. 640; Weed v. Chicago, St. P. M. & O. R. Co. 5 Neb. (Unof.) 623, 99 N. W. 827; McBride v. Scott, 132 Mich. 176, 61 L.R.A.

Co. 160 Ala. 590, 49 So. 340, it was held that in view of the distinction between a technical release under seal and a release under the Alabama statute, which operates according to the intention of the parties, it could not be said as a matter of law that a release made after the commencement of the action against the defendant, containing no allusion to such action, acknowledging the payment of a sum of money, "in full payment for such pain I suffered and loss of time caused by same," and releasing only the other party thereto "from all damages and responsibility for the same,"— was intended as a release to all damages for the entire tort, so as to operate as a release to an alleged joint tort feisor, but that it was a question of fact whether or not what 33 L.R.A.(N.S.)

the releasor had received was received in full satisfaction.

Another aspect of the question before the court in FITZGERALD v. UNION STOCK YARDS Co. is discussed in a note to Edem v. Fletcher, 19 L.R.A.(N.S.) 618, upon the effect, in a release of one joint tort feisor, or reservation of right as against others.

As to effect of release of one person from liability for a tort to release another, where former was not in fact or law liable, see note to Snyder v. Mutual Teleph. Co. 14 L.R.A.(N.S.) 321.

As to effect of covenant not to sue one tort feisor as a release of another, see note to Musolf v. Duluth Edison Electric Co. 24 L.R.A.(N.S.) 451. E. S. O.

445, 102 Am. St. Rep. 416, 93 N. W. 243, 1 A. & E. Ann. Cas. 61; Abb v. Northern P. R. Co. 28 Wash. 428, 58 L.R.A. 293, 92 Am. St. Rep. 864, 68 Pac. 954; Snyder v. Mutual Teleph. Co. 135 Iowa, 215, 14 L.R.A.(N.S.) 321, 112 N. W. 776; Denver & R. G. R. Co. v. Sullivan, 21 Colo. 302, 41 Pac. 501; Allen v. Ruland, 79 Conn. 405, 118 Am. St. Rep. 146, 65 Atl. 133, 8 A. & E. Ann. Cas. 344; Wardell v. McConnell, 25 Neb. 558, 41 N. W. 548.

Sedgwick, J., delivered the opinion of the court:

Martin Fitzgerald, a young man about twenty-three years of age, was in the employ of the Chicago, Burlington, & Quincy Railroad Company as a switchman in the yards at South Omaha. Because of a defect in one of the cars of the company, it was necessary to use a chain in coupling it with the tender of the engine, and Fitzgerald was directed by the foreman to go between the car and the tender for that purpose. While he was so employed, the defendant company drove a train of cars against the train on which he was working, which forced the car and locomotive together, and instantly killed him. His mother, the plaintiff, as administratrix of his estate, brought this action against the defendant for damages caused by his death. The defendant denied that it was negligent, and alleged that this plaintiff and the father of the deceased had brought an action against the Chicago, Burlington, & Quincy Railroad Company upon the same cause of action, and that the negligence of the defendant in that action was the cause of the injury complained of, and that the same parties also brought an action against the same railroad company as beneficiaries of the relief department of that company, and that afterwards both of the said actions were settled, and that the railroad company paid the plaintiff \$4,400 in full settlement of the damages caused by the death of the said Fitzgerald, and \$2,200 in full settlement of the benefits to which they were entitled from the relief fund. Upon the conclusion of the evidence, the court instructed the jury to find a verdict for the defendant. The plaintiff has appealed.

The parties agree that there are three principal questions to be determined in the case: (1) Were the defendant and the railroad company jointly liable for the death of the deceased; that is, were they joint tortfeasors? (2) If they were joint tortfeasors, could the plaintiff settle with and release one of them without releasing the other? (3) If the plaintiff could settle with and release the railroad company from liability and at the same time reserve its right of action against this defendant, is the testi-

mony in the case sufficient to establish that it was the intention and agreement of the parties to settle with and release only the railroad company, and reserve a right of action against this defendant? It was also contended by the defendant that in any event the evidence was not sufficient to show that this defendant was negligent, and that that negligence was the proximate cause of the injury complained of.

Upon the first question there is some controversy in the evidence, and we do not find it necessary to discuss this evidence in view of our conclusion upon the second proposition. If both parties are liable for the same injury, they are jointly and severally liable; that is, for the purpose of the case, they are joint tortfeasors. It is conceded in the pleading and briefs that the railroad company was liable. If this defendant was not guilty of negligence which was the proximate cause of the death of young Fitzgerald, then that of itself is a sufficient defense in this action. If it is conceded that the railroad company and this defendant were joint tortfeasors, would the settlement with the railroad company operate as a release of this defendant? While the action of Mr. and Mrs. Fitzgerald, as the parents of the deceased, was pending against the railroad company, they compromised with the railroad company by an agreement in writing, called a receipt and contract of settlement and release, as follows:

"Burlington Route. Feb., 1908. Audit Number, 253. Department Number, F. B. T. 1468. Chicago, Burlington, & Quincy Railroad Company, Lines West of the Missouri River. 2-29-08. To Mary Fitzgerald, as Administratrix of the Estate of Martin J. Fitzgerald, Deceased, Edward A. Fitzgerald and Mary Fitzgerald, Father and Mother of Said Deceased. South Omaha, Nebraska. Paid Voucher. That is to certify that I, Mary Fitzgerald, as administratrix of the Estate of Martin J. Fitzgerald, deceased, have this day received from the treasury of the Chicago, Burlington, & Quincy Railroad Company, the sum of forty-four hundred (\$4,400) dollars. \$4,400. And this is to certify that we, Edward A. Fitzgerald and Mary Fitzgerald, father and mother of said deceased, have this day received from the Relief Fund of the Relief Department of said Company draft No 30984, for twenty-one hundred (\$2,100) dollars same being amount of death benefit due us as beneficiaries of said deceased. And in consideration of the above payments, we, Mary Fitzgerald as such administratrix and Edward A. Fitzgerald, as such father and mother, hereby acknowledge full payment, settlement, re-

lease, and satisfaction, and discharge of all claims and demands of any nature whatsoever, which we, or either of us, as such administratrix or as such parent, may have or claim to have either against the Chicago, Burlington, & Quincy Railroad Company or its said Relief Department, or both of them, arising from, growing out of, or to grow out of the death of Martin J. Fitzgerald aforesaid, from injuries inflicted upon his person by reason of his being struck, run over, and crushed by switching train in yards at South Omaha, Nebraska, on or about October 15th, 1907. Member R. D. Draft No. 1187. Claim No. F. D. 50, Neb. Approved: F. B. Thomas. Approved: James E. Kelby. Approved: Approved: H. D. Foster, Asst. Auditor.

"Contract of Settlement and Release. Whereas, I have agreed upon a settlement of all claims against the Chicago, Burlington, & Quincy Railway Company arising from the circumstances set out in the foregoing memorandum, which is made a part of this agreement, and in said settlement have included all damages sustained by me, those not yet ascertained or developed, if any there shall be, as well as those now known, and also have included and settled all other causes of action at this date existing in my behalf against said company, whether arising upon contract or tort, and whether like or unlike the demand specifically referred to above: Now, in consideration of the payment to me of forty-four hundred dollars (\$4,400) hereby acknowledged and declared to be the full and only consideration moving to me, the receipt of which is hereby acknowledged, I do hereby release and forever discharge the Chicago, Burlington, & Quincy R. R. Company, its lessors, lessees, and controlled companies, and its and their officers, employees, Relief Department, successors, and assigns, of and from all debts, suits, causes of action, claims, and demands whatsoever, at law or in equity, which I now have, or to which I may hereafter become entitled on account of the circumstances above set out, including damages not yet ascertained or developed, if any there shall be, as well as those now known, and also of and from all or any other causes or things to this date, whether like or unlike the premises, and whether arising in contract or in tort. In witness whereof I have hereunto set my hand and seal this 29th day of February, 1908. Read to the said Mary Fitzgerald, Admr., etc., and Edward A. Fitzgerald, and subscribed by him in our presence, this

her

29th day of February, 1908, Mary X Fitzgerald

mark

gerald, as Administratrix of the Estate of Martin J. Fitzgerald, Deceased. Edward A. Fitzgerald, Father. Mary X Fitzgerald, mark

Mother. Witness: Mary Fitzgerald. Witness for Edward A. Fitzgerald, and for mark of Mary Fitzgerald: C. J. Smith.

This court, so far as we have noticed, has not considered and determined the precise question involved. In *Wardell v. McConnell*, 25 Neb. 558, 41 N. W. 548, the syllabus is as follows: "The rule is that, where the damages are uncertain, accord and satisfaction before judgment by one of several joint wrongdoers is satisfaction as to all; but the discharge of a party not shown to be a joint wrongdoer will not operate as a discharge of the other defendants." The point involved in the case and decided by the court is stated in the last paragraph of the syllabus. It is said in the opinion that "the testimony fails to show that Huber had ever sold intoxicating liquor to J. B. McConnell, the husband of the plaintiff in that action, and it is expressly proved that Mrs. McConnell had no facts in her possession at the time of bringing the action to justify her in joining Huber as defendant, and, if the testimony before us is to be believed, a verdict must have been rendered in his favor."

The opinion cites *McReady v. Rogers*, 1 Neb. 124, 93 Am. Dec. 333, in which it is stated: "Several actions may be brought and several judgments recovered against several wrongdoers, although but one satisfaction can be had." In *Iddings v. Citizens' State Bank*, 3 Neb. (Unof.) 750, 92 N. W. 578, *Wardell v. McConnell*, supra, is cited, and the point decided in that case is reaffirmed in these words: "The discharge of a party not shown to be a joint wrongdoer will not operate as a discharge of the other defendants." It must not be inferred, therefore, from these cases that this court has passed upon the question whether a settlement and release of one of several joint wrongdoers will necessarily amount to an accord and satisfaction of all damages suffered, and so discharge all of the parties liable therefor. In *Lovejoy v. Murray*, 3 Wall. 1, 18 L. ed. 129, the following propositions are decided: A judgment not fully satisfied against one or more cotrespanders is no bar to an action against one not joined in the first suit. Persons engaged in committing the same trespass are joint and several trespassers, and not joint trespassers exclusively. Satisfaction accepted in full for injury done precludes plaintiff from second recovery for same damages, though he may have obtained two or more judgments for the same tort. This is

the leading case in that court upon those propositions, and has been followed as such in subsequent cases in that court, and in the various state courts.

In the case at bar we have a complete settlement and release of one of the parties liable, from all claims of damage arising from one injury caused, as we are now supposing, by the joint action of several parties. Whether this should operate as release of all the parties jointly liable is a question that has been much discussed by the courts in this country and in England, and upon which there have been conflicting opinions. In ancient times it was quite uniformly answered in the affirmative. Such releases were usually formal and executed under seal; and, if they recited that all the damages occasioned by the injury had been satisfied, they were held to be conclusive upon the parties executing them. The rule then was, as it has since universally been held to be, that a party was not entitled to more than one satisfaction for an injury done him. If the injury had been fully compensated, he had no further right of action, and the release executed under seal acknowledging full compensation for the injury could not be contradicted or explained. It would seem that, if the courts in later decisions had kept this principle in mind, some of the uncertainty of the law upon this question might have been avoided. If a settlement by one of several joint wrongdoers, in which he admitted that the damages caused by the wrong done amounted to a certain specified sum, was not conclusive against the other wrongdoer, it is a little difficult to understand by what reasoning it could be made conclusive in his favor. It would seem that the real question would be whether the party injured had in fact been fully compensated for his injury, and his admission that his injury was limited to a certain sum, which admission was made for the purpose of obtaining a settlement with one of the parties who caused his injury, might under some circumstances have been considered open to explanation. When, however, he made such admission with due solemnity and under seal, it was, in the earlier cases at least, held to be conclusive against him. There is reason in holding that, if one of the joint wrongdoers acted for all and assumed to settle the whole matter and make full settlement of all claims of the injured party, such settlement might be binding upon all parties. We do not see upon principle why a part satisfaction and release of one wrongdoer should operate in favor of the other wrongdoer. It is generally held that there is no right of contribution existing between

wrongdoers, and the collection of part satisfaction from one is not an injury, but rather a benefit to the others. It is not the policy of the law to encourage litigation, but rather to favor settlement. Several wrongdoers who are jointly and severally liable for the injury done may not agree as to their liability, nor as to the desirability of adjusting the matter. Some of them might be willing to compromise with the injured party by paying a just proportion of the whole damage done, and be unwilling or even unable to pay the whole damage. Some men are quite eager for litigation; others will do anything reasonable to avoid it. If some of the wrongdoers are willing to adjust the matter by paying their reasonable proportion of the damage done, and the injured party can accept such payment and still reserve his claim against the more stubborn ones, such a construction of the law would seem to facilitate settlement and tend to avoid litigation. This idea is stated and elaborated in *Louisville & E. Mail Co. v. Barnes*, 117 Ky. 860, 64 L.R.A. 574, 111 Am. St. Rep. 273, 79 S. W. 261. See also *Bloss v. Plymale*, 3 W. Va. 393, 100 Am. Dec. 752; *Robertson v. Trammell*, 37 Tex. Civ. App. 53, 83 S. W. 258; *O'Shea v. New York, C. & St. L. R. Co.* 44 C. C. A. 601, 105 Fed. 559; *Carey v. Bilby*, 63 C. C. A. 361, 129 Fed. 203; *Gilbert v. Finch*, 173 N. Y. 455, 61 L.R.A. 807, 93 Am. St. Rep. 623, 66 N. E. 133; *Home Teleph. Co. v. Fields*, 150 Ala. 306, 43 So. 711; *El Paso & S. W. R. Co. v. Darr*, — Tex. Civ. App. —, 93 S. W. 166; *Chicago v. Babcock*, 143 Ill. 358, 32 N. E. 271. In 24 Am. & Eng. Enc. Law, 2d ed. p. 307, the law is stated as follows: "But it is a well-settled rule that, where a release of one wrongdoer is not a technical release under seal, then the intention of the parties is to govern, and it becomes a question of fact for the court or jury whether or not what the releasor has received was received in full satisfaction of his wrong; and, if it appears that it was not so received, it is only *pro tanto* a bar to an action against the other wrongdoers." Private seals do not affect the equity or legality of written instruments or contracts in this state. Comp. Stat. 1909, chap. 81, § 1. If this defendant was not a joint trespasser with the railroad company, it is conceded that the defense of settlement fails, and that, if defendant's negligence was the proximate cause of the injury, the court should have submitted the case to the jury, with instruction to ascertain the amount of the plaintiff's damages, and, after allowing the amount that had been received thereon, find their verdict for the remainder. If the de-

defendant and the railroad company were joint tort feorsors, as we have assumed in this discussion, the question is, Has the plaintiff been fully recompensed for the injury done? If the plaintiff received this money from the railroad company as full compensation for the damages caused by the injury complained of, and agreed with the railroad company to so receive it, and the parties were jointly liable for the wrong done, it would seem that the authorities generally hold that she is bound by that agreement, and cannot now maintain this action against this defendant, even though this defendant did not directly nor indirectly take any part in the settlement, or contribute anything towards the consideration therefor. It was held by this court in the cases cited above that even where there had been an accord and satisfaction with one party for the injury done, and that party formally released, it would not operate as a defense for the party whose wrongful act caused the injury, unless the party released was also in fact a joint wrongdoer. If this principle is conversely stated, an injured party who releases one of several joint wrongdoers from liability for a consideration which he agrees to accept as full compensation for the injury done thereby releases all who were jointly and severally liable therefor. This is in harmony with the authorities in general. This court considers itself committed to this rule.

The evidence is not such as to require the court to find as a matter of law that there was such an agreement. The rule that oral evidence is inadmissible to vary the terms of written instruments is generally applied only in suits between parties to the instrument. "It cannot affect third persons who, if it were otherwise, might be prejudiced by things recited in the writings, contrary to the truth, through the ignorance, carelessness, or fraud of the parties; and who therefore ought not to be precluded from proving the truth, however contradictory to the written statements of others." 1 Greenl. Ev. 16th ed. § 279. It will be seen that there is no such express provision in the receipt and contract of settlement. When these papers were presented to the plaintiff for her signature, the question was asked: "Does this release only the Burlington?" And it was answered by both the plaintiff's counsel and Mr. Thomas, who represented the railroad company, that it only released that company, and the papers were thereupon executed by this plaintiff. We do not think the court should so construe the transaction as matter of law. Under the circumstances disclosed in this record, the question was for the jury. The plaintiff can have but one satisfaction

for the injury. She can only recover from this defendant, in any event, the amount of damages occasioned by the injury less such payment as she has received thereon.

In this discussion, we have also assumed that the defendant was negligent, and that its negligence was a proximate cause of the injury complained of, but this has been assumed only for the purpose of discussion. The evidence is conflicting as to the negligence of this defendant, and whether such negligence, if any, was the proximate cause of the injury. This question also should be submitted to the jury for its determination.

For the reasons stated, the judgment of the District Court is reversed, and the cause remanded for further proceedings.

Reese, Ch. J., concurs in the conclusion.

NORTH CAROLINA SUPREME COURT.

JAMES MCLENNAN

v.

NORTH CAROLINA RAILROAD COMPANY, Appt.

(— N. C. —, 70 S. E. 1066.)

Railroad — lowering safety gates upon team — liability.

1. A railroad company which begins to lower a safety gate at a street crossing upon approach of a train, at a time when a traveler in a vehicle is upon the track, is bound to arrest the descent of the gate to give him opportunity to escape, and will be liable for the injury caused by lowering the gate upon his horses.

Same — negligence of travels — attempt to escape from track.

2. It is not negligence *per se* for a traveler in a vehicle who is upon a railroad track at a street crossing when the signal sounds for approach of a train and the safety gates begin to lower, to attempt to escape by driving his horse forward at a trot, rather than take the risk of remaining on the track inside the gates while the train passes, where he has less than 60 feet to go to get beyond the gate.

(April 19, 1911.)

Note. — Railroads: duty as to operation of safety gates at railroad crossings.

This note does not cover the question of what contributory negligence will excuse liability on the part of a railroad where an injury has resulted from a failure properly to operate its gates, nor does it cover the question of whether raised gates are an invitation to go upon the crossing upon which a traveler may rely upon in going thereon.

For a note on violation of police ordi-

APPEAL by defendant from a judgment of the Superior Court for Durham County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by the negligent operation of safety gates at a railroad crossing by defendant's lessee. Affirmed.

The facts are stated in the opinion.

Messrs. Guthrie and Guthrie and J. Lathrop Morehead, for appellant.

The presence of the raised gate did not justify plaintiff's total indifference and disregard to danger which was evident to him.

Hodgin v. Southern R. Co. 143 N. C. 93, 55 S. E. 413, 10 A. & E. Ann. Cas. 41; Koch v. Southern California R. Co. 148 Cal. 677, 4 L.R.A.(N.S.) 521, 113 Am. St. Rep.

nance as to safety gates, as ground for private action, see Sluder v. St. Louis Transit Co. 5 L.R.A.(N.S.) 246.

For a note on right of railroad company to delegate to independent contractor the maintenance of gates or flagmen at a street crossing, see Boucher v. New York, N. H. & H. R. Co. 13 L.R.A.(N.S.) 1177.

For a note on the power of municipality to require safety gates at crossing, see Pennsylvania R. Co's. Appeal, 3 L.R.A.(N.S.) 141.

Although the letter of an ordinance requiring companies operating cars on or over public streets, to erect safety gates at points where their tracks cross public streets, is silent as to any operation of such gates, its entire purpose would be frustrated unless they were also charged with the duty of properly operating them, and such duty is implied from the name, form, and purpose of such gates. Record v. Pennsylvania R. Co. 76 N. J. L. 800, 72 Atl. 62.

And although an act requiring a railway to employ "proper persons" to open and close its gates does not expressly say that it is the duty of such persons to see that the railway is reasonably safe when they open the gates, it implies that they are to exercise reasonable caution to see that the line is clear, and that they are not to open the gates when it is otherwise. Lunt v. London & N. W. R. Co. L. R. 1 Q. B. 277, 12 Jur. N. S. 409, 35 L. J. Q. B. N. S. 105, 14 L. T. N. S. 225, 14 Week. Rep. 497.

And although a railroad is not required to maintain gates and a flagman at a crossing, if it assumes to do both for such a period that the public have acquired knowledge of such fact, it is as much bound properly to operate them as if the municipal authorities had directed it to do so, and a failure to perform such duty is negligence. Edgerley v. Long Island R. Co. 46 App. Div. 284, 61 N. Y. Supp. 677; State v. Boston & M. R. Co. 80 Me. 430, 15 Atl. 36; House v. Erie R. Co. 26 App. Div. 550, 50 N. Y. Supp. 434.

It is generally held that it is the duty of railroad companies to exercise ordinary 33 L.R.A.(N.S.)

332, 84 Pac. 176, 7 A. & E. Ann. Cas. 795; Ellis v. Boston & M. R. Co. 169 Mass. 600, 48 N. E. 839; Greenwood v. Philadelphia, W. & B. R. Co. 124 Pa. 572, 3 L.R.A. 44, 10 Am. St. Rep. 610, 17 Atl. 188; Rangeley v. Southern R. Co. 95 Va. 715, 30 S. E. 386; Pennsylvania R. Co. v. Pfuell, 60 N. J. L. 278, 37 Atl. 1100; Dawe v. Flint & P. M. R. Co. 102 Mich. 307, 60 N. W. 838; Romeo v. Boston & M. R. Co. 87 Me. 540, 33 Atl. 24; Thomp. Neg. § 1614; Mitchell v. Seaboard Air Line R. Co. 153 N. C. 116, 68 S. E. 1059.

Messrs. Bryant & Brogden, for appellee:

When, in compliance with a municipal regulation or statute, or in the absence of either, a railroad company maintains and

care in the management of their gates at crossings, and that they are responsible to a traveler who, being without fault himself, is injured by negligent management of such gates.

In Feeney v. Long Island R. Co. 116 N. Y. 375, 5 L.R.A. 544, 22 N. E. 402, it was held that the jury were warranted in finding want of due care where there was evidence that when the person injured approached the crossing on a rainy evening the gates were up, but that after she had passed one gate they were lowered more rapidly than usual, without warning and without a light, by reason of which the plaintiff was struck on the head by the gates and injured. The court said: "The evidence warranted the jury in finding that the defendant omitted to observe that degree of care required by the circumstances, and that, owing to such omission, the plaintiff was injured. It was the duty of the defendant to use due care in operating the gates, so as to protect persons traveling upon the public highway not only from being run over by the cars, but also against injury from the gates themselves. If, on reaching a crossing protected by safety gates, a person finds them raised and motionless, he is at liberty to go on, and, if it becomes necessary to lower the gates while he is passing between them, it should be done with all the care demanded by the peculiar situation, and with due regard to the safety of human life."

Gates raised when crossing is unsafe.

It is clearly the duty of a gate tender to have his gates down when trains are approaching or passing over the crossing. Sager v. Atchison, T. & S. F. R. Co. 70 Kan. 504, 79 Pac. 132; Callaghan v. Delaware, L. & W. R. Co. 52 Hun, 276, 5 N. Y. Supp. 285; Whelan v. New York, L. E. & W. R. Co. 38 Fed. 15; North Eastern R. Co. v. Wanless, L. R. 7 H. L. 12, 43 L. J. Q. B. N. S. 185, 30 L. T. N. S. 275, 22 Week. Rep. 561.

And it is the duty of a gateman to know when a train coupling cars near a crossing

operates gates at a public highway or street, it is its duty to operate them not only with due regard to those approaching the crossing, but with due regard to those who have entered upon the crossing, and are between the gates.

Hodgin v. Southern R. Co. 143 N. C. 96, 55 S. E. 413, 10 A. & E. Ann. Cas. 41; Russell v. Carolina C. R. Co. 118 N. C. 1109, 24 S. E. 512; Feeney v. Long Island R. Co. 116 N. Y. 375, 5 L.R.A. 544, 22 N. E. 402; Cleveland, C. C. & I. R. Co. v. Schneider, 45 Ohio St. 678, 17 N. E. 321; Thomp. Neg. § 1533; O'Keefe v. St. Louis & S. F. R. Co. 108 Mo. App. 177, 83 S. W. 308; Smith v. Atlantic City R. Co. 66 N. J. L. 307, 49 Atl. 547; Pennsylvania Co. v. Stegemeier, 118 Ind. 305, 10 Am. St. Rep. 136, 20

N. E. 843; Parks v. Southern R. Co. 124 N. C. 136, 32 S. E. 387; Norris v. Atlantic Coast Line R. Co. 152 N. C. 510, 27 L.R.A. (N.S.) 1069, 67 S. E. 1017.

Plaintiff was required only to act with the same degree of care that a prudent man would have exercised under the same circumstances.

Parks v. Southern R. Co. 124 N. C. 136, 32 S. E. 387; Pennsylvania Co. v. Stegemeier, 118 Ind. 305, 10 Am. St. Rep. 136, 20 N. E. 843; Norris v. Atlantic Coast Line R. Co. 152 N. C. 510, 27 L.R.A. (N.S.) 1069, 67 S. E. 1017.

Brown, J., delivered the opinion of the court:

The facts are that the defendant operated

is to pass the crossing, and to protect the public by closing the gates during its movements. Walter v. Baltimore & O. R. Co. 6 App. D. C. 20.

And it is likewise his duty to open the gates at such times as travel can pass in safety. Sager v. Atchison, T. & S. F. R. Co. 70 Kan. 504, 79 Pac. 132.

It has been held that a railroad is not in the exercise of due care required in the operation of its gates,

—where the gates were left open when a train was approaching. Jenkins v. Baltimore & O. R. Co. 98 Md. 402, 56 Atl. 966; Evans v. Lake Shore & M. S. R. Co. 88 Mich. 442, 14 L.R.A. 223, 50 N. W. 386; Wilson v. New York, N. H. & H. R. Co. 18 R. I. 491, 29 Atl. 258; Louisville & N. R. Co. v. Eckman, 137 Ky. 331, 125 S. W. 729;

—where there was evidence that, at time of the accident, there was no watchman in charge of the gates, and that they were raised. Hughes v. Delaware & H. Canal Co. 1 Lack. Leg. News, 215;

—where the gates were open, and no signal or warning of the approach of a train given. Walsh v. Boston & M. R. Co. 171 Mass. 52, 50 N. E. 453; Glushing v. Sharp, 96 N. Y. 676;

—where the crossing gates were raised, and no bell was rung, and the flagman, who was on the way home, gave no warning until an instant before the accident. Fitzgerald v. Long Island R. Co. 10 N. Y. S. R. 433;

—where there was evidence that the gate at the crossing was raised, and that the flagman only swung a signal of safety, that no signal from an approaching train was given, and that the view of the train was obstructed by trees. Fitzgerald v. Long Island R. Co. 21 N. Y. S. R. 942, 3 N. Y. Supp. 230, affirmed in 117 N. Y. 653, 22 N. E. 1133.

—where there were carriage gates at a crossing for carriages and a turnstile for foot passengers, and one of the carriage gates was open and no keeper present, and a foot passenger was killed. Stapley v. London, B. & S. C. R. Co. L. R. 1 Exch. 33 L.R.A. (N.S.)

21, 4 Hurlst. & C. 93, 35 L. J. Exch. N. S. 7, 11 Jur. N. S. 954, 13 L. T. N. S. 406, 14 Week. Rep. 132;

—where the gates were raised after the passing of one train, and one started to cross and was struck by another train, of the approach of which he was not aware. Louisville & N. R. Co. v. Wilson, 124 Ky. 836, 100 S. W. 302;

—where, in violation of an ordinance, the gates were raised before a train had passed, and deceased went on crossing and was struck by a train going in an opposite direction and traveling at an unlawful speed. Smith v. Michigan C. R. Co. 35 Ind. App. 188, 73 N. E. 928;

—where a railroad required by a city charter to maintain gates at grade crossings, and to close them on the approach of trains, allows the gate to remain open, it appearing that the accident would not have happened if the gate had been closed on the approach and passing of the train. Baltimore & O. R. Co. v. Stumpf, 97 Md. 78, 54 Atl. 978;

—where the complaint in substance alleged that the crossing at which plaintiff was injured was a public one, that defendant had for sometime to the knowledge of plaintiff maintained guard gates there, that, relying on the fact that there were such gates and that they were always lowered on the approach of trains, plaintiff, because the gates were not lowered, approached crossing, and was about to pass over it when a train passed and caused his horse to run away and inflict injury. Rohde v. Chicago & N. W. R. Co. 86 Wis. 309, 56 N. W. 872;

—where there was evidence that a crossing in a city street was partially obstructed by standing cars, that it was approached by a train at the rate of 10 miles per hour, without any warning until a collision was imminent, and that the safety gates, constructed in accordance with the city ordinance, were open and tended to mislead the plaintiff. Lake Shore & M. S. R. Co. v. Frantz, 127 Pa. 297, 4 L.R.A. 389, 19 Atl. 22;

—where it appeared that the railroad's

railway gates on both sides of Corcoran street crossing in the city of Durham, for the protection of its tracks, as well as those of the Norfolk & Western and Seaboard Air Line Railways. On 22d of December, 1909, the gates being up, plaintiff entered upon the crossing, going south, driving a horse and buggy. When within 59 feet of the south gate, the gong in the gate tower sounded, a signal that a train was approaching and that the gates would close. The plaintiff was then on the Norfolk & Western track, and his horse in a trot. He did not stop, but drove on, attempting to get through the south gate before it closed. The gate descended on the horse's back, causing the animal to plunge through

the gate, throwing plaintiff out, and seriously injuring him.

The plaintiff offered evidence tending to prove it was defendant's custom to sound the gong as a warning to those between the gates, and to give them an opportunity to pass out before the gates were lowered, and that plaintiff was acquainted with and relied upon this custom. To this evidence defendant excepted. We think it was competent to prove the custom of defendant in sounding the gong, and that plaintiff knew of the custom and relied on it. *Parrott v. Atlantic & N. C. R. Co.* 140 N. C. 549, 53 S. E. 432; 1 *Wigmore*, Ev. §§ 92, 376. But a discussion of this exception is unnecessary, as it is proven by defendant's witnesses that there was a gong on the tower used for

employees were coupling cars near a crossing on a dark stormy night, that there was no light or brakeman on the rear car, which was pushed backward over the crossing, and that the gates were up and with a light upon them, and that the gateman did not come out until after the train began to move, and just to late to close the gates and prevent a buggy from going on the track, and that one of the employees saw the buggy approaching, but made no attempt to prevent it, although he suspected something might happen. *Walter v. Baltimore & O. R. Co.* 6 App. D. C. 20;

—where a lessor railroad failed, on the approach of lessee's engine, to lower its gates on one side of a way at the time those on the other side were lowered, and when the gates at a crossing some distance away, which gave notice that trains were about to pass, were lowered, and it appeared that the person injured could not have gone upon the track, if they had been properly lowered. *Startz v. Pennsylvania & N. Y. Canal & R. Co.* 42 N. Y. S. R. 457, 16 N. Y. Supp. 810;

—where an ordinance directed that gates shall be lowered whenever engines or cars approached under circumstances which made it appear reasonable to the gateman to suppose that they were coming upon or going across the crossing, where he failed to lower them, although he could see no one approaching the crossing at the time. *Chicago & A. R. Co. v. Wise*, 206 Ill. 453, 69 N. E. 500;

—where the uncontradicted testimony of a number of witnesses showed that the gates at the crossing were not properly operated at the time a boy was killed, that they were raised and a horse and wagon on which he was riding were permitted to be driven onto the crossing when a train was approaching at the rate of 40 miles an hour, and was so near that the wagon was struck and the boy killed, although the horse was moving all the time. *Bracken v. Pennsylvania R. Co.* 32 Pa. Super. Ct. 22.

But a railroad has been held not guilty of negligence,—where, by reason of frost, the gates could not be lowered, and the

gateman signaled with his lantern and shouted. *Canadian P. R. Co. v. Fleming*, 22 Can. S. C. 33.

And it was held in *Roland v. Philadelphia & R. R. Co.* 224 Pa. 630, 73 Atl. 958, that a failure to have the gates lowered was evidence of negligence to be taken into consideration by the jury in passing upon that question, but was not in itself, without regard to anything else proved, conclusive evidence of negligence.

And in *Rainey v. New York C. & H. R. R. Co.* 68 Hun, 405, 23 N. Y. Supp. 80, the mere violation of an ordinance requiring a railroad to attend the gates at all times, by failing to keep a gateman in attendance during the night, was held not to establish a cause of action, but to be evidence bearing upon the question of negligence.

Injuries from gates.

In *O'Keefe v. St. Louis & S. F. R. Co.* 108 Mo. App. 177, 83 S. W. 308, where the plaintiff was struck by a gate which was being lowered, the court stated the law as follows: "In respect to the first proposition, the law is that it was the duty of the gateman to exercise ordinary care in the operation of the gates to avoid letting them down on anyone in the street. This duty was not performed by the gateman merely glancing at the street as he began to turn the crank and lower the gate, and then turning his eyes in another direction and looking away from the gate he was lowering until after it was down. The exercise of ordinary care required the gateman to keep the gate under his control at all times, and to keep his eyes on the street while lowering the gate. If he had performed this duty, the accident would not have happened."

So, a gateman is bound to presume that persons might be on the street, and it is his duty to look out for them and keep his gates under control as he lowers them, so as not to injure travelers. *Ibid.*

And where a gate is lowered by turning a crank, and comes down slowly when properly operated, and can be stopped at

the purpose of giving notice of the lowering of the gates, and the gate keeper testified that he sounded the gong on this occasion. This is a very proper precaution, for the sounding of the gong not only serves to notify these then on the tracks to hasten off, but to those approaching the crossing it is a signal to stop, which they must heed at their peril.

The other exceptions to the evidence, upon examination, we think are without merit, and need not be discussed.

In apt time defendant moved to nonsuit:

(1) Upon the ground that there is no evidence of negligence; and (2) that the plaintiff, as matter of law, was guilty of contributory negligence upon his own showing.

The evidence of negligence is plenary. It was the gate keeper's duty to observe those who were crossing the tracks when he commenced to lower the gates. When he saw plaintiff trotting his horse in his endeavor to get through the gate, it was the gate keeper's duty to momentarily arrest the descent of the gate, and not let it come down on the horse's back. It is said the gate was operated by compressed air, and could not be stopped. The defendant's witness, the gate keeper, testified that he had never had occasion to stop the gates when he started them down, and further stated: "I expect you can stop

them in any position, if they are in proper order. Gates were in pretty good condition that day; about as good as they had been." The fact is that the gate keeper made no attempt to stop the gates, although he saw plaintiff, and must have known that his purpose was to escape from the peril he was in by being on the tracks when a train was approaching on one of them.

Upon the question of contributory negligence, the evidence shows that, when the gong sounded as a signal that a train was approaching, and that the gates would be closed, plaintiff was only 59 feet from the south gate on the Norfolk & Western track, and his horse at a trot. We cannot say as matter of law that he should have stopped and waited on the track until the train passed. It is a very dangerous and unpleasant position to occupy, to be in a buggy between closed gates inclosing three railroad tracks, when a train is passing on one of them. The plaintiff was in a position of danger, and doubtless his first impulse was to push ahead and drive on through the gate. We think upon this issue the trial judge gave the defendant all it was entitled to, when he submitted plaintiff's conduct under the circumstances to the judgment of the jury under the rule of the prudent man.

No error.

any point in its descent, it is the duty of the gateman to have the gate under control, and avoid letting it down on anyone who may be in the street; and he has no right to assume that people whom he has seen on the sidewalk would not step upon the street and pass under the gate, where the evidence tends to show people were in the habit of doing this. *Ibid.*

So, the case is properly submitted to the jury where, in an action for injuries sustained through being struck by the gate, there was evidence tending to prove that the gates were not in proper condition, in that the automatic bell was not ringing as usual, and that there was nothing to obstruct the gateman's view of the plaintiff, although he testified that he did not see her. *Smith v. Atlantic City R. Co.* 86 N. J. L. 307, 49 Atl. 547.

But it was held in *McKenna v. Alabama & V. R. Co.* 87 Miss. 652, 40 So. 426, that the fact that an injury to a pedestrian resulted from being struck by the beam of the gate at a crossing did not raise a presumption of negligence on the part of the railroad.

And it was held in *Tuohy v. Long Island R. Co.* 89 App. Div. 198, 85 N. Y. Supp. 824, that a railroad was not liable for an injury resulting to one being struck by gates, where the gateman securely fastened them up and went to the water-closet when no train was due to pass for twenty

minutes, and the gates were lowered by a person not in the railroad's employ, and it not appearing that they had before been interfered with.

Miscellaneous.

So, it has been held that the railroad was not in the exercise of due care in the operation of its gates, and that its negligence would render it liable;

—where the gate tender allowed a child less than seven years old, who was in company with his mother, to pass on the tracks when an approaching locomotive was partly hidden by a train which had just passed. *Tubello v. Delaware, L. & W. R. Co.* 67 N. J. L. 581, 52 Atl. 561;

—where a private way crossed the railway at nearly right angles, and the gate on one side was private, but on the other there was one gate for both private and public use, which was tended by the gateman, and the gateman in response to a query from one who had opened the private gate to cross, to know if the line was clear, answered in the affirmative when a train was so near that it struck the person crossing. *Lunt v. London & N. W. R. Co.* L. R. 1 Q. B. 277, 12 Jur. N. S. 409, 35 L. J. Q. B. N. S. 105, 14 L. T. N. S. 225, 14 Week. Rep. 497;

—where the gateman put down the gates and indicated to the trowman that the

crossing was ready for the passage of an engine standing 200 feet away, and about to back over the crossing, when plaintiff's foot was caught in the track. *Garafalo v. New York, N. H. & H. R. Co.* 206 Mass. 539, 92 N. E. 723;

—where there was evidence that after the gates were closed, a stranger had raised one of them to enable her to cross, shortly before deceased drove up. *Haywood v. New York C. & H. R. R. Co.* 35 N. Y. S. R. 748, 13 N. Y. Supp. 177, affirmed in 128 N. Y. 596, 28 N. E. 251;

—where plaintiff, to avoid fright to his horse, drove into a yard adjoining a crossing and, as a train was clearing the crossing, the gateman raised the gates and motioned plaintiff to cross, upon which he started for the crossing at a slow trot, and, as he came within a short distance of the crossing, a train suddenly appeared and the gates were lowered in front of his horse, which took fright and ran away, the court holding it error to grant a nonsuit. *Gray v. New York C. & H. R. R. Co.* 77 App. Div. 1, 78 N. Y. Supp. 653;

—where a railroad undertook to maintain a gate at a crossing, and it was held a question for the jury whether it was negligence to withdraw the keeper at 7 P. M., and leave the gates fastened back and open. *Philadelphia & R. R. Co. v. Killips*, 88 Pa. 405.

But a railroad has been held not guilty of negligence in the operation of its gates,

—where a mere volunteer or trespasser raised the gates at a railroad crossing to permit a team to pass, after they had been lowered by the regular gateman, and without his knowledge, and again lowered them before the team had crossed the track. *Haines v. Atlantic City R. Co.* 65 N. J. L. 27, 50 L.R.A. 862, 46 Atl. 595;

—where a gateman closed the last gate behind a street car which was going west, and when it had passed the west gate started to close that, but a car going east ran under it so he could not get the gate down lower than the trolley, and, seeing a train coming, he then raised the east gate to give the car going east a chance to get through. *Renders v. Grand Trunk R. Co.* 144 Mich. 387, 108 N. W. 368;

—where the gate tender had lowered the gates while a freight engine was partly on the crossing, and kept them down, but failed to call to or otherwise further warn a twelve-year-old girl of sufficient intelligence to work in a shirt factory, who passed under or around the gates and attempted to cross the tracks, and was struck by a train on a track other than the one first mentioned. *State use of Lilley v. Philadelphia, B. & W. R. Co.* 114 Md. 1, 78 Atl. 730. The court said: "He had warned them of danger as they approached the crossing by lowering the safety gate in their faces. He had continued to warn them of further danger, after the shifting had been suspended or completed, by maintaining the gates in a lowered position in their plain sight. That was the most ap-

propriate warning he could give them. With the gates still lowered, the danger signal in full sight, the two girls deliberately disregarded the warning provided by law for their protection, and fully displayed by the gate keeper. Even when they had passed the shifting engine, and were going toward the track on which the train was approaching, he continued to warn them of their danger by keeping the gate lowered in their full view, and, in accordance with the testimony of the survivor of them, showing, by leaning on it with folded arms, that the time had not arrived when it could with propriety be raised. If they acted upon the mistaken belief that the gates were down solely because of the shifting of cars, it was their misfortune, for which the appellee should not be held liable. Even when the gate keeper saw the two girls approaching the track on which the train was coming, it was not his duty to anticipate that, in spite of the danger signal of the lowered gate plainly visible to them, they would attempt to cross in advance of the coming train."

But where a gateman knew that a train was late and liable to pass at any moment, he was bound to use more than ordinary care, and if he saw persons on the track where they were liable to be hit by the train, it was his duty to do more than lower the gate; and if he failed to give other warning when he might have done so, he is guilty of negligence. *Lake Shore & M. S. R. Co. v. Ehlert*, 10 Ohio C. D. 443.

A railroad is not negligent in not having a gateman upon the ground at the crossing, and in operating its gates from a tower from which an attendant operated gates located at two crossings, where the gates were properly lowered, and it does not appear that if a gateman had been present he could have prevented plaintiff's runaway horse from breaking through the gates. *Brooks v. Boston & M. R. Co.* 188 Mass. 410, 74 N. E. 670.

And the fact that a gate tender could not read or write, nor tell the time by a watch or clock, is immaterial where there is no evidence that he could not see or hear a train approaching, and there is nothing to show that his ignorance contributed to the accident. *Roland v. Philadelphia & R. R. Co.* 224 Pa. 630, 73 Atl. 958.

In *Louisville & N. R. Co. v. Eckman*, 137 Ky. 331, 125 S. W. 729, where plaintiff had driven his automobile on the crossing when the gates were raised, and suffered injury by colliding with a train, the court said: "If, by keeping up the crossing gates when they should have been down, appellant's servants induced appellee to go upon the crossing when it was not safe for him to do so, and while thereon he was injured by a train, also in charge of appellant's servants, which in passing gave him no warning of its approach, such acts would undoubtedly constitute negligence. It is equally true that if, by the negligence of appellant's servants in failing to lower the gate, appellee was induced to run his automobile

upon the crossing, and while thereon and awaiting the raising of the west gate in order to leave the crossing, appellant's train passed so near the automobile that the vibration of the ground therefrom caused the automobile to move and run against the train, thereby inflicting appellee's injuries, or breaking his automobile, it would manifestly be but right to conclude that the negligence of appellant's servant in failing to lower the east gate in time to warn appellee not to go upon the crossing was the proximate cause of the injuries sustained; and this would be true although the passing train with which the automobile collided, in approaching the place of the collision, gave the usual signals of its coming. On the other hand, if, as claimed by appellant's counsel, appellee, notwithstanding his having been induced to go upon the crossing by the negligence of appellant's servant in failing to lower the gate in time to warn him not to do so, after getting thereon, knew, or by the exercise of ordinary care could have known, of the approach of the train, and thereafter negligently started his automobile, or negligently permitted it to be put in motion, and by reason thereof it ran into or against the train, there should have been no recovery, although appellant's servants in charge of the train may have been guilty of negligence in failing to give the usual signal of its approach, for in such case appellee's own negligence would have been the proximate cause of the injuries to his person and machine."

And where a gateman raised a gate when, by the exercise of ordinary care, he could have known that it was not safe for waiting carriages to go upon the crossing, the fact that he almost immediately closed them, and protected plaintiff from injury from the trains, will not relieve the railroad from responsibility for an injury resulting from a buggy preceding the plaintiff backing into the one in which the plaintiff was driving. *Illinois C. R. Co. v. Ruoff*, 141 Ky. 623, 133 S. W. 553.

So, the fact that the gate tender at night lowered the gates about an hour before an accident happened will not relieve the railroad from liability, providing the time elapsing and the circumstances surrounding the occurrence were sufficient to indicate that the fact that the gates had been raised could have been discovered by the gate tender by the exercise of reasonable care, and it need not be affirmatively established that the raising of the gates was the railroad's act. *Palmer v. New York C. & H. R. R. Co.* 129 N. Y. Supp. 658.

And testimony of a witness who was the first person to reach one injured at a crossing, that he saw the gateman leave his house and go toward the crossing before the accident, and that when he got to the crossing the gateman was there, tends in some degree to show that the gates were intended to be and would have been shut before the train arrived if the gateman had not been negligent. *Chicago & 33 L.R.A. (N.S.)*

A. R. Co. v. Redmond, 70 Ill. App. 119, affirmed in 171 Ill. 347, 49 N. E. 541.

And the negligence of a gateman at a railroad crossing in allowing a street car to get almost, if not entirely, upon the track before giving any warning that an engine was approaching, and then in giving contradictory signals as to stopping or going ahead, may render the railway company liable for an injury to a passenger in the street car, in jumping from the car under a reasonable apprehension of danger, although there was no real danger because the engine was under perfect control. *Kleiber v. People's R. Co.* 107 Mo. 240, 14 L.R.A. 613, 17 S. W. 946.

And a statute providing that before a street car crosses the tracks of a steam road, an employee shall go ahead and ascertain if the way is clear, does not relieve the steam road of the duty of so operating its gates as to indicate to the person operating the street car whether the track is clear, since the duties are concurrent. *Kopp v. Baltimore & O. S. W. R. Co.* 25 Ohio C. C. 546.

If the railroad using the tracks of another company accepts the services of the gateman of the other company, they become its servants, and it is liable for their negligence; and if it does not accept the services of such gatemen, its duty is to place competent gatemen there, and it is responsible for an omission to do so. *Cleveland, C. C. & I. R. Co. v. Schneider*, 45 Ohio St. 678, 17 N. E. 321.

And where three railroads cross the street, and one company hired a gateman and the others contributed toward his support, one who is injured through the negligence of such gateman in raising the gate before the passage of a train may recover of the company which hires and pays the gateman, although the train belonged to another road. *Brow v. Boston & A. R. Co.* 157 Mass. 399, 32 N. E. 362.

And both the company which installed and maintained the gates at a crossing, and another company which provided no other means of warning, but availed itself of the use of such gates and gatemen, are liable for the negligence of the gateman in failing to place lights on the gates when they are lowered at night, by reason of which an automobile collides with them, the responsibility of each company being the same as if it had used the gates alone. *Record v. Pennsylvania R. Co.* 76 N. J. L. 800, 72 Atl. C2.

And both the company owning a railroad and a company running over its tracks are liable for the inattention of a gate tender and his failure to lower the gate at a crossing when a train is approaching, by reason of which an accident occurs, notwithstanding a contract between the companies by which the owner of the road undertook to guard the crossing. *Louisville & N. R. Co. v. Roth*, 130 Ky. 759, 114 S. W. 264, the court said: "The contract between the two companies did not relieve either of them of this responsibility. Al-

though as between them it was the duty of the bridge company to perform this service, yet as to the public it was the duty of both, and neither could escape liability for this negligence upon the ground that, by a contract between them, it was the duty of the other to maintain these gates. The duty of protecting a crossing like this cannot be delegated to one of the companies using the track, or to the owner of the track, so as to absolve the company whose trains commit an injury, or the owner of the track, from liability to the person injured."

Where it is claimed that there was negligence in failing to lower gates, it is error to exclude evidence that because of the severity of the weather ice had formed so that they could not be operated, and that the railroad was in the act of removing it when the accident in suit occurred. *Recktenwald v. Erie R. Co.* 114 App. Div. 490, 99 N. Y. Supp. 1094. The court said: "Its duty with respect to the gates was the same as its duty with respect to other signals. The exercise of reasonable care in the construction and inspection of the gates, to maintain them in working order, was a full discharge of the defendant's duty with respect to the gates."

It cannot be said as a matter of law that the failure of a railroad to operate its gates at night was not the proximate cause of an injury occurring at a crossing, where an ordinance required the operation of the gates at day and night, although, as the electric car in which plaintiff was riding approached the crossing, the conductor went forward to see if the car could safely cross, and, through a misunderstanding of his signal, the motorman ran onto the crossing and the injury occurred. *Chicago & A. R. Co. v. Averill*, 224 Ill. 516, 79 N. E. 654.

And where it was contended by the plaintiff, who was riding a tandem when injured, that the gates at a crossing were suddenly dropped between the tandem riders and that he was thereby thrown, and it was contended by the defendant that the gates were down and that the plaintiff was injured by running into them, and five witnesses testified that the gates were open and eight that they were closed, there is no such preponderance of testimony as to justify an interference with a verdict for the plaintiff. *Edgerley v. Long Island R. Co.* 44 App. Div. 476, 60 N. Y. Supp. 1062.

Where there is evidence that gates are operated on Sunday, the fact that it was Sunday on which an accident occurred, and that the business of the town was not active, will not relieve a railroad company from negligence in failing to operate its gates. *Chicago & A. R. Co. v. Redmond*, 70 Ill. App. 119, affirmed in 171 Ill. 347, 49 N. E. 541.

And the question of whether an admission that gates are necessary at a crossing is more applicable to the busy parts of the week than on Sunday is rather for the jury than the court. *Merrigan v. Boston & A. R. Co.* 154 Mass. 189, 28 N. E. 149.
33 L.R.A. (N.S.)

The law does not require a railroad to have a light on the arm of a gate extending across the sidewalk, all that is necessary is to have sufficient light to enable a person exercising ordinary care to see the arm of the gate. *McDonald v. Covington & C. Elev. R. Transfer & Bridge Co.* 32 Ky. L. Rep. 992, 107 S. W. 226.

A railroad track at a street crossing is not a warning of danger from the negligent lowering of the gates by the gateman. *Sager v. Atchison, T. & S. F. R. Co.* 70 Kan. 504, 79 Pac. 132.

An injury resulting from the operation of gates does not raise the statutory presumption of negligence attending injuries by rolling stock of a railroad. *McKenna v. Alabama & V. R. Co.* 87 Miss. 652, 40 So. 426.

Where one receiving an injury at a crossing has actual notice of trains passing in front of him, he has all the warning that gates can give, and the condition of the gates as to him is immaterial. *Theobald v. Chicago, M. & St. P. R. Co.* 75 Ill. App. 208.

So, where the driver of a horse sees a train passing a crossing, and remains near by until a locomotive owned by one not a party to the suit passes and frightens the horse, the injury resulting is not the result of a failure to lower the crossing gates since she is warned by the view of the passing train, and has all that the warning gates can give. *Pittsburgh, C. C. & St. L. R. Co. v. Piper*, 100 Ill. App. 356.

A railroad company, in an action for personal injuries suffered at a crossing at night, cannot set up a failure of a municipality to notify the company, as required by statute, of the passage of an ordinance requiring the erection and operation day and night of gates at a crossing, where, in pursuance of such ordinance, it had erected the gates and for years operated them during the day, since it thereby waives the prescribed notice. *Chicago & A. R. Co. v. Averill*, 224 Ill. 516, 79 N. E. 654; *Perkins v. Wabash R. Co.* 233 Ill. 458, 94 N. E. 677. J. T. W.

OHIO SUPREME COURT.

JOHN H. WINDER et al., Exrs., etc., of
John O'Kell, Piffs. in Err.,
v.

THOMAS SCHOLEY et al., Trustees of Miami Lodge, No. 32, Knights of Pythias.

(83 Ohio St. 204, 93 N. E. 1098.)

Trust — promise to divide legacy — enforcement.

1. Where a testator is induced to make an apparently absolute legacy by a promise, express or implied, on the part of the legatee, that he will transfer the legacy to another, although no express trust is cre-

Headnotes by the Court.

ated, and although the legatee at the time of the promise intended no fraud, a court of equity may interfere to prevent a wrong, and declare the legatee a trustee *ex maleficio* for the protection of the testator's intended beneficiary.

Evidence — establishment of trust.

2. A trust in an absolute legacy may be established by parol evidence, and the contemporaneous declarations of the testator, and subsequent declarations of the legatee, that the bequest was made for the benefit of a third person upon the promise of the legatee to hold it in trust, are admissible for that purpose.

Same — joint legacy — promise to one.

3. Where such legacy is a joint legacy, the trust may be established as to all of the legatees by proof that the promise was made by one in behalf of all, and the subsequent

declarations of either of the legatees are admissible against all.

Same — trust legacy for lodge.

4. Where a testator, desiring to leave his property to his lodge, was advised by his lawyer that he could not do so directly, but that he could will it to three members of the lodge in whom he had confidence that they would do with it what he delegated to them to do, namely, to turn it over to the lodge, and he does so bequeath it to the three upon the promise of one, made in behalf of all, that they will transfer it to the lodge, equity may interfere to prevent the legatees from converting the property to their own use, and will declare them trustees *ex maleficio*.

Limitation of actions — enforcement of trust.

5. An action to have such legatees de-

Note. — May a constructive trust be based upon an undertaking to hold, for the benefit of another, property received through devise or inheritance, where no actual testamentary intention has been frustrated?

It is the aim of this note to present those cases in which the question whether a constructive trust, or, as it is often termed, a trust *ex maleficio*, arises from a promise to a decedent to apply property devolving upon the promisor by bequest or inheritance to certain purposes, as to which the promisee entertained no intention to make a direct provision which he was induced to forego by the promisor, but which, on the contrary, he designed to accomplish by conferring the intended benefit indirectly through the hands of a third person, practically, though perhaps not nominally, creating an express trust for such purpose. It is therefore complementary to a note in 8 L.R.A. (N.S.) 698, and its continuation in 31 L.R.A. (N.S.) 176, which contain the decisions in which the decedent's intention to give the property directly to a third person has been frustrated by the fraudulent conduct of an heir, devisee, or legatee.

The reader may also find useful in the present connection a note upon Gifts by will as affected by promises made to the testator, and by secret trusts, in 20 L.R.A. 465.

Since in the class of cases herein under discussion the element of personal fraud is wanting, its very existence being often expressly negatived by the continued willingness of the promisor to carry the decedent's wishes into execution, the only fraud which can justify the interposition of equity is the so-called "constructive fraud" upon the decedent, which would be occasioned by a failure to execute his wishes. The question stated is therefore merely a concrete aspect of the general question whether constructive fraud, as well as actual and intentional fraud, is sufficient to raise a trust *ex maleficio*. This general question, which has already re-

ceived some discussion in the note in 8 L.R.A. (N.S.) 698, above mentioned, in its relation to the decisions therein presented, is one upon which there is a conflict of opinion.

From what may be termed the technical point of view, the doctrine that a trust *ex maleficio* may be erected upon the anticipated breach of a parol promise to devote property received from the promisee to certain purposes is open to the serious objection that, by the simple expedient of giving it another name, it gives effect to a trust created by parol, and thus evades the express provision of the statute of frauds with respect to the creation or evidencing of trusts in realty, and the provisions of the statute of wills with respect to the formalities necessary to a valid testamentary disposition, unduly extending the judge-made exception which obtains where property has been acquired by actual fraud. For this reason the doctrine has been repudiated by some courts, as well as by so discriminating an author as Mr. Pomeroy. See Pom. Eq. Jur. § 1054.

On the other hand, looking at the matter from a practical view point, with the idea of doing justice to the parties, unhampered by artificial restrictions, and bearing in mind that the essential purpose of the statutes of frauds and wills is to interpose a safeguard against fictitious claims by requiring a satisfactory form of proof, the objections which stand in the way of the enforcement of a parol undertaking to hold property for the benefit of a third person, though unaccompanied by actual fraud, seem to be satisfactorily overcome by the court's insistence on clear and convincing proof of such undertaking.

If, then, the constructive fraud which would arise in case of nonperformance of a promise to apply property acquired from the promisee to the purposes agreed upon is sufficient to warrant a court of equity in enforcing performance, it is difficult to see why the same basis does not exist where the nominal as well as the real intention of the promisee was to create a trust. It would seem, therefore, as though the courts

clared trustees *ex maleficio* is not an action upon a contract not in writing, either express or implied, and, as such, barred in six years by the statute of limitations.

(December 20, 1910.)

ERROR to the Circuit Court for Montgomery County to review a judgment in plaintiff's favor in an action to recover money, together with interest, willed by testator to defendants upon their promise to hold the same in trust for a certain lodge. Affirmed.

The facts are stated in the opinion.

Messrs. Carr, Allaman, Kennedy, & Retter and McMahon & McMahon, for plaintiffs in error:

A will cannot be reformed, except it con-

tains the data for reformation within its own limits.

Kent v. Mahaffey, 10 Ohio St. 204; Giffin v. Brooks, 48 Ohio St. 211, 31 N. E. 743.

The jurisdiction to establish trusts *ex maleficio* is based on fraud, where the promise is not made in conformity with law, *viz.*, in writing.

2 Pom. Eq. Jur. §§ 1054-1056; Bispham, Eq. §§ 91, 218; Kent v. Mahaffey, 10 Ohio St. 220.

Assuming that the mere silence of Smart, when Kern said to the testator in his presence that the will would be all right if he had confidence that the legatees would carry out his wishes, amounted to an implied contract to turn over the money, the failure

which are willing to accept this doctrine might as well abandon the pretense that they are enforcing a trust *ex maleficio*; and instead announce that the statute of frauds will not in all cases preclude the enforcement of a parol trust, but that such a trust arising out of an understanding between the parties to a transfer of property may be enforced where its existence has been indubitably established. Such a course would do away with the difficulty of observing the tenuous boundary between the rule that the mere breach of a promise to hold property in trust is, in the absence of fraud in procuring the transfer, insufficient to raise a trust *ex maleficio*, and the doctrine that the constructive fraud upon the promisee in event of nonperformance of a promise in reliance upon which property is transferred will warrant a court of equity in constructing such a trust.

Of the cases comprised within the scope of this note, it may be said that the weight of authority supports the doctrine that equity will construct a trust upon the promise of an heir or legatee to devote all or a portion of the property received by inheritance or bequest to certain purposes, notwithstanding no actual fraud was contemplated by the promisor, and no specific testamentary intention was frustrated. This result is reached by adopting the somewhat forced inference that otherwise a direct testamentary gift would have been made. Where the purposes are such that an express trust or direct bequest would have been valid, equity will enforce performance of the promise; or, to the extent which a direct provision would have been invalid, will raise a trust for the benefit of the testator's heirs and next of kin.

A case in which a trust *ex maleficio* was held to arise notwithstanding the want of actual fraud on the part of a legatee is Curdy v. Berton, 79 Cal. 420, 5 L.R.A. 189, 12 Am. St. Rep. 157, 51 Pac. 858, where testatrix gave to a scrivener of the will certain property "in trust . . . to be distributed according to the private instructions I give him." The legatee having distributed the property in accordance with

the instructions given him, an action was brought by an heir at law of testatrix to have it decreed that the legatee held the legal title to the property in trust for the heirs. It was held that equity would raise a constructive trust in favor of the beneficiaries intended by testatrix, upon the ground that a legatee will not be countenanced in perpetrating a fraud by encouraging a testator to make a bequest which would not otherwise have been made, and then refusing to execute his promise.

So also, in Barrell v. Hanrick, 42 Ala. 60, it appeared that, in pursuance of an agreement between them, a testator devised certain property absolutely to a friend upon the understanding that he should hold it for the use and benefit of testator's brother, to whom, on account of his then being an alien enemy, the property could not be directly given; and that in view of the relations of the testator and the legatee it was a fair inference that the bequest and the parol stipulation relative thereto had birth as the result of the latter's suggestion and advice; that there was no reason to believe that the legatee practised any fraud or deceit in procuring the bequest, but, on the contrary, that there was every reason to believe that at the time of the execution of the will the legatee intended honestly and fairly to execute the trust in question, being prevented from doing so, however, by his death. Upon this state of facts it was held that evidence that the legatee's failure to fulfil his engagement was the result of an original fraudulent design was not essential to raise a trust *ex maleficio*, but his failure to execute the trust from whatever cause was a constructive fraud, against which relief should be decreed.

In Hooker v. Axford, 33 Mich. 453, where a wife, desirous of devising her property so as to benefit her husband, and also so as to prevent his creditors from depriving him of it, on her attorney's suggestion willed it to such attorney and her nephew upon the oral understanding that they would hold it for his use, it was held that equity would enforce the trust, both as against

to carry out such contract does not constitute a fraud.

Watson v. Erb, 33 Ohio St. 35; Crabill v. Marsh, 38 Ohio St. 331; Wheeler v. Reynolds, 66 N. Y. 227; Dunphy v. Ryan, 116 U. S. 491, 29 L. ed. 703, 6 Sup. Ct. Rep. 486; Lantry v. Lantry, 51 Ill. 458, 2 Am. Rep. 310; Grove v. Kase, 195 Pa. 329, 45 Atl. 1054; Williams v. Williams, 180 Ill. 364, 54 N. E. 229; Parrish v. Parrish, 33 Or. 486, 54 Pac. 352; Sprinkle v. Hayworth, 26 Gratt. 384; Cassels v. Finn, 122 Ga. 33, 68 L.R.A. 80, 106 Am. St. Rep. 91, 49 S. E. 749, 2 A. & E. Ann. Cas. 554; Gregory v. Bowlsby, 115 Iowa, 328, 88 N. W. 822; McCormick v. Grogan, L. R. 4 H. L. 82, Ir. Rep. 1 Eq. 313, 17 Week. Rep. 961; Orth v. Orth, 145 Ind. 184, 32 L.R.A. 298,

57 Am. St. Rep. 185, 42 N. E. 277, 44 N. E. 17.

A trust not communicated to the legatee or devisee in the lifetime of the testator does not exist.

Re Boyes, L. R. 26 Ch. Div. 531, 53 L. J. Ch. N. S. 654, 50 L. T. N. S. 581, 32 Week. Rep. 630; McCormick v. Grogan, L. R. 4 H. L. 82, Ir. Rep. 1 Eq. 313, 17 Week. Rep. 961; Re Stead [1900] 1 Ch. 237, 69 L. J. Ch. N. S. 49, 48 Week. Rep. 221, 81 L. T. N. S. 751; Rowbotham v. Dunnett, L. R. 8 Ch. Div. 430, 47 L. J. Ch. N. S. 449, 38 L. T. N. S. 278, 26 Week. Rep. 529; Bryan v. Bigelow, 77 Conn. 604, 107 Am. St. Rep. 64, 60 Atl. 266.

Messrs. Gottschall & Turner, for defendants in error:

the attorney and the nephew, notwithstanding the fact that the nephew was entirely passive at the time the will was executed, and had nothing whatever to do in procuring it, and the attorney acknowledged the trust and continued ready at all times to acknowledge the husband's rights; the court saying that if the attorney had given the advice intending to appropriate the property, it would have been a gross fraud and a gross breach of confidence; that it would be equally a fraud if, having given the advice honestly, he should afterward conclude dishonestly to retain the lands; and this being his position, the party who, under his advice, was associated with him, was in like position.

In Smullin v. Wharton, 73 Neb. 607, 103 N. W. 288, 106 N. W. 577, 112 N. W. 622, 113 N. W. 267, where a husband, desiring that his wife might continue to live in the manner to which they had been accustomed, but at the same time preferring that his property should go ultimately to his own family rather than to hers, requested her, at the time of his executing a will, leaving all his property to her, to use any surplus income for the benefit of his family, and to make a will leaving all the property to them at her death, it was held that by her promise to comply with such request, made at the time of the execution of the will, and reliance upon it by her husband in signing that instrument, and her refusal to carry out her promise, she thereby became a trustee *ex maleficio*, if the trust was defined and certain enough to be capable of enforcement.

In Re O'Hara, 95 N. Y. 403, 47 Am. Rep. 53, a testatrix gave to three persons, who were her lawyer, her doctor, and her priest, absolutely, but as joint tenants, the bulk of her estate, in reliance upon the promise of the legatees to devote it to certain charitable uses dictated in a letter of instructions, her intention in making such disposition being to accomplish certain purposes, some of which could not be legally carried out by express provisions in her will. The legatees were not actuated by fraudulent motives, and continued willing to carry out

the instructions, being prevented therefrom by the contention of the heirs at law that a trust *ex maleficio* arose, which, failing as to the intended beneficiaries, resulted to them; and this contention was sustained by the court.

In Amherst College v. Ritch, 151 N. Y. 282, 37 L.R.A. 305, 45 N. E. 876, a testator, desiring to evade the provisions of a statute limiting the proportion of an estate which may be given by will to charitable purposes, made certain persons in whom he had confidence his residuary legatees; one of whom undertook that they would respect his intentions as to the disposition of the property. The legatees were not actuated by fraudulent intentions, but continued willing, and in fact attempted, to carry out the testator's wishes. Upon this state of facts it was held that a constructive trust arose in favor of the charitable institutions to the extent to which the law permits property to be willed away from the heirs and next of kin to such institutions, and as to the balance, in favor of the heirs and next of kin.

So also in Edson v. Bartow, 154 N. Y. 215, 61 Am. St. Rep. 609, 48 N. E. 541, where a testatrix, in order to prevent the defeat of her testamentary intentions by a statute rendering void all legacies to charitable uses contained in wills executed less than two months before death, provided that if any legacies should fail, the amount thereof should go absolutely to the persons named as her executors, one of whom was the draftsman of the will, expressing her belief that in the use of same they would follow what they believed to be her wishes, it was held that, as the draftsman of the will impliedly consented to carry her wishes into effect as to such property, and the secret trust being void, as having for its object a circumvention of the statute referred to, equity would not permit the legatees to hold their legacies, but would declare a trust in favor of the heir at law and next of kin.

In McKee v. Jones, 6 Pa. 425, where a testatrix who had made a will devising certain lands to a son and daughter, upon the

An express trust engrafted upon an absolute bequest will be enforced.

McLellan v. McLean, 2 Head, 684; Shields v. McAuley, 37 Fed. 302; Hooker v. Axford, 33 Mich. 453; Williams v. Vreeland, 29 N. J. Eq. 417; Towles v. Burton, Rich. Eq. Cas. 146, 24 Am. Dec. 409; Jones v. McKee, 3 Pa. St. 496, 45 Am. Dec. 661; McKee v. Jones, 6 Pa. 425; Socher's Appeal, 104 Pa. 609.

Express fraud in procuring a bequest is not essential.

Moss v. Cooper, 1 Johns. & H. 352, 4 L. T. N. S. 790; Re Fleetwood, L. R. 15 Ch. Div. 608, 49 L. J. Ch. N. S. 514, 29 Week. Rep. 45; Curdy v. Berton, 79 Cal. 420, 5 L.R.A. 189, 12 Am. St. Rep. 157, 21 Pac. 858; Ransdel v. Moore, 153 Ind. 393, 53

L.R.A. 753, 53 N. E. 767; Mathews v. Leaman, 24 Ohio St. 615; Powell v. Yearance, 73 N. J. Eq. 117, 67 Atl. 892; Pollard v. McKenney, 69 Neb. 742, 96 N. W. 679, 101 N. W. 9; Larmon v. Knight, 140 Ill. 232, 33 Am. St. Rep. 229, 29 N. E. 1116, 30 N. E. 318; Dowd v. Tucker, 41 Conn. 197.

A promise, express or implied, by one, binds all.

Re O'Hara, 95 N. Y. 403, 47 Am. Rep. 53; Amherst College v. Ritch, 151 N. Y. 282, 37 L.R.A. 305, 45 N. E. 876; Schouler, Pers. Prop. §§ 156-158; Sealy v. Laurens, 1 Desauss. Eq. 137; Bunch v. Hurst, 3 Desauss. Eq. 273, 5 Am. Dec. 551; Herbeumont v. Thomas, Cheves, Eq. 21; Moss v. Cooper, 1 Johns. & H. 352, 4 L. T. N. S. 790; Re Fleetwood, L. R. 15 Ch. Div. 608,

request of the son, who was involved in debt, executed a codicil giving the whole tract to the daughter, who, at the time, was charged by her mother to remember that half belonged to her brother, and assented thereto, it was held that a trust *ex maleficio* arose in favor of the son.

In Schultz's Appeal, 80 Pa. 396, where a testator, desiring to bequeath his estate to charitable uses, but fearing that such disposition would be rendered invalid by law by his death within thirty days thereafter, bequeathed his property absolutely to a person in whom he had confidence, the court stated the law to be that if an absolute estate is devised, but upon a secret trust, assented to by the devisee, either expressly, or impliedly by knowledge and silence before the death of the testator, a court of equity will fasten a trust on him on the ground of fraud, though if he have no part in the devise, and no knowledge of it until after the death of the testator, there is no ground upon which equity can fasten such a trust on him, even though, after it comes to his knowledge, he should express an intention of conforming to the wishes of the testator.

In Shields v. McAuley, 37 Fed. 302, where a woman to whom certain real estate had been devised by a brother died intestate, leaving an instrument stating that by the request of such brother the realty should be sold at her death, and the proceeds divided between two charitable institutions, it was held that since evidently the brother had communicated his intention to her, and she had accepted the trust, the case came within the rule that if a testator make a devise in terms absolute, but upon a private understanding had with his devisee, whether by the latter's express promise or his assent implied from his silence, that he will apply the devised estate to some purpose designated by the testator, a trust arises which a court of equity will enforce unless unlawful in itself.

In De Laurencel v. De Boom, 48 Cal. 581, where a testator, after making a will giving all his property absolutely to a certain person, wrote a letter of instructions 33 L.R.A. (N.S.)

explaining the purposes to which he desired his property to be put, and the legatee in the testator's lifetime bound himself in writing to execute the wishes of the testator expressed in the letter, it was held that when the legatee thus accepted the terms of the trust, this created a valid trust which a court of equity would enforce, the court saying: "The presumption is, that the testator would have revoked or modified the will, except for the fact that the defendant, by a solemn instrument, accepted the trust, and promised to execute it. It would be a fraud upon the testator and upon *cestui que trusts* to permit the defendant to repudiate the trust on the faith of which the estate was devised to him."

In Re Minturn, 5 Dem. 508, a testatrix gave her entire estate to her executors in trust to pay the income to her brother for life, with remainder over. Among her papers after her decease was found an agreement under seal, signed by the brother, reciting the testamentary provision, and containing a covenant that, after enjoying the income for three years, he would execute a release thereof for any future time. It was held that although there was no direct evidence of an actual personal conference between the testator and the beneficiary, or that testatrix ever avowed an intention of so altering her testamentary disposition as to limit her brother's interest in her estate to the enjoyment of the income for three years, the fact of her having possession of the agreement was sufficient to bring the case within the doctrine of trusts *ex maleficio*.

On the other hand, in Evans v. Moore, 247 Ill. 60, 93 N. E. 118, where it appeared that a testator, at the time he made his will, did not desire or intend then to place the title in a nephew, on account of whose dissipation he thought better to place the title in someone else for the time being; that the devisee did not solicit or request that the devise be made to him to hold for the benefit of the nephew, and did nothing to induce it to be so made, beyond possibly promising testator to hold the title for

49 L. J. Ch. N. S. 514, 29 Week. Rep. 45; Hooker v. Axford, 33 Mich. 453.

Summers, Ch. J., delivered the opinion of the court:

John O'Kell, an old bachelor, had been for many years a member of Miami Lodge at Dayton, Ohio. He had been a daily visitor at the rooms of the lodge, and had spent most of his time there, and considered it his home. He became sick, and, having no heirs of his body, and his relatives all being in good circumstances, he desired to will his property to the lodge. In November, 1898, he requested the plaintiff in error A. Ferris Smart, who was one of the trustees of the lodge to write his will. Smart persuaded him to have it done by a lawyer, and by di-

rection of O'Kell went to a lawyer and requested him to draft a will giving the property to the lodge. The lawyer, learning that O'Kell probably would not live a year under the mistaken notion that in that event the bequest would be void under the charitable bequests statute, on that ground advised that O'Kell make an immediate transfer of his property to the lodge. Smart communicated the lawyer's advice to O'Kell, and later returned to the lawyer with the statement that O'Kell was unwilling to make an immediate transfer, as he might get well and need the property. The lawyer then suggested that what O'Kell wished might be effected by his making a will giving the property to two or three members of the lodge whom he would trust to give it

the benefit of the nephew until he was more mature in years and less given to dissipation, it was held that the case was within the rule that a mere parol promise of a grantee or devisee to hold the title of the property in trust, unattended with any fraud in procuring the conveyance or devise to be made, does not raise a constructive trust.

And in Orth v. Orth, 145 Ind. 184, 32 L.R.A. 298, 57 Am. St. Rep. 185, 42 N. E. 277, a testator gave his entire estate absolutely to his wife, requesting her in an accompanying letter to make certain provisions for their children. The wife having died, an action was brought by one of the children upon the theory that, as the wife had promised testator to carry out the requests and intention expressed in the letter, a trust *ex maleficio* arose from her failure to do so. It was held that if the wife by fraud had procured the execution of the will, or had dissuaded testator from executing a will creating a trust for the benefit of his children, equity would have held her a trustee for the benefit of those entitled by law to the property; but that her mere failure to comply with the requests contained in the letter, having promised her husband that she would comply with them, was not such fraud as will raise a trust *ex maleficio*. "Such a trust," says the court, "in its very nature, implies the absence of an intention on the part of the parties to create a trust by their own expression, for it would be to repeal the statute of trusts . . . forbidding the creation by parol of a trust concerning lands, to permit the parties, after declaring a parol trust and violating it, to then plead that violation as the fraud calling for the equitable construction of that particular trust. . . . There are, perhaps, cases where parol trusts, ineffectual under the statute, have been procured by such fraud and deceit as that equity will grant relief for the fraud, without regard to the declared trust; but such cases do not proceed upon the idea that

equity enforces the trust which is inhibited by the statute, but rather upon the idea that equity constructs a trust."

In Whitehouse v. Bolster, 95 Me. 458, 50 Atl. 240, it was held that no constructive trust arose from the promise of a decedent's father that her wishes should be carried out, where it appeared that the daughter did not rely upon such promise as an effectual disposition of her estate, but intended to make a will, being prevented however from doing so by a sudden illness and death, the court saying: "There is one principle which runs through all the cases, and which, in our view of this case, must be decisive here. It must always appear that the decedent relied upon the promise of the heir or devisee as an effective arrangement for the future disposition of his property. This principle is fundamental and universal. Such a trust as this is claimed to be has its origin in fraud. It is forced, if necessary, upon the conscience of the party to prevent the accomplishment of a fraudulent result. It is constructed to compel the donee to do with the estate coming to him as he has induced his ancestor or testator to believe that he will do. It is upheld when and only when it would be unconscientious for the donee to retain the estate to his own benefit. It exists only because the decedent relied upon the promise of the heir. If the decedent did not rely upon the promise, there is no fraud, and the trust fails. It is not a fraud not to keep a promise that was not relied upon."

In Moore v. Campbell, 102 Ala. 445, 14 So. 780, it was held that a bill charging that a residuary devisee and legatee accepted the gift upon a distinct promise and agreement with testatrix at the time the will was made that out of the proceeds of the residuary estate he would give a certain person a sum of money was, so far as it might be considered as seeking to enforce a parol trust in real property devised by the will, without equity. This decision, however, seems to proceed upon the theory

to the lodge. Smart again went to consult O'Kell and returned to the lawyer, and stated that his advice would be acted upon, and gave him three names, his own and those of John H. Winder and Lewis P. Williams, the other plaintiffs in error. A will was immediately drafted by the lawyer and executed by O'Kell, giving all of his property to the three persons named, and naming them as executors. In December O'Kell died, his will was probated, the three friends were appointed executors, and in January, 1899, they filed their first and final account, showing that they had received more than \$5,000 and had something more than \$4,000 for distribution. At different times shortly after O'Kell's death the executors, severally and to different members

of the lodge, made statements of the purport that O'Kell had given his property to them for the lodge, and that it would be turned over after the time had expired in which his heirs could contest the will. Nothing ever was turned over, and in 1906 this action was commenced to recover from the defendants the fund on hand for distribution together with interest. The common pleas court found for the lodge, and on error in the circuit court its judgment was affirmed.

Counsel for defendants say that there is no reported case in Ohio in which a trust has been ingrafted on a will by parol, and contend that a beneficiary under a will can be declared a trustee *ex maleficio* only when the testator was influenced by the legatee's actual intentional fraud. Pomeroy on

that the purpose of the bill was to enforce performance of an express, rather than of a constructive, trust.

That a constructive trust cannot arise from a promise to carry out a trust indefinitely declared by a will is held in *Olliffe v. Wells*, 130 Mass. 221. It there appeared that a testatrix before, and at the time of, and after the execution of her will, orally made known to the legatee to whom she bequeathed her residuary estate "to distribute the same in such manner as in his discretion shall appear best calculated to carry out wishes which I have expressed to him, or may express to him," her wish and intention that he should dispose of such property for charitable uses and purposes according to his discretion and judgment. The residuary legatee was apparently willing to proceed with the execution of the trust, to which objection was made on the part of the next of kin. It was held that, as between the legatee and the beneficiaries intended, equity might enforce a trust; yet, the will upon its face showing that the devisee took a legal title only, and not a beneficial interest, and the trust not being sufficiently defined by the will to take effect, the equitable interest went by way of resulting trust to the heirs or next of kin as intestate property, of which equitable interest they could not be deprived by any conduct of the devisee nor by any intention of the deceased, unless signified in those forms which the law makes essential to every testamentary disposition.

The foregoing decision, in marking a difference between cases where a bequest is upon a trust not definitely declared and cases where the bequest is upon its face outright, is usually characterized as being against the weight of authority; and is admitted by the court making it to be at variance with many other decisions which are criticized as overlooking or disregarding a fundamental distinction.

The objection to the validity of constructive trusts arising under the circumstances detailed in the foregoing cases, founded on the statute of frauds and the statute of 33 L.R.A. (N.S.)

wills, is discussed in *Amherst College v. Ritch*, 151 N. Y. 282, 37 L.R.A. 305, 45 N. E. 876, as follows: "The trust does not act directly upon the will by modifying the gift, for the law requires wills to be wholly in writing; but it acts upon the gift itself as it reaches the possession of the legatee, or as soon as he is entitled to receive it. The theory is that the will has full effect by passing an absolute legacy to the legatee, and that then equity, in order to defeat fraud, raises a trust in favor of those intended to be benefited by the testator, and compels the legatee, as a trustee *ex maleficio*, to turn over the gift to them. The law, not the will, fastens the trust upon the fund by requiring the legatee to act in accordance with the instructions of the testator and his own promise. Neither the statute of frauds nor the statute of wills applies, because the will takes effect as written and proved; but to promote justice and prevent wrong, the courts compel the legatee to dispose of his gift in accordance with equity and good conscience."

The opposing view is stated in *Moore v. Campbell*, *supra*, as follows: "The statute requiring wills to be in writing and attested in the manner prescribed was intended to prevent the fraudulent setting up of pretended devises and bequests or agreements, and then sustaining such pretenses by perjury. For this purpose the statute is specific in all the formalities to be observed in the execution of a will, and our decisions require a strict compliance with these requirements. The argument to sustain the rule is, that the statute should not be used as an instrument to make fraud successful, and where the proof clearly shows a fraudulent breach of trust, though resting in parol, to permit the statute to exclude parol proof of the trust would sustain fraud and defeat the purpose of the statute. Does not the argument render entirely nugatory the statute? The statute of wills, § 1966 of the Code, is as follows: 'No will is effectual to pass real or personal property . . . unless the same is in writing, signed by the testa-

Equity Jurisprudence, vol. 2, § 1054, is cited as follows: "There are a few cases which seem to hold that a trust will arise under these circumstances from a mere verbal promise of the devisee or legatee to hold the property for the benefit of another person. This position, however, is clearly opposed to settled principle. The only ground upon which such a trust can be rested, and is rested by the overwhelming weight of authority, is actual intentional fraud." In a note to this section in the second edition of that work, it is said: "The majority of the recent decisions do not insist on an actual fraudulent intention on the part of the legatee or devisee as necessary to the creation of a trust of this nature."

It is conceded that in cases of actual intentional fraud, equity will raise a trust, notwithstanding the statute of frauds or the statute of wills. In equity what difference can there be whether the fraudulent intention existed at the time the testator acted, or not until it was time for the devisee to act? In either case the testator acted upon the faith that the devisee would keep his promise. The result of his refusal or

failure to do so is the same in either case and equally fraudulent. The earlier cases are cases in which the devisee or legatee had a fraudulent intention at the time the promise was made; but by the weight of authority in this country, if not also in England, it is well settled that it is immaterial when the intention was formed. An examination of a great many cases shows that the law is well stated in the opinion of Vann, J., in the case of *Amherst College v. Ritch* (1897) 151 N. Y. 282-323, 37 L.R.A. 305, 45 N. E. 876, 887, as follows: "While a testator may make a gift to a legatee solely for the purpose of enabling him, if he sees fit, to dispose of it in a particular way, still, if there is no promise by him, either express or implied, to so dispose of it, and the matter is left wholly to his will and discretion, no secret trust is created, and he may, if he chooses, apply the legacy to his own use. When it clearly appears that no trust was intended, even if it is equally clear that the testator expected that the gift would be applied in accordance with his known wishes, the legatee, if he has made no promise, and none has been made in his behalf, takes an abso-

lute, or some person in his presence and by his direction, and attested by at least two witnesses, who must subscribe their names thereto, in the presence of the testator.' The legitimate conclusion from the argument is that the writings may stand unless the parol proof shows that they do not speak the whole truth. It is further contended in support of the principle, that parol proof in such cases does not vary the will or alter the terms of the writings, but that the property descends according to the terms of the will, and vests as therein directed, and that equity may seize upon it, after it has vested as prescribed in the will, and fasten a parol trust upon it in favor of another not mentioned in the will, in order to carry out the real intent and purpose of the testator. Can any fair judicial mind hold that a bequest or devise absolutely to A may be shown by parol proof to be to him in trust for B, and that the bequest to A was intended for B, that such proof neither varies nor contradicts the writings which gave it absolutely to A? Such an argument and conclusion seem to be a bold circumvention of the statute itself, rather than a mere rule invented of necessity to defeat fraud and to sustain the statute."

Of the English cases involving the enforcement in equity of secret trusts, many of which may be found in the note in 20 L.R.A. 465, already mentioned, only one need be herein reviewed in detail. This is *McCormick v. Grogan*, L. R. 4 H. L. 82. Ir. Rep. 1 Eq. 313, 17 Week. Rep. 961, which is interesting as explicitly holding that where the circumstances are such as abso-

lutely to exclude the inference of personal fraud in obtaining a bequest, the doctrine of constructive trusts does not apply. There a testator left all his property to a friend, whom he also appointed his executor, and thereafter, when on his deathbed, sent for him and told him that he had left him all his property. On the friend's asking, "Is that right?" testator said he would not have it otherwise; and then told him that he would find the will in a desk, and a letter with it, the contents of which he did not disclose, but which the friend testified that he supposed was connected with the testator's property. It was held that there was nothing in the circumstances of the case to warrant the supposition that any distinct promise to carry out the instructions of the letter had been exacted, the breach of which would constitute a fraud, such conclusion being strengthened by the circumstance that, in the letter itself, the testator left the carrying out of his instructions entirely to his friend's judgment. Lord Westbury, in the course of his opinion, said: "The jurisdiction which is invoked here by the appellant is founded altogether on personal fraud. It is a jurisdiction by which a court of equity, proceeding on the ground of fraud, converts the party who has committed it into a trustee for the party who is injured by that fraud. Now, being a jurisdiction founded on personal fraud, it is incumbent on the court to see that a fraud, a *malus animus*, is proved by the clearest and most indisputable evidence. It is impossible to supply presumption in the place of proof, nor are you warranted in deriving

lute title, and can do what he pleases with the gift. Whatever moral obligation there may be, no legal obligation rests upon him. On the other hand, if the testator is induced either to make a will or not to change one after it is made, by a promise, express or implied, on the part of a legatee, that he will devote his legacy to a certain lawful purpose, a secret trust is created, and equity will compel him to apply property thus obtained in accordance with his promise. *O'Hara v. Dudley*, 95 N. Y. 403, 47 Am. Rep. 53; *Brown v. Lynch*, 1 Paige, 147; *Dowd v. Tucker*, 41 Conn. 197; *De Laurencel v. De Boom*, 48 Cal. 581; *Browne v. Browne*, 1 Harr. & J. 430; *Church v. Ruland*, 64 Pa. 442; *Towles v. Burton Rich. Eq. Cas.* 140, 24 Am. Dec. 409; *McLellan v. McLean*, 2 Head, 684; *Russell v. Jackson*, 10 Hare, 204; *Thynn v. Thynn*, 1 Vern. 296; *Reech v. Kennegal*, 1 Ves. Sr. 124, 1 Wils. Ch. 227; *Wallgrave v. Tebbs*, 2 Kay & J. 321, 25 L. J. Ch. N. S. 241, 2 Jur. N. S. 83; *McCormick v. Grogan*, L. R. 4 H. L. 82, Ir. Rep. 1 Eq. 313, 17 Week. Rep. 691. The trust springs from the intention of the testator and the promise of the legatee. The same rule applies to heirs and next of kin who

induce their ancestor or relative not to make a will by promising, in case his property falls to them through intestacy, to dispose of it, or a part of it, in the manner indicated by him. *Williams v. Fitch*, 18 N. Y. 546; *Grant v. Bradstreet*, 87 Me. 583, 33 Atl. 165; *Gilpatrick v. Glidden*, 81 Me. 137, 2 L.R.A. 662, 10 Am. St. Rep. 245, 16 Atl. 464. The rule is founded on the principle that the legacy would not have been given, or intestacy allowed to ensue, unless the promise had been made; and, hence, the person promising is bound in equity to keep it, as to violate it would be fraud. While a promise is essential, it need not be expressly made, for active co-operation or silent acquiescence may have the same effect as an express promise. If a legatee knows what the testator expects of him, and, having an opportunity to speak, says nothing, it may be equivalent to a promise, provided the testator acts upon it. Whenever it appears that the testator was prevented from action by the action or silence of a legatee, who knew the facts in time to act or speak, he will not be permitted to apply the legacy to his own use when that would defeat the expectations of the testator. As

those conclusions in the absence of direct proof, for the purpose of affixing the criminal character of fraud, which you might by possibility derive in a case of simple contract. The court of equity has, from a very early period, decided that even an act of Parliament shall not be used as an instrument of fraud; and if in the machinery of perpetrating a fraud an act of Parliament intervenes, the court of equity, it is true, does not set aside the act of Parliament, but it fastens on the individual who gets a title under that act, and imposes upon him a personal obligation, because he applies the act as an instrument for accomplishing a fraud. In this way the court of equity has dealt with the statute of frauds, and in this manner, also, it deals with the statute of wills. And if an individual on his deathbed, or at any other time, is persuaded by his heir at law, or his next of kin, to abstain from making a will, or if the same individual, having made a will, communicates the disposition to the person on the face of the will benefited by that disposition, but, at the same time, says to that individual that he has a purpose to answer which he has not expressed in the will, but which he depends on the donee to carry into effect, and the donee assents to it, either expressly, or by any mode of action which the donee knows must give to the testator the impression and belief that he fully assents to the request, then, undoubtedly, the heir at law in the one case, and the donee in the other, will be converted into trustees, simply on the principle that

an individual shall not be benefited by his own personal fraud. You are obliged, therefore, to shew most clearly and distinctly that the person you wish to convert into a trustee acted *malo animo*. You must shew distinctly that he knew that the testator or the intestate was beguiled and deceived by his conduct. If you are not in a condition to affirm that without any misgiving, or possibility of mistake, you are not warranted in affixing on the individual the *delictum* of fraud, which you must do before you convert him into a trustee." And after reviewing the evidence in the case, he further said: "You cannot constitute a fraud in this matter unless you find that there is a distinct and positive promise the nonfulfilment of which brands the party with disgrace as having personally imposed on the testator." And Lord Hatherley said, with reference to the doctrine that equity will interpose where a testamentary intention has been frustrated by the decedent's reliance upon the undertaking of his heir or legatee: "But this doctrine evidently requires to be carefully restricted within proper limits. It is in itself a doctrine which involves a wide departure from the policy which induced the legislature to pass the statute of frauds, and it is only in clear cases of fraud that this doctrine has been applied,—cases in which the court has been persuaded that there has been a fraudulent inducement held out on the part of the apparent beneficiary in order to lead the testator to confide to him the duty which he so undertook to perform." E. S. O.

was said by this court in the O'Hara Case, supra: 'It matters little that McCue did not make in words a formal and express promise. Everything that he said and everything that he did was full of that interpretation. When the testatrix was told that the legal effect of the will was such that the legatees could divert the fund to their own use, which was a statement of their power, she was told, also, that she would only have their honor and conscience on which to rely, and answered that she could trust them, which was an assertion of their duty. Where, in such cases, the legatee even by silent acquiescence encourages the testatrix to make a bequest to him, to be by him applied for the benefit of others, it has all the force and effect of an express promise.' The trust does not act directly upon the will by modifying the gift, for the law requires wills to be wholly in writing; but it acts upon the gift itself as it reaches the possession of the legatee, or as soon as he is entitled to receive it. The theory is that the will has full effect by passing an absolute legacy to the legatee, and that then equity, in order to defeat fraud, raises a trust in favor of those intended to be benefited by the testator, and compels the legatee, as a trustee *ex maleficio*, to turn over the gift to them. The law, not the will, fastens the trust upon the fund by requiring the legatee to act in accordance with the instructions of the testator and his own promise. Neither the statute of frauds nor the statute of wills applies, because the will takes effect as written and proved; but to promote justice and prevent wrong the courts compel the legatee to dispose of his gift in accordance with equity and good conscience. As was well said in *Wallgrave v. Tebbs*, supra: 'Where a person, knowing that a testator, in making a disposition in his favor, intends it to be applied for purposes other than his own benefit, either expressly promises or by silence implies that he will carry the testator's intention into effect, and the property is left to him upon the faith of that promise or undertaking, it is in effect a case of trust, and in such a case the court will not allow the devisee to set up the statute of frauds,—or rather the statute of wills, by which the statute of frauds is now in this respect superseded,—and for the reason that the devisee by his conduct has induced the testator to leave him the property; and, as Lord Justice Turner says in *Russell v. Jackson*, no one can doubt that, if the devisee had stated that he would not carry into effect the intentions of the testator, the disposition in his favor would not have been found in the will. But in this the court does not violate the spirit of the statute, 33 L.R.A. (N.S.)

but for the same end, namely, prevention of fraud, ingrafts the trust on the devise by admitting evidence, which the statute would in terms exclude, in order to prevent a party from applying property to a purpose foreign to that for which he undertook to hold it.'

In the above case, as well as in the earlier case (*O'Hara v. Dudley*, 95 N. Y. 403, 47 Am. Rep. 53), which in its facts bears a striking resemblance to the instant case, there was no fraud on the part of the devisees or legatees in procuring the will, but it was held that by reason of the act of the testator and the promise of the devisee or legatee the law fastens upon the devisee or legatee a trust which equity, in case of his refusal to perform, will enforce on the ground of fraud. In the latter case the testatrix, by her will, gave the bulk of her estate to three persons, who were her lawyer, her doctor, and her priest, absolutely as tenants in common. It was not intended by her to give to them any beneficial interest, but her design was to devote the property to certain charitable purposes. This she was advised could not be done by an express provision in her will, but only by such an absolute gift to individuals, to whose honor she could confide the execution of her purpose. It was held that the gift could not be sustained as an absolute one to the persons named, as this would be a fraud upon the testatrix. In that case it was expressly found by the trial judge that the devisee practised no fraud. In the opinion by Finch, J., it is said (95 N. Y. 413): 'Equity acts in such case not because of a trust declared by the testator, but because of the fraud of the legatee. For him not to carry out the promise by which alone he procured the devise and bequest is to perpetrate a fraud upon the deviser which equity will not endure.' Cases are cited, and he then continues: 'In the last of these cases [*Williams v. Fitch*, 18 N. Y. 546] the making of a bequest to the plaintiff was prevented by an agreement of the father, who was next of kin, to hold in trust for the plaintiff, and the English cases were cited with approval and the trust enforced. All along the line of discussion it was steadily claimed that a plain and unambiguous devise in a will could not be modified or cut down by extrinsic matter lying in parol, or unattested papers, and that the statute of frauds and that of wills excluded the evidence; and all along the line it was steadily answered that the devise was untouched, that it was not at all modified, that the property passed under it, but the law dealt with the holder for his fraud, and out of the facts raised a trust *ex maleficio*, instead of resting upon one as created by the testa-

tor. The character of the fraud which justifies the equitable interference is well described in *Glass v. Hulbert*, 102 Mass. 40, 3 Am. Rep. 418. It was said to consist 'in the attempt to take advantage of that which has been done in performance or upon the faith of the agreement while repudiating its obligation under cover of the statute.'" These cases are followed and approved in *Ahrens v. Jones* (1902) 169 N. Y. 555, 88 Am. St. Rep. 620, 62 N. E. 666, where it is held: "Where a deed is executed for the purpose of effecting a distribution of the grantor's property, upon the express promise of the grantee to pay certain sums to others, though no express trust is created, a court of equity may interpose to prevent a wrong, and declare the grantee a trustee *ex maleficio* for the protection of the grantor's intended beneficiaries."

In *Ransdel v. Moore*, 153 Ind. 393, 408, 53 L.R.A. 753, 53 N. E. 767, 772, it is expressly held that an actual fraudulent intention on the part of the grantee or devisee is not necessary to the creation of a trust of this nature. In the opinion in that case the cases are reviewed, and many, if not all, of the cases, both English and American, are cited, and it is said by Monks, Ch. J.: "An actual fraudulent intention on the part of the heir or devisee is not necessary to the creation of a trust of this nature. The great weight of authority in England and in this country, in such a case, is that after the death of the testator or intestate equity will convert the devisee or heir into a trustee, whether when he gave his assent he intended fraud or not; the final refusal of himself, if living, or, if dead, of his heirs or devisees, to execute such trust, having the effect to consummate the fraud." To the same effect is *Gilpatrick v. Glidden*, 81 Me. 137, 2 L.R.A. 662, 10 Am. St. Rep. 245, 16 Atl. 464, where the cases are also reviewed.

In *McCormick v. Grogan* (1869) L. R. 4 H. L. 82, 1r. Rep. 1 Eq. 313, 17 Week. Rep. 961, the lord chancellor (Lord Hatherly) and Lord Westbury do seem to rest the jurisdiction of equity upon the ground of personal fraud in procuring the instrument, but later as well as earlier English cases to the contrary are cited in *Ransdel v. Moore*, supra, as well as many American cases, and what was said by Lord Westbury is here explained, as it is also in *Gilpatrick v. Glidden*, supra, and by Hall, Vice Chancellor, in *Re Fleetwood* (1880) L. R. 15 Ch. Div. 594, 49 L. J. Ch. N. S. 514, 29 Week. Rep. 45 where many cases are reviewed. In *Cassels v. Finn*, 122 Ga. 33, 68 L.R.A. 80, 106 Am. St. Rep. 91, 49 S. E. 749, 2 A. & E. Ann. Cas. 554, it is held that failure to perform a verbal promise

cannot make the promisor a trustee *ex maleficio* in the absence of actual fraud, but in the note to that case, by the learned editor of the American State Reports, it is said that that case could not have been carefully considered, and that it is opposed to all the cases cited in the note, and in contravention of correct and sound equitable principle.

Next it is contended that Winder and Williams made no promise, and that the court erred in rendering judgment against them. In *Russell v. Jackson*, 10 Hare, 204, where the bequest was to William Jackson and Thomas Aston Jackson, the Vice Chancellor, Turner, said: "But, whether Thomas Aston Jackson was present or not, the evidence is, I think, clear that the gift would not have been made to him but for the promise given by William Jackson that the intentions of the testator should be carried into effect; and I fully agree to the principles laid down in *Huguenin v. Baseley*, 14 Ves. Jr. 289, 9 Revised Rep. 276, 6 Eng. Rul. Cas. 834, followed in many other cases, that no person can claim an interest under a fraud committed by another. However innocent the party may be, if the original transaction is tainted with fraud, that taint runs through the derivative interest, and prevents any party from claiming under it." In *Moss v. Cooper* (1861) 1 Johns. & H. 352, Vice Chancellor Sir W. Page Wood said (367): "The only material distinction between a will made on the faith of a previous promise, and a will followed by a promise is this: If, on the faith of a promise by A, a gift is made in favor of A and B, the promise is fastened onto the gift to both, for B cannot profit by A's fraud. But if the will is first made in favor of A and B, and the secret trust is then communicated only to A, the gift will be fixed with a trust with respect to A, but not so as regards B, because in this case the gift to B. is not obtained by the procurement of A, and is not tainted with any fraud in procuring the execution of the will. That is the sole distinction between the case of a will made on the faith of a promise, and that of a will followed by a subsequent promise." In *Re Stead* [1900] 1 Ch. 237, it is said by Farwell, J. (241): "If A induces B either to make or to leave unrevoked a will leaving property to A and C as tenants in common, by expressly promising, or tacitly consenting, that he and C will carry out the testator's wishes, and C knows nothing of the matter until after A's death, A is bound, but C is not bound (*Tee v. Ferris*, 2 Kay & J. 357, 25 L. J. Ch. N. S. 437, 2 Jur. N. S. 807); the reason stated being that to hold otherwise would enable one

beneficiary to deprive the rest of their benefits by setting up a secret trust. If, however, the gift were to A and C as joint tenants, the authorities have established a distinction between those cases in which the will is made on the faith of an antecedent promise by A and those in which the will is left unrevoked on the faith of a subsequent promise. In the former case the trust binds both A and C (*Russell v. Jackson*, 10 Hare, 204; *Jones v. Badley*, L. R. 3 Ch. 362, 19 L. T. N. S. 106, 16 Week. Rep. 713), the reason stated being that no person can claim an interest under a fraud committed by another. In the latter case A, and not C, is bound (*Burney v. MacDonald*, 15 Sim. 6, 9 Jur. 588, and *Moss v. Cooper*, 1 Johns. & H. 352, 4 L. T. N. S. 790), the reason stated being that the gift is not tainted with any fraud in procuring the execution of the will. Personally I am unable to see any difference between a gift made on the faith of an antecedent promise and a gift left unrevoked on the faith of a subsequent promise to carry out the testator's wishes." There is no joint tenancy in this state, and the distinction made in the English cases cannot be made here. The reason for the distinction would apply here only in cases of separate devises or bequests. In the present case the bequest is a joint bequest of all the testator's property to the three persons named. It was all intended for the lodge, and made to the three upon the promise of one that they would give it to the lodge. The question was considered in the two New York cases already referred to, in one of which there was a joint tenancy and in the other a tenancy in common. In *Amherst College v. Ritch*, 151 N. Y. 282, 327, 37 L.R.A. 305, 45 N. E. 876, 888, it is said by Vann, J.: "The intention of the testator being thus clear, the secret trust was completed by the promise made by or on behalf of the residuary legatees. As the gift was to them as tenants in common, a promise that bound all was necessary in order to include each of the three shares. That Mr. Ritch and Mr. Vaughan duly promised appears so conclusively from their conduct, letters and statements to the testator that we do not regard any further expression of our views upon the subject as necessary. It is, however, strenuously urged that Mr. Bulkley made no promise, and hence that the secret trust did not extend to his share of the gift. If he were the only residuary legatee, the question would be more serious, but he was not. The trial court found that Messrs. Ritch and Vaughan promised for themselves and for Mr. Bulkley, and the evidence plainly warrants this conclusion. The general term, in its opinion, went

farther, and declared that there was an understanding between Mr. Bulkley and the testator to the same effect; but the evidence to sustain this conclusion is meager, although we do not hold it was insufficient. Assuming, however, that Mr. Bulkley made no promise, still we think that he was bound, under the circumstances, by the promise made in his behalf, and that he cannot profit by the action of his cotenants in making the promise for him, as that would be a fraud. He was not a purchaser. He furnished no consideration. There was no contract for his benefit. He was in the attitude of accepting a gift pure and simple, but that gift was made in reliance upon a promise given in his behalf. Can he violate the promise and fairly take that which came to him solely on account of the promise, even if it was not made or authorized by him? We think not, because his title came through the promise, and by accepting the gift he ratified the promise. He must repudiate the gift or accept the responsibility. While the cases are not uniform, the weight of authority sustains this conclusion. *Hooker v. Axford*, 33 Mich. 453; *Moss v. Cooper*, 1 Johns. & H. 367, 4 L. T. N. S. 790; *Tee v. Ferris*, 2 Kay & J. 357, 25 L. J. Ch. N. S. 437, 2 Jur. N. S. 807; *Re King*, Ir. L. R. 21 Eq. 273; *O'Hara v. Dudley*, 95 N. Y. 403, 47 Am. Rep. 53. In the case last cited this court said: 'So far, then, as McCue is concerned, he stands in the attitude of having procured and induced the testatrix to make a devise or bequest to himself and his associates by asserting its necessity, and promising faithfully to carry out the charitable purposes for which it was made; and whether his associates knew or promised, or did not, makes no difference where the devise is to them as joint tenants, and all must get their rights through the result accomplished by one.' Although the devise in that case was to joint tenants, the principle that 'all must get their rights through the result accomplished by one' is broad and equitable, and should not be limited to the technicality of a joint tenancy as distinguished from a tenancy in common, where, as in this case, the promise was made by two in behalf of themselves and another, and a devise thus obtained to the three. This rule prevents fraud, which is the primary object of the courts in enforcing secret trusts, while any other would promote fraud. We thus reach the conclusion that there was a secret trust that bound all of the residuary legatees."

It is further contended that the court erred in admitting the separate admissions of the several defendants, made after the death of the testator, and not in the hear-

ing of each other. A trust in an absolute devise may be established by parol evidence of contemporaneous declarations of the testator and subsequent declaration of the devisee in possession that the devise was made for the benefit of a third person upon the devisee's suggestion and promise to hold it in trust. After such evidence of the devisee's active or passive agency in procuring the devise, he will be declared a trustee *ex maleficio*, and the trust will be enforced against him. See cases cited in the note to Cassels v. Finn, supra, 106 Am. St. Rep. 91-99. In Harvey v. Gardner, 41 Ohio St. 642, it is held that in this state it is competent to prove an express trust in land by parol evidence, and that the contemporaneous declarations of the creator of the trust are admissible in evidence, and, further, that the acceptance of the trust may be presumed from acts of the grantee at or subsequent to the time of the grant. See also Russell v. Bruer, 64 Ohio St. 1, 59 N. E. 740; 1 Jarman, Wills. 390. In Church v. Ruland, 64 Pa. 432-442, it is said: "Indeed, it is not easy to see how such a trust ever could be made out except by parol evidence, and, if this is not competent, a statute made to prevent frauds would become a most potent instrument whereby to give them success. That this doctrine is applied to cases arising under wills where a person procures a devise to be made in his favor on the distinct declaration or promise that he will hold the land in trust either in whole or in part for another may be seen in the cases. . . . It is not affected by the statutory provisions on the subject of wills. The proof offered is not of any alteration, revocation, or cancellation, which must be evidenced in a particular manner. It gives full effect to the will and every word of it, and to the conclusiveness of the probate, where it is conclusive. It fastens upon the conscience of the party having thus procured a will, and then fraudulently refusing or neglecting to fulfill the promise on the faith of which it was executed, a trust or confidence, which a court of equity will enforce by compelling a conveyance when the proper time for it has arrived."

It is next contended that the action was barred by the six years' statute of limitations. The six years' statute bars an action upon a contract not in writing, either express or implied. This is not an action upon a contract. It is an action for relief on the ground of fraud. Such actions are barred within four years, but it is expressly provided that the cause of action in such case shall not be deemed to have accrued until the discovery of the fraud, and it is not suggested that the lodge dis-

covered the fraud more than four years before the commencement of the action.

It is next contended that the trial court disregarded the rule laid down in Russell v. Bruer, supra, that "the declaration of such trust must be contemporaneous with the deed, and the evidence beyond a reasonable doubt as to the existence of the trust, and must be clear, certain, and conclusive as to its terms and conditions." Without reviewing the evidence, we deem it sufficient to say that it does not leave a reasonable doubt that the testator intended to give his property to the lodge, that he was induced to will it to the defendants by the advice of the lawyer upon the promise of Smart that he and the other legatees would give it to the lodge. The lawyer so testifies, and his testimony was corroborated in many ways, and no reason is apparent why the testator should give his property to the defendants, and they suggest none; and there is evidence that each of them, immediately after the testator's death, and before avarice had found time to suggest that they divide the estate between themselves, admitted that it was intended for the lodge. The terms and conditions are clear, certain, and conclusive. There are none, excepting that it was to be turned over to the lodge. We reaffirm the rule, and also the statement in Collins v. Hope, 20 Ohio, 493, that in such cases courts will act with the extremest caution.

Judgment affirmed.

Crew, Spear, Davis, and Price, JJ., concur.

OKLAHOMA SUPREME COURT.

DAISY J. STEPHENS et al., Plffs. in Err.,
v.
OKLAHOMA CITY RAILWAY COMPANY.

(— Okla.—, 114 Pac. 611.)

Carrier — unforeseen accident — liability.

The severe rule of care and diligence which the law imposes upon carriers of passengers does not extend so far as to make one liable for an injury to a passenger from

Headnote by KANE, J.

Note. — What injuries may be deemed the proximate result of failure to stop street car for waiting passenger.

As to anticipation as an element of proximate cause, see note to Kreigh v. Westinghouse, C. K. & Co. 11 L.R.A. (N.S.) 684.

In South Chicago City R. Co. v. Dufresne, 200 Ill. 456, 65 N. E. 1075, it was held that a complaint did not state a cause of action which alleged that the defendant

an accident which is not the reasonable, natural, and probable result of the situation, and which could not have been foreseen by the carrier in the exercise of that degree of care which the law demands of him.

(Dunn, J., dissents.)

(March 21, 1911.)

ERROR to the District Court for Oklahoma County to review a judgment in defendant's favor in an action brought to recover damages for personal injuries alleged to have been caused by its negligence. Affirmed.

The facts are stated in the opinion.

Messrs. E. G. McAdams and Everest, Smith, & Campbell, for plaintiffs in error:

The proximate and direct cause of the injury complained of was the failure of the defendant in error to stop its car and permit the deceased to board it as one of its passengers. If it had done this, no injury would have been sustained by him.

Eichman v. Buchheit, 128 Wis. 385, 107 N. W. 325, 8 A. & E. Ann. Cas. 435; Billman v. Indianapolis, C. & L. R. Co. 76 Ind. 166, 40 Am. Rep. 230; Ætna F. Ins. Co. v. Boon, 95 U. S. 130, 24 L. ed. 398; Mueller v. Milwaukee Street R. Co. 86 Wis. 340, 21 L.R.A. 721, 56 N. W. 914; Louisville, N. A. & C. R. Co. v. Nitsche, 126 Ind. 229, 9 L.R.A. 750, 22 Am. St. Rep. 582, 26 N. E. 51; Brady v. North Western Ins. Co. 11 Mich. 425; Garrigan v. Kennedy, 19 S. D. 11, 117 Am. St. Rep. 927, 101 N. W. 1081, 8 A. & E. Ann. Cas. 1125; Salisbury v. Herchenroder, 106 Mass. 458, 8 Am. Rep. 354; Metallic Compression Casting Co. v. Fitchburg R. Co. 109 Mass. 277, 12 Am. Rep. 689; Atchison, T. & S. F. R. Co. v. Calhoun, 213 U. S. 1, 53 L. ed. 671, 29 Sup. Ct. Rep. 321; Laidlaw v. Sage, 158 N. Y. 73, 44 L.R.A. 216, 52 N. E. 679.

It is not necessary that any particular injury to any particular individual may be

foreseen by the street car company, as a consequence of its acts, in order to make it liable for results which followed from those acts.

Sutherland, Damages, 3d ed. §§ 16, 25, 28, 40; Foster v. Chicago R. I. & P. R. Co. 127 Iowa, 84, 102 N. W. 422, 4 A. & E. Ann. Cas. 150; McDonald v. Snelling, 14 Allen, 295, 92 Am. Dec. 768; Christianson v. Chicago, St. P. M. & O. R. Co. 67 Minn. 94, 69 N. W. 640; Chambers v. Carroll, 199 Pa. 371, 49 Atl. 128; Rudder v. Koopman, 116 Ala. 332, 37 L.R.A. 489, 22 So. 601; Kinney v. Koopman, 116 Ala. 310, 37 L.R.A. 497, 67 Am. St. Rep. 119, 22 So. 593; Burger v. Omaha & C. B. Street R. Co. 139 Iowa, 645, 130 Am. St. Rep. 343, 117 N. W. 35; Whitnack v. Chicago, B. & Q. R. Co. 82 Neb. 464, 19 L.R.A. (N.S.) 1011, 130 Am. St. Rep. 692, 118 N. W. 67; Reid v. Evansville & T. H. R. Co. 10 Ind. App. 385; 53 Am. St. Rep. 391, 35 N. E. 703; Schroder v. Crawford, 94 Ill. 357, 34 Am. Rep. 236.

Messrs. Shartel, Keaton, & Wells for defendant in error.

Kane, J., delivered the opinion of the court:

This was an action for personal injuries, commenced by the plaintiffs in error, plaintiffs below, against M. H. Kessler, city of Oklahoma City, and the defendant in error, Oklahoma City Railway Company, defendant below. The petition, in so far as it is necessary to notice its allegations for the purposes of this case, states, in substance: That on the 17th day of September, 1905, the plaintiffs were passengers on one of the cars of the defendant, the street railway company, and as such passengers received transfers and had disembarked from a car at the corner of Main and Broadway streets in said city of Oklahoma City, and were there waiting on the sidewalk, in the place designated by ordinance and fixed by custom for passengers to wait

street car company did not stop the car after the plaintiff had given notice of his intention to take passage, in consequence of which, while he was attempting to take passage, he was thrown to the ground and his hand run over, resulting in amputation. The court said: "If a refusal to stop cars on notice would give rise to a cause of action, it would necessarily be for damages resulting from the refusal to stop, which might consist of delay or loss of time, but the refusal to stop and accept him as a passenger would not be the proximate cause of the injury alleged."

In *Triebler v. New York & Q. C. R. Co.* 134 App. Div. 661, 119 N. Y. Supp. 439, a trolley company ran its cars on a highway so near to the fence that there was

only about 4 feet clearance, along which space was a footpath from which the company was accustomed to pick up passengers on signal, and which on the night in question was slippery with snow and ice and inclined toward the track. A pedestrian signaled an approaching car to stop, but the conductor, either from inattention or lack of a headlight, did not see him, and the car passed without slackening speed. The traveler, because of the suction, or his uncertain footing, or both, was drawn under the car and killed. It was held that the company was guilty of negligence in not stopping the car on signal, and was liable for the death of such traveler.

R. A. E.

for the north-bound Maywood car of said street railway company, with the intent and purpose of boarding the north-bound Maywood car of said company, and continuing their journey thereon in accordance with the provisions of said transfers; said Maywood car being the only car upon which said transfers, under the rules, regulations, and customs of said company, would be honored. That, while waiting for said north-bound Maywood car, a fire alarm was turned in, and the usual and customary fire alarm signals were given and sounded, which were plainly audible to the employees of said company, who were operating the north-bound Maywood car for which said plaintiffs were waiting. That at said time said Maywood car was at a point on Main street in said city just west of the corner of Main and Broadway streets. That, when said fire alarm was sounded, said employees on said north-bound Maywood car heard the same, but failed and refused to stop said car, but continued eastward on said Main street and turned north into Broadway street. That plaintiffs seeing said north-bound car approaching, and knowing by the sign in front of said car that it was the car for which they were waiting and for which they held transfers entitling them to passage thereon, went, with other passengers, from the sidewalk where they had been waiting to a point near the east side of the track of said defendant company, upon which said north-bound Maywood car was approaching and signaled the motorman to stop said car at said point, which was the usual and customary point for north-bound cars to stop for the purpose of receiving passengers. That said motorman failed and refused to stop said car, but continued northward on Broadway street at a rapid rate of speed, and plaintiffs were thus unable to board said car. By the rules and regulations of said street railway company, said transfers were forfeited and valueless if not used on the said Maywood car then approaching said point. That, after said car had passed plaintiffs, they attempting to return to the sidewalk on the east side of Broadway street, and that while they were so attempting to return, and while plaintiffs were using due and proper care and caution for their own protection and safety, a fire wagon containing fire apparatus, belonging to the fire department of Oklahoma City, came north on Broadway street and on the west side thereof, in response to the fire alarm hereinbefore referred to, which had been sounded two or three minutes previously. That at said time said defendant M. H. Kessler, the chief of said fire department, in a buggy drawn by one horse, was immediate-

ly in front of and across the street from said wagon bearing said fire apparatus, and was urging and causing said horse to run at full speed north on the east side of Broadway street. That said fire chief saw said plaintiffs and saw they were in imminent danger of being run down, injured, and killed by him, when he was about 80 feet from them. That said fire department wagon, preceded by said fire chief, came north on Broadway street just at the moment that said plaintiffs attempted to board said Maywood car and were seeking to return to said sidewalk for safety, and that said fire chief saw these plaintiffs in ample time before he reached the point where they were located, and by the exercise of proper care could have stopped said horse and thereby have protected said plaintiffs; but said fire chief, wholly disregarding their rights, and wholly ignoring the danger in which said plaintiffs were placed, did, then and there, in a manner grossly negligent of the rights and grossly unmindful of the lives and safety of plaintiffs, continue to urge his said horse northward at full speed, and did then and there carelessly, negligently, heartlessly, cruelly, and in a cold-blooded and murderous manner, urge said horse and the buggy drawn by it against the persons of said plaintiffs, thereby badly wounding and injuring them, and killing the husband of the plaintiff Daisy J. Stephens and the father of the other plaintiffs, who were members of their party.

It is further alleged, in substance: That, by a valid and subsisting ordinance of said city, said street railway company was on said date required to stop its cars after the sounding of any alarm of fire and upon the approach within 300 feet of said cars of any fire engine or apparatus. That said provisions of said ordinance were unknown to said plaintiffs. That it was the further duty of said company to stop its car on Broadway street at the north line of Main street when properly signaled so to do by persons desiring to enter said cars, and that said company failed and refused to stop said car when said pretended fire alarm was turned in, and failed and refused to stop said car at said north line of Main street on Broadway, although signaled so to do by plaintiffs. That said defendant company failed and refused to comply with the terms of said ordinance, but, on the contrary, negligently and carelessly proceeded on its way with said car after the sounding of said pretended fire alarm as aforesaid, and after said car had approached to within 300 feet of said fire apparatus and a buggy occupied by defendant, which was proceeding north on Broadway street, and that by its negligence in

so proceeding upon its way after the sounding of said pretended fire alarm and after said fire apparatus had approached to within 300 feet of said street railway car, in violation of said ordinance as aforesaid, lured said plaintiffs into the said street and caused said plaintiffs to believe that by remaining in said street they would be able to board said street car, and that had said street car stopped at the north line of Main street on Broadway said plaintiffs could and would have boarded said street car, and would have been in a place of safety. That by reason of the negligence and carelessness of said defendant company, as aforesaid, said plaintiffs were injured and killed, as above set out, and that the injury was the direct and proximate result of the combined negligence of defendant herein. That, but for the negligence of said company in proceeding on its way after the sounding of said pretended fire alarm as aforesaid, said plaintiffs would not have been in said street and would not have been exposed to the danger and injury which caused the death of one of said plaintiffs, and that said negligent action of said defendant company, in violation of said ordinance, and in refusing to stop said car as aforesaid, in violation of law and its duty under said ordinance, and as a common carrier of passengers, combined with the negligence of the other defendants herein as above stated, was the direct and proximate cause of the injury to and the death of said plaintiff.

To this petition the street railway company filed a demurrer, upon the grounds: (1) That there is a misjoinder of causes of action; (2) that said petition does not state facts sufficient to constitute a cause of action in favor of the plaintiffs and against the defendants. This demurrer was by the court sustained, and, the plaintiffs electing to stand upon their petition, the cause was dismissed as to the street railway company. To review the order of the court below dismissing said cause, this proceeding in error was commenced.

The demurrer of the street railway company raises questions of considerable nicety, as the petition presents a state of facts which are not approximated in any of the cases called to our attention, or that we have been able to find. The rule contended for by counsel for plaintiffs in error is that "if the concurrent or successive negligence of two persons, combined together, results in an injury to a third person, he may recover damages of either or both, and neither can interpose the defense that the prior or concurrent negligence of the other contributed to the injury." 1 Thomp. Neg. § 75. This rule is illustrated by the following authorities:

In *Byrne v. Wilson*, 15 Ir. C. L. Rep. 332, an omnibus overturned, precipitating a passenger into the lock of a canal. A third person, for whose acts the proprietor of the omnibus was not responsible, let the water into the canal, in consequence of which the passenger was drowned. The proprietor of the omnibus was held liable for damages for the death of the passenger. In *Chicago, R. I. & P. R. Co. v. Sutton*, 11 C. C. A. 251, 27 U. S. App. 310, 63 Fed. 394, Fred Sutton, the plaintiff, was performing his duties as a brakeman on one of the trains of the Chicago, Burlington, & Quincy Railroad Company at a railroad crossing near Reynolds, in the state of Nebraska, when an engine and train of cars of the Chicago, Rock Island, & Pacific Railway Company collided with the train of the Burlington Company and injured him. He sued the Rock Island Company for damages for this injury, which he alleged was caused by its negligence. That company denied any negligence on its part, and alleged that the negligence of the Burlington Company caused the injury, and that the defendant in error was guilty of contributory negligence. It was held that "one is liable for an injury caused by the concurring negligence of himself and a third party, to the same extent as for one caused entirely by his own negligence." In *Eaton v. Boston & L. R. Co.* 11 Allen, 500, 87 Am. Dec. 730, it was held that "it is no defense to an action by a passenger against a carrier to recover damages for an injury sustained through their negligence, that the negligence or trespass of a third party contributed to the injury, although such third party acted entirely independently of the carrier." In *Johnson v. Northwestern Teleph. Exch. Co.* 48 Minn. 433, 51 N. W. 225, the defendant, the Northwestern Teleph. Exch. Company, erected poles with cross-arms and strung its telephone wires thereon, in Central avenue, a public street in the business portion of East Minneapolis. One of the poles, bearing about 100 wires, stood at a curve in the street. The plaintiff's evidence tended to show that this pole had become rotten, and had not sufficient strength to withstand the weight and stress of these wires. The plaintiff was driving along this street upon a wood cart, when this pole broke near the ground and fell into and across the street, carrying with it the wires strung thereon. The pole struck the rear part of the wood cart, and smashed it, throwing the plaintiff to the ground and injured him. Guys had been fastened to the top of the pole and attached to a brick building belonging to a Mr. Shadwell. About a month before the accident, Shad-

well notified the defendant to remove these guys from his building, saying "If you do not take them off I will cut them off; I will cut them off." The defendant replied "Well all right take them off." On the day of the accident Shadwell cut the guys and as he did so the pole fell and the plaintiff was injured. It was held that, "where the negligence of the defendant and the act of a third person concurred to produce the injury complained of, so that it would not have happened in the absence of either, the negligence was a proximate cause of the injury." Mr. Chief Justice Gilfillan, in delivering the opinion for the court, said: "The negligence of each is a proximate cause, where the injury would not have occurred but for that negligence."

The foregoing cases and the case at bar are in a good many respects similar in principle; but we are of the opinion that in the instant case, at least, the rule invoked is subject to the limitation pointed out in *Clark v. Chambers*, L. R. 3 Q. B. Div. 327, 47 L. J. Q. B. N. S. 427, 38 L. T. N. S. 454, 26 Week. Rep. 613, 7 Cent. L. J. 11, that the intervening agency must have been one which the first actor was bound to anticipate. The rule seems to be that where the negligent act causes consequences such as in the ordinary course of things were likely to arise, and which might, therefore, reasonably be expected to arise, or which it was contemplated by the parties might arise, liability follows; otherwise not. *Ibid.* In *Sharp v. Powell*, 20 Week. Rep. 584, L. R. 7 C. P. 253, 26 L. T. N. S. 436, 41 L. J. C. P. N. S. 253, one of the cases cited by Cockburn, Ch. J., in *Clark v. Chambers*, it was held that "the action would not lie where the injury, though arising from the unlawful act of the defendant, could not have been reasonably expected to follow from it." In that case Lord Chief Justice Bovill says: "No doubt one who commits a wrongful act is responsible for the ordinary consequences which are likely to result therefrom; but, generally speaking, he is not liable for damage which is not the natural or ordinary consequence of such an act, unless it be shown that he knows, or has reasonable means of knowing, that consequences not usually resulting from the act are, by reason of some existing cause, likely to intervene so as to occasion damage to a third person. Where there is no reason to expect it, and no knowledge in the person doing the wrongful act that such a state of things exists as to render the damage probable, if injury does result to a third person, it is generally considered that the wrongful act is not the proximate cause of the injury so as to render the wrongdoer liable to an

action." Mr. Justice Strong, discussing this question in *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469, 24 L. ed. 256, said: "But it is generally held that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances." Even the severe rule of care and diligence which the law imposes upon carriers of passengers does not extend so far as to make one liable for an injury to a passenger from an accident which is not the reasonable, natural, and probable result of the situation, and which could not have been foreseen by the carrier in the exercise of that degree of care which the law demands of him. 3 *Thomp. Neg.* § 27-78. The reason of the rule is that the law holds a person liable for those consequences only which were the natural and probable result of his negligence, and which therefore ought to have been foreseen and anticipated.

Can it be said that the agent of the street railway company ought to have foreseen and anticipated the probable result of his negligence? This question must be answered in the negative. Personal injury is not one of the consequences that naturally follow missing a street car. Ordinarily no serious consequences flow from such a mishap. Cars usually run within a few minutes of each other, no appreciable time is lost, and the fare is always a matter of small consequence. If it were not for the terrible calamity that overtook the plaintiffs in this case, their actual damages would probably not greatly exceed the value of the unused transfer tickets. As stated in the petition the specific acts that actually caused the injury complained of were of an extraordinary nature and cruel and inhuman, almost beyond belief. The petition alleges, in substance, that, at the moment after plaintiffs attempted to board the said car, when they were seeking to return to said sidewalk for safety, said fire chief saw them before he reached the point where they were located, and by the exercise of proper care could have stopped his horse and avoided the casualty; that, instead of stopping as he could have done, he negligently, heartlessly, cruelly, and in a cold-blooded and murderous manner, urged his horse and the buggy drawn by it, against the said plaintiffs, thereby wounding and injuring all of them, and one of them so badly that within a few hours he died. Would it not have been perfectly natural and reasonable for the agent of the street

car company to presume, even if he saw the chief of the fire department bearing down upon the plaintiffs, under the circumstances set out in the petition, that he would stop his horses before reaching them, and avoid the injury? The only negligence the agent of the street railway company is charged with is not stopping his car as required by the ordinance; otherwise he is blameless, and in no way participated in the terrible catastrophe. It is true it was the plain duty of the street car company to stop its car at the place the plaintiffs sought to board it; but we do not believe that under the circumstances of this case it can be said that the unusual results that followed this act of negligence ought to have been foreseen by the agent of the company. It would be a hard, and we think an unjust, rule to hold that the street railway company was bound to anticipate the criminal act of the fire chief.

Watson v. Kentucky & I. Bridge & R. Co. 137 Ky. 619, 126 S. W. 146, 129 S. W. 341, is strongly in point. That was a personal injury case, commenced by Watson against the Kentucky & Indiana Bridge & Railroad Company, the Southern Railway Company, the Southern Railway Company in Kentucky, and the Union Tank Line Company, to recover damages for injuries sustained from an explosion of gas caused, as alleged, by the negligence of the defendants. The facts necessary to notice for the present purpose were that the tank from which the gasoline escaped belonged to the Union Tank Line Company. In reaching its consignee, it passed over several lines of railway, and was delivered by the Baltimore, Ohio, & Southwestern Railroad to the defendant Bridge & Railroad Company, in the city of Louisville, in what is known as the Youngtown yards. The latter company was at the time of the accident hauling the tank car, attached to one of its trains, from its railroad yards, near the Ohio river, to the place of business of the consignee, in the southern part of the city. The derailment of the car occurred about 7:30 o'clock in the evening, between Walnut and Madison street. The gasoline began at once to escape from the tank and continued to do so for several hours until the tank was emptied. By the derailing of the car the discharge pipe beneath the tank, provided for emptying it of its contents, was broken, as were the appliances for opening and closing the valves by which the contents were allowed to leave, or prevented from leaving, the tank. The gasoline, in escaping from the tank, ran down a gutter or drain in the street and along defendant Bridge & Railroad Company's right of way several hundred feet to a sewer into which

it flowed. The employees of defendant bridge and railroad company connected with the train in question, and later the wrecking crew called to their assistance, seemed to be unable to stop the escape of gasoline from the tank, or at any rate did not do so. From the gasoline vapor or gas of a highly combustible character arose and permeated the atmosphere a distance of 500 or 600 feet from the place of derailment. About 11:30 o'clock, Charles Duerr, who was standing on Madison street, a square west of the place of the accident, struck a match which he threw to the ground, and this match in its descent came in contact with the gas generated by the flowing gasoline, thereby causing the explosion by which appellant was injured. There was evidence tending to show that Duerr wantonly and maliciously lighted a match for the purpose of causing the explosion. Discussing the case upon this hypothesis, Mr. Justice Settle, who delivered the opinion for the court, said: "If, however, the act of Duerr in lighting the match and throwing it into the vapor or gas arising from the gasoline was malicious, and done for the purpose of causing the explosion, we do not think appellees would be responsible, for while the appellee Bridge & Railroad Company's negligence may have been the efficient cause of the presence of the gas in the street, and it should have been understood enough of the consequences thereof to have foreseen that an explosion was likely to result from the inadvertent or negligent lighting of a match by some person who was ignorant of the presence of the gas or of the effect of lighting or throwing a match in it, it could not have foreseen or deemed it probable that one would maliciously or wantonly do such an act for the evil purpose of producing the explosion. Therefore, if the act of Duerr was malicious, we quite agree with the trial court that it was one which the appellees could not reasonably have anticipated or guarded against, and in such case the act of Duerr, and not the primary negligence of the appellee Bridge & Railroad Company, in any of the particulars charged, was the efficient or proximate cause of appellant's injuries. The mere fact that the concurrent cause or intervening act was unforeseen will not relieve the defendant guilty of the primary negligence, from liability: but, if the intervening agency is something so unexpected or extraordinary as that he could not or ought not to have anticipated it, he will not be liable, and certainly he is not bound to anticipate the criminal acts of others by which damage is inflicted, and hence is not liable therefor. 29 Cyc. Law & Proc. pp. 501-512; *Sofield v. Sommers*,

9 Ben. 526, Fed. Cas. No. 13,157; *Andrews v. Kinsel*, 114 Ga. 390, 88 Am. St. Rep. 25, 40 S. E. 300."

The principle we believe to be applicable to the statement of facts set forth in that part of the petition which seeks to charge the street railway company with liability is further illustrated by the following cases: in *Scheffer v. Washington City, V. M. & G. S. R. Co.* 105 U. S. 249, 26 L. ed. 1070, a passenger injured in a railway collision became in consequence thereof disordered in mind and body, in consequence of which, some eight months thereafter, he committed suicide. His personal representatives brought an action against the company to recover for his death in consequence of the injury. It was held that this act, and not the negligence of the company, was the proximate cause of the injury, and that he could not recover. In *Henry v. St. Louis, K. C. & N. R. Co.* 76 Mo. 288, 43 Am. Rep. 762, the plaintiff was told to change cars, and got into one which was not ready, and was told to get out of that, and was injured by a passenger train soon after alighting. It was held that his expulsion from the car was not the proximate cause of the injury. In *Haley v. St. Louis Transit Co.* 179 Mo. 30, 64 L.R.A. 295, 77 S. W. 731, it was admitted the street railway was guilty of negligence in failing to stop the car on which plaintiff was a passenger, at the street where she wished to alight to go to her home, according to her signal twice properly and timely given; but it was held that it was not the proximate cause of the subsequent injuries she received from a fall while walking on the sidewalk between the place she alighted and her home, the sidewalk being covered with ice and snow. In *Central R. Co. v. Price*, 106 Ga. 176, 43 L.R.A. 402, 71 Am. St. Rep. 246, 32 S. E. 77, it was held that the negligence of a railway conductor in carrying a passenger beyond her destination was not the proximate cause of an injury received by her in consequence of the explosion of a lamp in a room at the hotel at which she was waiting for a return train.

The plain reason of all of those cases is that the injury inflicted could not have been foreseen even by the exercise of that high degree of care and foresight which the law puts upon common carriers of passengers. We think the case at bar falls fully within the reason of the rule.

The judgment of the court below is accordingly, affirmed.

Turner, Ch. J., and Williams and Hayes, JJ., concur.

Dunn, J., dissenting:

From the conclusion reached by my as-
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sociates in the foregoing case I am constrained to dissent.

An ordinance of Oklahoma City (No. 281) relating to the management of the cars of the street railway company on the sounding of a fire alarm provides: ". . . The cars of such railway company shall be stopped after the sounding of a fire alarm, and upon the approach of fire engines, hose cart, or other fire apparatus, which stoppage shall be made when such apparatus is within a distance of 300 feet of such cars, and shall remain standing until the same have passed."

Had the company observed this ordinance, and had the car stopped on the sounding of the fire alarm, the injuries complained of would not have happened. The violation of a valid ordinance is usually held to be prima facie evidence of negligence. The car did not stop, but, as averred by the petition, continued its course east, along Main street, until it came into Broadway and into the direct line of travel of the fire apparatus. Nor does the petition leave room for conjecture nor for the operation of the rule that one is held to be liable for the result of his negligence only when the same could or should have been foreseen; for the petition specifically avers that, when the said Kessler and the wagon bearing the fire apparatus were approaching the point where this injury occurred and at a place less than 300 feet south of the corner, they "were in plain view of and were seen and heard by the motorman and conductor of said car, but that said motorman and conductor, in violation of their duty and in violation of the said ordinance, No. 281, failed and refused to stop said car at said point." From which it will be seen that the operatives of this car and the company acting by and through them were required to exercise no foresight whatsoever in order to be held chargeable with the liability here sought to be enforced. These rapidly moving engines of destruction, it is averred, were in sight of the motorman and conductor; that they could and did see them, and, independent of any ordinance, failure to stop, under the facts shown, was manifestly negligence. The operatives of the car might not have known with absolute certainty that there would be passengers called into the street by its continued travel, but they knew they were doing the thing which would call them there if any desired passage, and they certainly did know that by their action some accident (if not this, some other) was likely to occur. This is all that the law requires to fix liability upon them for injuries which did occur. Nor is the gross disregard of ordinary care involved in the foregoing acts the only thing with which they are made

chargeable herein. The car not only did not stop when the alarm was sounded and when the fire apparatus came into the vision of the employees, but, in addition thereto, it failed to stop after proceeding on its way to a point where the deceased and injured parties stood, which was in the direct line of travel of the fire chief's running horse. At this place, it is alleged in the petition, it was the duty of the said company to stop its cars, and that this was the usual and customary point for the cars to stop; and it is further alleged that these parties were passengers on the said railway, and held transfers, and were at the proper place to take and board the cars to continue their journey. Nor is this all. It is further alleged that this is the only car which they could take under the terms of their transfers. So that the railway company, in addition to deliberately driving its car into a place where it was seen some accident was likely to happen, violated a positive contract which it had made with these people when it received their fare for carriage. It required them under its contract to take this specific car, and none other, and then failed to stop the car at the proper place and time to enable them to secure the benefit of this contract. It is alleged in the petition and manifest that if the car had stopped in response to the requirements of the ordinance, or if it had stopped when the operatives saw the fire apparatus approaching, or if it had stopped in response to the contract into which the company had entered, the injuries here complained of would not have happened.

All the foregoing acts may be termed, so far as the deceased and the plaintiffs herein are concerned, to have been as to them acts in the nature of omission of due care for their welfare, rather than commission; but it is further averred that, by the car proceeding on its way after the alarm or view of the fire wagons was had, the plaintiffs and the deceased were lured into the street, and caused to believe that, by remaining in the street, they would be able to board the car when it reached the point where they stood; that when the car did not stop so that they could board it, they was left standing there exposed to the danger which overwhelmed them. These facts, when taken together, in my judgment render the company liable for the injuries for which relief is here prayed. The petition avers that: "Said Mark H. Kessler saw these plaintiffs and saw said deceased, Daniel L. Stephens, in ample time before he reached the point where plaintiffs and said Daniel L. Stephens were located, and when he was about 80 feet from them, by the exercise of proper care to have checked

the rate of speed at which he was driving and to have stopped said horse, and thereby to have protected plaintiffs and said Daniel L. Stephens from the danger which they were in, which said danger was imminent and beyond the power of said plaintiffs and of said Daniel L. Stephens to avoid, but that said Mark H. Kessler, wholly disregarding their rights and wholly ignoring the danger in which these plaintiffs and the said Daniel L. Stephens were placed, did, then and there, in a manner grossly negligent of the rights and grossly unmindful of the lives and safety of plaintiffs and of said Daniel L. Stephens, continue to urge his said horse northward at full speed, and did then and there carelessly, negligently, heartlessly, cruelly, and in a cold-blooded and murderous manner, urge said horse and the buggy drawn by it against the person of said Daniel L. Stephens, thereby wounding and injuring the said Daniel L. Stephens so that within a few hours he died."

The foregoing allegations in my judgment do not bring this case within the rule laid down in the case of *Watson v. Kentucky & I. Bridge & R. Co.* 137 Ky. 619. 126 S. W. 146, 129 S. W. 341, from the Kentucky court of appeals. The general proposition there stated will, I believe, not be denied. The act there dealt with was one of wanton criminality for the purpose of committing a crime. In the case at bar there is no averment of fact leading us to believe that Kessler intended and willingly killed or injured these people. He had no bludgeon, fireman, or knife, nor other such deadly weapon, nor is it shown that in his mind he was bent upon destroying these people. He was engaged in depicting a scene which occurs every day in the crowded streets of every big city of this nation, and using the ordinary means used in carrying it out. If, instead of the injuries occurring as above set out, some enemy of these people had, with a deadly weapon, assaulted them and inflicted the injuries alleged, then the rule of the case from the Kentucky court of appeals would be applicable. But it is not applicable here, because of this distinction, and also, it seems to me for another reason: There people were passengers on the street car company's line. They were in every particular acting within their contractual rights. It was the affirmative duty of the street car company to use every reasonable precaution that it could to guard them from danger, either of negligence or criminality. The averments show that the company's employees saw Kessler and the fire apparatus approaching to the point where these people should board the car, and if, seeing this, it did not stop, in

my judgment it would be liable for the injuries which happened even if Kessler had maliciously and wantonly run them down with his horse; this for the reason that the parties were passengers, and the company saw and could have prevented the injury. But the averments of this petition do not make of Kessler's act a crime. Among the synonyms for "murderous," Webster's New International Dictionary mentions "savage," and "cruel," and "murderous," as defined in the Century Dictionary and Encyclopedia, means "very brutal; cruel or destructive;" and "murderous," "in a murderous or bloody manner." All of these epithets could be applied to Kessler's acts and yet not charge them as criminal.

Section 5655 of the Compiled Laws of Oklahoma, 1909, provides that "in the construction of any pleading, for the purpose of determining its effect, its allegations shall be liberally construed with a view to substantial justice between the parties."

Taking the facts as set forth in the pleadings before us, and giving them the construction required by the foregoing statute, in my judgment substantial justice requires that we should overrule the demurrer and send the case to the district court for a trial of the issues of fact by a jury.

VERMONT SUPREME COURT.

FREDERICK C. BOURKE et al., Appts.,
v.

OLCOTT WATER COMPANY et al.

(— Vt. —, 78 Atl. 715.)

Municipal water supply — tenants' bills — requiring payment by owners.

1. A water company whose charter provides that every person within a municipality shall be entitled to water upon paying a reasonable compensation cannot make the

Note. — *Right of water company to refuse to deal with tenant.*

As to validity of statute holding property owner liable for water and light furnished tenant, see note to East Grand Forks v. Luck, 6 L.R.A. (N.S.) 198.

BOURKE v. OLCOTT WATER CO. is supported in principle by State ex rel. Milsted v. Butte City Water Co. 18 Mont. 199, 32 L.R.A. 697, 56 Am. St. Rep. 574, 44 Pac. 966, which holds that the refusal of a water company to supply water to a tenant in the possession and occupancy of a house, when he is ready to pay for it in advance, and the company is supplying a city and its inhabitants under a franchise, cannot be justified by a by-law of the company declining to contract for water with any persons except owners of prop- 33 L.R.A. (N.S.)

payment of its bills by owners of buildings a condition to supplying water to tenants. **Equity — jurisdiction — compelling public service — remedy at law.**

2. Equitable relief by way of mandatory injunction may be granted to compel a water company to furnish water to one entitled to it, if several months must elapse before a hearing could be secured upon an application for a writ of mandamus.

(January 11, 1911.)

APPEAL by plaintiffs from a decree of the Chancery Court for Windsor County in a proceeding to compel defendants to furnish plaintiffs with water. Reversed.

The facts are stated in the opinion.

Mr. William Batchelder for appellants.

Messrs. Raymond Trainor and E. R. Buck, for appellees:

Orators' remedy at law was full, adequate, and complete.

Cox v. Malden & M. Gaslight Co. 199 Mass. 324, 17 L.R.A. (N.S.) 1235, 127 Am. St. Rep. 503, 85 N. E. 180; State ex rel. Atwater v. Delaware, L. & W. R. Co. 48 N. J. L. 55, 57 Am. Rep. 543, 2 Atl. 803; State v. New Haven & N. R. Co. 37 Conn. 154; State ex rel. Grady v. Chicago, M. & N. R. Co. 79 Wis. 259, 12 L.R.A. 181, 49 N. W. 243; People v. Albany & V. R. Co. 24 N. Y. 267, 82 Am. Dec. 295; Delaware, L. & W. R. Co. v. Central Stock Yard & Transit Co. 45 N. J. Eq. 50, 6 L.R.A. 855, 17 Atl. 146; Moundville v. Ohio River R. Co. 37 W. Va. 92, 20 L.R.A. 161, 16 S. E. 514.

Under the guise of a mandatory injunction, equity will not compel a party to do a continuous act involving labor and care.

Rutland Marble Co. v. Ripley, 10 Wall. 358, 19 L. ed. 961; 2 Dan. Ch. Pl. & Pr. 6th ed. p. 1663; Hayward v. East London Waterworks Co. 52 L. T. N. S. 175, 54 L. J. Ch. N. S. 523, L. R. 28 Ch. Div. 138, 49 J. P. 452; Port

erty or their authorized agents, where the landlord gave the water company a written order to turn on the water on the premises and charge to the tenant.

But when a building owned by one person is occupied by many tenants, the duty of furnishing water separately to each tenant of a building, and collecting rates from each as a separate consumer, cannot be imposed by the owner of the premises on the city board of water commissioners by furnishing, at his own expense, for each room shut-offs with locks and keys, and then tendering the keys to the commissioners, where the municipal charter provides for furnishing water to the owners or occupants of houses or other buildings, and making the cost a lien on the buildings, and the rules and regulations provide for dealing with

Clinton R. Co. v. Cleveland & T. R. Co. 13 Ohio St. 544; Union P. R. Co. v. Hall, 91 U. S. 343, 23 L. ed. 428; People v. Albany & V. R. Co. 24 N. Y. 267, 82 Am. Dec. 295; Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; Boston & L. R. Corp. v. Salem & L. R. Co. 2 Gray, 1.

The public service corporation may make and enforce such rules as are customary, necessary, and convenient for the conduct of its business.

Shortsleeves v. Capital Traction Co. 28 App. D. C. 365, 8 L.R.A.(N.S.) 287; Birmingham R. Light & P. Co. v. McDonough, 153 Ala. 122, 13 L.R.A.(N.S.) 445, 127 Am. St. Rep. 18, 44 So. 960.

Provisions in charters giving water companies the right to refuse to furnish water on premises until the water rents of former owners or occupants are paid are valid.

Vreeland v. O'Neil, 36 N. J. Eq. 399; Howe v. Orange, 70 N. J. Eq. 648, 62 Atl. 777; Girard L. Ins. Co. v. Philadelphia, 88 Pa. 393; East Grand Forks v. Luck, 97 Minn. 373, 6 L.R.A.(N.S.) 198, 107 N. W. 393, 7 A. & E. Ann. Cas. 1015.

Powers, J., delivered the opinion of the court:

The defendants having refused to furnish the orators with a supply of water for domestic use, these proceedings have been instituted to compel them by mandatory injunction so to do. The Olcott Water Company is a corporation chartered by No. 189, Acts of 1892, and is engaged in the business of selling water to the village of Wilder (formerly Olcott Falls) and its inhabitants, for municipal and domestic uses. The other defendants are its managing officers. The orators live in the village, and occupy rented tenements situate on the south side of Hawthorne street. The company's main passes along the street in front of these premises, and is connected therewith with proper piping, and at all

owners, and not with tenants. Kelsey v. Fire & Water Comrs. 113 Mich. 215, 37 L.R.A. 675, 71 N. W. 589.

And the assessment of water rates to tenants in some instances, under an express agreement with the owner of the premises that he would pay if the tenants were delinquent, when this was done by the superintendent without any express authority of the board of water commissioners, does not bind the board to deal with tenants instead of owners of buildings. *Ibid.*

The occupant of a suite of rooms in a model lodging house, so called, who has separate water fixtures, and does not use nor desire to use the water in common with the occupants of the other suites, is entitled to a mandatory injunction against 33 L.R.A.(N.S.)

times here material an abundant supply of water was available. The defendants' refusal is predicated solely upon a previously adopted rule of the company, in force at the time this controversy arose, which reads as follows: "This company will not collect rents from tenants. Such bills must be paid by owner of premises."

1. By § 13 of the company's charter it is provided that "every person" living within the territorial limits of the village of Wilder "shall be entitled to have and use an ample supply of water from the mains of said company, by paying a reasonable compensation therefor." That this corporation, like any other, has power to make and enforce reasonable rules for the conduct of its business, not inconsistent with the terms of its charter or the laws of the state, is not denied. It is insisted on the part of the orators, however, that this rule is not only unreasonable, but repugnant to the charter provision just quoted. We need not stop to consider whether the rule is reasonable or otherwise, for we deem it to be in manifest conflict with this provision of the charter, and it follows that it cannot be enforced. The comprehensive language used plainly indicates an intention on the part of the legislature to require the company to supply all who called for water, provided they paid. This view is strengthened (if need be) by the language of § 11 of the charter: "The occupant of any house, tenement, or building who shall take water of said company shall be liable for the rent or price of the same," etc. It is not to be believed that the legislature was here attempting to create a liability on the part of a tenant for water supplied under contract with his landlord.

2. But the defendants say that the orators have mistaken their remedy, and that they should have applied for a writ of mandamus, if the defendant's refusal was wrongful. It must be admitted that mandamus is a proper and the usual remedy

the water board to compel it to furnish water to his particular suite at a specified flat rate, and charge to him personally, instead of charging it to the owners of the entire house, who have charge of the hallways, etc., at a meter rate based on the amount of water flowing through a pipe supplying the entire building, where the city ordinance establishing the rates for model lodging houses, so called, provides that in such houses there shall be charged "for each tenement having water fixtures within the same" a specified flat rate; since the word "tenement" is obviously used to describe such part of the house as is used by a single family, in contradistinction from the whole house. *Young v. Boston*, 104 Mass. 95.

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to compel a corporation to perform a duty imposed upon it by law. But it does not necessarily follow that it is the exclusive remedy. Although it was held in *Cox v. Malden & M. Gaslight Co.* 199 Mass. 324, 17 L.R.A. (N.S.) 1235, 127 Am. St. Rep. 503, 85 N. E. 180, that mandamus furnishes a complete remedy to one to whom a gas company refuses to furnish gas in violation of its duty to the public, and that equity is without jurisdiction to grant mandatory injunctions in such cases, when there is no contract, and has been no previous deal between the parties, we prefer to regard the adequacy of the remedy by mandamus, which is the test of the question of equity's jurisdiction, as dependent upon the circumstances of the given case. If mandamus affords a plain, speedy, and adequate remedy, of course, equity has no jurisdiction. It was so held in *Harley v. Lindemann*, 129 Wis. 514, 8 L.R.A. (N.S.) 124, 109 N. W. 570, and it would be so on general principles. But a legal remedy, in order to be adequate in the sense involved in determining the jurisdiction of equity, to use the oft-quoted language of Mr. Justice Johnson in *Boyce v. Grundy*, 3 Pet. 210, 7 L. ed. 655, must be "as practical and as efficient to the ends of justice and its prompt administration as the remedy in equity." It would logically follow (as was held in *Baker v. Briggs*, 99 Va. 360, 38 S. E. 277) that, where mandamus would not be sufficiently prompt, equity could proceed by injunction. It seems to be the rule in New Jersey that circumstances may be such that resort may be had in such cases to the court of equity. For, while it was held in *Johnson v. Atlantic City Gas & Water Co.* 65 N. J. Eq. 129, 56 Atl. 550, that mandamus, and not injunction, is the proper remedy to compel a gas company to perform its corporate duty to supply a consumer with gas, there is a plain intimation in the opinion that in a proper case relief might be had by way of mandatory injunction. And in *Washington v. Washington Water Co.* 70 N. J. Eq. 254, 62 Atl. 390, an injunction was granted restraining the defendant from shutting off the complainant's water supply. So, in *Richmond Natural Gas Co. v. Clawson*, 155 Ind. 659, 51 L.R.A. 744, 58 N. E. 1049, an injunction was granted restraining the company from shutting off the supply of gas. And again in *Charles Simon Sons Co. v. Maryland Teleph. & Teleg. Co.* 99 Md. 141, 63 L.R.A. 727, 57 Atl. 193, an injunction was granted to restrain the defendant from charging the complainant a rate higher than that fixed by ordinance. To be sure in these cases the injunction was prohibitive in form, but the result was the same as though the prohib-

ited act had been accomplished and an injunction mandatory in form had issued to restore the complainants to the rights before enjoyed. It is impossible to make the adequacy of the remedy by mandamus depend upon whether the application therefor is made just before or just after the act which results in the irreparable injury.

It is said in 6 Pom. Eq. Jur. 633, that a mandatory injunction is sometimes awarded to compel a carrier to transport freight or to furnish proper facilities, and that relief may be had against a violation of duty by public service corporations, such as gas, water, and telephone companies, when the rights of the individual complainant will be affected thereby. Accordingly, it was held in *Union R. Co. v. Canton R. Co.* 105 Md. 12, 65 Atl. 409, that a mandatory injunction would be granted compelling a railroad company to allow another to connect therewith and run trains over its tracks according to statutory provisions, on the ground that in the nature of things there was no adequate redress at law for a denial of such right. In *Baltimore v. Baltimore County Water & Electric Co.* 95 Md. 232, 52 Atl. 670, it was held that, when a city wrongfully refused to grant a permit to a corporation to lay its water mains in the streets, the company need not bring mandamus to compel the issuance of the permit, but that an injunction would be granted to restrain interference with the laying of the mains. In *Whiteman v. Fayette Fuel Gas Co.* 139 Pa. 492, 20 Atl. 1062, a mandatory injunction was issued to compel the defendant to furnish the complainant a supply of gas which had been wrongfully cut off. In *Louisville & N. R. Co. v. Pittsburgh & K. Coal Co.* 111 Ky. 960, 55 L.R.A. 601, 98 Am. St. Rep. 447, 64 S. W. 969, it was held that a shipper was entitled to a mandatory injunction requiring a railroad company to furnish him cars, when it refused to fulfil its obligations in this respect. With us an application for a writ of mandamus is made to the supreme court. More or less delay is necessarily involved. The application might come at a time when it would be several months before a result could be had. In the meantime, all necessity for the writ may have passed. Cases may easily be supposed in which promptness of relief would be all-important, and the delay incident to an application for mandamus would render that remedy utterly inadequate and useless. Take the case of a railroad company wrongfully refusing to furnish cars to one engaged in the business of shipping Christmas trees. Take the case of an irrigation company wrongfully refusing to supply a customer with water at a time when the whole crop

was endangered. Take the case of an aqueduct company, bound by its charter to supply a municipality with water for fire protection, wrongfully cutting off the supply during an extremely dry time. Can it be said in such cases that mandamus affords a remedy as efficient to the prompt administration of justice as that by mandatory injunction? Take this very case. The orators had no other source of water supply. Winter was shutting down upon them. The preliminary injunction was dated November 29th, and the earliest possible relief by mandamus could not be afforded before the following January term of this court. In the meantime the orators and their families were to remain without water. Mandamus afforded no adequate remedy. Equity alone was adequate to their necessities. It does not follow that the orators are not to be required to pay for such water as they might use. Equity does not take the property of one and give it to another; but the rights of the company can all be taken care of in the court below on remand of the case.

Pro forma decree reversed, and cause remanded, with directions to the Court of Chancery to render a decree for the orators according to the prayer of the bill. Let the defendants there apply for such orders regarding the payment of water rents, accrued and to accrue, as they deem themselves entitled to, if they be so advised. Let the orators recover costs in this court, and the costs below be there determined.

VIRGINIA SUPREME COURT OF APPEALS.

SAMUEL H. SMITH, Plff. in Err.,
v.
LULA G. SMITH.

(— Va. —, 70 S. E. 491.)

Will — ambiguous memorandum — sufficiency.

A dated and signed memorandum in the handwriting of deceased, found among his belongings on the page of a blank book such as he used in his business, stating that "everything is" his wife's, cannot be probated as his will, although there is evidence that he had made a will, if there is nothing to identify this memorandum as the will referred to.

(March 9, 1911.)

ERROR to the Corporation Court of the City of Alexandria to review a judgment admitting to probate a pencil writing 33 L.R.A. (N.S.)

claimed to be the last will and testament of George T. Smith, deceased. Reversed. The facts are stated in the opinion.

Mr. J. K. M. Norton for plaintiff in error.

Messrs. Francis L. Smith and Robinson Moncure, for defendant in error:

That a writing exhibited for probate as a last will and testament was wholly written by the testator himself *prima facie* amounts to presumptive proof of his deliberate intention and capacity to make a will at the time of writing the same.

Temple v. Temple, 1 Hen. & M. 477; Wallen v. Wallen, 107 Va. 149, 57 S. E. 596; Colton v. Colton, 127 U. S. 309, 32 L. ed. 142, 8 Sup. Ct. Rep. 1164; Coffman v. Coffman (Coffman v. Heatnole) 85 Va. 459, 2 L.R.A. 848, 17 Am. St. Rep. 69, 8 S. E. 672; Selden v. Coalter, 2 Va. Cas. 553.

Writings are to be taken as meaning something, if possible, and to be given effect, if not as deeds, then as wills, and *vice versa*.

Pollock v. Glassell, 2 Gratt. 455; McBride v. McBride, 26 Gratt. 480; Clarke v. Ransom, 50 Cal. 595; Spencer v. Robbins, 106 Ind. 580, 5 N. E. 726; Heaston v. Krieg, 167 Ind. 101, 119 Am. St. Rep. 485, 77 N. E. 805.

Diaries, entries in account books, memoranda, entries in a continuous diary, purporting to make a disposition of the writer's property after death, may be probated as a will.

Reagan v. Stanley, 11 Lea, 316.

So with script written in a book of accounts.

Brown v. Eaton, 91 N. C. 28.

Cardwell, J., delivered the opinion of the court:

This writ of error brings here for review a judgment of the corporation court of the city of Alexandria, admitting to pro-

Note. — Sufficiency of showing that paper offered as a holographic will was intended as such.

No general rule can be laid down as to the sufficiency of the showing in any particular case that a decedent intended as a testamentary disposition of his property a writing offered after his death as a holographic will. As stated in Gaston's Estate, 188 Pa. 374, 68 Am. St. Rep. 874, 41 Atl. 529: "In cases such as this precedents rarely afford much aid. We start with the settled principle controlling the adjudication in all of them; namely, from the language of the paper itself, and the circumstances surrounding its execution and reservation, did the author of it intend the writing to be a disposition of his or her property, to take effect after death? The absence

bate in that court a pencil writing claimed to be the last will and testament of George T. Smith, deceased.

The writing in question is on the front page of a book issued by the Southern Railway Company to its employees, in which the employee was to keep certain records as to trains, and is as follows:

"Dec. 24, 1900 Every thing is Lous.

"G. T. Smith, 314 South Patrick St. Ax Va."

It appears that G. T. Smith was childless and died in the city of Alexandria in December, 1908, leaving surviving him his widow, Lula G. Smith, his father, Samuel H. Smith, and other relatives. For a short while after the death of G. T. Smith, no will was found, but later his widow and

her sister, who conducted a boarding house in Alexandria city, were preparing rooms for boarders, and while emptying decedent's trunk, which contained his clothes and personal effects, and which in his lifetime had been used by him for such purposes, and had been placed and kept in the garret of the house from shortly after decedent's death, came across the book containing the writing above set out and claimed to be the will of said decedent. The decedent had been a railroad freight conductor, and had used like books in the course of his employment. Upon finding said book, the decedent's widow, being in the possession of his real estate, did not offer the writing in the book for probate as the will of her deceased husband, but did so later and

of sameness of expression and the wide variations in facts in nearly all cases compel a conclusion from the language and circumstances of the particular case."

So, in that case it was held that a dated and signed paper, wholly in the handwriting of deceased, beginning with the words, "it my wish," followed by a schedule of property to be distributed among a number of beneficiaries who were her collateral relatives, an intimate personal friend, and the latter's children, which paper was found after decedent's death, and two years after its date, in a bureau drawer, sufficiently showed a testamentary intention on the part of the writer.

And a paper within, dated, and signed by the deceased, included in an envelop addressed to one named in the paper as donee of certain property therein given by appropriate testamentary words, and placed in a conspicuous place in a room where deceased took his own life, clearly shows testamentary purpose and intent. *Tozer v. Jackson*, 164 Pa. 373, 30 Atl. 400.

A document wholly written, dated, and signed by deceased, and in form a perfect and complete testamentary disposition, is, in the absence of any extrinsic evidence throwing light on the writer's intention, entitled to probate as his holographic will, although headed, "Notes of Intended Settlement by" the deceased. *Whyte v. Pollok*, L. R. 7 App. Cas. 400, 47 L. T. N. S. 356, 47 J. P. 340.

But "it is not conclusive in favor of the paper that it is in the form of a testament, perfect in all its parts, written, signed and found as prescribed in cases of holographic wills. . . . It may nevertheless not be an operative will for the reason that it may be shown by proof not to have been intended to operate as a will." *Douglas v. Harkrender*, 3 Baxt. 114.

And where a writing propounded as a holographic will has the name of one attesting witness subscribed, and it appears that deceased had made previous wills attested by two witnesses, it is a question for the jury from the proof of facts and circumstances, intrinsic and extrinsic, 33 L.R.A. (N.S.)

whether deceased wrote and signed the paper and procured one witness, intending to procure no other, but to deposit the paper among his valuables as his will, in which case the fact that there was one witness would raise no presumption that it was an unfinished or incomplete will; or whether deceased intended to procure another witness, and thereby to complete the execution of the paper as a witnessed will, in which case it was incomplete and unfinished, unless deceased further changed his purpose, and determined to make it operate as his holographic will, by keeping it among his valuable papers as such. *Ibid*.

But an instrument in form a will, entirely written and signed by deceased, and found in his possession, should be admitted to probate as a holographic will, although the word "witness" appears at the bottom of the will, and is not followed by any signatures, where two disinterested witnesses testify that deceased, not long before his death, told them that he had willed his property in the same manner provided by such instrument. *Ainsworth v. Briggs*, 49 Tex. Civ. App. 344, 108 S. W. 753.

If the deceased kept the paper propounded as his holographic will as he kept his other valuable papers or effects, it is a fact from which an inference may be drawn that he regarded it as his will, and intended it to have effect as such at his death. *Tate v. Tate*, 11 Humph. 465.

And a signed and dated paper entirely in the handwriting of deceased, as follows: "It is my wish and desire that my good friend and relative, Dr. Joseph B. Outlaw, have all my property of every description."—which paper deceased had put away among his valuable papers, where it was found at his death, sufficiently shows that he intended it to be his will. *Outlaw v. Hurdle*, 46 N. C. (1 Jones, L.) 150.

And this is likewise shown by an instrument entirely written, dated, and signed by the deceased, stating merely that a named person "is my heirress," in which instrument, below these words, more than a year later, he wrote a statement as to the correct spelling of "the legatee's name," and

after notice of decedent's father, Samuel H. Smith, and next of kin and heir at law.

Samuel H. Smith contested the probate of the paper as the will of the decedent, whereupon the issue of *devisavit vel non* was made up and tried by a jury; and, after the proponent of the will had introduced her evidence, the contestant demurred thereto, and the jury rendered the following verdict: . . . That the paper writing offered for probate as the last will and testament of George T. Smith is wholly in the handwriting of the said George T. Smith, signature as well as the body thereof, and that the said paper writing and every part thereof is the true last will and testament of the said George T. Smith, subject to the opinion of the court upon the questions of law arising upon the demurrer to evidence of Samuel H. Smith, the defendant in the issue."

At a later term of the court the judgment here complained of was entered, overruling the demurrer to evidence, and admitting the paper in question to probate "as the true last will and testament of George T. Smith, deceased."

That "Lous" mentioned in the paper in question referred to decedent's wife, Lula G. Smith, there is no room for doubt; and while there was some evidence offered by the proponent of the will tending to show that two different pencils were used in writing the body of the instrument and the

signature thereto, the jury were warranted in finding that the whole paper, including the signature, was in the handwriting of the said George T. Smith; in fact, this is to be taken as admitted upon the demurrer to the evidence, as well as the fact that the person writing and signing the paper had sufficient intelligence to make a will. The sole question, therefore, for our determination, is whether or not the said paper writing is a valid holograph will. In other words, was this paper designed to be testamentary in character and purpose?

It is a settled rule in this country and in England that, in determining whether the instrument propounded was intended to be testamentary, reference will be had to the surrounding circumstances, and the language will be construed in the light of those circumstances; and that, if it shall appear under all the circumstances that the instrument was intended to be testamentary, the court will give effect to the intention, if it can be done consistently with the language of the instrument. But, while the courts have gone far in construing almost any form of instrument to be a will, we have been unable to find a case in which a paper with nothing on its face to indicate that it was intended to be testamentary was held to be entitled to probate as a holograph will.

The essence of the various definitions of the word "will" as applied to the dispo-

which instrument bears an indorsement in his own handwriting, calling it his "will, to be opened by" a named person, "who will see it executed." *Ehrenberg's Succession*, 21 La. Ann. 280, 99 Am. Dec. 729.

But in *Young v. Wark*, 76 Miss. 829, 25 So. 660, it was held that a paper bearing merely the words, "Want Sarah relatives have all property," written and signed by deceased, could not be probated as his will, in the absence of any extraneous evidence that he intended it to have effect as such, although there was ample evidence that he intended and had even expressed the intention that his property should go to the relatives of "Sarah," his wife, from whom he had inherited nearly all of it.

A document written, dated, and signed by deceased, an ignorant and illiterate man, in the form of a letter to his brother and sister, stating that he gives his property to two designated persons, one of whom has been with him twenty-four years and the other of whom he has brought up, and that no law has anything to do with what he gives them, sufficiently shows that the deceased intended it as a testamentary disposition of the property. *Morvant's Succession*, 45 La. Ann. 207, 12 So. 349.

And an instrument wholly written, dated, and signed by deceased in the form of a letter, addressed to one of his brothers, marked "personal," and from its face in-

tended to be mailed, but by its language testamentary in character, and purporting to be a will, is entitled to probate as such, if the deceased in fact never intended to deliver it to the addressee during the former's lifetime, but kept it, treating and intending it as his will. *Prather v. Prather*, — Miss. —, 52 So. 449.

But a letter written by deceased to the chief beneficiary in an imperfectly executed will which he had left with his executor, which letter merely informed the addressee of the writer's provision for her, cannot, in the absence of other circumstances to show that it was intended as a holographic will, be admitted to probate as such. *Re Noyes*, 40 Mont. 231, 106 Pac. 355.

For other cases involving the question of *animus testandi* in letters offered for probate as wills, see notes to *Re Richardson*, 15 L.R.A. 635, and *Milam v. Stanley*, 17 L.R.A. (N.S.) 1126, as to sufficiency of letter as will.

As to the necessity of witnesses to a holographic will, see note to *La Rue v. Lee*, 14 L.R.A. (N.S.) 968.

Writing name in body of holographic will as a signature thereto, see note to *Meads v. Earle*, 29 L.R.A. (N.S.) 64.

Violation of requirement that holographic will shall be written by testator, see note to *Re Noyes*, 26 L.R.A. (N.S.) 1145.

A. C. W.

sition of one's property after his death, given by lexicographers, text writers, and in the decided cases, is: The legal declaration of a person's mind as to the manner in which he would have his property or estate disposed of after his death; the written instrument, legally executed, by which a man makes disposition of his estate, to take effect after his death. Underhill, Wills, pp. 7, 8; 2 Bl. Com. 499; 4 Kent, Com. 490; Shep. Touch. 399; Schouler, Wills, 3d ed. § 279.

Jarman on Wills, 6th ed. p. 28, says: "But if the instrument is not testamentary either in form or in substance (none of the gifts in it being expressed in testamentary language, or being in terms postponed to the death of the maker), and if no collateral evidence is adduced to show that it was intended as a will, probate will not be granted of it as a testamentary document."

In Schouler on Wills, supra, it is said: "Papers which are not clearly, on their face, of a testamentary character, even though signed and attested, require to have the *animus testandi* shown to the satisfaction of the court."

The rule, however, uniformly recognized, is that, to prove by declaration that a paper was intended as a will, declarations of a testator tending to show that it was intended as a will must have been made at the time that the paper was written; or, at least, must be shown to relate to the identical paper.

The opinion by Staples, J., in McBride v. McBride, 26 Gratt. 481, says: "It is necessary, however that the instrument whatever it may be, whether a note, settlement, or deed should have been designed to operate, as a disposition of the testator's property. That identical paper must have been intended to take effect in some form. It must have been written *animo testandi*. In the language of Judge Cabell, 'a paper is not to be established as a man's will merely by proving that he intended to make a disposition of his property similar to or even identically the same with that contained in the paper. It must satisfactorily appear that he intended the very paper to be his will. Unless it does so appear, the paper must be rejected, however correct it may be in its form, how comprehensive in its details, however conformable to the otherwise declared intentions of the party, and although it may have been signed by him with all due solemnity.' . . .

"He must have designated thereby to dispose of his property. He must have looked to that paper as the means by which an object was to be accomplished, and that object the distribution of his estate after his

death. Unless he intended this, the paper is not his will, whatever he may have called it."

See also Combs v. Jolly, 3 N. J. Eq. 625; Lyles v. Lyles, 2 Nott. & M'C. 531; Daniel v. Veal, 32 Ga. 589.

The opinion by the same learned judge (Staples), in Burke v. Lee, 76 Va. 386, says: "A party seeking to maintain a devise must show it by the will itself, and no defects in the language used in the instrument can be supplied by parol proof. The true inquiry is not what the testator meant to express, but what the words he has used do express. Evidence, is, however, always admissible for the purpose of showing the situation of the testator, the state of his family and of his property at the time of making his will, with a view of throwing light upon his intention in cases of doubt and difficulty.

"And evidence may generally be received as to any facts known which may be reasonably supposed to have influenced him in the disposition of his property, and as to all the surrounding circumstances at the time of making his will."

The words, "Every thing is Lous," which constitute the entire body of the paper here, are most reasonably to be interpreted as referring to an existing fact, and might, under certain conditions, be considered as having reference to a purpose on the part of the writer of those words to pass everything that he owned in the way of property to the ownership of "Lou," his wife, either by gift or devise; but there are no words or gift to be found in this paper, and nothing from which it could be reasonably determined that the writer intended the paper as a disposition of his property, to take effect after his death.

Looking, then, to the attending circumstances, or rather to the oral testimony, which may be considered in determining the question whether or not George T. Smith intended this paper as a testamentary disposition of his property after his death, we find that while the witnesses testify that the whole paper is in the handwriting of Smith, though written with different pencils and perhaps at different times, there are no facts testified to which throw any light upon his intention when he wrote what is found in the back of the book which contains this paper.

Luther Carter, a real estate agent of Alexandria, who claims to have known and seen right much of Smith, after testifying on cross-examination that the words, "Every thing is Lous," did not look to him as much like Smith's handwriting as the signature, says that he heard Smith state

that he had made his will in favor of his wife.

Henry M. Parish, who claims to have been well acquainted with Smith, says that he mentioned to Smith on several occasions the matter of joining the brakeman, or Brotherhood of Railroad Trainmen, but he always said he had never thought about it; but witness remarked to him on several occasions that he carried insurance with the conductors, and that Smith ought to take out insurance with the brakemen, so that in case he should retire he would have some insurance to leave to his wife; whereupon Smith remarked; "It don't make any difference about that. I have plenty for my wife to live on if I die to-day. I have a good home and have some money, and I don't bother with any insurance in any order at all."

It seems that George T. Smith, who had been a freight conductor and also a passenger conductor on the railroad, had gotten into some trouble, and was then running as a brakeman when he had his talk with Parish, who also was in the employ of the railway company.

There is also evidence that George T. Smith appreciated the efforts his wife had been making for him from the time of his marriage, but we do not think that this testimony throws any light upon the intention of Smith in making the writing found in the book which had been furnished to him by the railroad company for his report of the arrival and departure of trains from time to time. There is not enough in the evidence to identify this paper as the will that he had intended to make, or had made, of which he might have been speaking when talking to Parish, as (quoting from Judge Staples in *McBride v. McBride*, supra) "a paper is not to be established as a man's will merely by proving that he intended to make a disposition of his property similar to or even identically the same with that contained in the paper. It must satisfactorily appear that he intended the very paper to be his will."

In *Smith v. Spiller*, 10 Gratt. 318, William H. Spiller executed his bond to Francis Smith for \$4,000, payable four years after its date, and on the back of this bond there was found this memorandum, which was shown to have been written thereon by Francis Smith at the time that the bond was executed to him, to wit:

Memorandum.—If I do not collect the money due on the within note of my nephew Hickman Spiller during my life, 33 L.R.A. (N.S.)

then it is never to be collected; and I give him that sum.

[Signed]

Francis Smith.

Sept. 30, 1823.

This court held this indorsement on the back of this bond not to be of a testamentary character, but a part of the bond, and irrevocable without destroying the bond, and this ruling was made upon full recognition of the rule that whether a paper of a doubtful character was designed to operate as one instrument or as another may be determined by all the circumstances attending the transaction, and the contemporaneous conduct and declarations of the parties evincive of their purposes and motives, as showing what kind of instrument was within their contemplation and design; and in that case there were some declarations made by the parties at the time the paper in question was written and signed; but in the case here, beyond what we have already mentioned as having been proven, there is not a particle of testimony going to identify the paper in question as the will of George T. Smith.

In *Cope v. Cope*, 45 Ohio St. 464, 15 N. E. 206, the syllabus is: "Where the provisions of a will in each and all of its items are, when considered as an entirety, so obscure that, with the aid of all the light that can be shed on it by the extraneous circumstances, no definite idea can be formed of the intention of the testator in any of the dispositions he has attempted to make, it should be held void for uncertainty, and the property left to descend and be distributed according to law."

In *Clarke v. Ransom*, 50 Cal. 595, greatly relied on here by the defendant in error, the words:

Dear Old Nance: I wish to give you my watch, two shawls, and also five thousand dollars.

Your old friend,

E. A. Gordon.

—were held to be testamentary in character, and, as there were no words of revocation found in the paper, it was admitted to probate as a codicil to a will which Mrs. Gordon had theretofore made, disposing of an estate of about \$170,000, and appointing an executor, who, it seems, was also the devisee and distributee of almost the entire estate. It was made to appear from the testimony that the paper quoted above was written by Mrs. Gordon when ill, and but a few days before her death, and was in accordance with verbal instructions that she had already given Clarke, her executor, as to what the testatrix

wanted Miss Ransom, whom she always called 'Old Nance,' to have of her estate, and when she wrote this paper and delivered it to Miss Ransom she was requested not to show it to the executor, Clarke, until after Mrs. Gordon's death, and not then unless Clarke refused to carry out her verbal request. We think this a very different case from the one before us, but even in that case there was a strong dissenting opinion by Wallace, Ch. J.

Upon the whole case, we think that the paper here in question cannot be maintained as the last will and testament of George T. Smith, and therefore the judgment of the corporation court of the city of Alexandria upon the demurrer to the evidence must be reversed and annulled, and this court will enter the judgment the lower court should have entered in favor of plaintiff in error.

WASHINGTON SUPREME COURT.

SPOKANE & EASTERN TRUST COMPANY,
NY, Appt.,

v.

ANDREW M. I. HUFF, Resp't.

(— Wash. —, 115 Pac. 80.)

Bank — payment of overdraft — out of banking hours — right to recover.

That payment of an overdraft, under the mistaken belief that the drawer had funds, was made by the bank after office hours for the accommodation of the payee, does not change the rule that payment of such draft under such mistake in the ordinary course of business is not such a payment under mistake of fact as will entitle the bank to recover the money from the payee.

(April 21, 1911.)

Note. — Right of bank to recover back amount paid on check or other paper drawn upon or payable at it, under mistaken belief that there were sufficient funds to meet it.

The earlier cases upon this subject are collected and discussed in the note to Citizen's Bank v. Schwarzschild & S. Co. 23 L.R.A. (N.S.) 1092, and this note is supplementary thereto. As is shown in the earlier note, the general rule is that, in the absence of fraud, the payment of a note or check by a bank upon which it is drawn or at which it is payable, under the mistaken belief that the drawer of the check or maker of the note has sufficient funds to his credit to pay it, cannot be recovered back by the bank. This rule is supported by the decision in National Exch. Bank v. Ginn, 114 Md. 181, ante, 963, 78 Atl. 1020.

And the rule that a recovery will be allowed where the holder knew that there

APPEAL by plaintiff from a judgment of the Superior Court for Spokane County sustaining a demurrer and dismissing the complaint in an action brought to recover the amount paid on certain checks under the mistaken belief that the drawers of the checks had funds in the bank. Affirmed.

The facts are stated in the opinion.

Mr. Warren W. Tolman, for appellant:

Money paid under mistake can be recovered back.

Canadian Bank v. Bingham, 30 Wash. 484, 60 L.R.A. 955, 71 Pac. 43, 46 Wash. 657, 91 Pac. 185; Merchants' Bank v. Superior Candy & Cracker Co. 41 Wash. 653, 84 Pac. 605; North Coast R. Co. v. Hess, 56 Wash. 335, 105 Pac. 853.

Defendant, by reason of the erroneous payment of the checks by the bank, cannot shift a loss which was already his, from his own shoulders to those of the bank, who made the payment at his solicitation and for his personal accommodation after the close of the bank.

Canadian Bank v. Bingham, 30 Wash. 484, 60 L.R.A. 955, 71 Pac. 43; National Bank v. National Mechanics' Bkg. Assn. 55 N. Y. 211, 14 Am. Rep. 232; Merchants' Nat. Bank v. National Eagle Bank, 101 Mass. 281, 100 Am. Dec. 120; Northampton Nat. Bank v. Smith, 169 Mass. 281, 61 Am. St. Rep. 283, 47 N. E. 1009; Union Nat. Bank v. McKey, 42 C. C. A. 583, 102 Fed. 662; Carley v. Potter's Bank, — Tenn. —, 40 S. W. 328; Irving Bank v. Wetherald, 36 N. Y. 335; Oddie v. National City Bank, 45 N. Y. 735, 6 Am. Rep. 160; First Nat. Bank v. Burkham, 32 Mich. 328; Merchants' Bank v. Superior Candy & Cracker Co. 41 Wash. 653, 84 Pac. 604.

were no funds, or where there has been some fraud practised on the drawee bank, and the interests of third persons would not be prejudiced, is adhered to in James River Nat. Bank v. Weber, — N. D. —, 124 N. W. 952, wherein it was held that money paid a depositor in good faith, in reliance upon his statement that he had sufficient funds on deposit to make a payment, when in fact he had previously withdrawn the whole of his deposit, could be recovered back by the drawee bank. The court said: "It seems to be appellant's [drawer and payee] contention, in brief, that because plaintiff's teller, by consulting the books, could have learned the exact status of defendant's account, he had no right to rely upon defendant's statement that the check of October 7th had not been paid, and that he had a balance on December 27th of \$319.71. And it is urged that for this reason the payment was a voluntary one, and cannot be recovered back. We are unable to uphold

Messrs. Danson & Williams, for respondent:

Payment, in the ordinary course of business, of a check by a bank upon which it is drawn, under the mistaken belief that the drawer of the check has sufficient funds to his credit to pay the check, is not such a payment under mistake of fact as will permit a recovery by the bank.

First Nat. Bank v. Burkham, 32 Mich. 328; Manufacturers' Nat. Bank v. Swift, 70 Md. 515, 14 Am. St. Rep. 381, 17 Atl. 336; Oddie v. National City Bank, 45 N. Y. 735, 6 Am. Rep. 160; Riverside Bank v. First Nat. Bank, 20 C. C. A. 181, 38 U. S. App. 674, 74 Fed. 276; Note to Citizens' Bank v. Schwarzschild & S. Co. 23 L.R.A.(N.S.) 1092; National Bank v. Berrall, 70 N. J. L. 757, 66 L.R.A. 599, 100 Am. St. Rep. 821, 58 Atl. 189, 1 A. & E. Ann. Cas. 630; First Nat. Bank v. DeVenish, 15 Colo. 229, 22 Am. St. Rep. 394, 25 Pac. 177; City Nat. Bank v. Burns, 68 Ala. 267, 44 Am. Rep. 138; Bryan v. First Nat. Bank, 205 Pa. 7, 54 Atl. 480; Penacook Sav. Bank v. Hubbard, 58 N. H. 167; Fifth Nat. Bank v. Ashworth, 123 Pa. 212, 2 L.R.A. 491, 16 Atl. 596; First Nat. Bank v. Burkhardt, 100 U. S. 683, 25 L. ed. 766; National Gold Bank & T. Co. v. McDonald, 51 Cal. 64, 21 Am. Rep. 697; 5 Am. & Eng. Enc. Law, 2d ed. p. 1059.

Fullerton, J., delivered the opinion of the court:

The appellant is a banking corporation, and receives money on deposit subject to check by its depositors. On the morning of October 6, 1909, one Edwin J. Schloss had on deposit in the appellant's bank subject to check the sum of \$297, and one Leon J. Schloss had on deposit therein subject to check the sum of \$48. During the banking hours of that day the Schlosses severally withdrew their respective deposits. On the

such contention. The facts as found by the trial court, and which we must accept as true, clearly present a case of a payment of such last check through mistake on the part of plaintiff's officer. Whether, as found, defendant intentionally and fraudulently misled plaintiff's officer we need not determine. It is enough that the plaintiff bank, in good faith and by mistake of fact, parted with money to which defendant was not entitled either legally or morally. The facts do not present a case of the payment of money to adjust a disputed claim; nor do they present a case of voluntary payment. . . . In the light of the facts found, an implied promise on defendant's part to repay such money arose immediately upon the payment by plaintiff of the last check."

As to right of those other than banks to 33 L.R.A.(N.S.)

same day, and about one hour after the bank had closed its doors to the general public, the respondent, Andrew M. I. Huff, appeared at the bank with the check of Edwin J. Schloss for the sum of \$297, and the check of Leon J. Schloss for the sum of \$48, both dated upon that day, and presented the checks to the bank's assistant secretary for payment. The assistant secretary thereupon caused inquiry to be made of the bookkeeper and the paying teller of the bank, to ascertain whether the drawers of the checks had sufficient funds on hand to meet the checks, and, on being informed that they had, paid the checks to the respondent. When the books of the bank were balanced for the day, the overpayment was discovered, and on the next day the checks were tendered the respondent and repayment of the sums demanded. Repayment was refused, whereupon the present action was brought to recover the amount so paid. In the complaint, in addition to the foregoing facts, it was alleged that at the time of the payment the bank had ceased for that day the transaction of business with the public, a fact that the respondent well knew; that it paid the money after business hours as an accommodation to the holder of the checks; that the reason it did not discover that the depositors drawing the checks had withdrawn their funds was owing to the confusion incidental to the closing of the business of the bank for the day; and that the respondent "did not, by reason of said payment, so change his position that he would be prejudiced by repayment of the money so paid to him." To the complaint a demurrer was interposed, which the court sustained. Later on a judgment of dismissal was entered, and the appeal followed.

It is a general rule, sustained by almost universal authority, that a payment, in the ordinary course of business, of a check by a bank upon which it is drawn, under the

recover back overpayment made in ignorance or forgetfulness of previous payments see note to Simms v. Vick, 24 L.R.A.(N.S.) 517.

As to right of bank to recover amount paid on check in ignorance of insolvency of drawer, who was indebted to it, see note to National Exch. Bank v. Ginn, ante. 963.

As to the right of bank to apply deposit to its own claim against adverse claimant. see note to Jaselli v. Riggs Nat. Bank, 31 L.R.A.(N.S.) 765.

As to the right of drawee of forged check or draft to recover money paid thereon. see notes to First Nat. Bank v. Bank of Wyndmere, 10 L.R.A.(N.S.) 49, and Title Guarantee & T. Co. v. Haven, 25 L.R.A.(N.S.) 1308, and American Exp. Co. v. State Nat. Bank, — L.R.A.(N.S.) —. G. J. C.

mistaken belief that the drawer has funds in the bank subject to check, is not such a payment under mistake of fact as will permit the bank to recover the money so paid.

In *Hull v. Bank of South Carolina* Dud. L. 259, the court, passing upon the question, used this language: "This question is to be decided rather by authority than general reasoning on the subject. No part of a commercial community is more interested in commercial usages than banks, and they cannot complain when they are required to strictly conform to them. They cannot always guard against fraud and imposition, but they may against mistakes depending on an inspection of their own books and accounts. Mistakes may be prevented which cannot be remedied. They accepted and paid the check presented by the defendant for and on account of Hopton, the drawer, whose money they had kept for his convenience and accommodation. The privity of contract was between them and their customer Hopton, and not between them and one who may have happened in the course of dealing to present a check drawn by Hopton. . . . A bank check has all the characteristics of bills of exchange, and cannot be distinguished from them. Indeed, they perform not only all the offices of bills, but are more generally used for the transfer and payment of moneys. They are mercantile agents which should not be crippled in their daily and hourly operations. Before one reaches the bank after it has been drawn, it may have paid and discharged many debts, and, after it has been accepted and paid, all the intervening holders in general are discharged from all liability to the bank; it becomes then a transaction between the bank and the drawer, the bank not unfrequently paying money on checks of the drawer, when in fact he has no deposit."

In *First Nat. Bank v. Burkham*, 32 Mich. 328, Judge Cooley, writing for the court, used these words: "But we think it would be an exceedingly unsafe doctrine in commercial law that one who has discounted a bill in good faith, and received in its payment the strongest possible assurance that it was drawn with proper authority, should afterwards hold the moneys subject to such a showing as the drawee might be able to make as to the influences operating upon his mind to induce him to make payment. The beauty and value of the rules governing commercial paper consist in their perfect certainty and reliability; they would be worse than useless if the ultimate responsibility for such paper, as between payee and drawee, both acting in good faith, could be made to depend on

the motives which influenced the latter to honor the paper."

So, in *Oddie v. National City Bank*, 45 N. Y. 735, 6 Am. Rep. 160, Church, Ch. J., discussing the question said: "When a check is presented to a bank for deposit, drawn directly upon itself, it is the same as though payment in any other form was demanded. It is the right of the bank to reject it, or refuse to pay it, or to receive it conditionally, as in *Pratt v. Foote*, 9 N. Y. 463; but if it accepts such a check and pays it, either by delivering the currency, or giving the party credit for it, the transaction is closed between the bank and such party, provided the paper is genuine. In the case of a deposit, the bank becomes at once the debtor of the depositor, and the title of the deposit passes to the bank. The bank always has the means of knowing the state of the account of the drawer, and, if it elects to pay the paper, it voluntarily takes upon itself the risk of securing it out of the drawer's account or otherwise."

In *Manufacturers' Nat. Bank v. Swift*, 70 Md. 515, 14 Am. St. Rep. 381, 17 Atl. 336, it was said: "It is the duty of a bank to know the state of its depositor's account, and if it makes a mistake in this respect it must abide the consequences. The presentation of a check is a demand for payment; if it is paid, all the rights of the payee have been satisfied, and he is not entitled to ask any questions. It would forever destroy the character of a bank in all commercial circles, if, when it was ready and willing to pay a check, it permitted the holder to inquire if the drawer had funds there to meet it. It is a matter with which he has no concern. In the absence of fraud on the part of the holder, the payment of a check by a bank is regarded as a finality. And the fact that the drawer had no funds on deposit will not give the bank any remedy against the holder."

In *National Bank v. Berrall*, 70 N. J. L. 757, 66 L.R.A. 599, 103 Am. St. Rep. 821, 58 Atl. 189, 1 A. & E. Ann. Cas. 630, it was said: "As between the holder of a check and the bank upon which it is drawn, the latter is bound to know the state of the depositor's account. Before paying the check it must take into consideration whether it was drawn against funds, and whether the order for payment, evidenced by the check, has subsequently been revoked. Therefore, where a bank receives, in the ordinary course of business, a check drawn upon it and presented by a bona fide holder, who is without notice of any infirmity

therein, and the bank pays the amount of the check to such holder, it finally exercises its option to pay or not to pay, and the transaction is closed as between the parties to the payment."

See also *Citizens' Bank v. Schwarzschild & S. Co.* 109 Va. 539, 23 L.R.A. (N.S.) 1092, 64 S. E. 954; *Boylston Nat. Bank v. Richardson*, 101 Mass. 287; *Riverside Bank v. First Nat. Bank*, 20 C. C. A. 181, 38 U. S. App. 674, 74 Fed. 276; *First Nat. Bank v. Burkhardt*, 100 U. S. 686, 25 L. ed. 766; *City Nat. Bank v. Burns*, 68 Ala. 267, 44 Am. Rep. 138; *National Gold Bank & T. Co. v. McDonald*, 51 Cal. 64, 21 Am. Rep. 607; *Consolidated Nat. Bank v. First Nat. Bank*, 129 App. Div. 538, 114 N. Y. Supp. 308; *Morse, Banks & Bkg.* 4th ed. § 455.

But while the courts are uniform in holding that a bank cannot recover under the circumstances cited, they are not agreed upon the principle upon which the rule prohibiting a recovery rests. Some of them, it will be observed, put it on the ground of want of privity between the holder of the check and the bank; others upon the ground that the payment is not a payment by mistake within the meaning of the rule that permits a recovery; others again on the ground that to permit the bank to repudiate the payment would destroy the certainty that must pertain to commercial transactions of this sort, if they are to remain useful to the business public. To our minds the latter reason is the most satisfactory. If, for example, a merchant conducting a retail business must hold the money he receives from the bank in payment of checks and drafts taken in by him from his customers in payment for the purchase of goods until such reasonable time as the bank has to determine whether or not it will call upon him for a return of the money, it is manifest that he must discard the use of checks and drafts in the conduct of his business, and require his customers to bring him cash. The uncertainty, delay, and annoyance such rule would cause him would forbid their use in his business.

Concluding, as we do, that the bank cannot recover if the checks in question were received and paid by it in the ordinary course of business, it remains to inquire whether the special circumstances set out in the complaint relieve it from the rule. It is our opinion that they do not. The matters which are thought to relieve the bank of blame were of its own choosing. The holder of the checks in no way contributed to the mistake, and the fact that the bank officers were more liable to make a mistake at this particular time than some other may prove the officers them-

selves more culpable but it cannot change the effect of the mistake.

The judgment is affirmed.

Dunbar, Ch. J., and Parker and Mount, JJ., concur.

WASHINGTON SUPREME COURT.

STATE OF WASHINGTON, Appt.,

L. H. DARWIN, Resp't.

(— Wash. —, 115 Pac. 309.)

Libel — publication of conditional sales record — injury to seller.

The publication of a copy of a public record of conditional sales made by a retail merchant is privileged, and will not subject the publishers to a prosecution for criminal libel, although it was unwarranted, and alleged to have subjected the seller to the hatred of his customers and injured him in his business.

(May 2, 1911.)

Note.—While *STATE v. DARWIN* seems to be a case of first impression in applying the law of libel and slander to a publication concerning the relation of a merchant with his customers, it is clear that, aside from any question of privilege, words concerning merely a legal and proper relation of a merchant with his customers,—merely "charging a person with having done that which he may legally and properly do,"—are not libelous *per se*, although it might be otherwise with a publication concerning an illegal or improper business relation. Of course, as assumed in *STATE v. DARWIN*, under statutes defining libel as a publication having a certain effect, a complaint is good which alleges facts, and not merely conclusions, showing that a publication of this kind has produced the result described in the statute; and a false publication concerning a relation of a merchant with his customers may be actionable if special damage is clearly shown to have resulted therefrom.

A civil action for an alleged libel somewhat similar to that involved in *STATE v. DARWIN* is *Ukman v. Daily Record Co.* 189 Mo. 378, 88 S. W. 60, in which it appears that defendant published in a daily newspaper devoted to the gleanings and publication, as news, of facts from the current records kept by the recorder of deeds of the city of St. Louis, the following words: "Bills of Sale.—A. G. Ukman, 612 Chestnut, to Miss A. Handschiegel, Cigar Outfit, \$1."—"meaning," as alleged by plaintiff, "by said words, to charge plaintiff with having transferred his said business and stock of cigars for the nominal consideration of \$1 to the person aforesaid," whereas the consideration should have been printed at \$700.

APPEAL by the State from a judgment of the Superior Court for Whatcom County sustaining a demurrer to the complaint, and from an order discharging defendant in a prosecution for criminal libel. Affirmed.

The facts are stated in the opinion.

Messrs. George Livesey, Brown, White, & Peringer, and Craven & Greene for the State.

Messrs. Neterer, Pemberton, & Sather, for respondent:

The publication of a public record to which everyone has the right of access is privileged, and therefore not libelous.

25 Cyc. Law & Proc. p. 411; *People v. Jerome*, 1 Mich. 142; *Trimble v. Morrish*, 152 Mich. 624, 16 L.R.A. (N.S.) 1017, 116 N. W. 451; *Townshend, Slander & Libel*, 265; *Crocker v. Hadley*, 102 Ind. 416, 1 N. E. 734; *Bradley v. Cramer*, 59 Wis. 309, 48 Am. Rep. 511, 18 N. W. 268; *Shattuc v. McArthur*, 25 Fed. 133; *Urban v. Helmick*, 15 Wash. 155, 45 Pac. 747; *Bloss v. Tobey*, 2 Pick. 320; *People v. Isaacs*, 1 N. Y. Crim. Rep. 143; *Boynnton v. Shaw Stocking Co.* 146 Mass. 219, 15 N. E. 507; *Webb's Pollock, Torts*, 302; *Newbold v. J. M. Bradstreet & Son*, 57 Md. 38, 40 Am. Rep. 426.

Crow, J., delivered the opinion of the court:

The only question in this cause is the sufficiency of a criminal complaint to which the trial judge sustained a demurrer. The state elected to stand upon the complaint, and has appealed from an order discharging the defendant.

The complaint originally filed before a justice of the peace, omitting formal parts, reads as follows:

"T. S. Hamilton, being first duly sworn, on his oath deposes and says: That in Whatcom county, Washington, on or about the 12th day of April, 1910, the above-named defendant, L. H. Darwin, did commit the crime of criminal libel as follows: Then and there being the said defendant, L. H. Darwin, being then and there the business manager of the American Printing Company, a corporation, by which the

Morning Reveille, a newspaper published at Bellingham, Washington, and having a general circulation in and about Bellingham, Whatcom county, Washington, is and was then and there issued, did then and there unlawfully and maliciously defame and libel the complainant by then and there unlawfully and maliciously making public and publishing in said the Morning Reveille, and by then and there unlawfully and maliciously causing and procuring to be made public and to be published in said the Morning Reveille, the defamation and libel of the said complainant, T. S. Hamilton, by words, printing and writing, tending to expose the said complainant to hatred, contempt, ridicule, and obloquy, and to injure the said complainant in his business and occupation; that the said publication, printing, and writing was an article then and there published in said the Morning Reveille as aforesaid, and more particularly in substance, language, and words, as follows:

"'Conditional Sales.

"T. S. Hamilton (B. B. Furniture Company) to Mrs. Emily Sarlund, go-cart, \$10.

"T. S. Hamilton (B. B. Furniture Company) to Mrs. C. R. Halladay, go-cart, \$15.

"T. S. Hamilton (B. B. Furniture Company), to Miss Sophia Anderson, oil stove and oven, \$12.

"T. S. Hamilton (B. B. Furniture Company), to W. J. Hammons, 25 yards of carpet, \$12.50.

"T. S. Hamilton (B. B. Furniture Company), to William Mullin, furniture, \$12.60.

"T. S. Hamilton (B. B. Furniture Company), to Mrs. E. Huefner, range, \$60.'

"That the complainant herein now is, and for a number of years last past has been, engaged in the sale of furniture at retail in Bellingham, Whatcom county, Washington; and his said business was and is known and designated as the 'B. B. Furniture Company.' That, in connection with his said business, complaint has made, and does now make, conditional sales contracts with his various patrons. That in said contracts the said T. S. Hamilton was and is named as the vendor, and the various pur-

which mistake, when called to the attention of the defendant, three weeks later, was at once corrected, and the item published in correct form for two successive days.

In this case it was held that the words published were not libelous *per se*, and, further, that the plaintiff could not enlarge the meaning of the words as set out in the innuendo, by contending that they imputed insolvency or dishonest trickery in a business way; but even if he might go outside the innuendo in attributing a meaning, proof 33 L.R.A. (N.S.)

that he was in fact insolvent at the time of the publication was a complete defense to the imputation of insolvency, while the words would not, by fair construction, bear a meaning of a charge of dishonest trickery in a business way; nor would any damages be likely to result to the plaintiff, in his circumstances, even from such a meaning placed on the publication. The question of privilege in publishing a copy of a public record was not raised in this case.

A. C. W.

chasers or customers as vendees, and that said conditional sales contracts at all times have been, and now are, filed in the office of the auditor of Whatcom county, Washington, and indexed therein in the name of T. S. Hamilton as vendor and the several purchasers as vendees. That the name 'B. B. Furniture Company' does not appear upon the index in the records in the office of said auditor of Whatcom county, Washington, and that none of said contracts are filed or indexed in the name of said B. B. Furniture Company. That the said defendant, L. H. Darwin, publishes and causes to be published in said the Morning Reveille, and on the 12th day of April, 1910, did publish and cause to be published in said the Morning Reveille, a report and statement of the filings in the office of the said auditor of Whatcom county, Washington, for the day or days immediately preceding the publication of said items, and that the publication of said filings for said day or days is and was made under the heading in said publication entitled 'Court house Record,' and that only items and filings of recent date were and are published in said list. That on said 12th day of April, 1910, the said defendant, L. H. Darwin, did unlawfully and maliciously publish, cause to be published, and procure the publication of, the libel above set forth, and did on said date unlawfully and maliciously publish, cause to be published, and procure the publication of, said libel in a place in said paper separate and apart from the publication of said report of filings in the said auditor's office, and under a heading in bold-faced type entitled 'Conditional Sales,' and inserted therein as a part of said filing record the words 'B. B. Furniture Company.' That no sales other than as made by complainant are set forth in said libel. That all of the items set forth in said libel are and were contracts for sales that had been made and filed in said auditor's office by said T. S. Hamilton approximately two years prior to the publication of said libel, and that in said libel so published neither the dates of said contracts, nor the date of the filing thereof, was set forth, and that in the publication of said 'Courthouse Record,' the said dates are and were given. That said conditional sales contracts so mentioned in said libelous publication had all been fully paid and satisfied long prior to the publication of said libel. That the publication of said libel, as specified, and the publication of the names of the purchasers named in the said conditional sales referred to and mentioned in said libel, tended to expose, and did expose, complainant to the hatred, contempt, ridicule, and obloquy of the per- 33 L.R.A. (N.S.)

sons named as the vendees or purchasers in the conditional sales designated and mentioned in said libel, and tended to expose, and did expose, complainant to the hatred, contempt, ridicule, and obloquy of the public, and tended to injure complainant in his business and occupation, in that it tended to deter, and did deter, complainant's customers and the public and the persons named as vendees or purchasers in said libel, from further dealing or transacting business with complainant, to his financial loss. That the said defendant, L. H. Darwin, did make said libelous publication, and cause and procure same to be made, thus unlawfully, wilfully, and maliciously, knowing that the same would tend to expose the complainant to hatred, contempt, ridicule, and obloquy, and knowing the same would tend to injure the complainant in his business and occupation, and the said defendant did thereby intend to expose the said T. S. Hamilton to public hatred, contempt, ridicule, and obloquy, and to injure the said T. S. Hamilton in his business and occupation." Respondent was convicted on this complaint before the justice of the peace, and appealed to the superior court, where the demurrer was sustained. Appellant's only assignment is that the trial judge erred in sustaining the demurrer and discharging respondent. The prosecution is based upon § 2424, Rem. & Bal. Code, which reads as follows: "Every malicious publication by writing, printing, picture, effigy, sign, or otherwise than by mere speech, which shall tend: (1) To expose any living person to hatred, contempt, ridicule, or obloquy, or to deprive him of the benefit of public confidence or social intercourse; or . . . (3) to injure any person, corporation, or association of persons in his or their business or occupation, shall be a libel. . . ."

Appellant contends the publication tended to expose the complainant to hatred, contempt, ridicule, and obloquy; that it was malicious, was made without justification or excuse; that it tended to injure complainant in his business; that criminal libel is charged in the language of the statute; and that the complaint is sufficient. While no reasonable excuse appears for making the publication, and the motive that actuated it may not have been commendable, and although it may have annoyed the complainant, yet from the facts pleaded we do not conclude that it amounted to a criminal libel. Although no dates of sales were mentioned in the publication, it is nevertheless conceded the sales were actually made by Hamilton in the due course of his business. There is no question but that they were conditional sales, and that

for his own protection he filed memoranda thereof with the county auditor under the authority of §§ 3670 et seq., Rem. & Bal. Code. Publication at any time thereafter of the fact that he had made such filings would not tend to expose him to hatred, contempt, ridicule, and obloquy, nor are we able to understand how it would tend to injure him in his usual business, which he was conducting in the manner stated. If there was any circumstance such as the nature, value, or quantity of the merchandise sold, which could by any possibility be construed as tending to reflect upon the vendor, and subject him to contempt and ridicule, that fact must have been known to him when he made the conditional sales and filed their memoranda with the county auditor. There is no intimation that his business methods or the making of such sales were not legitimate or honorable. The complaint alleged the publication was made long after the dates of the respective sales, and after payment of the purchase price. Of this fact the vendor, Hamilton, cannot complain. It could in no manner injure him in his credit or business standing. If it could, his methods, which he himself adopted, must have been at fault. The only possible persons, if any, whose credit or financial standing could have been affected by so late a publication were the vendees, who had then made full payment, but the respondent is not charged with having libeled them. Although the complaint follows the language of the statute in making its charges, the statements upon which appellant relies are simply conclusions of the pleader deduced from the facts alleged.

It is for the court to determine whether the facts pleaded sustain such conclusions. Conceding the publication to have been unwarranted, and at the same time irritating and annoying to Hamilton, yet it only states facts taken from public records, the truth of which is not questioned. The alleged publication contains no words libelous *per se*.

Appellant insists that extrinsic circumstances have been pleaded as inducement innuendo, which, coupled with the language published, are sufficient to show that the publication tended to produce, and did produce, the results which the statute is intended to prohibit. In support of this contention, appellant cites, with others, the following authorities: *Denney v. Northwestern Credit Asso.* 55 Wash. 331, 25 L.R.A. (N.S.) 1021, 104 Pac. 769; *State v. Elliot*, 10 Kan. App. 69, 61 Pac. 981; *State v. O'Hagan*, 73 N. J. L. 209, 63 Atl. 95. An examination of these cases will disclose that, if pertinent at all, they tend to

show the insufficiency of this complaint. *Denney v. Northwestern Credit Asso.* supra, was a civil action for damages predicated on an alleged libel. We there said: "In all charges of this kind, it is the duty of the court to regard the words spoken or written as might a stranger to the parties, and if they be in themselves, and without the aid of the innuendo, otherwise innocent, and if they do not in themselves, and without the aid of the special knowledge possessed by the parties concerned, imply malice, or hold the party out to public contempt or ridicule, or make any charge involving moral turpitude, or touch him in his business, or subject him to an infamous punishment, it is the general rule that they are not libelous *per se*. If the words do not come within this rule, 'it is necessary that the declaration should set forth precisely in what way the damage resulted from the speaking of the words. It is not sufficient to allege generally that the plaintiff has suffered special damages, or that the party has been put to great costs and expenses. . . . By special damage in such a case is meant pecuniary loss.' *Pollard v. Lyon*, 91 U. S. 225, 237, 23 L. ed. 308, 314. See also 5 Enc. Pl. & Pr. p. 766; 25 Cyc. Law & Proc. p. 455; *Dun v. Maier*, 27 C. C. A. 100, 52 U. S. App. 381, 82 Fed. 169; *Bradstreet Co. v. Oswald*, 96 Ga. 396, 23 S. E. 423; *Newbold v. J. M. Bradstreet & Son*, 57 Md. 38, 40 Am. Rep. 426."

Appellant concedes the publication here involved is not libelous *per se*. We find no allegations sufficient to show that Hamilton was actually damaged or injured personally or in his business. The complaint only states the pleader's conclusions to that effect. Hamilton first published the matter set forth in the complaint when he filed the memoranda of the conditional sale contracts, and caused them to become public records, the publication of which is privileged. An information will not lie for publishing words charging a person with having done that which he may legally and properly do. It is conceded the conditional sales memoranda were legally and properly filed. The publication was truthful.

The demurrer only admitted facts alleged, and not the pleader's conclusions. The latter must be ignored in passing upon the sufficiency of the complaint. Thus considering the complaint, we conclude it does not state facts sufficient to charge criminal libel.

The judgment is affirmed.

Dunbar, Ch. J., and Morris and Chadwick, JJ., concur.

WEST VIRGINIA SUPREME COURT
OF APPEALS.

CARRIE SHUTTLESWORTH SMITH,
Appt.,
v.

TAYLOR WARD

and

HARVEY W. HARMER, Admr., etc., of
Arthur W. Martin, Deceased, Appt.

(66 W. Va. 190, 66 S. E. 234.)

**Vendor's lien — breach of warranty —
abatement.**

1. Equity will not enforce a lien for purchase money reserved on land in a deed of general warranty, when a part of the land had been before sold by the grantor to other persons whose right is superior to that of the grantee in the deed, without abatement from the purchase money of the value of the land so lost to the grantee in such deed.

Same — partial failure of title — abatement — measure.

2. When abatement from purchase money is decreed a grantee of land under a general warranty deed, for loss of part of the land within its bounds by superior adverse title, the measure of abatement or compensation is not the average value of the land lost as compared with the balance of the land, but the relative value; that is, the value of the particular land lost at the date of the deed.

Same — knowledge of vendee — effect.

3. Knowledge by a grantee by general warranty deed, of superior claim to part of the land conveyed to him, will not debar him from compensation for the particular land lost to him from such superior right.

Same — abatement — laches — effect.

4. The statute of limitation or laches will not prevent a purchaser of land under general warranty from abatement of purchase money yet unpaid, for a part of the land lost to him from superior adverse right.

(November 9, 1909.)

A PPEAL by complainant and defendant Harmer from a decree of the Circuit Court for Barbour County dismissing a bill filed to enforce a note against certain land under the lien reserved for deferred

Headnotes by BRANNON, J.

Note.—As to effect of purchaser's knowledge of encumbrance in an action for breach of covenant, see note to *Browne v. Taylor*, 4 L.R.A. (N.S.) 309.

As to specific question whether the existence of a public highway, private way, or railroad right of way across land at time of conveyance constitutes a breach of covenant, see note to *Van Ness v. Royal Phosphate Co.* 30 L.R.A. (N.S.) 833.
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purchase money, and discharging the note on the ground that defendant Ward was entitled to an abatement from the purchase price of a sum in excess thereof. **Affirmed.**

The facts are stated in the opinion.

Mr. Samuel V. Woods, for appellants:

The measure of damages in case of an abatement on account of a deficiency in the quantity of land sold is the average price of the whole land.

Depue v. Sergeant, 21 W. Va. 327; *Hull v. Cunningham*, 1 Munf. 330; *Nelson v. Matthews*, 2 Hen. & M. 164, 3 Am. Dec. 620.

A sale in gross is a contract of hazard, in which each party takes on himself risk of excess or deficiency, and there can be no relief afforded to either, whatever may be the actual quantity in a tract of land sold.

Keyton v. Bradford, 5 Leigh, 47; *Crislip v. Cain*, 19 W. Va. 438; *Pratt v. Bowman*, 37 W. Va. 715, 17 S. E. 210; *Newman v. Kay*, 57 W. Va. 98, 68 L.R.A. 908, 49 S. E. 926, 4 A. & E. Ann. Cas. 39; *Russell v. Keeran*, 8 Leigh, 20.

The party complaining must have exercised at least the degree of diligence which may be fairly expected from a reasonable person.

Grymes v. Sanders, 93 U. S. 55, 23 L. ed. 798.

Messrs. Haymond Maxwell also for appellants.

Mr. Fred O. Blue, for appellee:

The vendee was entitled to compensation according to the relative value of the land to which a good title was not made.

Rawle, Covenants, 5th ed. § 187, pp. 265-267; 1 *Jones*, Real Prop. in Conveyancing. §§ 745, 945; 2 *Warvelle*, Vendors, p. 1009; *Morris v. Phelps*, 5 Johns. 49, 4 Am. Dec. 323; *Humphreys v. McClenachan*, 1 Munf. 493; *Hunt v. Nolen*, 46 S. C. 356, 24 S. E. 310; *Clarke v. Hardgrove*, 7 Gratt. 399; *Griffin v. Reynolds*, 17 How. 609, 15 L. ed. 229; *Hogg*, Equity Principles, p. 23; *Butcher v. Peterson*, 26 W. Va. 447, 53 Am. Rep. 89.

Defendant Ward is entitled to abatement, notwithstanding at the time he received his deed from grantor he had notice of the prior sale by his grantor to third persons.

Butcher v. Peterson, 26 W. Va. 450, 53 Am. Rep. 89.

Brannon, J., delivered the opinion of the court:

By deed Arthur W. Martin conveyed to Taylor Ward a tract of land in Barbour county containing 435 acres. The consideration was \$20,000, part cash, the balance in deferred instalments. Among these deferred

instalments was one of \$1,000 payable October 11, 1898, for which Ward made his note to Martin. Martin, by his will, left a legacy to Carrie Shuttlesworth, and in part payment of it Edwin Maxwell, as executor of Martin, assigned the note to Carrie Shuttlesworth. Later Carrie Shuttlesworth Smith, formerly Carrie Shuttlesworth, brought a chancery suit to enforce said note against the land, under the lien reserved for deferred purchase money in said deed from Martin to Ward. Ward filed an answer setting up that the deed by which Martin had conveyed the land to him contained a covenant of general warranty, and that it conveyed the land by specific metes and bounds, and that within those bounds were contained certain lots having houses upon some of them, which Martin had sold to persons before he conveyed the land to Ward, and that such persons were in possession actual of them when Martin conveyed to Ward, and that the value of those lots and houses exceeded the amount of the note sued for by Mrs. Smith. The result of the suit was a decree dismissing the bill of Mrs. Smith and discharging Ward from the \$1,000 note. It is not controverted that the owners of the lots lying within the boundary given in the deed from Martin to Ward have right paramount to Ward under said deed, or that Ward never got possession of them, or that their value exceeded the note, or that they lie within said deed's boundary. Under the law the case is plainly for the defendant. Counsel for Mrs. Smith argue law of sale in gross and average value, as if the case involved abatement of purchase money for deficiency of quantity. Those matters are not involved. The case is one of loss of a part of the land within the boundary of the tract, lost to the purchaser by reason of superior rights arising from the vendor's prior sale, breaking the general warranty of his deed guarantying good title. It is not the case where the purchaser gets all his boundary, but loses in quantity; but it is the case where he loses by superior adverse right a part of the lands assured to him. Are we at this day required to cite much authority for the worn proposition that one getting a portion of the land warranted shall not be compelled to pay out purchase money yet in his hands? *Heavner v. Morgan*, 30 W. Va. 335, 8 Am. St. Rep. 55, 4 S. E. 406; *McClagherty v. Craft*, 43 W. Va. 270, 27 S. E. 246; *Clarke v. Hardgrove*, 7 Gratt. 399. *Butcher v. Peterson*, 26 W. Va. 452, 53 Am. Rep. 89, states the law thus: "If . . . the vendor has warranted the title, and the portion lost is much or little, the vendee

may elect to hold so much of the land as he can, and compel the vendor to abate the purchase money if unpaid, or, if paid, to make compensation for the land so lost by reason of the want of title or right in his vendor. *Atty. Gen. v. Day*, 1 Ves. Sr. 218; *Roffey v. Shallock*, 4 Madd. 227, 20 Revised Rep. 293; *Beverley v. Lawson*, 3 Munf. 317." And cases cited in *Worthington v. Staunton*, 16 W. Va. 242, show that it makes no difference whether the purchaser claims under an executory contract or a deed conveying legal title. Equity will enjoin a judgment for purchase money against one claiming under a deed of general warranty even where title is in suit or in threat of suit. *Wamsley v. Stalnaker*, 24 W. Va. 214. Here the land has been lost.

On what basis shall Ward be compensated for lost land? Counsel for Mrs. Smith say on the basis of average value. That would be so if it were a question of deficiency in quantity; but not so where there is loss of specific land. There the basis is the relative value. *Hogg, Equity Principles*, 23; *Butcher v. Peterson*, 26 W. Va. 447; *Clarke v. Hardgrove*, 7 Gratt. 399. That part lost may be specially valuable over the balance. It may contain a building, a fine spring, a stream, meadow, or other thing giving it greater or special value. *Rawle, Covenants*, § 187. So there can be no complaint of the decree on this score.

Another point made against the decree is that, when Ward purchased, he knew of the ownership of the lots by recordation of deeds made by Martin, to their purchasers, by their possession, and otherwise, and that, in fact, he gets all the land which he expected to get. Here we are cited to many authorities (*Coles v. Withers*, 33 Gratt. 186, and others) holding that a purchaser must examine records, take notice of the rights of those in possession, and will be affected with notice of what inquiry would have disclosed. Why are we called on to investigate these authorities when so plainly they do not apply? They apply between competing purchasers from the same vendor, or to purchasers of land under encumbrances, or to one purchasing when a former purchaser from the same vendor is in possession. But what have they to do as to the rights of a purchaser against his vendor under a warranty? This is not a contest between Ward and those lot owners. The vendor has warranty against such other claims. The warranty has dispensed with inquiry. This court said in *Butcher v. Peterson*, 26 W. Va. 450: "It is immaterial that the vendee had knowledge of all the facts in relation to the title, and that he

accepted the conveyance or made the purchase, believing that said facts did not impair the title. When a purchaser has notice of a defect or encumbrance, and requires from the vendor a warranty, the presumption of law is that the covenant was expressly taken against such known defects or encumbrances.—Rawle, on Covenants, 566; Jackson v. Ligon, 3 Leigh, 161. If the purchaser had failed to contract for an express warranty, then this doctrine might apply; but to contend, in the face of the positive covenant of Jackson, that Peterson should be denied relief because he had knowledge of facts which in law destroy the title to a part of the land purchased, would be to deprive him of the benefit of his warranty. The covenant of general warranty, unless qualified by the contract, in terms, is a protection against defects of title, whether they result from mistakes of law or mistakes of facts." See Rawle, 123. As to this feature of the case, we are cited to Stafford v. White, 6 Gratt. 93, holding that where the parties did not know that land across a creek was in the bounds, and the purchaser got all the land which he expected to get, or thought he was getting, though that part of the tract over the creek was held by superior right, there could be no abatement of purchase money. The court said that it fully appeared that the parties at the time of sale supposed that the land went only to the creek, and did not know that the lines called for included any land over the creek. It said that for the land sold "supposed by the parties to be situate on the north-east side of the creek, the appellee agreed to pay an aggregate sum." Here was a mutual mistake, and the evidence showed it. Abatement was properly given in that case. Ours is a different case. The evidence does not prove any understanding that the lots were not included, or that there was a mutual mistake. I thought that the above quotation from Judge Allen was ample to establish the proposition that, where a general warranty is made, knowledge of defect of title does not preclude the grantee from the benefit of the warranty; but, some question about it having been suggested, I will cite further authority. "Covenants in a deed protect the grantee against every adverse right, intent, or dominion, whether he had notice of such adverse interest or not." Huyck v. Andrews, 113 N. Y. 81, 3 L.R.A. 789, 20 N. E. 581, 10 Am. St. Rep. 432, citing on page 437 many cases stating that it makes no difference that the grantee had notice. 2 Greenl. Ev. § 242, says: "A public highway over the land, a claim of dower, a

private right of way, a lien by judgment or by mortgage, . . . or any other outstanding, elder, and better title, is an encumbrance, the existence of which is a breach of this covenant. In these and the like cases it is the existence of the encumbrance which constitutes the right of action, irrespective of any knowledge on the part of the grantee." 11 Cyc. Law & Proc. p. 1066, is full authority for the proposition. So is Devlin, Deeds, § 897. So is Jackson v. Ligon, 3 Leigh, 161, 196. Warranty binds even if the party knew of bad title. Beach v. Miller, 51 Ill. 207, 2 Am. Rep. 290. Rawle, Covenants, 566, says that such is the rule; but he says that the purchaser cannot withhold the purchase money, but must pay, and then turn round and sue on his covenant. Such is the English law, such, perhaps, in many of our states; but that is not law in the Virginias, because our cases say that the Virginia law differs materially in this respect. Our law is that the purchaser can enjoin a judgment for purchase money for bad title, or, if sued in equity to enforce the lien, equity will relieve him from payment of the purchase money on account of defect of title. The cases expressly say that our law is different. Wamsley v. Stalnaker, 24 W. Va. 214; Heavner v. Morgan, 30 W. Va. 335, 8 Am. St. Rep. 55, 4 S. E. 406; McClaugherty v. Croft, 43 W. Va. 272, 27 S. E. 246. In those cases are cited old Virginia cases for the same proposition.

Ward set up in his answer the loss of the lots, and erroneously considered his answer as a reply setting up new matter calling for affirmative relief, whereas it was merely an answer in defense of the matter of the bill. The plaintiff demurred to it as a reply, but the court held it such, and then the plaintiff filed an answer to it as a reply, and alleged that Martin did not intend to sell the lots, and they were included in the deed by mistake on the part of the scrivener. This matter should have been put into the case by amended bill with a prayer for reformation of the deed, and, as it relates to a matter of a mere defense answer, it is in law a special replication now obsolete. Cooper says it cannot have any effect on the defendant. 11 Va. & W. Va. Dig. 262. Then it would not put the matter in the case. But whether that answer could avail the plaintiff or not we need not say; for, if we consider it as an amended bill alleging a mistake, there is no evidence of it. On the contrary, Charles F. Teter, the attorney who prepared the deed from Martin to Ward, says that Martin and Ward together came to his office, and he prepared the deed at Martin's re-

quest, and Martin presented him the plat of the tract by which to draw the deed, the plat giving boundary, and told him to draw the deed by it. And, after the deed had been drawn, it was read to both Martin and Ward, and Ward was particularly anxious to know whether it carried all the buildings on the land, and he, Teter, told him it would, and that it was not necessary to set them out specifically. Teter says nothing was said about the lots in question. He does not say that they were to be excluded. He proves no mistake in drafting the deed by including them. No one else gives any evidence to prove such mistake. No evidence shows that Ward knew that the lots were included in or out of the deed, or that he got all he expected to get without them. There is no evidence that Ward understood that an inch was to be excluded from the bounds of the tract as Martin had purchased and owned it, not a bit of evidence that Ward, or even that Martin, intended to except an inch from the tract as the plat bounded it. Both agreed on the plat as descriptive of the boundary. The evidence is full that they intended to conform to the plat. Martin might have forgotten to exclude the lot, but that would not bind Ward, it not being mentioned in the contract; but there is no evidence, except guess, that Martin intended to exclude any part of the tract as he had bought it. If there is a mistake, no evidence proves it. If Ward knew the lots were included, he might have thought that they were tenant houses.

It is clearly proven that Ward afterwards, when he discovered superior title in others to the lots, made demand on Martin for abatement on that account, and asked a settlement of the matter, and that Martin admitted liability for the lots, and promised Ward to arrange it. It is further proven that for two lots which had been sold by Martin before his sale to Ward, but not conveyed, Martin paid Ward \$110, and then Ward conveyed those two lots to Martin's purchasers. It is not proven that Ward did, as a matter of fact, know that these lots had been conveyed by Martin. He lived miles away, and merely passed by the tract along the public road sometimes, and never inspected the tract or investigated the particular boundary.

It is argued that Ward's claim rests on the theory that Martin perpetrated a fraud, and that Ward should have called for rescis-

sion earlier, and, not having done so, is to be treated as acquiescing and ratifying. This cannot be so. Ward's right arises, not from fraud, but from warranty broken.

It is argued that Ward's claim is barred by the statute of limitations. The statute was not pleaded; but Ward is not suing to collect anything. He is only asking to keep money in his hands. It may be that one who has paid, suing at law for breach of warranty, would be barred, but this is not that case. No time runs against right to retain purchase money and defend its collection in such a case. Nor will equity charge laches. Ward was not called on to sue at law or in equity as to this note. He could not sue on the warranty in advance of its payment. As well might it be claimed that one in possession of land might sue an adverse claimant on pain of losing his land by the statute of limitations.

It is assigned as error that the decree does not decree to Mrs. Smith the amount of the note against the estate of Martin, by way of recourse on account of the fact that Martin's executor had assigned the note to Mrs. Smith. That was not involved in the case. We cannot in this case convene creditors of Martin. Ward is not interested in that matter. Relief on that matter is not foreclosed by the decree in this case.

An assignment of error is based on the fact that Ward's answer calls itself an answer calling for affirmative relief. It sets up the defense against the note for loss of land, and asks that Ward be discharged from it. This did not require an answer calling for affirmative relief. As to this feature of the answer, what matters the name? If called a cross-bill answer, could not mere defense be made under it as under an ordinary answer? It is an ordinary answer as to the note. But the answer asked that the balance of the value of the lost land after crediting on the note be decreed to Ward against the estate of Martin. Likely as to this such statutory answer would be proper. I doubt it. But why are we put to the labor of responding to this assignment of error when Ward was denied, or not given, such relief against the estate? The decree is thus favorable to the estate as also to Mrs. Smith, a legatee. How are they harmed by that feature of the answer? No error is, of course, predicated on this feature of the answer.

Decree affirmed.

CALIFORNIA SUPREME COURT.

UNION LABOR HOSPITAL ASSOCIATION, Respt.,
v.
VANCE REDWOOD LUMBER COMPANY
et al., Appts.

(158 Cal. 551, 112 Pac. 886.)

Boycott — hospital — exclusion from patronage by employees.

1. A hospital excluded from the list has no cause of action on the ground of illegal boycott, against several employers who, to serve their own interests, deduct from the wages of their employees a small amount for a hospital fund, in consideration of

which the employees are entitled to tickets entitling them to care in case of injury, in any hospital on a list furnished by the employers; and it will be immaterial that the lists were selected with a view to injure the business of the excluded hospitals.

Master — conditions of employment — acquiescence in hospital regulations.

2. It is not illegal for an employer to make continuation in his employment depend upon the employee's acquiescence in provisions established by him for securing hospital service for injured employees through forced contributions from their wages.

(November 17, 1910.)

Note. — Lawfulness of boycott by other than labor union.

In its scope this note is limited to cases considering the lawfulness of a boycott by a combination of individuals or companies. It is not intended to include cases considering the right of an individual or company to restrict or regulate the sale of his product by refusing to sell to retailers unless they agree not to handle competing articles, or cases involving other regulations of a similar character. So it excludes cases involving the right of a manufacturer to sell his product for retail at less than a stated price, or his right to make other restrictions which he may deem necessary to enforce this rule.

Cases involving the validity of what has been termed the blacklist are also excluded; also cases which pass upon the right of employers of labor to agree not to employ each other's employees unless they shall procure a written discharge stating the reasons therefor, or other similar regulations.

As to backlisting of servants, see note in 4 L.R.A.(N.S.) 1119. As to blacklisting dealer, or a libel, see notes in 49 L.R.A. 612, and 8 L.R.A.(N.S.) 783.

As to the lawfulness of boycott by a labor union, see notes in 16 L.R.A.(N.S.) 85; 18 L.R.A.(N.S.) 707; 32 L.R.A.(N.S.) 748.

As to right of labor union to forbid its members to handle one's product, see note in 12 L.R.A.(N.S.) 642; also note in 32 L.R.A.(N.S.) 792.

As to the liability of a member of a combination for injury to a boycotted dealer, see note in 2 L.R.A.(N.S.) 824.

As to civil liability for maliciously procuring the discharge of an employee or preventing his employment, in the absence of conspiracy or concerted action, see note in 27 L.R.A.(N.S.) 966.

As to the liability of an individual, in the absence of a conspiracy, for driving away another's business, see note in 22 L.R.A.(N.S.) 1224; and as bearing upon the general question herein raised, see the discussion as to absolute and qualified rights in the note in 29 L.R.A.(N.S.) 869. 33 L.R.A.(N.S.)

The cases within the scope of this note apply principles not peculiarly applicable to the questions raised, but which are quite generally applied to cases entirely foreign to the question under consideration. It necessarily follows that no general rule can be deduced from these cases, which are peculiarly applicable to the question under consideration. It is to be noted that even though the same result may be reached in the cases considered, yet that result is very apt to have been reached along entirely different lines of reasoning, and by the application of entirely different principles. On the other hand, entirely different results may be reached upon very similar states of fact, where the principle applied is different, and this without the courts having in their respective decisions considered the doctrine on which the opposing decision is based.

Decisions as to the lawfulness of a boycott by a labor union cannot be regarded as entitled to any considerable weight as authority upon the question of the lawfulness of a boycott by business competitors, since, in many of the cases at least, the facts involved in the two classes of cases require the application of different principles of law. Boycotts by labor organizations are never for the purpose of crushing out business competition in order to build up a monopoly, and hence, at least on this ground, are not apt to be deemed violative of public policy. In many, if not most, instances of boycotts by labor organizations, the purpose sought is to bring to a successful termination an industrial struggle originally instituted for the betterment of the condition of laborers involved therein. On the other hand, the general purpose or object sought by business boycotts is to destroy the business of a competitor for the purpose of establishing a monopoly, stifling competition, etc.

Where act is violative of public policy.

In general, it may be said that the rule of public policy is against unreasonable restrictions on trade, and monopolies which have that tendency are therefore disfavored; hence a boycott by a combination of business competitors against individual rivals,

A PPEAL by defendants from a judgment of the Superior Court for Humboldt County in plaintiff's favor in an action brought to enjoin defendants from discriminating against it in the conduct of its hospital business. Reversed.

The facts are stated in the opinion.

Messrs. Denver Sevier, C. M. Wheeler, F. A. Cutler, and F. R. Sweasey for appellants.

Messrs. J. F. Quinn and Coonan & Kehoe for respondent.

Henshaw, J., delivered the opinion of the court:

This action was brought by plaintiff against

for the purpose of crushing out such rivals in order to gain a monopoly in that line of business, is violative of public policy, and constitutes an unlawful conspiracy, which will render the members thereof liable to anyone injured thereby.

Thus, a combination of persons natural or artificial, to restrict a legitimate trade or commerce in any field by hampering or destroying individual liberty, stifling competition, or preventing the exercise of individual freedom to dispose of either labor or capital, is unlawful. And a combination of undertakers and liverymen by which they agree not to do business with any person who does not patronize them exclusively, the effect of which is to prevent members thereof from permitting the use of vehicles at a funeral, because the undertaker in charge comes within the ban of the combination, is violative of public policy, unlawful, and for the injury inflicted by the interruption of the funeral by reason of this combination, the persons guilty are liable. *Gatzow v. Buening*, 106 Wis. 1, 49 L.R.A. 475, 80 Am. St. Rep. 17, 81 N. W. 1003.

This doctrine is peculiarly applicable where the means used to effectuate the boycott are coercive. See *Evenson v. Spaulding*, 9 L.R.A. (N.S.) 904, and note thereto, on the question of the lawfulness of interference by competitors or others with the agents of a dealer or manufacturer.

Thus, a combination of granite manufacturers, under an agreement not to patronize in their business any person not a member of the association, is unlawful, and the members are liable for injuries resulting to a third person whose business is injured by the refusal of the members of this association to deal with him, where such refusal is compelled by by-laws of the association levying upon the members a fine for the breach of their agreement to patronize only members of the association. *Boutwell v. Marr*, 71 Vt. 1, 43 L.R.A. 803, 76 Am. St. Rep. 746, 42 Atl. 607. The court said that "the law sees in the membership of an association of this character both the authors of its coercive system and the victims of its unlawful pressure. If this were not so, men

the named defendant and six other lumber companies, to obtain an injunction restraining and enjoining them from conspiring and combining together to vex, annoy, hinder, injure, and destroy the hospital business of plaintiff. The scheme of annoyance and destruction consisted in this: The defendants compelled every employee to consent to the deduction of \$1 from his monthly wage, 12½ cents of which went into a contingent fund to help needy employees who might be injured, and 87½ cents of which went to a hospital for an employee's ticket. This ticket entitled the employee to medical and surgical care and attendance in case of injury. The hospital

could deprive their fellows of established rights, and evade the duty of compensation, simply by working through an association. But it can hardly be supposed that the defendants' organization reached its present proportions without some previous use of the methods disclosed by the evidence above recited; and, as far as its membership was due to coercion, there was a further element of unlawful pressure in the enforcement of united action against the plaintiffs. It would be strange, indeed, if the members of an association organized upon such a basis, and advanced by such means, could meet a claim of this nature by saying that they had made no attempt to secure the co-operation of outside parties. It is clear that if the association had comprised but a small portion of the manufacturers, and had destroyed the plaintiffs' business by compelling other manufacturers to join them in withholding patronage, its members would have been liable. But it is claimed in effect that a business can be destroyed with impunity when the organization has become so extensive that there are no outside patrons to control, or so few that their course is a matter of no moment. Upon this theory, every successful instance of coercion would increase the safety with which another coercion could be attempted, and, when coercion had been pursued until but one contumacious person remained, immunity would be complete. It is clear that the law cannot concede to organizations of this character the powers and immunities claimed for their association by these defendants, and retain its own power to protect the individual citizen in the free enjoyment of his capital or labor."

The same result was reached under a very similar state of facts in *Martell v. White*, 185 Mass. 255, 64 L.R.A. 260, 102 Am. St. Rep. 341, 69 N. E. 1085. The court said that the facts showed a clear and deliberate interference with the business of a person with the intention of causing damage to him, that the defendants combined and conspired together to ruin the plaintiff in his business, and accomplished this purpose, and added: "It cannot be necessary to enter upon a course of reasoning, or to cite author-

could be selected by the employee from a list of three or four presented to him, but the Union Labor Hospital was not mentioned and was not on the list. These facts form the foundation of the charge of malicious and wilful conspiracy, combination, and boycott, designed to vex, annoy, hinder, injure, and destroy the plaintiff's business and coerce and intimidate its patrons and customers, to ruin its credit, and to prevent it from selling its bonds, etc. There was no issue over the question of what these defendants were doing. The court found, generally, in favor of the allegations of the complaint, found that the defendant companies derived a benefit from the existing hospital arrangement and the fund created by the 12½ cents taken out of the monthly

hospital dues of each employee since thus they were relieved of the burden of caring for indigent and injured employees. The court also found that the relations existing between the defendants and the agents of plaintiff were of such a nature that the defendants were justified in not entering into an agreement with the Union Labor Hospital, such as existed between the defendants and the other hospitals upon their list. And the court also found that the defendants, in entering into the agreement with the other hospitals, were acting solely for the purpose and with the intent to subserve their own (defendants') interests.

The defendants were all companies engaged in lumbering and milling in Humboldt county. The occupations of their men

ities in support of the proposition that, while a person must submit to competition, he has the right to be protected from malicious interference with his business."

This is also the doctrine of *Baldwin v. Escanaba Liquor Dealers' Asso.* — Mich.—, 130 N. W. 214, which holds that a combination of liquor dealers is liable for coercing advertisers and would-be advertisers in a newspaper, from advertising therein by threatening financial injury through the loss of their custom and patronage, where the object is maliciously to injure the business of such newspaper publisher, rather than to promote any legitimate interest of their own. The court said that this conduct was an unlawful boycott within the meaning of that term, which was defined to be "a combination of several persons to cause a loss to a third person by causing others, against their will, to withdraw from him their beneficial business intercourse, through threats that, unless a compliance with their demands be made, the persons forming the combination will cause loss or injury to him; or an organization formed to exclude a person from business relations with others by persuasion, intimidation, and other acts which tend to violence, and thereby cause him, through fear of resulting injury, to submit to dictation in the management of his affairs."

It is unlawful for an individual or a combination of individuals to obstruct, harass, and annoy the employees of another when engaged in the discharge of their duties, even though such other person is a competitor in business. So, it is unlawful to threaten the customers of such person if they continue to deal with him, to cause and procure false and injurious reports concerning him and his business to be circulated in the vicinity thereof, and for such unlawful conduct the members of the combination are liable to the injured party. *Standard Oil Co. v. Doyle*, 118 Ky. 662, 111 Am. St. Rep. 331, 82 S. W. 271.

Jackson v. Stanfield, 137 Ind. 592, 23 L.R.A. 588, 36 N. E. 345, 37 N. E. 14, holds that for injury inflicted upon a retail lum-

ber dealer by a combination of dealers coercing wholesalers not to sell him any lumber, the injured person may recover from the members of the combination. The court said that since the policy pursued against the business of the injured person was of a menacing character, calculated to destroy or injure it, it was unlawful, and the persons inflicting the wrong were amenable to the injured party in a civil action for damages. In this connection it was pointed out that the action complained of was not a mere passive, let-alone policy, and withdrawal of all business relations, intercourse, and friendship, but it consisted of actions, threats, and intimidations.

And see also *Funck v. Farmers' Elevator Co.* 142 Iowa, 621, 24 L.R.A.(N.S.) 108, 121 N. W. 53, which holds unlawful a combination among retail dealers to coerce wholesalers into refusing to sell goods to certain persons, by threatening to discontinue all business relations with such wholesalers.

And a combination among wholesalers and some retailers in the coal business, by which they refused to sell a retail dealer not a member of the combine in question, was held unlawful in *Hawarden v. Youghiogheny & L. Coal Co.* 111 Wis. 545, 55 L.R.A. 828, 87 N. W. 472.

In the foregoing case the result was reached on the theory that while persons have a right to combine for the purpose of promoting their individual welfare in any legitimate way, yet such combination was unlawful if the purpose was to inflict injury on another, and injury actually resulted therefrom.

As affected by nature of object.

In other cases the same result has been reached, but rather on the theory that the boycott complained of was malicious, and hence actionable, since the primary purpose was to destroy the business of another, rather than to promote the legitimate ends of the conspirators.

Thus, where a combination has no legit-

were dangerous. That provision should be made for the medical and surgical care of the men injured was most proper. No objection is made to this, nor to the means adopted to effectuate it, saving that plaintiff contends that because its hospital was not upon the list, and because the employees were compelled to take out hospital tickets in one or another of the enumerated hospitals, a species of unlawful discrimination by the defendants against the plaintiff was thus established, a discrimination which it is urged and which the court found was an illegal boycott, against the continuance of which defendants were enjoined.

It is important to understand exactly what these defendants were doing. Essentially it was this: By agreement amongst

themselves they selected a list of hospitals, of which plaintiff's was not one. By agreement amongst themselves, for their own protection and for the betterment of the condition of their men, they required of the men, as a condition of obtaining employment, or as a condition of remaining in employment, that they should assent to a deduction from their monthly wages of 87½ cents, which should be given to a hospital of the employee's own selection, taken from the list presented. These defendants did not go so far as to discharge, or even to threaten to discharge, an employee who might buy a ticket entitling him to service of the plaintiff's hospital. They insisted merely that he buy a ticket in one of their designated hospitals. An employee was at

imate end to promote, but it is carried into execution for the sole purpose of injuring another's business by agreeing not to sell or buy from such person, and by inducing third persons also to abstain from business intercourse with such person, it constitutes an unlawful conspiracy. *Ertz v. Produce Exch.* 79 Minn. 140, 48 L.R.A. 90, 79 Am. St. Rep. 433, 81 N. W. 737.

So, where the purpose is maliciously to injure a person running a retail mercantile business, rather than to promote any legitimate interest of his own, an employer of labor commits an actionable wrong by coercing his employees not to patronize such retail establishment, by threatening to discharge them if they do so. *Wesley v. Native Lumber Co.* — Miss. —, 53 So. 346.

As to validity of agreement at common law, by which employer seeks to direct trade of employees to the other party, see note in 24 L.R.A. (N.S.) 649.

A combination of business men formed for the purpose of injuring another in his hotel business by refusing to purchase goods of any traveling salesman who might patronize this hotel, and by inducing other business men also to refuse to patronize such salesman, constitutes an unlawful conspiracy, where the members thereof have no legitimate end of their own to promote by such interference with the business of another. *Webb v. Drake*, 52 La. Ann. 290, 26 So. 791.

In recognition of this doctrine, combinations to boycott another have sometimes been sustained where it appeared that the primary purpose of the combination was to promote some legitimate object of the members of the combination.

Thus, an agreement among a number of newspaper publishers not to sell newspapers to a dealer therein, unless he discontinued distributing with such newspapers advertising circulars, is not unlawful where the reason for the agreement was that the circulation of such advertising matter in this manner interfered with and injured newspaper advertising. *Collins v. American News Co.* 34 Misc. 260, 69 N. Y. Supp. 638, 33 L.R.A. (N.S.)

affirmed in 68 App. Div. 639, 74 N. Y. Supp. 1123.

So, a combination of retail lumber dealers, by mutually agreeing not to deal with any wholesale dealer who sells lumber to persons not dealers at any place where a member of the association is carrying on business, is not unlawful, since the object is to protect such retail dealers against sales by wholesale dealers to contractors and consumers. *Bohn Mfg. Co. v. Hollis (Bohn Mfg. Co. v. Northwestern Lumbermen's Assn.)* 54 Minn. 223, 21 L.R.A. 337, 40 Am. St. Rep. 319, 55 N. W. 1119. To the same effect is *Montgomery Ward & Co. v. South Dakota Retail Merchants' & H. Dealers' Assn.* 150 Fed. 413. But compare with *Jackson v. Stanfield*, *Funck v. Farmers Elevator Co.* and *Hawarden v. Youghiogheny & L. Coal Co.* supra.

And an employer of a large number of men in a milling business who, in connection therewith, for the benefit of such men as well as for his own profit, operates a mercantile business, may lawfully coerce his employees into trading at his place of business to the exclusion of other mercantile concerns, by threatening to discharge them if they do not do so; and he may also lawfully coerce wholesale dealers into refusing to sell their goods to competing mercantile houses, by refusing to deal with any wholesalers who sold to his competitors. *Lewis v. Huie-Hodge Lumber Co.* 121 La. 658, 46 So. 685.

So, where an employer of labor who also in connection therewith, conducted a mercantile business, in order to retain the trade of his employees, threatened to discharge them if they traded with a rival, such conduct did not constitute an actionable wrong, although injury resulted therefrom, since the object was to promote the interest of the defendant. *Robison v. Texas Pine Land Assn.* — Tex. Civ. App. —, 40 S. W. 43.

An agreement among insurance companies, the effect of which is to cause the companies to decline to pay for services brought them by a person not a party to the agreement, and to refuse to accept such services where

liberty to buy an additional ticket in plaintiff's hospital, but, in the nature of things, an employee having purchased a ticket in another hospital would not be likely to lay out any more money for such a purpose.

There being no contractual relations between plaintiff and defendants, the defendants, individually or in combination, were under a duty only to refrain from inflicting a legal wrong upon plaintiff. The finding of the court is that defendants in making their agreements with the Sequoia, St. Francis, Marine View, and Trinity Hospitals were acting solely for the purpose and with the intent to subserve their own interests. But if this were not so, and their purpose were to injure the business of plaintiff, nevertheless, unless they adopted illegal

means to that end, their conduct did not render them amendable to the law, for an evil motive which may inspire the doing of an act not unlawful will not of itself make the act unlawful. *J. F. Parkinson Co. v. Building Trades Council*, 154 Cal. 581, 21 L.R.A.(N.S.) 550, 98 Pac. 1027, 16 A. & E. Ann. Cas. 1165; *Pierce v. Stablemen's Union*, 156 Cal. 70, 103 Pac. 324. Unquestionably there was nothing illegal in the measures employed to accomplish this result. The suasion or intimidation or coercion was purely moral, and went no further upon the part of the defendants than a refusal to employ or to retain in their employ anyone unwilling to comply with their hospital regulation. This was strictly a matter between employer and em-

tendered, does not entitle the person whose services are declined to an injunction enjoining the carrying out of the agreement. *Tanenbaum v. New York F. Ins. Exch.* 33 Misc. 134, 68 N. Y. Supp. 342.

Where motive is malicious.

In other jurisdictions, such boycotts have been held to be violative of public policy because the means used to make effective the boycott were coercive and unlawful and the motive malicious.

Thus, *Doremus v. Hennessy*, 176 Ill. 608, 43 L.R.A. 797, 68 Am. St. Rep. 203, 52 N. E. 924, 54 N. E. 524, holds that a combination of persons engaged in the laundry business, to attempt to destroy the business of a competitor by inducing and coercing her employees to leave her, and to prevent her securing her work done by other laundries by the same means, constitutes an unlawful conspiracy, and for the injury resulting thereby the conspirators are liable. The doctrine is here asserted that "damage inflicted by fraud or misrepresentation, or by the use of intimidation, obstruction, or molestation, with malicious motives, is without excuse, and actionable. Competition in trade, business, or occupation, though resulting in loss, will not be restricted or discouraged, whether concerning property or personal service. Lawful competition that may injure the business of another, even though successfully directed to driving that other out of business, is not actionable. Nor would competition of one set of men against another set, carried on for the purpose of gain, even to the extent of intending to drive from business that other set, and actually accomplishing that result, be actionable unless there was actual malice. Malice, as here used, does not merely mean an intent to harm, but means an intent to do a wrongful harm and injury. An intent to do a wrongful harm and injury is unlawful, and if a wrongful act is done to the detriment of the right of another, it is malicious, and an act maliciously done with the intent and purpose of injuring another is not lawful competi-

tion. In this case it is clear the evidence sustained the allegations of the plaintiff's declaration, and there is here no contention on the facts. The principles herein announced are sustained by the weight of authority in England and in this country."

And see, to the same effect, *Purington v. Hinchliff*, 219 Ill. 159, 2 L.R.A.(N.S.) 824, 109 Am. St. Rep. 322, 76 N. E. 47, wherein this doctrine was applied to a masons' and builders' association to prevent the sale by a competitor of his product within the district covered by the combination, and the product being of the character that could only successfully be manufactured and sold in that district.

A distinction between such interference with the business of another, when in the line of competition, and when the primary purpose is maliciously to injure another, is made in *West Virginia Transp. Co. v. Standard Oil Co.* 50 W. Va. 611, 56 L.R.A. 804, 88 Am. St. Rep. 895, 40 S. E. 591. In this case a count containing an allegation that the defendant and competitor by their monopoly and control over the oil business refused to ship or permit others to ship oils, or buy the oils shipped through the plaintiffs' line, and, being the only refiners of oil at a certain place, refused to buy oil shipped through the pipe line of the plaintiff, was held not to set up an unlawful act in the sense that it constituted an actionable wrong, since it was an attempt by one competitor in a business to better himself by injuring his rival, and hence the count was held not to state a cause of action. However, another count which did not allege that the defendants' were competitors with the plaintiff, but alleged substantially the same acts, and charged that they were committed for the malicious purpose of injuring the plaintiff in his business, was held to set forth an actionable wrong, and hence to be good on demurrer.

—Doctrine that malicious motive does not affect otherwise lawful act.

The doctrine as to the effect of malice is denied in some jurisdictions, and hence

ployee, and where no contract between them stands in the way, it is the unquestioned right of the employee to leave the employment at his pleasure, and it is equally the right of the employer to discharge at his pleasure, or to impose conditions upon the retention of the employee in his employment. If imposed conditions are regarded as unjust, unfair, or onerous, the employee need not comply with them, but may resign, and, as has been said in the cases above cited, he may do this as an individual, or he may do so by concerted action as a member of an organized body or trades union. Precisely as may the employee cease labor at his whim or pleasure, and, whatever be his reason, good, bad, or indifferent, leave no one a legal right to com-

plain; so, upon the other hand, may the employer discharge, and, whatever be his reason, good, bad, or indifferent, no one has suffered a legal wrong. A man may have a profitable general merchandise business in the neighborhood of a mill or factory, depending for its patronage upon the mill or factory hands. For reasons sufficient to them, they may cease dealing at this store by concert of action, and so long as their methods (not their motives), are legal, they may perfect a boycott which will destroy the storekeeper's business. Upon the other hand, the mill owner, being under no contractual obligation to the storekeeper, may indisputably shut down his mill at any time, and thus work a destruction of the storekeeper's business. It is conceivable.

combinations to boycott another for a malicious purpose have been sustained on the theory that the act by any member of the combination was lawful, and would not be rendered unlawful because a number joined therein. The cases applying this doctrine confuse or fail to distinguish between the exercise by individuals of an absolute right as distinguished from a qualified right. They also fail to note limitations on the doctrine of *Allen v. Flood*, as made in later decisions which in effect reaffirm the doctrine of *Stevenson v. Newnham* (1853) 13 C. B. 297, 22 L. J. C. P. N. S. 110, wherein the doctrine is asserted that an act which does not amount to a legal injury is not rendered actionable because it is done with a malicious purpose. This is a considerable limitation upon the loosely stated rule that an otherwise lawful act does not become unlawful by reason of the motive actuating it, since the former simply amounts to a mere truism. In other words, if the person does not suffer a legal injury, he has no right of action. It does not from this follow, however, that an injury flowing from an otherwise lawful act does not amount to a legal injury where it is inflicted maliciously, and hence does not constitute an actionable wrong. But to the contrary, by the great weight of authority a malicious motive will render unlawful an act which otherwise would be lawful.

On the theory criticized, it has been held lawful for a school teacher to advise or persuade his pupils not to patronize a certain store, and to be immaterial that he acts maliciously in so doing. *Guethler v. Altman*, 26 Ind. App. 587, 84 Am. St. Rep. 313, 60 N. E. 355.

And it is lawful for the governor of a state, having authority in that regard, to prohibit the inmates of a soldiers' home from patronizing a certain restaurant in which it was suspected intoxicating liquors were unlawfully sold, and the act does not become unlawful by reason of other persons joining or aiding therein. *Rowan v. Butler*, 171 Ind. 28, 85 N. E. 714.

In *Brewster v. C. Miller & Sons Co.* 101 33 L.R.A. (N.S.)

Ky. 368, 38 L.R.A. 505, 41 S. W. 301, the court sustained, as against one injured thereby, the validity of an organization among undertakers, by which they agreed not to serve anyone indebted, or claimed to be indebted, to any member of the association. A person injured by the refusal of any member of this organization to serve him, on the claim of one of them that he was indebted for prior services rendered his father, which was disputed by the injured person, was held to have no cause of action against the members of the combination. The court reasoned that since one person has a right to decline to enter into a business undertaking with another, any number of persons can enter into an agreement by which they can decline to assume business relations with or enter into any contract with one or more persons, and that, as the members of an association for a good reason, or for no reason, had the right to decline to render services or furnish burial material to the plaintiff, if they saw proper to decline to render services because another member of the association asserted a claim against the plaintiff, their refusal created no legal liability against them; that it was immaterial so far as concerned the plaintiff as to what reasons may have influenced them to decline employment or to refuse to furnish the burial material which he desired.

Heywood v. Tillson, 75 Me. 225, 46 Am. Rep. 373, holds a refusal by an employer to employ or retain in his service any person renting property of another is not an actionable wrong, even though such employer is doing a large business and has in his employ many employees. The court reasoned that the interference complained of was not with the general rights of the plaintiff, that the threat was not general, but was confined to his employees, and added: "The plaintiff may rent to all the rest of humanity. The defendant owes no duty to the plaintiff. He has done him no wrong by declining to employ his tenants, unless he was under some legal obligation to employ them, and was guilty of some wrong in not employing them. This very action is

that his motive may be so venomous that he shuts down his works merely to destroy the storekeeper's business, and yet the storekeeper has no right of action, nor indeed has he right of inquiry into the motive which prompted the act. Since the mill owner may do this, he may do less than this, and exact of his employees, as a condition of their continued employment, that they do not deal at that store, and for this, also, however grave the injury, the storekeeper will have no legal cause of complaint. These views touching the arbitrary right of the employee to labor or to refuse to labor, and the reciprocal arbitrary right of the employer to employ or discharge labor, without regard in either case to the actuating motives, are propositions settled beyond peradventure. It is well settled, observes Chief Justice Shaw in *Com. v. Hunt*, 4 Met. 133, 38 Am. Dec. 346, "that every man, whether skilled laborer, mechanic, farmer, or domestic servant, may work or not work, or work or refuse to work, with any company or individual at his own option, except so far as he is bound by contract." In *Payne v. Western & A. R. Co.* 13 Lea, 507, 49 Am. Rep. 666, it is said: "Railroad corporations have in this matter the same right enjoyed by manufacturers, merchants, lawyers, and farmers. All may dismiss their employees at will, be they many or few, for good cause, for no cause, or even for cause morally wrong, without being thereby guilty of legal wrong. *A fortiori* they may 'threaten' to discharge them without thereby doing an illegal act."

The question will be found very elaborately discussed in *Heywood v. Tillson*, 75 Me. 225, 46 Am. Rep. 373, and in the more

recent case of *Banks v. Eastern R. & Lumber Co.* 46 Wash. 610, 11 L.R.A. (N.S.) 485, 90 Pac. 1048, a case very similar to the one at bar. Banks charged that he was conducting a public hospital, that the defendant was a corporation engaged in the manufacture of lumber and shingles, employing a large number of men; that 50 cents a month were retained from the wages of each man, to be disbursed for hospital and medical services; that 56 employees of the defendant selected plaintiff's hospital, and served upon defendant a written demand that their hospital dues be thereafter paid to the plaintiff; that plaintiff, in consideration, issued to each of the employees a certificate entitling him to medical and surgical treatment in the hospital, and that defendant refused to pay the fees to plaintiff so demanded by the written request of its employees; but, to the contrary, notified its employees that all hospital dues would be paid to the Dumon Hospital, and that any employee not consenting to such demand would be discharged. It was alleged that all the acts of the defendant were wanton, wilful, and malicious, and done with intent to harass plaintiff and injure his business. A demurrer to the complaint was sustained. In upholding the ruling of the trial court the supreme court of Washington said: "The respondent was entitled to employ its servants upon the conditions alleged. It had a perfect right to contract for the retention of reasonable hospital fees, and reserve to itself the privilege of selecting the physician to whom such fees should be paid. The contract, which did not profit the respondent, was made for the direct benefit of his employees. Appellant made

brought upon the assumption that the defendant was in some way under an obligation to employ the plaintiff's tenants; that he was guilty of a dereliction of duty, of a violation of the plaintiff's right, in not employing his tenants, or in threatening not to employ such as should become or were his tenants. . . . The defendant had an absolute right to employ, or not to employ, a tenant of the plaintiff, and no action would be maintained against him if he chose not to do it. . . . The act legal, he cannot be sued for mere ill-will or personal animosity, especially when he has cause."

Compare with *International G. N. R. Co. v. Greenwood*, 2 Tex. Civ. App. 76, 21 S. W. 559, wherein employers were held liable to a hotel and saloon keeper, for threatening to discharge any of their employees who in any way patronized the plaintiff, either by eating at his house or drinking at his bar, the purpose being maliciously to injure the plaintiff. It is, however, said that such employer was not liable for posting a notice that he would not take into his service any-

one who might patronize the plaintiff, since the employer had the right to determine for himself who he might thereafter employ, and the reasons upon which he might act concerned no one but himself; distinction being made between the exercise of the right of entering into contract relations with another, and the exercise of the right to discharge another where the discharge could only lawfully be made for a reasonable cause.

—Where complaining person is member of combination.

A person cannot complain of a wrongful action of a combination of local insurance agents, to fix the rates of insurance and to compel all insurance companies to withdraw their agencies from persons not joining, where he himself is a member of the combination. *Beechley v. Mulville*, 102 Iowa, 662, 63 Am. St. Rep. 479, 70 N. W. 107, 71 N. W. 428.

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no agreement with the respondent. There was no privity of contract between him and respondent. The contract between the respondent and the employees was not made for the benefit of appellant, and he had no right of action thereon. If appellant made any contract which has been violated, it was with the 56 employees to whom he issued hospital certificates. He cannot dictate the manner in which the respondent shall conduct its business, nor can he, by any agreement with respondent's employees to which respondent is not a party, compel it to change the terms of its contracts of employment. Appellant places much reliance on the allegations of malice, but if the respondent is conducting its business in a lawful manner, making and performing valid contracts with its employees, the mere incident of a malicious motive toward the appellant does not of itself warrant a recovery.

"Appellant contends this is an action in tort, based on the malicious and wanton acts of the respondent, and seems to predicate his right to recovery upon respondent's wrongful motive. Judge Cooley, at page 1505 (832) of vol. 2, 3d ed. of his work on Torts, says: 'Bad motive, by itself, then, is no tort. Malicious motives make a bad act worse, but they cannot make that a wrong which in its own essence is lawful. An act which does not amount to a legal injury cannot be actionable because it is done with a bad intent. Where one exercises a legal right only, the motive which actuates him is immaterial. When in legal pleadings the defendant is charged with having wrongfully and unlawfully done the act complained of, the words are only words of vituperation, and amount to nothing unless a cause of action is otherwise alleged.' In substance, the act of respondent of which appellant complains is that it has maliciously caused its employees to violate their contract with him; but the acts herein alleged give the appellant no cause of action as against respondent. *Boyson v. Thorn*, 98 Cal. 578, 21 L.R.A. 233, 33 Pac. 492."

We are unable to perceive where any element of monopoly enters into this consideration, as respondent contends. Defendants had the undoubted right to deal with any hospital which they might select. In fact they are dealing with four, and they are not even prohibiting their men from engaging the services of plaintiff. We repeat that since the acts of defendants are within their legal rights, the motive for those acts is not a subject of inquiry. "To entitle a plaintiff to recover, there must be a wrong done. 'No one is a wrongdoer but he who does what the law does not allow.' 33 L.R.A. (N.S.)

He who does what the law allows cannot be a wrongdoer, whatever his motive. So, no one is guilty of a fraud because he exerts his rights. The motive which may induce such exertion is immaterial." *Heywood v. Tillson*, 75 Me. 237, 46 Am. Rep. 373.

The judgment is reversed, and the cause remanded.

We concur: **Lorigan, J.; Melvin, J.**

A petition for rehearing in banc having been filed, the following *Per Curiam* response was handed down December 20, 1910: Rehearing denied.

Beatty, Ch. J., concurring:

In response to the petition for a rehearing of this cause I desire to say that, while concurring in the judgment of reversal, I find some expressions in the opinion of Justice Henshaw which I deem unnecessary to the conclusion of the court, and which, if not absolutely inconsistent with my views, as expressed in the case of *J. F. Parkinson Co. v. Building Trades Council*, 154 Cal. 581, 21 L.R.A. (N.S.) 550, 98 Pac. 1027, 16 A. & E. Ann. Cas. 1165, are yet in apparent conflict with what I deem to be the true doctrine applicable in cases of this character. I take no exception to the proposition that an act in its essence lawful does not become actionable because inspired by a bad motive. But I am convinced that the weight of reason and authority is in favor of the view that the motive of a harmful act is material, where the act is not absolutely and unqualifiedly lawful in itself. This is illustrated by cases of malicious prosecution, unlawful imprisonment, and libel, in which the pleas of probable cause and privilege are defeated by proof of actual malice, and the doctrine of those cases rests upon a principle which makes it fully applicable to a case wherein it is made to appear that the ruin or injury of a legitimate business (by which I mean any useful vocation open to every citizen as of common right) is the direct result of a combination formed for the primary purpose of injuring that business, and this notwithstanding such injury may involve some incidental advantages to those who have caused it. This, which appears to be the necessary complement or counterpart of the proposition that injury incidentally resulting to a business from a combination entered into for the benefit, by lawful means, of those who engage in it, is not actionable, is supported, not only by reason, but by authority.

Besides the case of *Quinn v. Leatham* [1901] A. C. 495, referred to and commented upon in the *Parkinson Case*, I would call attention to the opinion of the circuit court of appeals in *National Fireproofing Co. v. Mason Builders' Asso.* 26 L.R.A. (N.S.) 148, 94 C. C. A. 535, 169 Fed. 259, from which I quote the following statement of the doctrine for which I am contending: "The direct object or purpose of a combination furnishes the primary test of its legality. It is not every injury inflicted upon third persons in its operation that renders a combination unlawful. It is not enough to establish illegality in an agreement between certain persons to show that it works harm to others. An agreement entered into for the primary purpose of promoting the interest of the parties is not rendered illegal by the fact that it may incidentally injure third persons. Conversely, an agreement entered into for the primary purpose of injuring another is not rendered legal by the fact that it may incidentally benefit the parties. As a general rule it may be stated that, when the chief object of a combination is to injure or oppress third persons, it is a conspiracy, but that, when such injury or oppression is merely incidental to the carrying out of a lawful purpose, it is not a conspiracy. Stated in another way: A combination entered into for the real malicious purpose of injuring a third person in his business or property may amount to a conspiracy, and furnish a ground of action for the damages sustained, or call for an injunction, even though formed for the ostensible purpose of benefiting its members and actually operating to some extent to their advantage; but a combination without such ulterior oppressive object, entered into merely for the purpose of promoting by lawful means the common interests of its members, is not a conspiracy."

This doctrine, however, cannot avail the respondent here as the case is presented by the record; for, although it is found by the trial judge that the defendants, without any interests of their own to subserve, or any lawful object to promote, did conspire and confederate together for the purpose of unlawfully injuring the plaintiff in the manner alleged in the complaint, it is also found, as shown in the opinion of the court, that the agreement with the four favored hospitals was entered into by the defendants, solely for the purpose and with the intent to subserve their own interests. These two findings appear to me to stand in absolute and irreconcilable opposition to each other, and the result is no finding at all upon a point essential to the validity of

the judgment, which must therefore be reversed.

CONNECTICUT SUPREME COURT OF ERRORS.

EMIL MARRI

v.

STAMFORD STREET RAILROAD COMPANY, Appt.

(— Conn. —, 78 Atl. 582.)

Husband — injury to wife — loss of consortium — right to recover.

A man cannot recover for loss of the society or those personal services of his wife formerly embraced by the term 'consortium,' through injuries negligently inflicted upon her by another, where the statutes have conferred upon her a legal entity of her own, and relieved her of the obligation to perform services which she formerly owed him.

(January 6, 1911.)

Note. — Right of husband to recover for loss of consortium through personal injury to wife.

As to right of wife to recover for loss of consortium resulting from negligent injury to husband, see note to *Feneff v. New York C. & H. R. R. Co.* 24 L.R.A. (N.S.) 1024.

As to the right of a husband or wife at common law to recover for loss of services or consortium against a person negligently causing death of spouse, see the note to *Sherlag v. Kelley*, 19 L.R.A. (N.S.) 633.

As to right of wife, under modern married women's acts, to sue for alienation of the affections of her husband, see note to *Nolin v. Pearson*, 4 L.R.A. (N.S.) 643.

For cases considering the question whether the husband's action for damages sustained by him on account of personal injury to wife abates by his own death or that of the wrongdoer, see note to *Hey v. Prime*, 17 L.R.A. (N.S.) 570.

Right at common law.

The wife owes a duty to her husband, of which physical labor may or may not be a part, depending upon circumstances, which is called in the common-law writs, consortium, and means conjugal society and assistance. So the common law recognized the right of the husband to maintain an action against one who tortiously impaired the ability of a wife to perform her duty, and thus deprived the owner of his right thereto. Such action, when based on personal injury to the wife, was in trespass on the case, *per quod consortium amissit*.

Even before the days of Blackstone, down to the present time, the authorities, Eng-

APPEAL by defendant from a judgment of the Superior Court for Fairfield County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

Statement by Prentice, J.:

This action was brought to recover damages claimed to have been sustained by the plaintiff as the result of a collision between a trolley car negligently operated by the defendant's servant in the streets of Stamford and a carriage drawn by horses, in which the plaintiff and his wife were being driven. Recovery was sought for personal injuries to the plaintiff, harm done to the horses and carriage owned by the plaintiff, and

injuries to the plaintiff in his relative rights through the expenditure which he was required to make in the care and cure of his wife, who was personally injured at the same time, and through his loss of her services and companionship resulting from her injuries. The court found that the collision and resulting injuries were caused by the defendant's negligence, and without contributory negligence on the part of the plaintiff or Mrs. Marri, and rendered judgment in the plaintiff's favor. Included in the amount for which recovery was thus had was a sum for money expended for doctors, medicine, care, and nursing, and the sum of \$300 "for loss of consortium." The appeal assigns a number of errors, but all the assignments are waived except one

lish and American, are, apparently without well-considered exceptions, in accordance with the reason above stated,—to the effect that the husband's recovery is for the loss or impairment of his right to conjugal society and assistance. *Hyde v. Scysson*, Cro. Jac. 538; *Guy v. Livesey*, Cro. Jac. 501; *Guy v. Lusy*, 2 Rolle, Rep. 51; *Russell v. Corne*, 2 Ld. Raym. 1031, 1 Salk. 119, 6 Mod. 127, Holt, K. B. 699; *Union P. R. Co. v. Jones*, 21 Colo. 340, 40 Pac. 891; *Denver Consol. Tramway Co. v. Riley*, 14 Colo. App. 132, 59 Pac. 476; *Fuller v. Naugatuck R. Co.* 21 Conn. 557; *Washington & G. R. Co. v. Hickey*, 12 App. D. C. 269; *Indianapolis Traction & Terminal Co. v. Menze*, 173 Ind. 31, 88 N. E. 929, rehearing denied in 173 Ind. 37, 89 N. E. 370; *Citizens' Street R. Co. v. Twiname*, 121 Ind. 375, 7 L.R.A. 352, 23 N. E. 159; *Adams Hotel Co. v. Cobb*, 3 Ind. Terr. 50, 53 S. W. 478; *Mewhirter v. Hatten*, 42 Iowa, 288, 20 Am. Rep. 618; *McKinney v. Western Stage Co.* 4 Iowa, 420; *Hooper v. Haskell*, 56 Me. 251; *Duffee v. Boston Elev. R. Co.* 191 Mass. 563, 77 N. E. 1036; *Kelley v. New York, N. H. & H. R. Co.* 168 Mass. 308, 38 L.R.A. 631, 60 Am. St. Rep. 397, 46 N. E. 1063; *Barnes v. Hurd*, 11 Mass. 59; *Blair v. Chicago & A. R. Co.* 89 Mo. 334, 1 S. W. 367; *Smith v. St. Joseph*, 55 Mo. 456, 17 Am. Rep. 660; *Mann v. Rich Hill*, 28 Mo. App. 497; *Booth v. Manchester Street R. Co.* 73 N. H. 529, 63 Atl. 578; *Hopkins v. Atlantic & St. L. R. Co.* 36 N. H. 9, 72 Am. Dec. 287; *Lagergren v. National Coke & Coal Co.* 117 N. Y. Supp. 92; *Baltimore & O. R. Co. v. Glenn*, 66 Ohio St. 395, 64 N. E. 438; *Neville v. Mitchell*, 28 Tex. Civ. App. 89, 66 S. W. 579; *Dallas v. Jones*, — Tex. Civ. App. —, 54 S. W. 606, reversed on another point in 93 Tex. 38, 49 S. W. 577, 53 S. W. 377; *Missouri K. & T. R. Co. v. Vance*, — Tex. Civ. App. — 41 S. W. 167; *Lindsey v. Danville*, 46 Vt. 144; *Whitcomb v. Barre*, 37 Vt. 148; *Selleck v. Janesville*, 104 Wis. 570, 47 L.R.A. 691, 76 Am. St. Rep. 892, 80 N. W. 944.

It has long been the rule that, in actions to recover for personal injuries to the wife, the husband may recover for the loss 33 L.R.A. (N.S.)

of the society of his wife in addition to, and as distinguished from, loss of services. *Jones v. Utica & B. River R. Co.* 40 Hun, 349.

In *Denver Consol. Tramway Co. v. Riley*, 14 Colo. App. 132, 59 Pac. 476, holding that a husband could recover for the loss of the consortium of his wife, the meaning of the term and the husband's right are thus expressed: "The companionship and society of a wife are not articles of commerce. They cannot be weighed or measured; they are not bought and sold, and no expert is competent to testify to their value. The consideration upon which they are bestowed is not pecuniary. Yet the husband is entitled to compensation in money for their loss, and the amount of that compensation is to be determined by the jury, not from evidence of value, but from their own observation, experience, and knowledge, conscientiously applied to the facts and circumstances of the case. So also in relation to the services of the wife. The wife does not occupy the position of a servant, and her services to her husband are not those of a servant. She makes his home cheerful and inviting, and ministers to his happiness in a multitude of ways outside of the druggery of household labor. All the work of the house may be done by hired employees, and her services still give character to the home. They are not rendered in accordance with set rules; they are not repeated in regular order from day to day; they have their source in the thoughtfulness of the wife, and her regard for her husband, and no witness is qualified to define them, or reduce them to a list, or say what they are worth, so that their value must also be estimated by the jury."

In *Berger v. Jacobs*, 21 Mich. 215, where the wife sued for personal injuries to herself, the court merely said that "for any damages accruing to the husband from the assault and battery upon the wife, as for loss of her assistance and society, and the expenses to which he may have been put in nursing and curing her, he alone could sue."

Hawkins v. Front Street Cable R. Co.

which charges the court with error in its allowance of the \$300 for loss of consortium. Mrs. Marri, in her action for the consequences of the same accident, brought and heard at the same time, was allowed full compensation for all her injuries, including pain and suffering. Mr. and Mrs. Marri were married in 1888.

Messrs. William B. Boardman and Frederick W. Huxford for appellant.

Messrs. Homer S. Cummings and John J. Cullinan, for appellee:

Damages may be recovered for loss of consortium.

Kelley v. New York, N. H. & H. R. Co. 168 Mass. 308, 38 L.R.A. 631, 60 Am. St. Rep. 397, 46 N. E. 1063; Feneff v. New

York C. & H. R. Co. 203 Mass. 278, 24 L.R.A. (N.S.) 1024, 133 Am. St. Rep. 291, 89 N. E. 436; Coe v. Hill, 201 Mass. 21, 86 N. E. 949; Missouri, K. & T. R. Co. v. Vance, — Tex. Civ. App. —, 41 S. W. 167; 3 Bl. Com. 140; Chitty, Pl. § 83, Revision of 1885; Smith v. St. Joseph, 55 Mo. 456; 17 Am. Rep. 660; Holleman v. Harward, 119 N. C. 150, 34 L.R.A. 803, 56 Am. St. Rep. 672, 25 S. E. 972; Bennett v. Bennett, 116 N. Y. 584, 6 L.R.A. 553, 23 N. E. 17; Mewhirter v. Hatten, 42 Iowa, 288, 20 Am. Rep. 618; Selleck v. Janesville, 104 Wis. 577, 47 L.R.A. 691, 76 Am. St. Rep. 892, 80 N. W. 944; Matteson v. New York C. R. Co. 35 N. Y. 487, 91 Am. Dec. 67; Diver v. Diver, 56 Pa. 109; Baltimore & O. R. Co. v. Glenn, 66 Ohio St. 395, 64 N. E. 438;

3 Wash. 592, 16 L.R.A. 808, 28 Am. St. Rep. 72, 28 Pac. 1021, seems to be opposed to the right of the husband to recover for a loss of the consortium of his wife. Here it was held that the loss of the society, companionship, and solace of one's wife is not an element of the damages which he can recover in case of her injury through another's negligence. Mr. Justice Stiles said: "At common law, when a wife was injured through the tort of a third person, the injury and the right of action were hers; but she could not sue unless her husband, if living, joined her as plaintiff. The recovery in that case was the pecuniary measure of her own injury and suffering in body and mind. But there was another element of damages which could be recovered only by her husband suing alone in a separate action *viz.*, his loss of her services, and his outlay in restoring her to health. In this case the complaint seems to have been based upon the idea that he could also recover for the society, companionship, and solace of his wife; but we do not understand these to be recoverable injuries. As matter of fact, unless death ensues, the husband is not deprived of either, although his enjoyment of them may be lessened by the knowledge of his wife's suffering. They are of those sentimental, intangible injuries which the law cannot measure. Even in cases of death, they are not elements of damage."

Character of injury sustaining right.

While the great majority of the cases discussed in this note, as will be inferred from its title, embrace those where the husband has lost the consortium of his wife through some personal injury to her, it is not to be implied in any way that his right to recover for a loss of her consortium is restricted to the extent of depriving him of the right where he loses her companionship and society through other means.

Thus, Ainley v. Manhattan R. Co. 47 Hun, 206, discloses that an endeavor was made to show that the doctrine that a hus-

band is entitled to recover damages for the loss of society of his wife is applicable only to actions for seduction, "where the defendant has run away with the wife, and actually deprived the plaintiff of her company." The court, in deciding otherwise, used the following language: "We are not aware that the rule is thus restricted. The rule is that, if the husband is entitled to the assistance and society of his wife, he is entitled to recover damages against a party who unjustly deprives him of such assistance and society; and there does not seem to be any reason, if the fact exists that he has been deprived of such assistance and society by the act of another, why he should not recover as well where such deprivation has been the result of the negligence of the defendant, as where such deprivations have been caused by the enticing away of the wife."

In Lyons v. New York City R. Co. 49 Misc. 517, 97 N. Y. Supp. 1033, it was held that the "loss of society" mentioned in an act giving jurisdiction to a municipal court of an action "to recover damages for a personal injury or for loss of services . . . excepting . . . loss of society of husband or wife" refers only to actions founded upon an intentional injury to the consortium, and not to an unintentional act, as negligence, which may result in a loss both of services and society, and did not deprive that court of jurisdiction in the case at bar.

A husband has been permitted to recover damages for the loss of his wife's society and services due to the selling of laudanum to her despite his protests and warnings. Holleman v. Harward, 119 N. C. 150, 34 L.R.A. 803, 56 Am. St. Rep. 672, 25 S. E. 972, wherein Montgomery, J., said: "A married woman still owes to her husband, notwithstanding her greatly improved legal status, the duty of companionship and of rendering all such services in his home as her relations of wife and mother require of her."

Likewise has he been permitted to recover where the defendant secretly sold the wife laudanum, to the destruction of her in-

Nixon v. Ludlam, 50 Ill. App. 273; Berger v. Jacobs, 21 Mich. 215; Foot v. Card, 58 Conn. 8, 6 L.R.A. 829, 18 Am. St. Rep. 258, 18 Atl. 1027; Mathewson v. Mathewson, 79 Conn. 26, 5 L.R.A.(N.S.) 611, 63 Atl. 285, 6 A. & E. Ann. Cas. 1027; Bigaouette v. Paulet, 134 Mass. 123, 45 Am. Rep. 307.

A wife owes to her husband certain services and ministrations which belong to the husband by reason of the marriage relationship.

Payne's Appeal, 65 Conn. 401, 33 L.R.A. 418, 48 Am. St. Rep. 215, 32 Atl. 948; Grant v. Green, 41 Iowa, 88; Longendyke v. Longendyke, 44 Barb. 366.

Prentice J., delivered the opinion of the court:

The court included in its judgment in

telleet and the impairment of her health, when he knew she was using it as a beverage. Hoard v. Peck, 56 Barb. 202.

And for an injury caused his wife by the malpractice of a physician and surgeon he has been allowed to recover. Melwhirter v. Hatten, 42 Iowa, 288, 20 Am. Rep. 618.

Extent of right.

The husband's right of recovery is limited to a pecuniary compensation for the loss of consortium with his wife, and the expenses he was put to by reason of her injuries. Chicago & M. Electric R. Co. v. Krempel, 116 Ill. App. 253.

And he is entitled to recover for his future loss of consortium as well. Union P. R. Co. v. Jones, 21 Colo. 340, 40 Pac. 891; Hopkins v. Atlantic & St. L. R. Co. 36 N. H. 14, 72 Am. Dec. 287; London v. Cunningham, 1 Misc. 408, 20 N. Y. Supp. 882; Kimberly v. Howland, 143 N. C. 398, 7 L.R.A.(N.S.) 545, 55 S. E. 778.

But where there was no evidence that the loss of the wife's service and society would continue beyond the trial and into the future, and no data whatever was afforded by the evidence upon which the jury could assess the extent or quantum of future damages to plaintiff from the future loss of such service and society, it was held that the husband could not recover anything for future loss. Birmingham Southern R. Co. v. Lintner, 141 Ala. 420, 109 Am. St. Rep. 40, 38 So. 363, 3 A. & E. Ann. Cas. 461.

So, the wife's contributory fault may constitute a defense to an action by a husband for the loss of her society and her aid, etc., although the statutes have emancipated her from many common-law disabilities, and relieved the husband from responsibility for civil injuries committed by her. Chicago, B. & Q. R. Co. v. Honey, 26 L.R.A. 42, 12 C. C. A. 190, 27 U. S. App. 196, 63 Fed. 39, reversing 59 Fed. 423.

As a factor in mitigation of the damages which a husband may be entitled to, the jury may consider any evidence which

favor of the plaintiff husband a sum for his loss of consortium. The right of consortium has had modern definition which limits it to a right growing out of the marriage relation, which the husband and wife have, respectively, to the society, companionship, and affection of each other in their life together. By this definition it is clearly intended to distinguish the right to consortium from that to services. Feneff v. New York C. & H. R. R. Co. 203 Mass. 278, 24 L.R.A.(N.S.) 1024, 133 Am. St. Rep. 291, 89 N. E. 436. Such was not the common-law use of the term. In its original application it was used to designate a right which the law recognized in a husband, growing out of the marital union, to have performance by the wife of all those duties and obligations in respect to him

tends to show that the husband did not avail himself of the companionship and society of his wife. Sullivan v. Lowell & D. Street R. Co. 162 Mass. 530, 39 N. E. 185.

"The husband . . . has a legal right to the society of the wife," said McClellan, Ch. J., in Birmingham Southern R. Co. v. Lintner, "involving all the amenities and conjugal incidents of the relation. This right of society may be invaded by an act which, while leaving to the husband the presence of the wife, yet incapacitates her for the marital companionship and fellowship; and such incapacity may be deprivation of her society, differing in degree only from total deprivation by her death. For such impairment, so to say, of the wife's society, of his right of consortium,—such deprivation of the aid and comfort which the wife's society, as a thing different from mere services, is supposed to involve,—he is entitled to recover."

In *Furnish v. Missouri P. R. Co.* 102 Mo. 669, 22 Am. St. Rep. 800, 15 S. W. 315, the defendant claimed that the trial court erred by instructing the jury "to allow the plaintiff such sum as the evidence showed would compensate him for the 'loss of society and companionship of his wife.'" The objection was placed upon two grounds: It was first asserted that there was no loss to the plaintiff of the society or companionship of his wife, because, though injured, she was yet with him, and he therefore had the benefit of her society. But here is what the court said: "But the answer to that first contention is that, as her husband, he was entitled to her society as she was when the negligence of defendant impaired her strength, her health, and her usefulness as a helpmate. Though he may still be with her, and her companionship may be even more dear to him since her injury, because of her very helplessness and need of his attention, yet that does not diminish the legal wrong he has suffered from the acts which produced that condition. He is entitled to be compensated for such loss of her society as resulted from the negligence alleged. By the term 'so-

which she took upon herself when she entered into it. The meaning of the term as thus employed has remained its common-law meaning. As thus employed it includes the right to society, companionship, and conjugal affection, and the law has from early days recognized the right of a husband to have recovery in damages for the loss of these incidents of the marital relation when he was deprived of them by certain acts regarded as necessarily destructive of them. *Wilton v. Webster*, 7 Car. & P. 198, 201; *Weedon v. Timbrell*, 5 T. R. 357, 360. Acts, on the other hand, whose natural consequence was the diminution or impairment of these incidents, and whose necessary consequence was not their loss, were not regarded as furnishing a right of

action. *Lellis v. Lambert*, 24 Ont. App. Rep. 653, 654; *Houghton v. Rice*, 174 Mass. 366, 368, 47 L.R.A. 310, 75 Am. St. Rep. 351, 54 N. E. 843.

But the right of consortium was by no means fully expressed in the terms of society, companionship, and conjugal affection. The right to service was a prominent factor in it, and in respect to certain kinds of injuries, without doubt, the predominant factor. If we go back to the times when it took on its meaning, the conditions were that the wife was socially and legally regarded as the husband's inferior, as having her existence merged into that of her husband, and as owing to him the duty, which he was entitled to command, of serving and administering to him in all the re-

ciety' in this connection, is meant such capacities for usefulness, aid, and comfort as a wife, which she possessed at the time of the injury. Any diminution of those capacities by the acts or negligent omissions of defendant constituted a just basis for an award of compensatory damages therefor. . . . Next it is urged that, as no evidence was offered of the value of the wife's society, the instruction should not have been given. To this it may be said that the nature of the subject does not admit of direct proof of value, and that, when the fact of loss of society is established by testimony, the assessment of reasonable compensation therefor must necessarily be committed to the sound discretion and judgment of the triers of fact."

The fact that the wife in her own right brings an action and recovers for a personal injury sustained by her is no bar to an action by the husband for expenses for her care and cure, and loss of her services and consortium. *Duffee v. Boston Elev. R. Co.* 191 Mass. 563, 77 N. E. 1036; *Smith v. St. Joseph*, 55 Mo. 456, 17 Am. Rep. 660; *Selleck v. Janesville*, 104 Wis. 570, 47 L.R.A. 691, 76 Am. St. Rep. 892, 80 N. W. 944.

In *Blair v. Bloomington & N. R. Electric & Heating Co. infra*, where the wife had recovered damages for her injuries in a prior action, and the defendant attempted to set that up as a bar to the husband's action, as well as sought refuge in the statute, supra, the court said that it was unable to see how the statute affected the determination of the question, and continued: "The judgment against appellee in the suit of Lillian Blair is conclusive as to all of the elements of damages recoverable by her; but if appellant also suffered damage resulting from the injury to her, which was personal to himself, and such as could not have been recovered by her in her suit, the judgment in her suit is not conclusive as to such damages recoverable by him. The mere fact that a wife pursues an independent calling does not absolve her from the performance of marital duties of service and consortium owing to her husband. If

the pursuit by a wife of an independent calling wholly prevents her from performing any service for her husband, or affording him any companionship, then he can have suffered no substantial damage in those respects by her injury; but to the extent, much or little, that her injury has in fact deprived him of her services and consortium, he is entitled to be compensated in damages."

Nor is a recovery by the plaintiff for the injury to his person a bar to an action by him to recover for the loss of the society and services of his wife, and for expenses in effecting her cure, caused by the injury to her in the same accident. *Skoglund v. Minneapolis Street R. Co.* 45 Minn. 330, 11 L.R.A. 222, 22 Am. St. Rep. 733, 47 N. W. 1071.

Right as affected by statute.

Modern legislation which has so greatly affected the status of married women by recognizing their right to a separate existence, entitling them to the ownership of their property, giving them ability to contract, power to control their earnings, and endowing them with the capacity to sue or be sued, has not, according to the great weight of authority, although *MARRI V. STAMFORD STREET R. Co.* is to the contrary, abridged in anywise the common-law right of a husband to the companionship, love, and service of his wife which is comprehended by the term "consortium," and his attendant right to sue therefor in the event of its loss through some personal injury to her.

Indeed it has been said that positive and explicit legislation is necessary in order to deprive the husband of his right to sue for the loss of the society of his wife. *Omaha & R. Valley R. Co. v. Chollette*, 41 Neb. 578, 59 N. W. 921; *Mewhirter v. Hatten*, 42 Iowa, 288, 20 Am. Rep. 618.

In *Omaha & R. Valley R. Co. v. Chollette*, supra, where the husband brought an action to recover for the loss, among other items, of his wife's society, etc., through a personal injury to her, the trial judge re-

lations of domestic life. Her emancipation of recent years was centuries in the future. She was looked upon as the servant of and ministrant to her liege lord, to whom and to whose interests she was, by virtue of her marriage vow, devoted. He was entitled to her services, and these she was expected to render in the care of his home, in the rearing of his children, and in attending upon his wants. The solace and comfort which she was expected to bestow were in part, at least, that which would naturally flow from her rendition of this service, and her society, companionship, and affection as a faithful and loving wife would naturally have their fruition in a faithful performance of it. The services which the law had in contemplation were not so much those

which resulted in wages earned, or from the mere performance of labor, as those which found their expression at the domestic fireside, and in all manner of aid, assistance, and helpfulness in all the relations of domestic life. "The word 'service' has come to us in this connection from the times in which the action originated, and it implies whatever of aid, assistance, comfort, and society the wife would be expected to render to or bestow upon her husband under the circumstances and in the condition in which they may be placed, whatever those may be." 1 Cooley, Torts 471.

The law's conception of the claim which the husband had upon the wife, and of his right growing out of the marital relation,

stricted the jury to a consideration of the extent to which her injuries had incapacitated her from "performing all the duties of a wife that reasonably devolved upon her in the marriage relation," and it was held that to this extent the husband could recover, notwithstanding the married women's act.

As said in *Mewhirter v. Hatten*, supra, on a precisely similar question: "We feel very clear that the legislature did not intend by this section of the statute to release and discharge the wife from her common-law and scriptural obligation and duty to be a 'helpmeet' to her husband. If such a construction were to be placed upon the statute, then the wife would have a right of action against the husband for any domestic service or assistance rendered by her as wife. For her assistance in the care, nurture, and training of his children, she could bring her action for compensation. She would be under no obligation to superintend or look after any of the affairs of the household unless her husband paid her wages for so doing. Certainly, such consequences were not intended by the legislature, and we cannot so hold, in the absence of positive and explicit legislation."

Likewise in *Birmingham Southern R. Co. v. Lintner*, 141 Ala. 420, 109 Am. St. Rep. 40, 38 So. 303, 3 A. & E. Ann. Cas. 461, where the statute provided that "the earnings of the wife are her separate property; but she is not entitled to compensation for services rendered to or for the husband, or to or for the family," it was said: "The whole scope and purpose of this enactment manifestly is to vest in the wife her earnings in services rendered to third persons, strangers to the household. It in no degree emancipates her from her household duties, nor authorizes her to enter upon such alien service as would conflict with and prevent the performance of her duties incident to the domestic establishment,—the care, comfort, and convenience of the family,—the duties, in short, which, before the statute, she owed to the husband as the husband and head of the family. These du-

ties she owes now just as she did at the common law; and while the husband may allow her to premit them and engage wholly or to any less extent in outside service the earnings of which belong to her, without such emancipation by the husband, she owes these services to him now as before, and for any wrongful act of a stranger which deprives him of them, he is entitled to recover for the consequent loss and injury."

Thus it has been specifically held that the husband's right at common law to recover for loss of his right to the society of his wife is not affected by statutory provisions to the effect:

—that a married woman may receive, use, and possess her own earnings, and sue for the same in her own name, free from the interference of her husband or creditors. *Blair v. Bloomington & N. R. Electric & Heating Co.* 130 Ill. App. 400; *Chicago & M. Electric R. Co. v. Krempel*, 116 Ill. App. 253.

—that the "earnings of the wife are her own separate property; but she is not entitled to compensation for services rendered to or for her husband, or to or for the family." *Birmingham Southern R. Co. v. Lintner*, supra; *Southern R. Co. v. Crowder*, 135 Ala. 417, 33 So. 335.

—that "the earnings of any married woman from her trade, business, labor, or services shall be her sole and separate property, and may be used and invested by her in her own name." *Omaha & R. Valley R. Co. v. Chollette*, 41 Neb. 578, 59 N. W. 921; *Riley v. Lidtke*, 49 Neb. 139, 68 N. W. 356; *London v. Cunningham*, 1 Misc. 408, 20 N. Y. Supp. 882.

—that the "wife may receive the wages of her personal labor, and maintain an action therefor in her own name, and hold the same in her own right." *Mewhirter v. Hatten*, 42 Iowa, 288, 20 Am. Rep. 618; *McKinney v. Western Stage Co.* 4 Iowa, 420.

—that the wife is given the right to her earnings from future "separate labor." *Kirkpatrick v. Metropolitan Street R. Co.* 129 Mo. App. 524, 107 S. W. 1025; *Par-*

which entered into the meaning of the word "consortium" to express that right as the subject of invasion by wrongdoing was thus one which embraced the right to service as a distinct factor; and there was no attempt to disassociate the right to society, companionship, and affection from it. All these rights were bound together in social and legal contemplation, and they were bound together in the law's expression of them. In some cases, as where the wrong was criminal conversation, the loss of conjugal society and affection might stand out and be emphasized as the pre-eminent and perhaps sole basis of recovery. In others, as in actions growing out of personal injuries, the loss of service would present itself as the predominant factor. The law has, however, never been solicitous to distinguish between these different elements of damage or to separate them, and there will be found few cases indeed, and we think no one of the earlier ones, in which the husband's loss was regarded as one into which the element of service did not enter. The pleadings in the early cases, and the language of the opinions in them, clearly show that loss of services as well as society and affection were included in the legal meaning of the loss of "consortium." 1 Chitty, Pl. 49; 3

Chitty, Pl. 417; Guy v. Lusy, 2 Rolle. Rep. 51; Russell v. Corne, 2 Ld. Raym. 1031, 1 Salk. 119, 6 Mod. 127, Holt, K. B. 699; Guy v. Livesey, Cro. Jac. 501; Hyde v. Scyssor, Cro. Jac. 538. The older and more recent text writers unite in stating that in an action *per quod consortium amisit* recovery might properly be had for the husband's loss, whether it partook of the one character or the other. 1 Bacon, Abr. 502; Reeve, Dom. Rel. 63; Tiffany, Persons & Dom. Rel. 77; Kinkead, Torts, § 499.

It does not clearly appear whether the trial court in the present case used the term in defining the basis upon which recovery was allowed in the narrow sense of the definition first stated, or in the more correct and comprehensive sense. That is, however, a matter of small present importance. But it is important in an examination of the development of the law relating to the general subject under consideration to bear in mind that within the legal meaning of consortium are embraced as well those incidents of the marital relation which center about service, and thus possess a practical and material value to a husband, as those which are associated with what, for want of a better term, we say designate as its

tello v. Missouri, P. R. Co. 141 Mo. App. 162, 107 S. W. 473.

—that "every married woman shall have the same rights and remedies, and shall be subject to the same liabilities, in relation to property held by her in her own right, as if she were unmarried; and may make contracts, and sue and be sued, in all matters in law and equity, and upon any contract by her made, or for any wrong by her done, as if she were unmarried." Booth v. Manchester Street R. Co. 73 N. H. 529, 63 Atl. 578.

—that "neither husband nor wife has any interest in the property of the other 'except' dower in real estate." Baltimore & O. R. Co. v. Glenn, 66 Ohio St. 395, 64 N. E. 438.

The established law in Pennsylvania, notwithstanding any statutory provisions entitling the wife to her earnings, or giving her control over her property, is to the effect that the husband is still entitled to compensation for the loss of her aid, assistance, comfort, and society, caused by the negligence of others. Reagan v. Harlan, 24 Pa. Super. Ct. 27, citing Platz v. McKean Twp. 178 Pa. 301, 36 Atl. 136; Kelley v. Mayberry Twp. 154 Pa. 440, 26 Atl. 595; Henry v. Klopfer, 147 Pa. 178, 23 Atl. 337, 338, in which latter cases no reference was made to any statutes. And in Hewitt v. Pennsylvania R. Co. 228 Pa. 397, 77 Atl. 623, and McMeekin v. Pittsburgh R. Co. 229 Pa. 572, 79 Atl. 133, this right of the husband is held to be established without any mention of any statute. 33 L.R.A.(N.S.)

So, in Massachusetts, although the husband's control over the person or property of his wife has been reduced to a minimum, if it has not entirely disappeared (Nolin v. Pearson, 191 Mass. 283, 4 L.R.A.(N.S.) 643, 114 Am. St. Rep. 605, 77 N. E. 890, 6 A. & E. Ann. Cas. 658), he still retains the unmodified right to her conjugal society, and may recover damages for injuries to her person through the wrongs of others. Duffee v. Boston Elev. R. Co. 191 Mass. 563, 77 N. E. 1035; Sullivan v. Lowell & D. Street R. Co. 162 Mass. 538, 39 N. E. 185; Kelley v. New York, N. H. & H. R. Co. 168 Mass. 308, 38 L.R.A. 631, 60 Am. St. Rep. 397, 43 N. E. 1063, wherein it was said: "Notwithstanding the progress of legislation in giving to married women the control of their time and actions, this right of the husband is not destroyed. The unity and identity of interest which, by the common law, existed between husband and wife, have been impaired. . . . They are not, however, entirely done away with. The husband's right to compel his wife to work for him is abridged, but he still has a right to her society and assistance, which is different in character and degree from that which other people have, or which she is at liberty to give to them. By marriage, both husband and wife take upon themselves certain duties and obligation towards each other, in sickness and health, which it cannot be supposed that the legislature has intended wholly to uproot. A married woman may now perform any labor or services on her sole and separate

sentimental side, and are expressed in the terms of affection, solace, comfort, companionship, and society wholly unrelated to service.

The common law has long recognized the right of a husband to recover damages for his loss of consortium in the comprehensive sense of that word, as for an injury to him in respect to his relative rights, when that loss was the consequence of certain wrongful acts done to or in relation to his wife. Blackstone, in his Commentaries, vol. 3, p. 139, states the law as it had been established by the courts at the time when he wrote, as follows: "Injuries that may be offered to a person, considered as a husband, are principally three: Abduction, or taking away a man's wife; adultery, or criminal conversation with her; and beating or otherwise abusing her. . . . The third injury is that of beating a man's wife, or otherwise ill-using her; for which, if it be a common assault, battery, or imprisonment, the law gives the usual remedy to recover damages, by action of trespass *vi et armis*, which must be brought in the names of the husband and wife jointly; but if the beating or other maltreatment be very enormous, so that thereby the husband is deprived for any time of the company and assistance

of his wife, the law gives him a separate remedy by an action of trespass, in the nature of an action on the case, for this ill usage, *per quod consortium amisit*, in which he shall recover a satisfaction in damages." Similar statements of the law are made by later writers. 1 Bacon, Abr. 502; 1 Chitty, Pl. 49.

The first two of the grounds of action enumerated by Blackstone present the same general aspects, in that the wrong is one which is done directly and primarily to the husband, and one which strikes at the very foundation of the conjugal relation, and is necessarily destructive of all of its benefits. The reason of the rule, from the standpoint of the common law, that these wrongs, having this consequence, should give to the husband a right of action against the offender for a recovery measured by the loss to him of all those benefits, including service and society, is apparent. An action, however, could not, until recent years, be maintained in the wife's favor under reversed conditions. The common-law reasons for this are found in the unity of persons created by a marriage, the superior position of the husband in the eye of the law, the status of married women under the law, and the fact that recovery

account, as her husband may; nevertheless, each owes certain duties to the other which are not annulled by the statutes. *Mewharter v. Hatten*, 42 Iowa, 288, 20 Am. Rep. 618. These duties are included in the word 'consortium.'"

Now, however, since the decision in *Bolger v. Boston Elev. R. Co.* 205 Mass. 420, 91 N. E. 389, it may be seriously questioned whether the law upon this point in the commonwealth of Massachusetts remains as stated in the preceding cases. The case of *Bolger v. Boston Elev. R. Co.* supra, is not directly within the scope of the present note, since the action was brought by the husband to recover for the loss of his wife's consortium, etc., where death ensued, and belongs to the note to *Sherlag v. Kelley*, 19 L.R.A.(N.S.) 633. However, the court decided in that case that the husband could recover only for the expenses he was put to in his endeavor to cure the wife, and straightway followed *Feneff v. New York C. & H. R. R. Co.* 24 L.R.A.(N.S.) 1024, wherein it was held that a wife cannot recover for loss of consortium, against a stranger, for negligently injuring her husband physically and mentally, so that his companionship is less satisfactory and valuable than before the injury, where he has a right to recover full compensation in his own name. Nor did the court stop there. It went further, and said: "We do not see why the case of *Feneff v. New York C. & H. R. R. Co.* supra, is not decisive of this case. No valid distinction can be drawn between the husband's right to re-

cover for the loss of his wife's consortium, in cases growing out of the negligence of a third party, and the wife's right to recover for loss of the husband's consortium in like cases. Neither can it make any difference that, in the case of the wife, the loss of consortium is or may be the sole ground of recovery, and in the case of the husband it is or may be one of several grounds of recovery."

That the husband has a separate right of action to recover damages for the loss of services and consortium of his wife occasioned by her injury is the settled law of this and other jurisdictions. *Blair v. Bloomington & N. R. Electric & Heating Co.* 130 Ill. App. 400.

Where the husband and wife join in an action to recover for personal injuries to the latter it has been held that, under the Iowa statute (Rev. Stat. 1860, § 2771), the husband may join a claim in his own name and recover for the loss of his wife's society. *McDonald v. Chicago & N. W. R. Co.* 26 Iowa, 124, 96 Am. Dec. 114. This holding, it will be observed, is contrary to the rule as established under the common law.

So, in *Casewell v. North Jersey Street R. Co.* 69 N. J. L. 226, 54 Atl. 565, it was held that the husband and wife may sue together for personal injuries received by the latter, and in the action he may recover, among other items, compensation for the deprivation of the society of his wife.

E. M. S.

in such an action would inure to the benefit of the husband, a partner in the wrong, as a chose in action reduced to possession. "By marriage, the husband and wife are one person in the law; that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband, under whose wing, protection, and cover she performs everything."

1 Bl. Com. 442. "We may observe that in these relative injuries notice is only taken of the wrong done to the superior of the parties related, by the breach and dissolution of either the relation itself, or at least the advantages accruing therefrom; while the loss of the inferior by such injuries is totally unregarded. One reason for which may be this: that the inferior has no kind of property in the company, care, or assistance of the superior, as the superior is held to have in those of the inferior, and therefore the inferior can suffer no loss or injury." 3 Bl. Com. 143.

In most of the states of this country alienation of affections, although unaccompanied with criminal conversation or enticing or harboring, has come to be recognized as a wrong to the husband belonging to the same class as the two just considered, both as to its necessary consequences in the destruction of the conjugal relation, and also for that reason in its legal consequence as furnishing the husband a ground for an action to recover for the loss of consortium, whether that loss be that of services or society, or both. *Foot v. Card*, 58 Conn. 1, 6 L.R.A. 829, 18 Am. St. Rep. 258, 18 Atl. 1027; *Nolin v. Pearson*, 191 Mass. 283, 4 L.R.A. (N.S.) 643, 114 Am. St. Rep. 605, 77 N. E. 890, 6 A. & E. Ann. Cas. 658; *Fratini v. Caslini*, 66 Vt. 273, 44 Am. St. Rep. 843, 29 Atl. 252; *Cross v. Grant*, 62 N. H. 675, 13 Am. St. Rep. 607. The courts which recognize the alienation of a wife's affections as a wrong to the husband, justifying an action, view it in the same light as did the common-law abduction and adultery, and treat it in the same way. The logic of this is apparent.

Blackstone's third class includes only cases in which personal injuries actionable in trespass are inflicted upon the wife. The situation presented in such cases, as bearing upon an injury to the relative rights of a husband, is very different from that which results from a wrong falling within one of the other two classes. The former are not only not destructive of the marital relation, but they have no tendency to even impair it. They are not calculated to change the feelings of the parties toward each other, to diminish their love and affection, to lessen the sweetness of their companionship,

or to weaken the desire to do all that is incumbent upon the parties to a marital union. Their result is to impair physical capacity, and, in so far as the husband is concerned, to diminish the ability of the wife to render to and bestow upon him that aid and help, and those ministrations which, in health, she would be able to render and bestow. The disposition of mind remains unchanged, but the injuries received set limitations upon the ability to perform. The consequences to the husband are only those which flow from an impairment of physical capacity in the wife, and in no manner from a change of the mental and moral attitude, which means a destruction of the marital relation in all respects save form.

Since Blackstone's day there has been an extension of the common-law right of a husband to recover for loss of consortium to cases in which the personal injury sustained by the wife was the result of negligence, so that it is generally held that it makes no difference whether the injury is intentionally or negligently inflicted. 1 Cooley, Torts, 469, and cases cited in note. It is not difficult to understand how this latter extension came about. From a modern point of view the classification, early made, of batteries with abduction and criminal conversation as wrongs furnishing a husband a right of action against the wrongdoer for loss of consortium, is less apparent, since there is no clear connection between the two classes of wrongs, and since in the latter class the loss of society, companionship, and affection does not appear to be present as a natural consequence of the wrong. Loss or impairment of conjugal affection is certainly not a natural result of physical injuries suffered by one of the parties to a marital union. Neither is there to be expected an impairment in other ways of the conjugal relation viewed from its sentimental, as distinguished from its practical, side. It is scarcely to be imagined that the law, in the early stages of its development, had any notion of assuming that a physical injury to a wife would be attended with such consequences as these, or of justifying an inquiry whether, in the given case, such consequences had actually arisen, or of attempting to measure the pecuniary value of such consequences, and awarding that measure to the husband.

There is, however, a real connection between the natural results of the two classes of wrongs, in that they alike involve a loss of certain of the benefits which attach to the marital relation. It may not be the same benefit, or the same degree of that benefit, in one case as in the other. But

that benefit is one which is embraced within the comprehensive term "consortium." It may in one case be a benefit whose essence is service, and in another, one which flows, chiefly or entirely, from the purely personal relation, and is founded in affection and mutual regard. But in either event it is a loss which lies in the same general field.

There is another common ground in that, as we have seen, service, in the early common-law conception, was a pre-eminent feature of a husband's marital rights, and one around which centered others which impress the modern mind as being limited to the sentimental rather than extended to embrace the useful and practical aspects of marriage. There can be little doubt that it was these useful and practical incidents, embodied in the idea of service, and the capacity to render in a useful and helpful way aid, assistance, and co-operation, which the law originally regarded, and has continued to regard, as pre-eminently the foundation of recovery in personal-injury cases where there was loss or impairment thereof. It was these which had their natural origin in physical impairment, and it was therefore necessarily these which the law must have had in contemplation when the right to recover in personal-injury cases as for an injury to the husband was recognized. But that fact furnishes no reason why the loss should not have been treated as that of consortium. The confusion which has apparently grown up has arisen not from the use of this term, but from the repetition of familiar defining phrases without proper discrimination between their different phases as appropriate to differing conditions.

An examination of the multitude of cases in which recovery by the husband for loss of consortium resulting from personal injuries has been approved, and especially the earlier and better considered of them, discloses that the loss of service and the capacity for service resulting from diminished or destroyed ability to serve in useful ways has been the real basis of recovery. Search for a case of that character in which it has been held, either directly or by reasonable implication, that a husband could recover for the simple reason that conjugal affection, society, or companionship had been rendered less agreeable or satisfactory to the husband by reason of an injury to his wife, will, we think, bear small fruit. There are, indeed personal-injury cases in which the familiar general language descriptive of consortium, and including all its varied elements pertinent to one situation or another, is repeated. Color is, doubtless, thus given to the proposition that the basis of

recovery in the one class of cases is in its practical application the same as in the other. But these will be found to be hasty expressions borrowed from one set of conditions for use in another, without thought as to whether all the enumerated elements had direct pertinence to the situation under consideration.

It is quite inconceivable that the law which has set its face steadfastly against a recovery by a husband where the conjugal relation had been disturbed by the intrusion of an admirer upon the society, attentions, and regard of the wife, so that the companionship and marital relations of the married pair had been rendered less pleasant and agreeable to the husband, and the law which has been reluctant to recognize a right of action where the affections of the wife had been alienated, should early concede the right of recovery where there had been only such impairment of conjugal relations, pure and simple, as would result from a diminution of physical powers due to personal disability. *Lellis v. Lambert*, 24 Ont. App. Rep. 653, 654; *Houghton v. Rice*, 174 Mass. 366, 368, 47 L.R.A. 310, 75 Am. St. Rep. 351, 54 N. E. 843.

Such has been the history of the development of the common law in relation to the matter in question, and such the state of the law prior to the comparatively recent statutes regulating the status and rights of married women. Counsel for the defendant contends that the changes thus accomplished in this jurisdiction remove all foundation for the common-law principle, in so far as it justifies a recovery for the loss of consortium, in any sense of that term, resulting from personal injuries inflicted upon a wife. As incidental to his argument he asserts that these changes have placed the two parties to a marriage in equal positions in respect to the right of recovery for a loss of service, society, or companionship as a result of personal injuries to the other, so that, if one of them is entitled to recover, the other, under reversed conditions, must be.

In *Foot v. Card*, 58 Conn. 1, 6 L.R.A. 829, 18 Am. St. Rep. 258, 18 Atl. 1027, a case which grew out of a marriage contracted before the statute (Pub. Acts. 1877, chap. 114, p. 211) was enacted, we said that, as the parties to a marriage stood upon an equality in so far as their right to its incidents of conjugal society and affection were concerned, we were unable to discover why the right of a wife to sue for the loss of those incidents as the result of an alienation of affections should not be the same as that of the husband under like conditions. We now have a somewhat different question presented, and it is presented under

conditions which have been materially affected by the legislation of 1877. We are not now dealing with the sentimental side of the conjugal relation. If we were, the decision in *Foot v. Card*, supra, would furnish authority for the preliminary proposition that a husband now stands before the law in the same position as to a right of action growing out of a loss within that field. We are, however, concerned with the more material side of the marital union,—with the side which represents practical results expressed in the terms of service. In *Mathewson v. Mathewson*, 79 Conn. 23, 32, 35, 5 L.R.A. (N.S.) 611, 63 Atl. 285, 6 A. & E. Ann. Cas. 1027, we had occasion to review at length the changes which had been wrought in the legal status of married women by comparatively recent legislation in this state, culminating in the act of 1877, and to note the marked character of the results which must attend them. In this connection we observed that this legislation had removed the foundation of the formed legal status, namely, the unity in the husband of his own and his wife's legal identity and capacity to own property, and laid a new foundation; namely, the equality of husband and wife in legal identity and capacity of owning property. We said that this was in the nature of fundamental legislation, involving all the results necessarily owing from the principle established; that in enacting it the state adopted a fundamental change of public policy; and that the new legal status must be administered in accordance with that policy. That case immediately concerned contractual rights. But its language is equally appropriate to all the rights of married women who come under its application. Her identity is no longer merged in that of her husband. She is recognized as having a complete legal entity of her own, with rights of her own, and enforceable as her own. She is no longer looked upon as the servant of a master to whom she owes the duties of a servant. Her place before the law is one of equal dignity with that of her husband. She owes duties to her husband; he in like manner owes similar ones to her. These duties include those of both helpfulness and love. He has no monopoly of rights, and she has come into a position in which her rights are recognized, and will be enforced. Under such conditions the conclusion is irresistible that whatever right the one party to a marriage relation should have to recover for the loss of whatever incidents of that relation fall within the field of either service or society and companionship should likewise be recognized in the other.

The question then remains whether the law shall say that both husband and wife

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are entitled to maintain an action for loss of consortium when the other sustains at the hands of a third person personal injuries, not accidental, resulting in physical impairment, or that neither can do so. As the result of the legal status created for those who come under the operation of the act of 1877 it seems clear that in an action to recover for personal injuries to a wife, compensation can be obtained for the resultant physical impairment and disability as fully and to the same extent as in an action by a husband, where he is the person personally injured. This impairment and disability necessarily includes diminution or destruction of the capacity to serve or help in all practical ways. This being so, and the foundation of the husband's former recovery being essentially grounded, as we have seen it was, in the impairment of the wife's capacity for service and usefulness, it follows quite inevitably that the wife's recovery must be regarded as exclusive, except, of course, as to expenses which the husband may have been called upon to incur by reason of the wife's injury. The right to recover these rests upon a different basis.

Some courts, in their efforts to justify the ancient rule as applied to modern conditions, have attempted to draw a distinction between a wife's capacity for productive service in employment or business and capacity for service within the domain of domestic helpfulness and assistance; permitting recovery by the wife for the former and by the husband for the latter. This distinction carries legal refinement too far into the region of the impractical in an attempt to save a principle which does not belong to conditions which now exist in this state, at least, and rests upon grounds by no means satisfactory.

If it be said that this reasoning ignores the fact that a husband may, as the result of the disability of his wife, be injured in that her society and companionship are thereby rendered less agreeable and satisfactory and his married life less pleasant, and that the court ought at least to discover if such is not the case, and award him compensation for whatever he may have suffered in that way, the answer is that the law has never undertaken any such investigations, has never countenanced any attempt to measure pecuniarily such a loss, and, as we have seen, has never recognized in the mere impairment of conjugal relations, pure and simple, the foundation of a right of action. *Feneff v. New York C. & H. R. R. Co.* 203 Mass. 278, 24 L.R.A. (N.S.) 1024, 133 Am. St. Rep. 291, 89 N. E. 436.

We are of the opinion that the reason

for the former rule no longer exists, and that it should cease to have recognition. "Where the reason of the law fails, the law ceases to operate." Mathewson v. Mathewson, 79 Conn. 23, 26, 5 L.R.A. (N.S.) 611, 63 Atl. 285, 286, 6 A. & E. Ann. Cas. 1027. The court was therefore in error in allowing the plaintiff the sum of \$300 or any sum for loss of consortium, and it would not matter whether the allowance was for loss of what is termed service or society, or both.

There is error in part, the judgment is set aside, and the cause remanded, with direction to the Superior Court to render a judgment for the amount of \$1,418 damages.

The other Judges concur.

NEBRASKA SUPREME COURT.

HUGH H. CARROLL, Appt.,
v.
VILLAGE OF ELMWOOD et al.
(88 Neb. 352, 129 N. W. 537.)

Dedication — fee — products of soil.

Where land is platted for and dedicated to city or village purposes in accordance with the provision of article 1 of chapter 14 of the Compiled Statutes of 1909, the city or village acquires the ownership of the streets, alleys, and public grounds in fee simple, and an abutting lot owner cannot maintain an action against the city or village to recover the value of the natural products of the soil, grown upon the surface of an adjacent street which has been converted to the use of the municipality.

(January 24, 1911.)

Headnotes by BARNES, J.

Note. — Right to vegetation growing in highway.

This note is confined to the right to grass, shrubs, grain, and similar vegetation growing in the highway, and does not include trees.

As to right to mineral under the surface of street or highway the fee of which is vested in the public, see note to Leadville v. Bohn Min. Co. 8 L.R.A. (N.S.) 422.

As to right of municipality to take soil or mineral from highway to injury of fee, see note to Hamby v. Dawson Springs, 12 L.R.A. (N.S.) 1164.

Where title is in adjacent owner.

Where the title to the highway is in the abutting owner, the public have only the right of passing and repassing, and such use of the soil as is necessary to fit it and keep 33 L.R.A. (N.S.)

APPEAL by plaintiff from a judgment of the District Court for Cass County in defendants' favor in an action brought to recover the value of hay alleged to have been unlawfully converted by defendants. Affirmed.

The facts are stated in the opinion.

Mr. A. N. Sullivan, for appellant:

The right acquired by the village is a use.

Washburn, Easements & Servitudes, p. 3; Pierce v. Keator, 70 N. Y. 421, 26 Am. Rep. 612.

The presumption is that the abutting landowners on each side of the street own to the center of the street.

Western U. Teleg. Co. v. Williams, 86 Va. 696, 8 L.R.A. 429, 19 Am. St. Rep. 908, 11 S. E. 106; Peabody Heights Co. v. Sadtler, 63 Md. 533; 52 Am. Rep. 519; Vaughn v. Stuzaker, 16 Ind. 338; Terre Haute & S. R. Co. v. Rodel, 89 Ind. 128, 46 Am. Rep. 164; Rice v. Worcester County, 11 Gray, 283, note.

The grass on the right-of-way or street may be cut down in order to make it passable, but it would constitute a trespass *ab initio* to carry off, use, or pasture the grass.

Stackpole v. Healy, 16 Mass. 33, 8 Am. Dec. 121; Woodruff v. Neal, 28 Conn. 165; Griswold v. Bay City, 35 Mich. 452.

The village had no legal authority to engage in the hay industry, and take it by force from an abutting proprietor who had peaceably and lawfully harvested it.

Warren v. Lyons City, 22 Iowa, 351; Glasgow v. St. Louis, 87 Mo. 678; Dubach v. Hannibal & St. J. R. Co. 89 Mo. 483, 1 S. W. 86; Portland & W. Valley R. Co. v. Portland, 14 Or. 188, 58 Am. Rep. 299, 12 Pac. 265; Pomeroy v. Mills, 3 Vt. 279, 23 Am. Dec. 207; Le Clercq v. Gallipolis, 7 Ohio, 217, 28 Am. Dec. 641; Harris v.

it fit for that purpose. Woodruff v. Neal, 28 Conn. 165; Caulkins v. Mathews, 5 Kan. 191; Stackpole v. Healy, 16 Mass. 33, 8 Am. Dec. 121; Adams v. Emerson, 6 Pick. 57; Avery v. Maxwell, 4 N. H. 36; Phifer v. Cox, 21 Ohio St. 248, 8 Am. Rep. 58.

The property to the grass and herbage remains in the abutting owner. Barclay v. Howell, 6 Pet. 498, 8 L. ed. 477; Woodruff v. Neal, 28 Conn. 165; Caulkins v. Mathews, 5 Kan. 191; Shawnee County v. Beckwith, 10 Kan. 603; Adams v. Emerson, 6 Pick. 57; Robinson v. Flint & P. M. R. Co. 79 Mich. 323, 19 Am. St. Rep. 174, 44 N. W. 779; People v. Foss, 80 Mich. 559, 8 L.R.A. 472, 20 Am. St. Rep. 532, 45 N. W. 480; Tonawanda R. R. Co. v. Munger, 5 Denio, 255, 49 Am. Dec. 239; Phifer v. Cox, 21 Ohio St. 248, 8 Am. Rep. 58; (hedge) Chambers v. Furry, 1 Yeates, 167 (dictum); Tucker v. Eldred, 6 R. L. 404; Hold-

Elliott, 10 Pet. 25, 9 L. ed. 333; *Coffin v. Portland*, 27 Fed. 412.

Messrs. Byron Clark, William A. Robertson, and William Deles Dernier, for appellees:

The village has the right to hay grown upon land set apart for streets, and cannot be guilty of conversion, nor liable to an action of trover for the taking of such hay.

Davis v. Omaha, 47 Neb. 836, 66 N. W. 859; *Wahoo v. Nethaway*, 73 Neb. 54, 102 N. W. 86; *Lindsay v. Omaha*, 30 Neb. 512, 27 Am. St. Rep. 415, 46 N. W. 627; *Locke v. Shreck*, 54 Neb. 472, 74 N. W. 970.

Barnes, J., delivered the opinion of the court:

Action by a lot owner in the village of Elmwood to recover the value of the grass or hay grown on a street of the village adjacent to his lots, and appropriated by

the village trustees to the use of the corporation.

It appears that in the month of July, 1886, the owners of the land on which the village of Elmwood is situated duly caused the same to be surveyed and platted, and the plat acknowledged in the manner provided by §§ 8980, 8981, *Cobbe's Anno. Stat.* 1909. After such acknowledgment, they duly filed the plat, for record as therein provided, and thus dedicated the streets, alleys, and public grounds, as shown in said plat, to the public use as and for the village of Elmwood; that thereupon said village was organized, and has existed and exercised the powers and duties of a municipal corporation from thence to the present time; that the plaintiff had purchased, and at the time of the commencement of this action owned, certain lots in the said village abutting upon one of the public streets so dedicated as aforesaid; that in

en v. Shattuck, 34 Vt. 336, 80 Am. Dec. 684; *Cole v. Drew*, 44 Vt. 49, 8 Am. Rep. 363; *Harrison v. Brown*, 5 Wis. 27.

The owner of cattle, therefore, who is not an abutting owner, cannot justify turning them on the highway for the purpose of grazing. *Woodruff v. Neal*, 28 Conn. 165; *Stackpole v. Healy*, 16 Mass. 33, 8 Am. Dec. 121; *Jewett v. Gage*, 55 Me. 538, 92 Am. Dec. 615; *Campau v. Konan*, 39 Mich. 362; *Bertwhistle v. Goodrich*, 53 Mich. 457, 19 N. W. 143; *Robinson v. Flint & P. M. R. Co.* 79 Mich. 323, 19 Am. St. Rep. 174, 44 N. W. 779; *Avery v. Maxwell*, 4 N. H. 36; *Holladay v. Marsh*, 3 Wend. 142, 20 Am. Dec. 678; *Harrison v. Brown*, 5 Wis. 27.

If he does so, he is liable to the abutting owner in an action of trespass. *Stackpole v. Healy*, 16 Mass. 33, 8 Am. Dec. 121; *Harrison v. Brown*, 5 Wis. 27.

In 22 *Edw. IV.*, 8, pl. 24, it was said by one of the court that "if one drive a herd of cattle along the highway, where trees, or wheat, or any other kind of corn is growing, if one of the beasts take a parcel of the corn, if it be against the will of the driver, he may well justify, for the law will intend that a man cannot govern them at all times as he would; but if he permitted them, or continued them, etc., then it is otherwise."

In *Caulkins v. Mathews*, 5 Kan. 191, though it was not necessary to pass on the right to grass growing on the highway, the court said: "How a public road on the defendant's land would give the plaintiff any right to pasture his horse outside of the road we cannot see. It is questionable even whether the plaintiff would have any right to pasture his horse in the road itself. It is hardly to be supposed that the legislature, by authorizing the laying out and establishing of roads and highways, or even by passing laws regulating the running at large of stock, intended thereby to 33 L.R.A. (N.S.)

make public pasture fields of the public highways; and it is very questionable whether they have the right to do so, even if they should so desire. Such an act would at least be a very novel exercise of the right of eminent domain. Men may pass and repass with their stock upon the public highways, but we think that that is the extent of their right."

No private person but the owner of the fee has the right to carry away herbage growing on the road. *Gamble v. Pettijohn*, 116 Mo. 375, 22 S. W. 783 (*dictum*); *Cole v. Drew*, 44 Vt. 49, 8 Am. Rep. 363.

Neither has a town the right to cut and carry away herbage from the side of the highway. *Adams v. Emerson*, 6 Pick. 57; *Curtis v. Kesteven County Council*, L. R. 45 Ch. Div. 504, 60 L. J. Ch. N. S. 103, 63 L. T. N. S. 543, 39 Week. Rep. 199.

And it is liable in trespass if it does so. *Adams v. Emerson*, *supra*.

The owner of land adjoining a highway, and who owns to the center thereof, has a right to depasture his land in the highway. *Parker v. Jones*, 1 Allen, 270; *Robinson v. Flint & P. M. R. Co.* 79 Mich. 323, 19 Am. St. Rep. 174, 44 N. W. 779; *Avery v. Maxwell*, 4 N. H. 36; *Holden v. Shattuck*, 34 Vt. 336, 80 Am. Dec. 684.

A strip of grass left to grow in a rural or country road on the side of the beaten track belongs to the owner of the fee, and he has the right to harvest it. *People v. Foss*, 80 Mich. 559, 8 L.R.A. 472, 20 Am. St. Rep. 532, 45 N. W. 480.

A person has no right from mere caprice or express malice to drive upon and destroy a strip of grass growing between the two ditches on the sides of a highway, in the space usually known as the wrought or traveled part of the road, but outside the beaten or traveled path, on the portion of which another person owns the fee. *Ibid*.

The owner of that part of the highway on which grass is growing is not guilty of

the month of August, 1907, the plaintiff cut the grass growing upon the street on which his lots abutted; that immediately thereafter the trustees of the village caused the same to be removed without the consent of the plaintiff, and converted it to the use of the corporation. The plaintiff thereupon brought this action in the justice court of Cass county to recover the value of the grass or hay thus appropriated, the defendants had judgment, and the plaintiff appealed to the district court. On the trial, and after the introduction of the evidence, that court directed the jury to return a verdict for the defendants, which was accordingly done. Plaintiff took the proper exceptions, and has brought the case here by appeal, so that the sole question presented by this record is whether, as an abutting owner, the plaintiff can maintain an action to recover the value of the grass

or hay which grew naturally upon the surface of the village street.

The plaintiff invokes the common-law rule in support of his contention that he was entitled to recover the value of the grass or hay growing in the village street (the natural production of the soil), appropriated by the defendants, and cites authorities from many of the states where that rule prevails. In § 663 of Dillon on Municipal Corporations, vol. 2, it is said: "Where the public acquires only the use, and the fee remains in the original proprietor or abutter, the latter is considered to be the owner of the soil for all purposes not inconsistent with the public rights, and may maintain actions accordingly." In this state, however, a different rule prevails. § 8982, Cobbe's Anno. Stat., provides that "the acknowledgment and recording of such plat is equivalent to a deed in fee simple of such portion of the premises platted as

assault and battery merely because he pushes away the horses of another who wantonly drives over the grass to destroy it, and defends himself from the latter's subsequent attack. Ibid.

In *People v. Foss*, supra, the court said: "It may not be desirable that grass should grow and be harvested in the wrought portion of the highway, but when, upon a rural or country road, the travel has been in a uniform beaten track, leaving grass to grow and ripen undisturbed upon the sides of such track, no one but the abutting landowner, who owns the fee, has the right to harvest it; and he can not only maintain trespass or trover against any person cutting and taking it away against his will, but he has the right to protect it against wanton or malicious damage or destruction, whether it is attempted to be done under the guise of travel upon the highway or in some other way. In this case the complaining witness could not have destroyed this grass by turning his cattle upon it to pasture it. Neither, in my opinion, could he drive his horses and wagon upon it to trample it under foot, when it was not at all necessary to do so, and while he knew Foss and his son were at work gathering it. The law does not permit or encourage any 'dog in the manger' business of this kind."

A hedge growing in the public road in such a place as not to inconvenience public travel is not such a nuisance as will justify any person in abating it, and one who cuts it down is liable to the abutting owner in damages. *Phifer v. Cox*, 21 Ohio St. 248, 8 Am. Rep. 58.

In *Shawnee County v. Beckwith*, 10 Kan. 603, the court held that when a highway is laid out, nothing passes to the public except what is actually necessary to make the road a good and sufficient thoroughfare for the public; and hence, that a hedge growing within the limits of a newly laid out highway belonged to the owner, which he could remove at pleasure; and that

where the cost of removal of the hedge was less than the cost of a new fence, he could only recover the difference. The court said: "The fee in the land never passes to the public, but always continues to belong to the original owner. He continues to own the trees, the grass, the hedges, the fences, the buildings, the mines, quarries, springs, water courses, in fact everything connected with the land over which the road is laid out which is not necessary for the public use as a highway. Angell, Highways, chap. 7, §§ 301 to 312, and cases there cited. He may remove all these things from the road, or use and enjoy them in any other manner he may choose, so long as he does not interfere with the use of the road as a public highway. No other person has any such rights. In fact, the original owner has as complete and absolute dominion over his land, and over everything connected therewith after the road is laid out upon it, as he had before, except only the easement of the public therein. In the present case there is no claim or even pretense that the said hedge was needed for the road."

Constitutionality of statute allowing cattle to graze on highway.

Statutes authorizing the appropriation to the use of anyone having cattle which he may choose to have run at large, of the grass and herbage growing in the highway the fee to which, subject to the public easement of a right of way, is in a private person, without any provision for compensation, would on principle seem to be unconstitutional, since at common law such vegetation is the property of the owner of the fee. *Woodruff v. Neal*, 28 Conn. 165.

The constitutionality of such statutes has been doubted or denied in cases in which it was not necessary to decide the matter. *Campau v. Konan*, 39 Mich. 362; *Robinson v. Flint & P. M. R. Co.* 79 Mich. 323, 19 Am. St. Rep. 174, 44 N. W. 779; *Tona-*

is on such plat set apart for streets or other public use, or as is thereon dedicated to charitable, religious, or educational purposes." The law of Iowa on this subject is identical with the section of our statutes above quoted, and in that state it was held that laying off and recording a town plat or an addition thereto, under chapter 41 of the Code of 1851, had the effect to vest in the corporation the fee simple title to an exclusive right of dominion over the streets and alleys thus dedicated to public use, and that in such case neither the original proprietor nor his grantees have the right to the subterraneous deposits of coal within the limits of such street, and the corporation was allowed to maintain an action against the abutting lot owner for coal mined and taken by him from beneath the same. *Des Moines v. Hall*, 24 Iowa, 234.

In § 664, Dillon on Municipal Corporations, vol. 2, it is said: "Where, however, the fee or legal title passes from the original proprietor, as in some of the states it is declared it shall, in statutory dedications, and in cases where land is acquired for streets and public purposes by the exercise

of the right of eminent domain, such proprietor or the adjoining owner cannot maintain an action for injuries to the soil, or ejectment, but he nevertheless has a remedy for any special injury to his rights by the unauthorized acts of others." In *Wahoo v. Nethaway*, 73 Neb. 54, 102 N. W. 86, in speaking of the statute above quoted, this court said: "It would seem that there is in this state much reason for holding that incorporated cities should, in actions relating to their streets, be subject to the operation of the statute of limitations. They own in fee simple the streets, alleys, and other public places within their corporate limits. Comp. Stat. 1899, chap. 14, art. 1, §§ 104, 106. They may maintain ejectment to recover possession of them. They may, speaking generally, vacate them either in whole or in part. The right is even given to sell and dispose of them, and apply the money derived from the sale to any legitimate municipal purpose. See Comp. Stat. 1899, chap. 14, art. 1, § 77. In other words, municipal corporations are invested with a sort of proprietary interest in this class of property, and may be required, therefore, to guard it with the

wanda R. R. Co. v. Munger, 5 Denio, 255, 49 Am. Dec. 239; *Holladay v. Marsh*, 3 Wend. 142, 20 Am. Dec. 678.

In *Tonawanda R. R. Co. v. Munger*, 5 Denio, 255, 49 Am. Dec. 239, the court, speaking of the constitutionality of statutes allowing cattle to run at large, said: "Cattle at large in the highway will not only trample down, but also crop and eat the grass and herbage there growing; and if the legislature have power to authorize their running at large, the grazing cannot be wrongful. What would this be but taking the private property of the owner of the land used as a highway, and transferring it to the owner of the cattle? In my judgment, the legislature have no such power, whether compensation be made or not, but certainly in no case unless compensation is made. On this short ground, I think the town regulation assuming to authorize cattle to 'run at large' was wholly void."

Such statutes have, however, been held constitutional on the ground that any injury from the exercise of the right of public pasturage will be considered and compensated in the assessment of damages for the taking of the land for a highway. *Griffin v. Martin*, 7 Barb. 297, Hand, J., dissenting.

This reason, however, even if valid, would not apply where the highway was laid out before the passage of the statute allowing cattle to run at large.

In *Griffin v. Martin*, supra, the following additional reason is given for upholding such a statute: "It cannot with truth be said that a by-law like the one in ques-

tion takes the property of one man and gives it to another, or even to the public without compensation. The owner of the soil is not deprived of the pasturage, any more than he is of the way. He can enjoy both in common with his neighbors."

But surely this is very fallacious reasoning, for if the owner of land is deprived of the exclusive use of the vegetation growing on it, and compelled to enjoy it only in common with others, he is deprived of a valuable right. It may as well be said that he is entitled to no compensation when part of his land is taken for a highway, because he can enjoy the way in common with others.

In *Hardenburgh v. Lockwood*, 25 Barb. 9, the court concurred in the decision in *Griffin v. Martin*, supra, saying: "I regard the right to allow cattle, horses, or sheep to go at large on highways as one of the easements or servitudes pertaining to the land occupied as a highway. The right is supported by usage as old as the history of our country. The land is to be presumed to have been taken with reference to this usage, and the exercise of this right by the proper authorities."

The right of the public to pasture cattle on the highway is not a legitimate public use as a highway, and although long-continued usage might make it such, so that damages for such use would be presumed to be compensated for at the time of laying out the road, no good reason appears why there should be such a presumption in the absence of such special usage.

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same degree of vigilance as that which is exacted of private owners. It is believed that the authorities are all agreed upon the proposition that as to property which is held in private ownership, and not upon public trusts, municipal corporations are on the same footing with private individuals, and equally affected by the limitation laws." And it was held prior to the passage of the act of 1899 that the statute of limitations would run against the lands of a municipal corporation the same as against the lands of a private individual. It follows, therefore, that the village of Elmwood being the owner in fee of the streets upon which the plaintiff's lots abutted, it was entitled to use and appropriate the grass or other natural products of the soil growing upon the surface thereof, and the plaintiff, having no legal title to the streets, could not maintain an action against the city for the conversion to its own use of any of such products.

We wish it to be thoroughly understood, however, that by this holding the plaintiff is not to be deprived of any of his rights to the use and occupation of the streets, or any of the equitable or incidental rights that accrue to him by reason of his abutting ownership. Neither do we follow the rule announced in *Des Moines v. Hall*, supra, to the extent of holding that the city would be entitled to minerals, if any should be found, underlying the surface of its streets. It is sufficient for the disposition of this case to declare that the plaintiff cannot maintain this action to recover the value of the hay growing upon the street adjacent to his lots. It is contended by counsel for the plaintiff that, by the language of the dedication of the plat, the original owners retained the title to the streets, and only dedicated the same to the public use. The acknowledgment of the plat seems to be in the ordinary and usual form. It reads as follows: "We, the undersigned owners and proprietors of the land included in the accompanying plat of Elmwood, Cass county, Nebraska, do hereby approve of the division of the grounds into lots, and ratify the said plat; and do hereby dedicate to the public use the streets and alleys as thereon shown, and in accordance with the survey thereof." This dedication did not have the effect contended for by plaintiff, and did not restrict the rights of the village or the public to a mere use and occupation of its streets, but was a sufficient compliance with the statute, and, when taken together with the survey, the filing, and recording of the plat, operated as a conveyance of the streets designated thereon in fee simple to the corporation. Indeed, if the plat had been filed

and recorded without any acknowledgment, the acceptance of the grant and a continuous occupancy of the streets since 1886, with the consent of the plaintiff and his grantors, would be sufficient to estop him from now claiming that the village has not the fee-simple title thereto declared by the statutes.

We are therefore of opinion that the judgment of the District Court was right; and for the foregoing reasons it is affirmed.

NEBRASKA SUPREME COURT.

FRANK C. BURKE, Receiver of Mutual Hail Insurance Society,

v.

R. SCHEER, Impleaded, etc., Appt.

(— Neb. —, 130 N. W. 962.)

Corporation — insurance — insolvency — action against stockholders.

1. A single suit in equity cannot be maintained by the receiver of an insolvent mutual hail insurance company, organized under chapter 43, Comp. Stat. 1909, against all the policy holders of such insolvent company, for the separate liability of each

Headnotes by FAWCETT, J.

Note.—*Right to maintain single suit in equity to enforce separate liability of members of an insolvent insurance association.*

It is to be noted that the foregoing subject includes only the question of equity jurisdiction to enforce an independent liability of a member of an insolvent association, as distinguished from its jurisdiction to enforce the liability of such a member where the liability is joint instead of independent. This specific question seems to have been passed upon in no other case. For somewhat analogous cases, see note to *Rogers v. Boston Club*, 28 L.R.A.(N.S.) 743, which discusses the question of the jurisdiction of equity on the ground of preventing a multiplicity of suits to enforce liability of members of a club or corporation.

As to equity jurisdiction to adjust losses between concurrent insurance policies on the same property, to avoid a multiplicity of suits, see note in 32 L.R.A.(N.S.) 941.

For cases involving the jurisdiction of equity, upon the ground of avoidance of a multiplicity of suits, to entertain suits for possession of separate parcels of land held adversely by different defendants, claiming under a common source, see note in 14 L.R.A.(N.S.) 239.

As to the power of equity to take jurisdiction because of a multiplicity of actions at law for personal injuries growing out of a single tort, see note in 20 L.R.A.(N.S.) 848.

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policy holder for unpaid assessments, whether levied by the directors of the company before insolvency, or by the court thereafter, on the ground that such single suit would prevent a multiplicity of actions at law; nor can such a suit be maintained on the ground that it is ancillary or auxiliary to the main insolvency proceeding; nor upon the ground that the money, when collected, would become part of a fund that would be distributed under the direction of the court; since no question is involved in which the defendants have a common interest, and the suit is merely an aggregation of separate actions at law, each involving separate issues and having no relation to each other, except that there is a common plaintiff, and in each of which the remedy at law is adequate, and is the remedy pointed out by the statutes governing such companies.

Same — action for assessments — non-residents.

2. Nor can the receiver join in one action all policy holders or members of such company who are severally liable for individual unpaid assessments,—those who reside in counties other than the county where the suit is brought, as well as those who reside within such county,—and issue summons to such other counties to obtain service upon such nonresidents.

(April 8, 1911.)

APPEAL by defendant from a judgment of the District Court for Lancaster County sustaining a demurrer to the answer in a suit to recover unpaid assessments upon members of a mutual hail insurance company. Reversed.

The facts are stated in the opinion.

Messrs. Hainer & Smith, for appellant:

The liability of a member in one of these societies is a several, and not a joint, liability, and the statute expressly provides for the enforcement of such several liability by a suit instituted against the individual member.

Pollard v. Bailey, 20 Wall. 520, 22 L. ed. 376; Keith v. Tilford, 12 Neb. 271, 11 N. W. 315; Holmes v. Hutchins, 38 Neb. 618, 57 N. W. 514; Fitzgerald v. Fitzgerald & M. Constr. Co. 41 Neb. 471, 59 N. W. 838; German-American F. Ins. Co. v. Minden, 51 Neb. 870, 71 N. W. 995; Terry v. Little, 101 U. S. 216, 25 L. ed. 864.

Summons cannot be issued and served upon a defendant in a county other than that where he resides, unless a joint cause of action exists against the defendant served in the adjoining county and a defendant served in the county where the action is instituted.

Stewart v. Rosengren, 66 Neb. 445, 92 N. W. 586; Penney v. Bryant, 70 Neb. 120, 96 N. W. 1033; McKibbin v. Day, 71 Neb. 281, 98 N. W. 845.
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The statutory liability or remedy cannot be changed or dispensed with by alleging that the suit is ancillary only to the suit for the appointment of a receiver, nor can the equity jurisdiction be sustained on the ground of preventing a multiplicity of suits.

Hale v. Allinson, 188 U. S. 57, 47 L. ed. 381, 23 Sup. Ct. Rep. 244, affirming 102 Fed. 790.

Mr. G. F. Rose also for appellant.

Messrs. E. P. Holmes and G. L. Delacy, for appellee:

The liability of the stockholders for either unpaid subscriptions, which is contractual, or for the statutory liability, must be enforced by a receiver in a suit in equity, joining all the stockholders.

Farmers' Loan & T. Co. v. Funk, 49 Neb. 353, 68 N. W. 520; German Nat. Bank v. Farmers' & M. Bank, 54 Neb. 593, 74 N. W. 1086; Van Pelt v. Gardner, 54 Neb. 701, 74 N. W. 1083, 75 N. W. 874; Hastings v. Barnd, 55 Neb. 93, 75 N. W. 49; Pickering v. Hastings, 56 Neb. 201, 76 N. W. 587; Reed v. Burg, 2 Neb. (Unof.) 117, 96 N. W. 414; Fremont Package Mfg. Co. v. Storey, 2 Neb. (Unof.) 325, 96 N. W. 416; Emanuel v. Barnard, 71 Neb. 756, 90 N. W. 666; Swing v. Karges Furniture Co. 123 Mo. App. 367, 100 S. W. 669; Maine Trust & Bkg. Co. v. Southern Loan & T. Co. 92 Me. 444, 43 Atl. 24; Pettibone v. McGraw, 6 Mich. 441; Kelly v. Clark (Kelly v. Fourth of July Min. Co.) 21 Mont. 291, 42 L.R.A. 621, 69 Am. St. Rep. 688, 53 Pac. 959, 19 Mor. Min. Rep. 431; Carter, R. & Co. v. Samuel Hano Co. 73 N. H. 588, 64 Atl. 201; See v. Heppenheimer, 55 N. J. Eq. 240, 36 Atl. 966; Cook v. Carpenter, 212 Pa. 165, 1 L.R.A. (N.S.) 900, 108 Am. St. Rep. 854, 61 Atl. 799, 4 A. & E. Ann. Cas. 723; Efrid v. Piedmont Land Improv. & Invest. Co. 55 S. C. 78, 32 S. E. 758; Barton Nat. Bank v. Atkins, 72 Vt. 33, 47 Atl. 176; Stiles v. Laurel Fork Oil & Coal Co. 47 W. Va. 838, 35 S. E. 986; Gainella v. Bigelow, 96 Wis. 185, 71 N. W. 111; Eau Claire Nat. Bank v. Benson, 106 Wis. 624, 82 N. W. 604; Dwinell v. Minneapolis, F. & M. Mut. Ins. Co. 97 Minn. 340, 106 N. W. 315.

The action being one in equity, and being rightly brought in Lancaster county, summons can be sent to the other counties and served on defendants therein, giving the district court of Lancaster county jurisdiction over the persons of all the defendants so served.

Brown v. Brown, 10 Neb. 349, 6 N. W. 397; Cobbey v. Wright, 23 Neb. 250, 36 N. W. 505; Gainey v. Gilson, 149 Ind. 58, 45 N. E. 633.

Fawcett, J., delivered the opinion of the court:

The Mutual Hail Insurance Society, a corporation organized under the provisions of "An Act to Authorize the Organization of Mutual Hail Insurance Companies" (Comp. Stat. 1909, chap. 43), which, for the sake of brevity, will be designated the company, was, on February 19, 1908, by the district court of Lancaster county, adjudged insolvent, and plaintiff was appointed receiver. The court found the liabilities of the company to be \$13,277.95. There being no funds in the hands of the receiver with which to pay these liabilities, the court made an assessment upon the policy holders of the company, 254 in number, and residing in many different counties, of \$1.25 per acre for the number of acres covered by their several policies. The receiver was then instructed to bring suit against all of the policy holders. Only three of the policy holders were residents of Lancaster county. The receiver brought this suit in the district court of Lancaster county against all of the 254 policy holders, and had summons directed to the sheriff of each of the outside counties where any of the policy holders resided. The defendant George Spurl, for a separate answer, alleged that, at the time of the commencement of this action, and for a long time prior thereto, and ever since, he was and has been a resident of Nance county; that the only defendants in this suit residing within the county of Lancaster at the time of the commencement thereof were Charles Newman, J. W. Jacoby, and G. M. Coffman; that the summons for the answering defendant was issued by the clerk of the district court of Lancaster county, directed to the sheriff of Nance county, and by said sheriff served upon said defendant in said Nance county; that no other service was made upon him, and that he has made no voluntary appearance in said cause; that the petition does not set forth any joint liability against the answering defendant, or the said defendants, or either of them, residing in Lancaster county, and that the answering defendant is not and was not jointly liable with the defendants residing in Lancaster county, or any of the defendants mentioned in the petition, for any sum of money whatever. Wherefore said defendant "challenges the jurisdiction of the court over his person, and alleges the fact to be that said action is not rightly brought against him in said Lancaster county."

A general demurrer to the answer was sustained, and defendant electing to stand upon his answer, judgment was entered against him for \$146.25, from which judgment he prosecutes this appeal.

The main grounds assigned by plaintiff as a basis for his right to join these 254 actions at law in one suit in equity, and to send process for 251 of the defendants to the numerous outside counties in the state, are: That the company issued to each of the defendants, on or about the day mentioned in their respective applications, a policy of insurance, insuring him against loss or damage to his crops, "which several policy each one of the defendants received and now holds, and each of the defendants, by virtue thereof, is a member of the said Mutual Hail Insurance Society of Nebraska; that each of the defendants duly signed and delivered to the said corporation, . . . an application in writing, and became thereby bound and holden, as is provided by law, for his ratable share of all the losses and expenses of said society incurred while he was a member, and each of the defendants is indebted to the said corporation and its creditors in the specific sum so assessed against him;" that the aggregate sum of all the individual assessments of the defendants, if realized, would be more than sufficient to pay the costs and the principal and interest due the creditors; but that certain of the defendants have removed from the state, and others are insolvent; that in order to make a just, ratable, and equitable distribution among the members of the burden of said corporate debts, a court of equity should take into account the losses in collections that will result from such removals and insolvency, "and, upon rendition of judgments for the full amounts of said assessments, plaintiff will submit to the court whether execution should immediately issue for the full liability, or whether, in the first instance, an execution for a part only thereof would be considered adequate for the collection of a sum sufficient to discharge all of the said liabilities and costs;" that this suit is ancillary only to the main receivership suit; that the funds to be derived from the proceedings are trust funds for equal and ratable distribution among the creditors, and the application and distribution thereof should be ordered and directed by a court of equity; that separate and independent actions at law against each of the defendants would require a multiplicity of lawsuits, "and would lead to excessive and interminable complications, and inflame and excessively aggregate the costs of administering the affairs of said corporation, so as to become burdensome upon said trust, in that costs of separate suits and costs of reputable counsel or attorneys would necessarily equal or exceed in most cases the entire avails of individual actions commenced in justice court, with right of

successive appeals to the supreme court; that attempts to enforce said liabilities by such separate suits would leave open to controversy an issue in each separate suit as to the necessity of enforcing said assessment in full, and as to whether the amount of all the unpaid debts sufficiently justified the enforcement of said full assessment against each individual member;" that in all of the aforesaid respects plaintiff is without an adequate remedy at law, and that the collection of sums necessary to discharge said debts can only be made in equity, and the affairs of the company can only be administered by and through the aid of a court of equity. The prayer of the petition is that the court may inquire and determine that the defendants are members of the company, ascertain the particular time for which they carried insurance, the particular debts accruing against the company during the term of membership of each of the defendants, and fix and decree the amount of the liability of each one of the defendants; "that a several judgment be entered in favor of plaintiff and against each one of the defendants found liable as a contributory upon said assessment to the payment of the corporate debts of the said Mutual Hail Insurance Society of Nebraska and the costs of this proceeding, and that execution be awarded against each defendant for the amount so found due from him, or, if the sums apparently collectible upon said judgment should appear to the court to be in excess of that required for the payment of said debts and costs, then the amount for which execution shall issue in the first instance against each defendant may be ascertained and determined by the court."

It will be observed that the petition expressly alleges that the company "issued to each one of the defendants" a "several policy" upon his individual application, and that "each of the defendants" is indebted to the said corporation and its creditors "in the specific sum" so assessed against "him," and that in the prayer the court is asked to ascertain "the particular term" for which each policy holder carried insurance; that the court decree the amount of the liability of "each one of the defendants," and that "a several judgment" be entered in favor of plaintiff and "against each one of the defendants." It is apparent, therefore, that plaintiff is seeking in this suit in equity to obtain 254 judgments at law. Section 121, chap. 43, Comp. Stat. 1907, governing companies of this character, provides: "Such companies may issue policies only on growing crops, insuring against damage or loss by hail, and for any time not beyond the life of its charter.

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. . . All persons insured shall make application in writing, obliging [obligating] themselves to the company for the payment of losses and expenses as required by the by-laws of the company. The liability of the members may be limited by the by-laws, provided that if the total amount collected in any year shall be insufficient to pay all losses and expenses for that year, then the persons sustaining losses shall receive their proportion of the funds realized from the assessment, in full satisfaction of their loss; and no member shall be required to pay more than the amount of his obligation." No by-laws are shown to have ever been adopted, and it is argued by plaintiff that, because the liability of the members has not been limited by the by-laws, therefore their liability is unlimited, and that each member or policy holder is personally liable for all of the debts of the company. The trouble with this contention is that the statute quoted fixes a maximum liability, viz., "and no member shall be required to pay more than the amount of his obligation." No limitation less than that fixed by the statute having been fixed by the by-laws of the company, it may be conceded that each policy holder would be liable for the company's debts to the full amount of his obligation, but that does not render him liable for the entire debts of the company. It would be hard to conceive how any such company could induce substantial and conservative farmers to insure their growing crops when by so doing they would incur such a liability.

Section 124 of the act under which the company was operating provides: "Suits at law may be brought against any member of such company who shall neglect or refuse to pay any obligation given by him or her according to the provisions of this act, and the directors or officers of any company so formed who shall wilfully refuse or neglect to perform the duties imposed upon them by the provisions of this act shall be liable in their individual capacity to the person sustaining such loss." The legislature has therefore prescribed both the maximum of a member's liability and the form of action by which the payment of that liability may be enforced; and we do not think the fact that the company has become insolvent can in any manner enlarge such liability, or change the form of action which may be resorted to for its enforcement. The claim that the present suit will avoid a multiplicity of suits is without merit. Except as it may operate as a "big stick" in preventing policy holders from defending the suit at long range, it would not materially lessen the litigation, as each defendant would have a perfect right to employ coun-

sel, set up his separate and independent defenses, and demand a separate jury trial. *Hale v. Allinson* (C. C.) 102 Fed. 790, affirmed in 188 U. S. 56, 47 L. ed. 380, 23 Sup. Ct. Rep. 244; *High, Receivers*, 4th ed. § 316; *Republic L. Ins. Co. v. Swigert*, 135 Ill. 150, 12 L.R.A. 328, 25 N. E. 680; *Winters v. Armstrong* (C. C.) 37 Fed. 508; *Smith v. Johnson*, 57 Ohio St. 486, 49 N. E. 693; *Smith, Receiverships*, § 231.

The cases cited by plaintiff, from this and other courts, to the effect that a creditor of an insolvent corporation cannot bring a separate action against an individual stockholder of such corporation for the unpaid portion of his stock subscription, but that a receiver should be appointed to bring suit for the benefit of all the creditors, are not in point here. Nor can any of those cases be held to apply to a case like this, where the statute itself has fixed the kind of action that may be resorted to. The reason for those holdings is apparent. If each of the 55 creditors in this case were permitted to commence a separate action against each of the 254 policy holders, and each of the 254 policy holders, in order to avoid paying more than his ratable proportion of the indebtedness, should be compelled to bring an action for contribution against each of his 253 co-policyholders, the courts of this state would be kept busy for a number of years to come in disposing of this litigation. The court in this case did right in instructing the receiver to collect from the policy holders, by suit if necessary, the amounts due from them under their contracts with the company; but it would not be warranted in ordering, nor do we understand from the allegations of the petition that it did in fact order, the receiver to proceed against all of the defendants by a suit in equity. It is the duty of the receiver to obey the order of the court; but in so doing the constitutional rights of each defendant must be recognized, and he will have to proceed by separate actions at law in which each defendant may have the right to defend his own suit free from the embarrassing presence of other defendants with whom he has no joint liability. The fact that this may be expensive, and may result in the creditors failing to receive payment of their demands in full, is a circumstance which cannot be considered. There is ample authority to sustain our holding, in addition to the cases above cited, but we do not deem it necessary to take the time or to enlarge this opinion by a reference to them.

The judgment of the District Court is reversed, and the case remanded, with directions to overrule plaintiff's demurrer.

Reversed and remanded.

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WEST VIRGINIA SUPREME COURT OF APPEALS.

WEAVER MERCANTILE COMPANY

v.

W. D. THURMOND, Plff. in Err.

(68 W. Va. 530, 70 S. E. 126.)

Nuisance — use of property — injury to neighbor.

1. A man is bound to use his premises so as not to injure his neighbor's property. Same — storage of water.

2. A landowner who brings water upon his premises by artificial means, and stores it in tanks or reservoirs for his use, is liable if the water escapes and injures the property of an adjoining owner.

Same — liability of landlord.

3. If a landlord has on his premises a water tank which supplies water to several houses, occupied by several tenants, he is bound at his peril to prevent the water from escaping and injuring the property of an adjoining proprietor.

Evidence — presumption of negligence.

4. If the tank bursts and the escaping water does injury to the property of an adjoining proprietor, negligence will be presumed. In such case the rule of *res ipsa loquitur* applies.

Bankruptcy — failure of trustee to intervene in suit.

5. A trustee in bankruptcy may obtain permission from the bankrupt court to intervene and prosecute a suit brought in the state court by the bankrupt before his adjudication. But his failure to intervene will not abate the suit.

Appeal — intervention of bankruptcy trustee.

6. If the trustee fail to intervene in such suit in the lower court, he cannot do so by petition in this court, after the case has been brought here on writ of error or appeal. Such petition presents original matter which does not belong to the jurisdiction of this court.

(January 24, 1911.)

Headnotes by Williams, P.

Note. — Liability for escape of water stored on premises.

This note supplements the note to *Brennan Constr. Co. v. Cumberland*, 15 L.R.A. (N.S.) 541. It excludes cases in which the damage arises from the bursting of water pipes and the like, and confines itself to cases where the damage results from the escape of water actually stored, as from reservoirs, irrigation ditches, etc.

An irrigating company is liable for negligently permitting water from its ditch to escape to plaintiff's land because of faulty construction of the ditch, or for allowing the water to become obstructed so as to injure plaintiff's land by seepage or percolation, the injury in such a case not being

ERROR to the Circuit Court for Fayette County to review a judgment in plaintiff's favor in an action brought to recover damages for injuries to plaintiff's goods by the bursting of a water tank, alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Messrs. Dillon & Nuckolls for plaintiff in error.

Messrs. Osenton, McPeak, & Horan, for defendant in error:

Defendant was bound to keep the water tank in repair, and to answer in damages for any injury resulting from his negligent failure so to do.

Sawyer v. McGillicuddy, 81 Me. 318, 3

L.R.A. 458, 10 Am. St. Rep. 260, 17 Atl. 124; Milford v. Holbrook, 9 Allen, 17, 85 Am. Dec. 735; Elliott v. Pray, 10 Allen, 378, 87 Am. Dec. 653; Shipley v. Fifty Associates, 101 Mass. 251, 3 Am. Rep. 346; Readman v. Conway, 126 Mass. 374; Looney v. McLean, 129 Mass. 33, 37 Am. Rep. 295; Donohue v. Kendall, 18 Jones & S. 386; Canandaigua v. Foster, 156 N. Y. 354, 41 L.R.A. 554, 66 Am. St. Rep. 575, 50 N. E. 971; Kecoughtan Lodge No. 29, K. P. v. Steiner, 106 Va. 589, 56 S. E. 569, 10 A. & E. Ann. Cas. 256; Dollard v. Roberts, 130 N. Y. 269, 14 L.R.A. 238, 29 N. E. 104; Kirby v. Boylston Market Asso. 14 Gray, 249, 74 Am. Dec. 682; 24 Cyc. Law & Proc. p. 1084.

damnum absque injuria. Paolini v. Fresno Canal & Irrig. Co. 9 Cal. App. 1, 97 Pac. 1130.

In City Water Power Co. v. Fergus Falls, 113 Minn. 33, 32 L.R.A. (N.S.) 59, 128 N. W. 817 (an action by a lower riparian owner for damages caused by the destruction of his milldam by the breaking of the dam of an upper owner), it was held that the erection and maintenance of a dam across a natural water course, for the purpose of utilizing the water power, is not a nuisance, nor is the owner thereof an insurer of its safety; but he is bound to exercise in the premises a degree of care proportionate to the injuries likely to result to others if it proves insufficient; and the dam must be sufficient to resist not merely ordinary freshets, but such extraordinary floods as may reasonably be anticipated.

So, the owner of a dam is liable for damages to property by a flood occasioned by a combination of negligence on his part and by an unprecedented flood, constituting an act of God, provided his negligence was the proximate cause of the injury. Frederick v. Hale, 42 Mont. 153, 112 Pac. 70.

But in Bridgeport v. Bridgeport Hydraulic Co. 81 Conn. 84, 70 Atl. 650, it is held that the owner of a dam is not liable for injuries caused by extraordinary, unprecedented floods, these being classed with inevitable accidents as the result of *vis major* or act of God, against which one cannot reasonably be required to provide.

In Canon City & C. C. R. Co. v. Oxtoby, 45 Colo. 214, 100 Pac. 1127, holding a railroad company liable for damages to adjoining property by seepage water which escaped from a barrow pit maintained on the railroad right of way, and which collected surface water from rains and melting snow, the court seems to have assumed that the liability was not dependent upon the lack of reasonable care to prevent seepage. It referred to the statement in Sylvester v. Jerome, 19 Colo. 128, 34 Pac. 780, that the provision of § 2272 of Mills's Anno. Stat., imposing liability upon the owners of reservoirs for irrigation purposes, was simply an affirmation of a common-law principle.

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In Garnet Ditch & Reservoir Co. v. Sampson, 48 Colo. 285, 110 Pac. 79, 1136, it is held that an absolute liability, not dependent upon the failure to exercise ordinary care, is imposed upon the owner of the reservoirs by § 2272, Mills's Anno. Stat. (Colo.), providing that the "owners of the reservoirs shall be liable for all damages arising from leakage or overflow of the waters therefrom, or by floods caused by breaking of the embankments of such reservoirs." In a *per curiam* opinion on a rehearing in this case, the court said that it had held that the statute imposes an absolute liability, but had not held that a reservoir owner may or may not, under the law of the land, and notwithstanding the statute, be excused from liability upon showing that the injury was caused by the act of God or the public enemy.

It was also held in this case that the provisions of the section were not affected by a later statute requiring reservoirs of certain capacity, or dams of certain dimensions, to be constructed under safeguards and under the supervision of the state engineer, to the end that they may not overflow, and that breakage or seepage may not occur.

This case also holds that natural barriers like mesa or hillside, used by the builder of the reservoir for impounding the water, are equally with artificial embankments within the provision of the statute rendering the owner absolutely liable.

Where a rat gnawed a hole in a box placed in a building to catch water from the roof, the landlord was held not liable to the tenant for damages to goods stored below, by water escaping through the hole, where the landlord had used reasonable care in looking after the security of the box, which was of a kind ordinarily constructed for the purpose. Carstairs v. Taylor, 40 L. J. Exch. N. S. 129, L. R. 6 Exch. 217, 19 Week. Rep. 723.

Mustang Reservoir Canal & Land Co. v. Hissman, — Colo. —, 112 Pac. 800, merely deals with the measure of damages for flooding land,—a question not within the scope of this note.

J. D. C.

The fact that the tank burst and allowed the water to escape and injure the plaintiff's goods was of itself sufficient to create a presumption of negligence, and throw the burden of disproving it upon the defendant.

Cooley, Torts, 3d ed. 1427, 1428; Judson v. Giant Powder Co. 107 Cal. 549, 29 L.R.A. 718, 48 Am. St. Rep. 146, 40 Pac. 1020; Shafer v. Lacock, 168 Pa. 497, 29 L.R.A. 254, 32 Atl. 44; Cork v. Blossom, 162 Mass. 330, 26 L.R.A. 256, 44 Am. St. Rep. 362, 38 N. E. 495; Richmond R. & Electric Co. v. Hudgins, 100 Va. 409, 41 S. E. 736; 29 Cyc. Law & Proc. p. 590.

Williams, P., delivered the opinion of the court:

Action of trespass in circuit court of Fayette county for injury to personal property, judgment for plaintiff for \$650, and defendant brings error.

Defendant was the owner of an hotel situate at the base of a hill in the town of Thurmond, Fayette county. It was supplied with water by means of a large wooden tank erected on the side of the hill some distance above the hotel. The plaintiff company did a mercantile business, and occupied, as a storeroom, a building under lease from J. W. Mankin, situate below the water tank. The tank burst and the water flowed down the hill into the storeroom, and damaged plaintiff's goods.

A number of defenses are made to the action. The first is that the tank was constructed of apparently good material, and in a workmanlike manner; and that, if there was in fact any defect in the material, or fault in construction, such defect was latent, and defendant was ignorant of it, and therefore not liable, because not negligent. But, as we understand the law to be, the liability of defendant does not depend on negligence in construction, but upon negligence in not keeping the water confined. No matter in what the negligence consisted, it is proved by the bursting of the tank. The rule *res ipsa loquitur* applies. If the person whose duty it was to keep the tank in good repair had not been negligent in some respect, the tank would not have burst. The negligent act may have been the failure to keep it properly painted, but it is not material what it was. Liability in cases like the present rests upon the principle that a man who erects a structure upon his premises which, because of neglect to take care of it, becomes a nuisance, either to the public or to the property of an adjoining owner, is liable. He is bound, at his peril to prevent it from injuring the property of his neighbor. In 1 Wood, Nuisances, § 111, the rule is thus 33 L.R.A. (N.S.)

stated: "Every person who, for his own profit or advantage, brings upon his premises, and collects and keeps there, anything which, if it escapes, will do damage to another, subject to some exceptions rendered necessary for the protection of industrial interests, is liable for all the consequences of his acts, and is bound at his peril to confine it and keep it in upon his own premises. If he does not, he is answerable for all the damages that result therefrom, without any reference to the degree of care or skill exercised by him in reference thereto. Therefore, if a man brings water upon his premises by artificial means, and collects and keeps it there, either in reservoirs or in pipes, he is bound at his peril to see that the water does not escape, to the damage of an adjoining owner." This principle has few exceptions, and has been applied in a large number of cases, both in England and in this country. A few of such cases will serve to illustrate the correctness of applying the principle in this case. A cooking range, erected so near a partition wall of two adjoining houses as, by its ordinary use to injure the goods of the adjoining proprietor and render his house uncomfortable and disagreeable, has been held to constitute a nuisance. Grady v. Wolsner, 46 Ala. 381, 7 Am. Rep. 593. Where the walls of a building, after the building has been partially destroyed by fire, were permitted to stand, and afterwards fell upon a person passing along the street, it was held that the corporation owning the building was liable. Church of Ascension v. Buckhart, 3 Hill, 193. A building adjoining the street fell, and injured a person passing. The owner of the building was held liable. Mullen v. St. John, 57 N. Y. 567, 15 Am. Rep. 530. The court also held that, in the absence of explanatory circumstances, negligence of the owner was presumed, and that the burden is upon him to prove that he used ordinary care.

Kearney v. London, B. & S. C. R. Co. L. R. 5 Q. B. 411, is a leading English case decided in 1870. In that case plaintiff was injured by a brick falling on him from the top of one of the pilasters of a railroad bridge as he was passing along a highway underneath. Defendant moved for a nonsuit, on the ground that no negligence was shown; but the court of Queen's bench, by a divided vote, held that it was a case in which the doctrine of *res ipsa loquitur* applied. This case was appealed to the exchequer chamber and was there unanimously affirmed; that court holding that the defendant was bound to use due care in keeping the bridge in proper repair, so as not to injure persons passing along the high-

way, and that there was evidence from which the jury might infer negligence. Negligence may be, and often is, inferable from the nature of the accident causing the injury; as, for instance, from the falling of a barrel into the highway from the window of a shop (*Byrne v. Boadle*, 2 Hurlst. & C. 722, 33 L. J. Exch. N. S. 13, 9 L. T. N. S. 450, 12 Week. Rep. 279); the falling of bags of sugar on plaintiff as he was passing by a warehouse (*Scott v. London & St. H. Docks Co.* 3 Hurlst. & C. 596, 34 L. J. Exch. N. S. 220, 11 Jur. N. S. 204, 13 L. T. N. S. 148, 13 Week. Rep. 410). In the case of *Gee v. Metropolitan R. Co.* L. R. 8 Q. B. 161, 42 L. J. Q. B. N. S. 105, 28 L. T. N. S. 282, 21 Week. Rep. 584, plaintiff was injured by falling out of the door of a railroad coach. He had placed his hand on a brass rod across the door, for the purpose of steadying himself in order to look out of the window. He supposed the door was closed and fastened, but, as soon as he placed his hand on the rod, the door swung open, and he fell out, and was injured. Upon this state of facts the court unanimously held that plaintiff had a right to assume that the door was closed and fastened, that he was not guilty of contributory negligence, and that the negligence of defendant in not having closed and fastened the door of the coach when plaintiff boarded the train, which seems to be a rule of the railroads in England, could be properly inferred. In *Fletcher v. Rylands*, L. R. 1 Exch. 265, 1 Eng. Rul. Cas. 235, which is a leading English case, the facts were: "The defendants constructed a reservoir on land separated from the plaintiff's colliery by intervening land. Mines under the site of the reservoir and under part of the intervening land had been formerly worked, and the plaintiff had, by workings lawfully made in his own colliery and in the intervening land, opened an underground communication between his own colliery and the old workings under the reservoir. It was not known to the defendants, nor to any person employed by them in the construction of the reservoir, that such communication existed, or that there were any old workings under the site of the reservoir, and the defendants were not personally guilty of any negligence; but, in fact, the reservoir was constructed over five old shafts leading down to the workings. On the reservoir being filled, the water burst down these shafts and flowed by the underground communication into the plaintiff's mines." Upon this state of facts, the court of exchequer chamber held that the defendants were liable for the damage caused. The court in its opinion says: "We think that the true rule of law is that the

person, who, for his own purposes, brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril; and, if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiff's default, or perhaps that the escape was the consequence of *vis major*, or the act of God; but, as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient. The general rule, as above stated, seems on principle just. The person whose grass or corn is eaten down by the escaping cattle of his neighbour, or whose mine is flooded by the water from his neighbour's reservoir, or whose cellar is invaded by the filth of his neighbour's privy, or whose habitation is made unhealthy by the fumes and noisome vapours of his neighbour's alkali works, is dammed without any fault of his own; and it seems reasonable and just that the neighbor, who has brought something on his own property which was not naturally there, harmless to others so long as it is confined to his own property, but which he knows to be mischievous if it gets on his neighbor's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. But for his act in bringing it there no mischief could have accrued; and it seems but just that he should at his peril keep it there, so that no mischief may accrue, or answer for the natural and anticipated consequences." And upon authority this, we think, is established to be the law, whether the things so brought be beasts, or water, or filth, or stench." This case was appealed to the House of Lords, and there affirmed. L. R. 3 H. L. 330, 6 Mor. Min. Rep. 129.

The same rule was applied by the supreme court of Minnesota upon a similar state of facts. Defendant had excavated a tunnel upon his own land, extending under the bed of a stream. The pressure of the water caused the roof of the tunnel to break, and the water, rushing through the tunnel, undermined plaintiff's land. The court held that "the defendant was liable for the damage occasioned, without proof of negligence or unskillfulness on his part." *Cahill v. Eastman*, 18 Minn. 324, Gil. 292, 10 Am. Rep. 184. The court cites a number of cases in support of its decision, among them the case of *Fletcher v. Rylands*, *supra*. To suffer filthy water to percolate through the soil and to injure the cellar and well of an adjoining proprietor, the supreme court of Massachusetts in *Ball v. Nye*, 99 Mass. 582, 97 Am. Dec. 56,

held to be an act for which the defendant was liable; and further held that no other negligence need be shown than such as was necessarily inferred from the nature of the injury. That court also cites with approval the case of *Fletcher v. Rylands*, *supra*. In *Shipley v. Fifty Associates*, 106 Mass. 199, 8 Am. Rep. 318, a proprietor who built the roof of his house so that quantities of ice and snow collected thereon, and fell upon a traveler in the highway, was held liable. It was also held that no further proof of negligence than that inferred from the manner of the accident was necessary. See also *Wilson v. New Bedford*, 108 Mass. 261, 11 Am. Rep. 352; *Gilmore v. Driscoll*, 122 Mass. 202, 23 Am. Rep. 312, 14 Mor. Min. Rep. 37; *Gorham v. Gross*, 125 Mass. 232, 28 Am. Rep. 224, applying the same principle.

Defendant in the present case had leased the hotel to his son, J. S. Thurmond, who was in possession at the time of the injury complained of, and it is contended that, as there was no agreement by the lessor to make repairs, he is not liable. But the undisputed evidence is that the tank supplied water, not only to the leased premises, but also to other houses in the vicinity of the hotel, owned by defendant, and that the servant who was engaged in running the engine that pumped water from the river in to the tank was employed by defendant. This engineer testified that he went to see the tank whenever he wanted water in it; that he saw it at 7:30 o'clock on the morning that it burst; that he was on top of the tank; that he saw it also on the evening previous. Here it is shown that defendant's agent filled the tank with water, which caused it to burst. The rule of law is that the principal is liable for the acts of his agent, done within the scope of his authority and in the line of his employment. The effect, therefore, upon defendant's liability, is the same as if he himself had been running the engine. Independent of this fact, however, there is a positive rule of law which under the circumstances proven to exist in this case makes defendant liable. The general rule of law is that, in the absence of express agreement, it is the duty of the tenant to make repairs of the leased premises. This rule is based on the principle that during the continuance of the lease the landlord has no right of entry. But the present case falls under a well-recognized exception to this general rule. It is this: Where premises are leased in part to two or more tenants, with the right of each to use a certain part in common, the law obliges the landlord to keep such part in repair. This rule applies between landlord and tenant, 33 L.R.A. (N.S.)

and, *a fortiori*, to the public, or to an adjoining proprietor. *Readman v. Conway*, 126 Mass. 374; *Looney v. McLean*, 129 Mass. 33, 37 Am. Rep. 295; *Milford v. Holbrook*, 9 Allen, 17, 85 Am. Dec. 735; *Elliott v. Pray*, 10 Allen, 378, 87 Am. Dec. 653; *Sawyer v. McGillicuddy*, 81 Me. 318, 3 L.R.A. 458, 10 Am. St. Rep. 260, 17 Atl. 124; *Canandaigua v. Foster*, 156 N. Y. 354, 41 L.R.A. 554, 66 Am. St. Rep. 575, 50 N. E. 971; 2 *McAdam*, Land & T. p. 1732. In the present case the tank was not used exclusively for the hotel, but was used to supply other buildings with water on lands of defendant. So that, according to the principle decided in the foregoing cases, the tank being, at the time of the injury, used in common by the lessee of the hotel, and by the landlord, or by his other tenants, and it matters not which, the landlord was bound to keep it in such repair as to prevent the escape of the water in such manner as to injure the property of an adjoining owner.

The theory is advanced in brief of counsel for defendant that the bursting of the tank was caused by a clandestine explosion of dynamite. But this is only a theory, and there is no evidence to support it, except the testimony of J. S. Thurmond, who says that he was on the street when it burst; that he heard a loud report, like an explosion, and immediately looked toward the tank, and saw the body of water, which looked white at first. His opinion, formed from what he heard and saw there, and from the appearance of the broken staves of the tank, which he afterwards saw scattered over the ground, was that it had been blown up with dynamite. But the sudden bursting of the large iron bands, or hoops, would very likely make a loud report, and the bursting of the hoops at the bottom would also likely cause the staves to break, if the hoops near the top of the tank did not give way at the same time. The pressure of 30,000 gallons of water against the bottom ends of the staves, with the hoops holding the upper ends together, would be sufficient to break the staves. There is evidence that the tank had been painted only once after it was put up; that the hoops were almost eaten in two with rust. There is also evidence by a competent expert witness that it is necessary to paint such tanks, at least once a year, to prevent the rust from destroying the iron hoops. It burst between 9 and 10 o'clock in the morning of March 28, 1906. There is no evidence that it was caused by an act of God, such as a severe and unusual windstorm; and the dynamite theory is so highly improbable that we are compelled to say that, as a question of law, proof of

the bursting of the hoops was also proof of defendant's negligence.

It is assigned as error that defendant's special plea No. 3 was improperly rejected. It alleges that, after the institution of the suit, plaintiff had been adjudged a bankrupt. Section 11c of the bankruptcy act (act July 1, 1898, chap. 541, 30 Stat. at L. 549, U. S. Comp. Stat. 1901, p. 3426) is: "A trustee may, with the approval of the court, be permitted to prosecute as trustee any suit commenced by the bankrupt prior to the adjudication with like force and effect as though it had been commenced by him." Pursuant to this provision, the trustee could have obtained permission of the bankrupt court to prosecute this suit; but there is no evidence that he had such permission, or that he applied for it before the time the plea was tendered. It does not follow that his failure to intervene in the suit would abate the action. The bankrupt may still prosecute an action to final judgment, provided the trustee does not intervene, just as if no trustee had been appointed. *Hubbard v. Gould*, 74 N. H. 25, 64 Atl. 668. "An action by or against the bankrupt in the state court does not abate upon the adjudication in bankruptcy or appointment of a trustee, and, in the absence of an application by the trustee for substitution, it may be prosecuted or defended by the bankrupt." *Hahlo v. Cole*, 112 App. Div. 636, 98 N. Y. Supp. 1049. "A trustee in bankruptcy may, but need not, intervene as plaintiff in a suit brought by the bankrupt before the adjudication in bankruptcy." *Griffin v. Mutual L. Ins. Co.* 119 Ga. 664, 46 S. E. 870. It was further held in that case that, if no trustee is appointed, or if the bankrupt court does not consider it of interest to the estate of the bankrupt to permit the trustee to prosecute such suit, the action is not thereby abated. See also 3 Current Law, 468. The fact that plaintiff was adjudged a bankrupt after this action had been brought could not affect defendant's interest in the result of the suit. It has no bearing on the question of his liability, and is not a matter of defense to him. Plea No. 3 was therefore properly rejected.

It is assigned as error that the court improperly refused to permit witness for plaintiff, M. E. Callahan, to answer a certain question on cross-examination relating to the amount of plaintiff's loss. Shortly after the bursting of the tank, witness Callahan, who was vice president of the plaintiff company, assisted in taking an inventory of the goods, for the purpose of estimating the amount of the damages, which

he stated to be over \$1,700. After the bursting of the tank, plaintiff rented another room, and moved its goods to it; and, after the goods were moved, a fire occurred which destroyed the entire stock, including the portion of the goods damaged by the water from the tank, which had not then been sold. On cross-examination he was asked: "Q. What became of these goods? A. We removed, afterwards, a part of them. A part of them were sold, and the rest was removed to the store on the hill. Q. Do you know what you got for the ones which you sold?" To this last question the court sustained an objection, and the defendant excepted. This witness, notwithstanding he was interested as an officer and stockholder in plaintiff company, was not personally employed in selling the goods. It is not shown that he knew what the goods brought, which had been sold. Witness had assisted in estimating the damage to the goods by the water, and was examined in chief to prove the amount estimated. The question objected to did not pertain to matters concerning which he had testified in his direct examination. Weaver, Graves, Buster, and this witness were all engaged in estimating the damage to the goods. Weaver knew the cost price, and would call it out, and Graves and Buster would estimate the damage, and the figures were put down by witness Callahan. He was examined to prove that he had correctly taken down the figures as they were called out to him. It does not appear that there was a separate account kept of the damaged goods that were sold; so that there was no way of estimating by the accounts that were kept what had been received for the portion of the damaged goods sold previous to the destruction by fire of what were not sold. It was, therefore, not error for the court to sustain plaintiff's objection to the question. But, even if it were a proper question to be answered, it does not appear from the record what answer the witness was expected to make. Consequently we are unable to see that defendant was prejudiced by the court's ruling.

Witness Graves, who assisted in making an estimate of the damages, was asked the following question: "Q. Tell the jury, Mr. Graves, how much the damages footed up? How much it amounted to in dollars and cents?" The court overruled defendant's objection to this question. He excepted, and assigns this action of the court as error. But the answer itself shows that he was not prejudiced by it. His answer was: "Thirteen hundred dollars and some cents. I do not know what it was. I did not make

the figures." The jury were certainly capable of judging that this answer furnished no proof of the amount of damages. Witness says he did not know because he did not make the figures; and witness Callahan, who did take down the figures, was examined to supply the proof as to the amount of damage.

It was not error to refuse defendant's instruction No. 4. It is framed upon the theory that the defendant's liability rests alone upon the unsound condition of the tank, and the defendant's knowledge of such condition, at the time of the lease. This is not the law. He was bound to know its condition, and to keep it from doing injury to adjoining property owners.

Defendant's No. 6 was also properly refused. It would tell the jury that if they believed it was the duty of J. S. Thurmond, the lessee, to keep the tank in repair, they must find for the defendant, unless it appear by a preponderance of the evidence that the tank was in unsound, unsafe, and dangerous condition at the time of the lease, and that this fact was known to defendant, or could have been known by the exercise of ordinary diligence; and, furthermore, that the burden of proof is on plaintiff to show that it was in this unsound condition at the date of the lease. This is not the law of this case. The tank was a structure which, from its very nature, was likely to become dangerous by reason of neglect, and defendant was liable, notwithstanding his lessee may also have been liable.

Defendant's instructions Nos. 1, 3, and 5 are as favorable to him as we think the law warrants. No. 7 is that the bursting of the tank does not of itself show negligence nor create liability on defendant. The cases which we have cited in the first part of this opinion are authority for holding that this is a case where the happening of the accident of itself is sufficient to establish negligence, there being no evidence that it was caused by an act of God, or that it was clandestinely destroyed by an enemy. It is a case in which the familiar rule of evidence, *res ipsa loquitur*, applies.

J. W. Crider, plaintiff's trustee in bankruptcy, presents a petition to this court, praying that this cause be proceeded with in this court for his benefit. The trustee was not made a party to the action below, and he cannot be made a party by order of this court on petition. The petition presents matter for original jurisdiction, and cannot be considered by this court.

We find no error in the record prejudicial to the defendant, and the judgment will be affirmed.

33 L.R.A. (N.S.)

IDAHO SUPREME COURT.

RE CHRIS PETERSON.

(19 Idaho, 433, 113 Pac. 729.)

Criminal law — suspension of sentence — right of convict.

1. Where, on a plea of guilty, the defendant is sentenced to imprisonment for a term of six months and a fine of \$300 and costs of suit, and it is provided in the judgment that, in case said fine and costs are not paid, defendant be imprisoned in the county jail until said fine and costs are paid, at the rate of one day imprisonment for each \$2 of the fine and costs, not exceeding 172 days in all, and it is further ordered that, upon payment of said fine and costs, the judgment for six months' imprisonment be suspended until further order of the court or the judge thereof, and the defendant pays said fine and costs, and is released without bail, the court has no authority to have the defendant rearrested and imprisoned, to serve out said term of imprisonment.

Habeas corpus — unauthorized sentence — relief.

2. The final sentence and judgment against the defendant cannot be made a mere matter of discretion with the judge or court, to depend upon the subsequent conduct of the convicted person. Such sentence is wholly unauthorized by law, and a defendant imprisoned thereunder will be discharged on habeas corpus.

(February 25, 1911.)

APPPLICATION for a writ of habeas corpus to secure petitioner's release from the custody of the sheriff of Bonner County, to which he had been committed to serve out a suspended term of imprisonment. Granted.

The facts are stated in the opinion.

Mr. Herman H. Taylor, for petitioner:

The rendering of judgment and the final sentencing of the defendant cannot be made a mere matter of discretion with the judge or the public prosecutor, nor to depend upon the subsequent conduct of the convicted person.

People ex rel. Boenert v. Barrett, 202 Ill. 287, 63 L.R.A. 82, 95 Am. St. Rep. 230, 97 N. E. 23; *Weaver v. People*, 33 Mich. 296, 1 Am. Crim. Rep. 552; *Re Strickler*, 51 Kan. 700, 33 Pac. 620.

Habeas corpus will be issued to inquire into a commitment issued on a void judgment, or a judgment which would not be

Headnotes by SULLIVAN, J.

Note. — As to power of court to suspend sentence or stay execution of sentence, see note to *State v. Abbott*, ante, 112.

grounds for the issuance of the commitment.

Re Ring, 28 Cal. 247; Ex parte Dobson, 31 Cal. 499.

The vacation and resentencing after part of a valid sentence, partly or wholly executed, is void.

25 Am. & Eng. Enc. Law, p. 315, and cases cited; Re Johnson, 46 Fed. 477; Brown v. Rice, 57 Me. 55, 2 Am. Rep. 11; State v. Gray, 37 N. J. L. 368, 1 Am. Crim. Rep. 554; State v. Addy, 43 N. J. L. 113, 39 Am. Rep. 547; Gibson v. State, 68 Miss. 241, 8 So. 329; State v. Crook, 115 N. C. 760, 29 L.R.A. 261, 20 S. E. 513; Ex parte Lange, 18 Wall. 163, 21 L. ed. 872; State v. Warren, 92 N. C. 825; Ex parte Rosenheim, 83 Cal. 388, 23 Pac. 372; People v. Hamberg, 84 Cal. 468, 24 Pac. 299; Ex parte Wadleigh, 82 Cal. 518, 23 Pac. 190; Lowrey v. Hogue, 85 Cal. 600, 24 Pac. 995; People v. Brown, 113 Cal. 35, 45 Pac. 181; Roberts v. Howells, 22 Utah, 389, 62 Pac. 892.

Messrs. D. C. McDougall, Attorney General, and O. M. Van Duyn for the State.

Sullivan, J., delivered the opinion of the court:

This is an application for a writ of habeas corpus to obtain the release of Chris Peterson from the custody of the sheriff of Bonner county. The cause of the imprisonment is as follows: On the 9th of December, 1910, in the district court of Bonner county, the defendant pleaded guilty to the charge of selling intoxicating liquors in violation of what is commonly known as the "local option law." Sess. Laws 1909, p. 9. The defendant appeared for sentence, and the following sentence and judgment was entered in the minutes of the court on December 10, 1910: "At this day, the state was represented by Mr. Peter Johnson, prosecuting attorney, and John A. Steinlein; the defendant was represented by his counsel, Mr. E. W. Wheelan, the said defendant, through his said counsel, having heretofore entered a plea of guilty in said action, and the court having fixed this date as the time to pronounce judgment, and the court, being fully advised, rendered its judgment as follows: It is the judgment of the law and the sentence of the court that you, the said Chris Peterson, be imprisoned in the county jail situated at Sandpoint, Bonner county, state of Idaho, and be therein confined for a period of six months, and that the date of your confinement will commence when you reach the jail, and that you pay a fine in the sum of \$300, and the costs taxed at \$44.30, and that, in case said fine and costs

are not paid, you be imprisoned in the county jail of said county until said fine and costs are paid, at the rate of one day imprisonment for each \$2 of said fine and costs, not exceeding 172 days in all, for such nonpayment of fine and costs. It is further ordered that, upon payment of said fine and costs, the foregoing judgment of six months' imprisonment be suspended until the further order of this court or the judge thereof."

On the 9th day of December, 1910, the defendant also entered a plea of guilty to another charge of the same kind, and a judgment was entered against him, sentencing him to imprisonment for six months in the county jail, and a fine of \$200 and costs of suit, which fine and costs amounted to \$219.80, and the defendant was sentenced to imprisonment in the county jail at the rate of one day for each \$2 of said fine and costs, amounting to 109 days. It was also provided by said judgment that, upon payment of said fine and costs, the sentence of imprisonment should be suspended until the further order of the court or judge. The defendant thereupon paid the fine and costs in both cases, and was released from custody without bail, and was permitted to go at liberty without any requirement to further appear under said judgments or either of them, except that the sentence of six months' imprisonment was suspended until the further order of the court or judge. Thereafter, without any notice to the defendant or his attorney, and without any modification of said judgment, the clerk of said court delivered to the sheriff of said county a commitment in said first action, which is in words and figures as follows: "At this day the defendant appeared in open court with his counsel, E. W. Wheelan, Esq., the state being represented by Peter Johnson, prosecuting attorney, and John A. Steinlein, Esq. Thereupon the defendant was informed by the court that an information had been filed against him charging him with selling intoxicating liquor contrary to law, namely, whisky, and of his plea of guilty as charged; and was then asked by the court if he had any legal cause to show why judgment should not be pronounced against him, and, no sufficient cause appearing or being alleged, the court rendered the following judgment: It is the judgment of the law and the sentence of this court that you, Chris Peterson, be imprisoned in the county jail of Bonner county, state of Idaho, for six months, and that said term of imprisonment begin on the date of your admission into said jail, and that you pay a fine of \$300, and that you pay the costs of this prosecution amounting to \$44.30, and

that, in case said fine and costs are not paid, you be imprisoned in the county jail of said county until said fine and costs are paid, at the rate of one day of imprisonment for each \$2 of said fine and costs, not exceeding _____ days in all, for such nonpayment of fine and costs.

Done in open court this 10th day of December, A. D. 1910.

R. N. Dunn, District Judge."

A similar commitment was issued in the second action above referred to. The defendant avers in his petition that he had not attempted to escape from the jurisdiction of said court, but, at all times after the payment of said fines and costs on the 10th day of December, 1910, and until the 23d day of December, 1910, when the alleged illegal detention began, he was permitted by the court to be and remain at large, without any bond or any recognizance for his future appearance, and without any requirement for his appearance; that on the said 23d day of December, said sheriff, without any further or other order of the court whatever, and without any modification or amendment of the judgments above recited, and without any appearance of defendant or counsel being had or required in said court, and without any notice whatever to the defendant, took the defendant into custody and restrained and confined him in the jail in the said county under said commitments.

It appears from the petition that the judgments attached to the commitments are like the copy of the judgment above set forth, except the following provision is not contained in the judgment signed by the court and attached to the commitments, to wit: "It was further ordered that, upon payment of said fine and costs, the foregoing judgment of six months be suspended until the further order of this court or the judge thereof."

It is first contended by counsel for the defendant that his payment of said fines and costs ended the court's jurisdiction over the defendant, and that, as the defendant was then released from being required to give any bail or sureties for his reappearance, the court had no jurisdiction or authority thereafter to commit him to serve out the term of imprisonment imposed by said sentence. In support of that contention, counsel cites *People ex rel. Boenert v. Barrett*, 202 Ill. 287, 63 L.R.A. 82, 95 Am. St. Rep. 230, 67 N. E. 23; *Weaver v. People*, 33 Mich. 296, 1 Am. Crim. Rep. 552; *Re Strickler*, 51 Kan. 700, 33 Pac. 620. In the *Barrett* Case, above cited, the court held that the rendering of judgment and the final sentencing of de-

fendant cannot be made a mere matter of discretion of the judge or public prosecutor, nor to depend upon the subsequent conduct of the convicted person. In the *Weaver* Case, it was held that the release of a defendant on his own recognizance and without sureties usually signified that the offender is to go without punishment. In the *Strickler* Case, the court said: "In this case it was attempted to hang a sentence of ninety days' imprisonment over the head of the defendant, to be executed at such time as the prosecuting attorney of Ford county, or the judge of the court might see fit,"—and held that such a sentence was wholly unauthorized by law, and that the commitment issued was illegal, and directed the discharge of the prisoner. We know of no authority in our statutes for such judgments as the ones entered in said cases. The district court has no authority after sentencing a prisoner to a term of imprisonment, to direct his release, with or without bond, making such release subject to recall by the judge or court, and thereafter require the defendant to serve out the suspended term of imprisonment.

The order suspending the six months' imprisonment no doubt was an inducement to the defendant to immediately pay the fine and costs, which he did, and he was not required to give any bail for his further appearance in said matter, and was released from custody. It evidently was the intention to hang the sentence of six months' imprisonment over the head of the defendant, to be executed at such time as the court or judge might require. As was stated in the *Strickler* Case, *supra*: "This would leave the defendant in a very uncertain situation. He would be unable to tell for an indefinite period whether he was a free man or a convict, and while the sentence, in terms, might be for but ninety days' imprisonment, it would be, in effect, far more severe, because of the uncertainty as to the time of its execution." If said sentences were suspended on certain conditions, and the law authorized the district court to suspend them, in case the defendant was charged with violating the conditions of suspension, common justice would require that he be given a hearing, which was not done in this case. But that makes no difference in this case, as the court had no authority to suspend the sentence.

Other questions are raised that are not necessary to be determined on this hearing. The defendant having been released upon the payment of said fines and costs, under the facts of this case the court had no authority to commit the defendant to the county jail, to serve out said imprisonment sentence, as was done. For that rea-

son the prayer of the petition must be granted, and the prisoner discharged.

Ailshie, P. J., and Budge, District Judge, concur.

ALABAMA SUPREME COURT.

JEROME SEIGEL, Appt.,

v.

THOMAS LONG.

(— Ala. —, 53 So. 753.)

Assault — physical interference with person.

1. Placing one's hand on another's head and pushing his hat back for the purpose of seeing his face, in order to identify him, is an assault and battery.

Same — mistaken identity.

2. Mistake in identity of the person assaulted is no justification for assault and battery.

Same — offer of apology.

3. Offering to apologize to one upon whom a battery has been committed is no defense to an action to recover damages for the battery.

Trial — affirmative charge — conflicting evidence.

4. A general affirmative charge cannot be given where the evidence is in dispute.

(December 8, 1910.)

Note. — Assault or homicide as affected by mistake in identity of person assaulted.

This note is limited to cases of mistake in the identity of the person assaulted, and includes homicides committed under such mistake. Cases of aiming at one and hitting another are excluded.

On homicide by unlawful act aimed at another than the one killed, see the note to *White v. State*, 63 L.R.A. 660.

The decision in *SEIGEL v. LONG* is supported by principle and authority.

It is a general rule that the crime or wrong is to be judged as if there had been no mistake in identity. Such a mistake will, therefore, neither mitigate nor aggravate the offense, save that the defendant must have exercised reasonable care in ascertaining the identity of the person assaulted, in order to avail himself of any justification or excuse that might have existed had the assault been upon the person intended.

The rule obtains in assaults generally including murder in the first degree, but in Texas and possibly in Tennessee there is an exception in murder in the first degree.

Assaults.

Where one intends to assault or kill a
33 L.R.A.(N.S.)

APPEAL by plaintiff from a judgment of the Circuit Court for Perry County in defendant's favor in an action brought to recover damages for an assault and battery. Reversed.

The facts are stated in the opinion.

Mr. Arthur M. Pitts for appellant.

Mr. W. F. Hogue for appellee.

Mayfield, J., delivered the opinion of the court:

Appellant sued appellee for an assault and battery. The first count of the complaint was in Code form. The plaintiff's evidence made out a case of inexcusable and rude assault. The defendant's evidence likewise made a case of assault, though one of less insolence and rudeness than that which plaintiff's evidence tended to prove; nevertheless it proved the first count of the complaint, and failed to prove the pleas which were the general issue. The plaintiff was therefore clearly entitled to the general affirmative charge as to the first count, as was requested by him, for nominal damages.

The defendant's account of the re-encounter, so far as pertains to the assault and battery *vel non*, was as follows: "I did place my left hand on his forehead, and pushed his hat back on his head. I did this for the purpose of seeing his face and identifying him. I said to him, 'Some scoundrel came along here yesterday, or the other day, and scared my horses, and

certain person, and by mistake in identity assaults the wrong person, the intent is transferred from the person intended to the person assaulted. *People v. Wells*, 145 Cal. 138, 78 Pac. 470.

In *Carter v. State*, 87 Ala. 113, 6 So. 356, where the defendant, being drunk, committed an assault, but not a battery, upon a woman whom he mistook for a prostitute, the appellate court said in affirming a conviction: "It is unquestionably the law that if the defendant intended to inflict personal violence on another person than the one assaulted, a mere mistake in the identity of the person would not excuse him. It was no justification of the assault charged in this case that the defendant was drunk, or that he erroneously believed the person assaulted to be a common prostitute."

In *Morris Hotel Co. v. Henley*, 145 Ala. 678, 40 So. 52, it was held that it was no defense to an assault by the manager of a hotel that the person assaulted was unknown to the manager to be a guest in the hotel. The court said that an assault would not be justified whether the person was or was not a guest in the hotel.

Assaults with particular intents.

Where the prisoner, supposing T. to be M., and, wishing to murder M., shot at and

caused them to run away and break my rake,' and I am looking for him. I did tell him that some of you all scoundrels think you own the world, but I stated that we need some of it. There were two young ladies and another gentleman in the automobile. I was provoked when I walked from my wagon down to the automobile. I was provoked at the time I placed my hand on Mr. Seigel. I was angry at the person who frightened my team. I was hunting the person who frightened my team, and no one else. I did call the negro, and ask him if this was the person who came along a few days before and frightened my team."

It is true that defendant's testimony tended to show that defendant made a mistake as to the identity of the party whom

he assaulted, and he told plaintiff that, if he was not the person who frightened his team, he owed him an apology; but this did not prevent what he did from being an assault and battery. It was an assault and battery, with or without mistaken identity. *Carter v. State*, 87 Ala. 113, 6 So. 356.

It was likewise no defense that defendant offered to apologize after the assault, if he made a mistake as to the identity of the person assaulted. It may likewise be true that defendant did not intend to injure or hurt the plaintiff, unless he proved to be the one who had frightened the team the day before; but this, if true, did not prevent what he says he did from being an assault and battery. An intent to injure is not a necessary element of assault and

wounded T., he was held guilty of wounding T. with intent to murder him. Parke, B., said: "There is no doubt but the prisoner intended to hit Taylor, but he mistook the particular person." *Reg. v. Smith*, 33 Eng. L. & Eq. Rep. 567.

In *People v. Torres*, 38 Cal. 141, where the facts are not reported, the court said: "As an abstract proposition, however, the fourth instruction is not erroneous. If A, intending to murder B, shoots C, supposing C to be B, and wounds C, he is guilty of an assault with the intent to murder C. Notwithstanding A's mistake, C is the person whom he assaulted, and whom he intended to kill. (*Reg. v. Smith*, supra.)" But the instruction referred to is, it seems, applicable not only to a case of mistaken identity, but perhaps more particularly to the case of aiming at one and hitting another.

Where the defendant, to avenge an injury to his brother, followed a man that he mistakenly supposed to be his brother's assailant, along the road, at night, and wounded him with a knife, the court, in affirming a conviction of assault with intent to kill and murder the person wounded, said: "Thompson was the only person in reach of appellant at the time he committed the offense with which he is charged. He intended to assault that person with a weapon which the jury found to be a deadly weapon. His blows did not miss the object at which they were aimed. He may not have intended to kill Thompson, but he was properly convicted if he intended to kill the man at whom the knife was directed. The evil and specific intent to strike the form before him at the time is manifest, and that form proved to be Thompson. That there was a mistake as to the identity of the person intended to be injured constitutes no defense. If appellant did to Thompson what he intended to do to Morrison, he is as guilty under the statute as if no mistake had been made." *McGehee v. State*, 62 Miss. 772, 52 Am. Rep. 209.

Upon the trial for an indictment for cutting and wounding W. with intent to do him some grievous bodily harm, where it

appeared that the prisoner mistook W. for another man with whom he had been quarreling, Alderson, B., said that he should direct the jury that, if they think the prisoner did to the prosecutor what he intended to do to another man, they should find him guilty, and that if *Rex v. Holt*, 7 Car. & P. 518, held otherwise, he should overrule it. *Reg. v. Lynch*, 1 Cox, C. C. 361.

So, in *Reg. v. Stopford*, 11 Cox. C. C. 643, where the prisoner was charged with wounding H. with intent to do him grievous bodily harm, the fact that he mistakenly supposed H. to be one of a body of men who had assaulted him shortly before was held to be immaterial.

In *Rex v. Holt*, supra (referred to in the *Lynch Case*, supra), upon an indictment for shooting at H. with intent to murder him, containing also counts with intent to maim, to disfigure, to disable, and to do him some grievous bodily harm, the jury found that the prisoner shot at H., taking him for L., but hit no one, and had no intent against H., and the court directed an acquittal.

Homicides.

In *Brown's Case*, 1 East, P. C. 245, 274, where a soldier killed a person whom he supposed to have been one of those who had assaulted him and his comrades, he was held guilty of manslaughter, as that would have been his crime under the circumstances had the deceased been one of those supposed; it appeared that the prisoner had reasonable grounds for the mistake in identity.

Where a person aims at a man and kills the man he aims at, it is immaterial that he supposed the man he aimed at to be another person, or rather it is of no consequence that he would have acted differently had he known that the man that he shot at was not the person that he supposed he was. *Jackson v. State*, 106 Ala. 12, 17 So. 333. A similar conclusion was reached in *Murphy v. State*, 108 Ala. 10, 18 So. 557.

If the killing of A would have been murder, the killing of B, taking B for A, is a crime not below the grade of murder. *Brown v. State*, 147 Ind. 28, 46 N. E. 34.

battery in a civil action. *Carlton v. Henry*, 129 Ala. 479, 29 So. 924; *Thomason v. Gray*, 82 Ala. 291, 3 So. 38; 2 Greenl. Ev. § 85.

It has likewise been held by this court, repeatedly, that "any touching by one person of the person of another in rudeness or in anger is an assault and battery, and that every assault and battery includes an assault." *Jacobi v. State*, 133 Ala. 17, 32 So. 163. Therefore, under all the testimony, the plaintiff was entitled to recover at least nominal damages; and hence charge 2, which was limited to the first count, should have been given.

The evidence was in dispute as to the other count. It attempted to set out the facts as to which there was dispute, and

hence the general affirmative charge as to it was properly refused.

Plea 3 was in effect the general issue. While it contained immaterial matter, it was surplusage or inducement merely. In legal effect it was the general issue, and certainly not subject to the grounds of demurrer assigned.

For the error in refusing charge 2, the judgment is reversed, and the cause remanded.

Reversed and remanded.

Dowdell, Ch. J., and Simpson and McClellan, JJ., concur.

In *State v. Dennis*, 119 Iowa, 688, 94 N. W. 235, the court, in affirming a conviction of murder in the second degree, said: "That the intended victim was a person other than the deceased is, of course, immaterial. If the purpose and plan was to injure or kill someone, it matters not that a mistake was made in the identity of the person actually assaulted. This is elementary." It may be noticed that it was also held by the court that there was no error in leaving to the jury the question of murder in the first degree.

When a man murders another man, supposing the latter to be a third person, it is none the less murder. *Thompkins v. Com.* 28 Ky. L. Rep. 642, 90 S. W. 221; mistaken identity will not excuse a killing, nor reduce it from murder to manslaughter. *Burchet v. Com.* 8 Ky. L. Rep. 258, 1 S. W. 423; and killing from ambush is none the less murder because the person killed was killed in the belief that he was another man. *Jennings v. Com.* 13 Ky. L. Rep. 79, 16 S. W. 348.

In *State v. Clifford*, 59 W. Va. 1, 52 S. E. 981, where the judgment was reversed as not sustained by the evidence, and there was some question whether there was not a mistake in the identity of the person at whom the shot was fired, it was held that "in cases where the blow intended for one person, by accident falls upon and kills another, the thing done follows the nature of the thing intended to be done, and the guilt or innocence of the slayer depends upon the same considerations that would have governed had the blow killed the person against whom it was directed. Hence the homicide is murder or manslaughter or excusable homicide, for precisely the same reasons that would have determined its character had the event conformed to the intent, and the principle is the same whether the misadventure proceeded from the misdirection of the blow or from a mistake in the identity of the victim."

For Texas homicide cases, see *infra*, "Murder in the first degree—exceptions to rule."

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Murder in the first degree—same rule.

The same rule applies in murder in the first degree. In *People v. Suesser*, 142 Cal. 354, 75 Pac. 1093, it was held that where a man intending to kill A, by mistake in identity, shoots B and kills B, supposing B to be A, and the crime would have been murder in the first degree had A been the person killed, it is just as much murder in the first degree under the circumstances.

A mistake in identity will not alter a crime from being murder in the first degree. *Com. v. Klose*, 4 Kulp, 111. See also *State v. Dennis*, *supra*.

A crime is no less murder in the first degree because the murderer mistook the identity of the person that he shot and killed. *Com. v. Eisenhower*, 181 Pa. 470, 59 Am. St. Rep. 670, 37 Atl. 521.

In *Clarke v. State*, 78 Ala. 474, 56 Am. Rep. 45, 6 Am. Crim. Rep. 525, the court in reversing on other grounds a conviction of murder in the first degree, said: "The theory of the state is that the accused shot the deceased, mistaking him for Allen, whom he intended to kill. If this theory be found true by the jury, the defendant is guilty or innocent of the offense charged, the same as if the fatal shot had killed the person for whom it was designed."

In *State v. McGonigle*, 14 Wash. 594, 45 Pac. 20, where, however, it seems that the case was no more than aiming at one and hitting another, the court in affirming a conviction of murder in the first degree said: "Inasmuch as the undisputed testimony was to the effect that the appellant left the yard after having had some trouble with Eaves, went to the barn, several hundred feet away, armed himself, returned to the house, and deliberately fired upon Eaves, or upon the man whom he supposed to be Eaves, we are unable to say there was not sufficient evidence of deliberation and premeditation to go to the jury."

—exceptions to rule.

In Texas, and possibly in Tennessee, there

is an exception to the rule. In Texas the courts hold that, where there is a mistake in identity, the express malice of the first degree of murder is wanting.

In *Musick v. State*, 21 Tex. App. 69, 18 S. W. 95, where it is impossible to say from the report whether the person killed was the person aimed at or not, but it is clear that the person killed was not the person intended to be killed, the court, in affirming a conviction of murder in the second degree, said: "It would seem to be clear, from the evidence in this case, that the parties (one of whom was this appellant) implicated in the murder of Ownes, the deceased, intended to kill one McElroy, and not Owens. The law applicable to this phase of the case was fully expounded by the trial judge in his able charge to the jury. The rule of common law was that if A shoots at B, with express malice, and by accident or mistake kills C, the offense would be what we call murder in the first degree. Under our Code, to constitute murder of the first degree, or rather a murder upon express malice, it must and can only be a malice directed towards the particular individual, and if another than the one against whom this malice is conceived and entertained be the mistaken victim of such malice, the crime is murder in the second degree."

So, in *Leggett v. State*, 21 Tex. App. 382, 17 S. W. 159, where there was a mistake in the identity of the person fired at and killed, the court said: "We have heretofore seen that intent is the essence of the crime, and if appellant killed the deceased, believing him to be Frazier, then he would be guilty of the identical crime of which he would have been guilty had he killed Frazier, unless the killing of Frazier would have been murder in the first degree, and then this killing would have been murder in the second degree."

So, in *Ferrell v. State*, 43 Tex. 503, which it seems probable was not a case of aiming at one and hitting another, but a mistake in the identity of the person at whom the shot was fired and upon whom it took effect, the court reversed a conviction of murder in the first degree, on the ground that under the Texas statute murder in that degree is not committed where there had been a mistake in the identity of the person killed.

And in *Wright v. State*, 44 Tex. 645, where the defendant killed a person whom he mistakenly supposed to be an escaped convict, and was convicted of murder in the second degree, the court, in affirming the judgment, points out that the trial court excluded the first degree from the consideration of the jury.

The following Texas cases illustrate the doctrine that except as to murder in the first degree, the usual rule applies:

In *Angell v. State*, 36 Tex. 542, 14 Am. Rep. 380, where in a scuffle in which there were several people, the defendant, meaning to shoot the constable, shot and killed a friend, his conviction of murder in the second degree was affirmed on appeal.

So, in *Carter v. State*, 30 Tex. App. 551, 2 Am. St. Rep. 944, 17 S. W. 1102, where there was a mistake in the identity of the person killed, and the indictment was for murder in the second degree, the act was considered the same as if there had been no mistake in identity.

So, in *Peter v. State*, 23 Tex. App. 684, 5 S. W. 228, the court, in affirming the conviction for manslaughter of a constable who committed the homicide in attempting to arrest the brother of the person he was after, he having made a mistake in identity, considered the case for the purposes of the opinion as if there had been no mistake in identity. (It may be said that, while the constable's papers were not regular, the evidence in the case was such that a conviction of manslaughter might have been had, it seems, even if the papers had been regular.)

In *White v. State*, 44 Tex. Crim. Rep. 346, 63 L.R.A. 660, 72 S. W. 173, where it appeared that the defendant, after a quarrel with K., left the house, and, turning, shot through the door, killing a woman, and the court instructed the jury that however great his passion, if he knew when he shot that he was shooting at a woman, he was guilty of murder in the second degree, but that if he thought that the person that he was shooting at was K., then his crime was reduced to manslaughter, on appeal a conviction of murder in the second degree was affirmed.

In Tennessee the matter seems left in doubt by *Bratton v. State*, 10 Humph. 103, where it was held that a person aiming at one man and hitting another could not be convicted of murder in the first degree, and it is, perhaps, possible that the reasoning of the opinion is intended to include the case of mistaken identity, as the decision is placed upon the ground that there must be "a specific intention to take the life of the particular person slain."

The question of care.

The care which is necessary in order to justify or excuse a mistake in identity, where the assailant has cause to assail the person supposed, cannot be more than reasonable care under the circumstances. The circumstances under which such mistakes arise do not generally permit of much delay, and if the case of *Crabtree v. Dawson*, *infra*, is intended to exact a greater amount of precaution than reasonable care under the circumstances, it does not seem to be supported by authority.

Where a person is beaten, and retaliates at once upon an innocent bystander, under circumstances, however, which would have led a reasonable man to believe that the blows of the retaliator were necessary for the latter's self-defense, and were given without malice, he is not liable in a civil action for an assault and battery. *Paxton v. Boyer*, 67 Ill. 132, 16 Am. Rep. 615.

In *Isham v. State*, 38 Ala. 213, where a slave killed a disguised white man under the belief that he was a runaway slave, it

was held that the crime was no greater than if the deceased had been a runaway slave, although the punishment would have been greater, ordinarily, in the case of a slave killing a white man.

In *Courvoisier v. Raymond*, 23 Colo. 113, 47 Pac. 284, where at a time of riot in the night the defendant shot a policeman, claiming that he thought the policeman was one of the rioters who was advancing upon him in such a manner as to make him think that his life was in danger, the court held, in a civil action for the assault, that the question to be considered was: "If the jury believed, from the evidence, that the defendant would have been justified in shooting one of the rioters had such person advanced towards him as did the plaintiff, then it became important to determine whether the defendant mistook plaintiff for one of the rioters, and if such a mistake was in fact made, was it excusable in the light of all the circumstances leading up to and surrounding the commission of the act?" —the court holding further that if these issues had been resolved by the jury, in favor of the defendant, he would have been entitled to a judgment.

In *State v. Spaulding*, 34 Minn. 361, 25 N. W. 793, where a conviction of murder in the first degree for the killing of one Washburn was reversed, the defendant offered to prove by his wife that one Andrews had grossly insulted and abused her in his absence, and had made threats to kill defendant, which had that day been communicated to him; and that in the afternoon of that day Andrews had attempted to carry these threats into execution; that he was a hard character; and that defendant had good reason to believe, at the time of the shooting, that this man, who turned out to be Washburn, was Andrews. The court said as to this offer: "This was offered as one entire proposition, and as such was properly rejected. In view of another trial, however, it is proper to say that so much of the offer as proposed to prove that the threats of Andrews were communicated to defendant, and the alleged attempt to kill him on the same day, might be considered material, in connection with the fact of the existence of hostile feelings or a quarrel between them, as tending to support defendant's theory of the case, and to explain the fact of his being armed in expectation of an attack, and as bearing on the question of premeditation. So, also, any legitimate evidence tending to show that defendant mistook Washburn for Andrews would be proper."

In *Cook's Case*, Cro. Car. 538, reference is made to the case of William Levin, wherein it appeared that Levin's maid servant aroused him in the night for fear of burglars, and that the servant, having a friend in the house, hid her down stairs, and Levin coming down, being informed by his wife that there was someone in the room where this woman had been hid, entered there in the dark, and thrusting with his rapier before him, killed the woman, and it was 33 L.R.A. (N.S.)

held that he was not guilty of manslaughter, as he did it ignorantly, without intent to injure her.

See also *Brown's Case*, supra.

In *Crabtree v. Dawson*, 119 Ky. 148, 67 L.R.A. 565, 115 Am. St. Rep. 243, 83 S. W. 557, the appellate court said: "If the defendant, at the time he struck the plaintiff, believed, and had reasonable grounds to believe, that he was Ollie Noble, and that he further believed that it was necessary, in the exercise of a reasonable judgment, to strike Noble, in order to defend himself from threatened attack about to be made upon him by Noble, and that he used no more force than was necessary, for this purpose, then he is excused on the ground of self-defense and apparent necessity. But it was the duty of the defendant to have exercised the highest degree of care practicable under the circumstances to have ascertained whether the person whom he was about to strike was in fact the one whom he believed him to be, and from whom he apprehended danger to himself." And it was also held that it was error to charge the jurors that only ordinary care and diligence was required from the defendant under the circumstances, as that which was required was "the highest or utmost care practicable under the circumstances by which he was surrounded." B. B. B.

ARKANSAS SUPREME COURT.

HUGH McCONNELL, Appt.

v.

ERPHIE McCONNELL.

(— Ark. —, 136 S. W. 931.)

Husband and wife — separation agreement — unfairness — setting aside.

1. A separation agreement by which a man worth from \$15,000 to \$60,000 pays his wife, who has nothing, is in distress, and with no one to look to for advice, \$500 in lieu of all interest in his estate, will be set aside as unfair.

Appeal — interference — alimony.

2. The allowance of \$50 per month as alimony to a wife having no property, against a man worth from \$15,000 to

Note. — Validity of agreement to pay attorney a percentage of amount obtained as alimony.

The authorities support the holding in *McCONNELL v. McCONNELL*, that an agreement to pay an attorney for his services in procuring a divorce a percentage of the amount obtained is invalid. *Brindley v. Brindley*, 121 Ala. 429, 25 So. 751; *Newman v. Freitas*, 129 Cal. 283, 50 L.R.A. 548, 61 Pac. 907; *Jordan v. Westerman*, 62 Mich. 170, 4 Am. St. Rep. 836, 28 N. W. 826; *McCurdy v. Dillon*, 135 Mich. 678, 98 N. W. 746; *Lynde v. Lynde*, 64 N. J. Eq. 736, 53

\$60,000, who causes the wife to leave the home because of his siding with his sister in her attempt to control the affairs of the house, will not be interfered with on appeal.

Attorney — divorce proceeding — contract for share of alimony.

3. An agreement by a woman to pay her attorney a percentage of the alimony recovered in a suit for divorce against her husband is void as against public policy.

Appeal — divorce — counsel fees — agreement for compensation.

4. No presumption that a woman will perform her invalid contract to give her attorney a share of the allowance secured in a divorce proceeding as alimony will prevent the appellate court from affirming a special allowance for counsel fees made by the trial court.

(March 13, 1911.)

APPEAL by defendant from a decree of the Greene County Chancery Court, dismissing the complaint and allowing plaintiff alimony in an action for divorce. Affirmed.

The facts are stated in the opinion.

Messrs. J. D. Block and Huddleston & Taylor, for appellant:

There is no attempt in the original com-

plaint to set out any of the several statutory causes for divorce, and any other than a legal cause is no cause, and the demurrer should have been sustained.

Rosewater v. Schwab Clothing Co. 58 Ark. 446, 25 S. W. 73; Phillips v. Southwestern Teleg. & Teleph. Co. 72 Ark. 478, 81 S. W. 605; Martin v. Royster, 8 Ark. 74; Chapline v. Robertson, 44 Ark. 202; Fordyce v. Merrill, 49 Ark. 277, 5 S. W. 329.

If a wife needs money to enable her to secure legal advice and assistance, she should have a suitable allowance; but if she has secured attorneys by an agreement for a contingent fee, then no allowance should be made.

White v. White, 86 Cal. 212, 24 Pac. 1030; Sharon v. Sharon, 75 Cal. 1, 16 Pac. 345; Mudd v. Mudd, 98 Cal. 320, 33 Pac. 114; 14 Cyc. Law & Proc. p. 763; Nelson, Div. & Sep. § 881; Brindley v. Brindley, 121 Ala. 429, 25 So. 751; Stewart v. Stewart, 156 Cal. 651, 105 Pac. 956.

Alimony is only allowed when the husband has been guilty of a matrimonial offense.

G—— v. G——, 67 N. J. Eq. 30, 56 Atl. 736.

Where a wife leaves her husband with-

L.R.A. 471, 97 Am. St. Rep. 692, 52 Atl. 694; Van Vleck v. Van Vleck, 21 App. Div. 274, 47 N. Y. Supp. 470; Re Brackett, 114 App. Div. 257, 99 N. Y. Supp. 802.

The invalidity has been placed on the ground of champerty. Brindley v. Brindley, 121 Ala. 429, 25 So. 751.

In Newman v. Freitas, 129 Cal. 283, 50 L.R.A. 548, 61 Pac. 907, the court said: "Contracts for contingent fees paid attorneys were not tolerated at all at common law, but in this, and perhaps most of the states, such contracts are allowed, if not favored. This is on the ground that otherwise a party without the means to employ an attorney and pay his fee certain, and having a meritorious cause of action or defense, would find himself powerless to protect his rights. In divorce cases, however, the law has taken care that the wife shall not be without assistance in proper cases, either to prosecute or defend such actions. The court in its discretion may require the husband to pay as alimony any money necessary to enable the wife not only to support herself, but also to prosecute or defend the action, and is given ample power to enforce such order. The reason or necessity therefor does not exist in such cases as in the others for allowing contingent attorneys' fees, and where the reason ceases the rule or law also ceases."

The invalidity of such an agreement has also been placed on the ground that the contract is, in its nature, against the policy of the law and contrary to good morals, as facilitating divorce and preventing reconciliation. Newman v. Freitas, supra; Jor-

dan v. Westerman, 62 Mich. 170, 4 Am. St. Rep. 836, 28 N. W. 826; McCurdy v. Dillon, 135 Mich. 678, 98 N. W. 746; Lynde v. Lynde, 64 N. J. Eq. 736, 58 L.R.A. 471, 97 Am. St. Rep. 692, 52 Atl. 694.

In Jordan v. Westerman, supra, the agreement was held void notwithstanding the existence of a statutory provision "that all existing laws, rules, and provisions of law restricting or controlling the right of a party to agree with an attorney, solicitor, or counsel for his compensation, are repealed, and hereafter the measure of such compensation shall be left to the agreement, express or implied, of the parties."

An agreement to give an attorney a percentage of the alimony as compensation for his services has been declared invalid on the ground that the subject-matter is not capable of being assigned, since the purpose of alimony is the support of the wife, and since the statutes provide for compensation of the attorney. Jordan v. Westerman, 62 Mich. 170, 4 Am. St. Rep. 836, 28 N. W. 826; Lynde v. Lynde, 64 N. J. Eq. 736, 58 L.R.A. 471, 97 Am. St. Rep. 692, 52 Atl. 694.

Where the contract of an attorney with a wife suing for divorce is invalid because she contracts to give him a percentage of alimony recovered, he may recover what his services are reasonably worth. McCurdy v. Dillon, 135 Mich. 678, 98 N. W. 746.

Where an order of the court to pay alimony and suit money is reversed because the court had considered an invalid contract of the wife to give her attorney as his fee a portion of the amount allowed to her, the reversing order will be without

out sufficient cause and against his will, he is not liable for her maintenance elsewhere, and she cannot bind him.

Schouler, Dom. Rel. 3d ed. § 66, p. 102; Begbie v. Begbie, 7 N. J. Eq. 98; Martin v. Martin, 8 N. J. Eq. 563; Angelo v. Angelo, 81 Ill. 251; Thompson v. Thompson, 3 Head, 527; Boggess v. Boggess, 4 Dana, 308; Kock v. Kock, 42 Barb. 515; Brindley v. Brindley, 121 Ala. 429, 25 So. 751; Rea v. Rea, 53 Mich. 40, 18 N. W. 551; Johnston v. Johnston, 54 Kan. 72, 39 Pac. 725; Coles v. Coles, 32 N. J. Eq. 547; Nickerson v. Nickerson, 34 Or. 1, 48 Pac. 423, 54 Pac. 277; Goodman v. Goodman, 80 Mo. App. 274; Van Horn v. Van Horn, 82 Mo. App. 79; Kempf v. Kempf, 34 Mo. 211; Hooper v. Hooper, 19 Mo. 355; Cannon v. Cannon, 17 Mo. App. 390; Webb v. Webb, 44 Mo. App. 229; Schierstein v. Schierstein, 68 Mo. App. 205; Horton v. Horton, 75 Ark. 22, 86 S. W. 824, 5 A. & E. Ann. Cas. 91.

Mr. S. R. Simpson, for the appellee:

An attorney dealing with a destitute wife has a right to contract with her for future pay out of any property or money gained by litigation.

Craig v. Craig, 90 Ark. 40, 117 S. W. 765; Slocum v. Slocum, 86 Ark. 471, 117 S. W. 806; Glenn v. Glenn, 44 Ark. 46; Fountain v. Fountain, 80 Ark. 481, 97 S. W. 656, 10 A. & E. Ann. Cas. 557; Strickland v. Strickland, 80 Ark. 451, 97 S. W. 659; Shirey v. Shirey, 87 Ark. 175, 112 S. W. 369; Ex parte Caple, 81 Ark. 504, 99 S. W. 830.

Plaintiff was entitled to attorneys' fees and alimony.

Slocum v. Slocum, 86 Ark. 471, 111 S. W. 806; Craig v. Craig, 90 Ark. 43, 117 S. W. 765; Shirey v. Shirey, 87 Ark. 175, 112

S. W. 369; Rigsby v. Rigsby, 82 Ark. 278, 101 S. W. 727.

On appeal by the husband, the wife should be allowed counsel fees and expenses to enable her to resist his suit.

14 Cyc. Law & Proc. pp. 766, 767; Craig v. Craig, 90 Ark. 40, 117 S. W. 765; Glenn v. Glenn, 44 Ark. 46; Fountain v. Fountain, 80 Ark. 481, 97 S. W. 656, 10 A. & E. Ann. Cas. 557; Strickland v. Strickland, 80 Ark. 451, 97 S. W. 659; Shirey v. Shirey, 87 Ark. 175, 112 S. W. 369; Plant v. Plant, 63 Ark. 128, 37 S. W. 308; Jones v. Jones, 95 Ala. 443, 18 L.R.A. 99, 11 So. 11.

Hart, J., delivered the opinion of the court:

This is an action for divorce and alimony instituted by Erphie McConnell against Hugh McConnell. Plaintiff and defendant were married in Missouri on August 12, 1906, and soon afterwards came to defendant's home, at Paragould, Arkansas, and lived there until their separation on April 9, 1908. At the time of their marriage plaintiff was twenty-three and defendant was fifty years old. Defendant was a man of considerable property, and plaintiff had nothing. When they separated, they executed a written agreement, whereby plaintiff was to receive \$500 in lieu of all her claims or interest of any kind whatever in her husband's property. When they separated, plaintiff went to her mother, and has not lived in the state of Arkansas since that time. She alleged in her complaint that her husband drove her from his home and refused to live with her for more than one year before she instituted the action. She also alleged matters which, if true, amounted to such in-

prejudice to a new application for alimony and counsel fees. Van Vleck v. Van Vleck, 21 App. Div. 272, 47 N. Y. Supp. 470, s. c. 21 App. Div. 631, 47 N. Y. Supp. 472.

If the court discovers during the progress of a divorce action that it is being prosecuted on a contingent fee no attorney fee will be allowed. Brindley v. Brindley, 121 Ala. 429, 25 So. 751; Sharon v. Sharon, 75 Cal. 1, 16 Pac. 345; White v. White, 86 Cal. 212, 24 Pac. 1030.

And when the agreement is that the attorney is to get a percentage of what the wife obtains, and this fact is not known when an attorney fee is allowed, but is discovered after final judgment in favor of the husband, but before the attorney fee is paid, the allowance of the fee will be rescinded. Brindley v. Brindley, 121 Ala. 429, 25 So. 751.

In Sharon v. Sharon, 75 Cal. 1, 16 Pac. 345, it was held that pending an action for divorce the wife has no necessity entitling her to an allowance for counsel fees, when 33 L.R.A.(N.S.)

her attorneys are faithfully and satisfactorily acting for her, in pursuance of an agreement whereby they are to have, as compensation for their services, a contingent interest in the result of the litigation.

But if more than one counsel is necessary, the fact that one attorney had an agreement with the wife to prosecute the action for a contingent fee will not prevent an allowance to the other attorney, who performed services in ignorance of such agreement. White v. White, 86 Cal. 212, 24 Pac. 1030, s. c. 86 Cal. 216, 24 Pac. 1031.

See also Donaldson v. Eaton, 136 Iowa, 650, 14 L.R.A.(N.S.) 1168, 125 Am. St. Rep. 275, 114 N. W. 19, holding that an agreement by a client to transfer certain property and pay his attorneys a lump sum to get him a divorce and settle his wife's claim for alimony in an action against him for the annulment of the marriage is champertous as speculating on the terms of settlement, and is against public policy as facilitating divorce. R. A. E.

dignities as to render her condition in life intolerable. The suit was commenced in the fall of 1909.

The defendant denied the allegations of the complaint. During the pendency of the suit, the court allowed plaintiff temporary alimony and also an attorneys' fee in the sum of \$100. On final hearing the chancellor found that plaintiff was not entitled to a divorce; but that she was entitled to alimony. A decree was entered, dismissing her complaint for divorce, for want of equity, and allowing her permanent alimony in the sum of \$50 per month, and setting aside the agreement of the parties in regard to the rights and interest of the wife in her husband's property, made at the time of their separation. The court also refused to allow any additional attorneys' fee. The case is here on appeal.

On the whole case we think the decision of the chancellor was correct. In cases of this sort we do not think any useful purpose can be served by setting out in detail the evidence, or making extended comments on it. We deem it sufficient to say that a careful consideration of the testimony leads us to the conclusion that there is no sufficient reason why the parties to this suit should not keep the vows made by them at the marriage altar, and live together as husband and wife. No charge of immoral conduct is made by either. Neither appears to have any settled hatred or antipathy for the other. It appears that they had no marital troubles until in October, 1907, when a sister of the defendant came to live with them. She had an equal share in her brother's residence, and they owned other property in common. She seems to have had a desire to take charge of the household, and the plaintiff naturally resented her actions in this regard. The defendant became involved in the trouble and jealousy thus engendered, and participated in the quarrels. The quarrels between plaintiff and defendant grew more frequent and more violent, and finally culminated in their separation, which, as above stated, occurred on April 9, 1908. Shortly after their separation plaintiff brought suit against Mollie McConnell, the sister of defendant, alleging that she had alienated her husband's affections from her. Plaintiff dismissed this suit, and subsequently the sister of defendant died.

It appears that the parties to the suit, during its pendency, have at different times sought a reconciliation; but it seems that they have never been of that mind at the same time, and it is difficult for us to determine whether such efforts have been made in good faith, or for the purpose

of obtaining some benefit in the trial of this case. We are inclined to the latter opinion. However, we are of the opinion that the plaintiff failed to establish her grounds for divorce, and that the decision of the chancellor in dismissing her complaint for divorce was correct. But it does not follow, as contended by counsel for defendant, that he erred, either in setting aside their separation agreement, or in allowing her permanent alimony, payable in monthly instalments. The facts in this case are not like those in either the case of Pryor v. Proyor, 88 Ark. 302, 129 Am. St. Rep. 102, 114 S. W. 700, or that of Shirey v. Shirey, 87 Ark. 184, 112 S. W. 369. In the Pryor Case, the agreement was made during the pendency of the suit for divorce and by consent of parties was made part of the decree, and was found to be fair and reasonable. The contract in the Shirey Case was an antenuptial one, and the court held that it was not characterized by fairness and good faith.

Contracts like the one in question are controlled by the principles announced in the case of Bowers v. Hutchinson, 67 Ark. 15, 53 S. W. 399. The court said: "In this country the courts, as a general rule, have enforced covenants and promises in deeds of separation relating to the maintenance of the wife and property, provided they are based upon a sufficient consideration, are fair and equal, are reasonable in their terms, and are not the result of fraud or coercion, and the separation has actually taken place when the agreement is entered into, or immediately follows."

In the case at bar the contract was made when the separation took place. The record does not definitely show what defendant is worth, but his property is variously estimated from \$15,000 to \$60,000. It is conceded that plaintiff has nothing. At the time of their separation, when the agreement under consideration was made, plaintiff was in great distress and far away from anyone whom she could look to for advice, and it seems that she trusted entirely to her husband's sense of fairness in the matter. The agreement was made at his request, and, when all these matters are considered in connection with the amount and value of the defendant's estate, we do not think that the provisions made for the plaintiff in the contract were fair and just. Therefore the chancellor was right in setting it aside. While, as above stated, the evidence was not sufficient to justify the chancellor in entering a decree of divorce for the plaintiff, we think it does show that the defendant was more to blame for the separation than the plaintiff. It was his

duty to cleave to his wife in preference to his sister.

It is also the duty of the husband to support his wife, and, under the facts and circumstances of this case, we hold that the allowance of alimony made by the chancellor in the final decree should not now be disturbed. *Shirey v. Shirey*, 87 Ark. 175, 112 S. W. 369.

The allowance of alimony is always subject to modification by the chancellor, to meet the changed situation and condition of the parties in interest.

We have already expressed the view that there are no insurmountable obstacles to prevent these parties from again living together happily; and if in the future either party manifests a bona fide intention to return to the other, and if after a reasonable time, his or her efforts at reconciliation are refused, such refusal will amount to wilful abandonment, and the chancellor will be justified in so treating it.

We now come to the question of attorney's fees. It is shown that the plaintiff made an agreement with her attorney that he should receive a portion of whatever property, real or personal, that should be awarded her out of her husband's estate. An agreement by a wife to pay her attorney, in a suit for divorce and alimony against her husband, a certain per cent of such sums as the court should award her for alimony, is void as against public policy. 2 Nelson, Div. & Sep. § 88; 14 Cyc. Law & Proc. p. 763; *Van Vleck v. Van Vleck*, 21 App. Div. 272, 47 N. Y. Supp. 470; *Jordan v. Westerman*, 62 Mich. 170, 4 Am. St. Rep. 836, 28 N. W. 826. In the last case the court said (quoting from syllabus): "Public policy is interested in maintaining the family relation, the interests of society requiring that such relation be not lightly severed, and that families shall not be broken up for inadequate causes or from unworthy motives; and where differences have arisen, which threaten disruption, public welfare and the good of society demand a reconciliation, if practicable or possible; and for these reasons a contract which tends to prevent such a reconciliation is void."

Now it is contended by counsel for defendant that, although such contract is void, there is no presumption that the wife will not fulfil it, and that, where her attorney has faithfully and satisfactorily acted for her in pursuance of an agreement for a contingent interest in the result of the litigation, there is no necessity entitling her to an allowance for attorneys' fees, and they contend that the court erred in allowing the sum of \$100 for her counsel fees. They rely upon the cases of *White v.* 33 L.R.A. (N.S.)

White, 6 Cal. 212, 24 Pac. 1030, and *Sharon v. Sharon*, 75 Cal. 1, 16 Pac. 345. We do not agree with their contention. It appears that the attorney made the agreement for a contingent fee in this case in good faith, and doubtless when he made it he believed it was a valid contract.

The allowance of alimony is within the sound discretion of the court, and the chancellor is entitled to know all the facts which would influence him in fixing the amount.

The chancellor made no special findings of fact in this case. We will not assume that he made an allowance of alimony and also of counsel fees to be paid by the husband, knowing that the wife had contracted to pay a percentage of the alimony awarded her to her solicitor. On the contrary, we will presume that, before the allowance was made, the parties to the contract had ascertained that the contract for a contingent fee was void as against public policy, and that it was treated by them and by the court as having no binding force whatever when the application for alimony and counsel fees was heard and granted.

The decree will be affirmed.

Petition for rehearing denied.

COLORADO SUPREME COURT.

SEATON MOUNTAIN ELECTRIC LIGHT, HEAT, & POWER COMPANY et al.,
Plffs. in Err.,

v.

IDAHO SPRINGS INVESTMENT COMPANY et al.

(49 Colo. 122, 111 Pac. 834.)

Corporation — public service — steam heat — regulations — validity.

1. A rule adopted by a corporation organized to supply electric light and steam heat to the inhabitants of a municipal corporation, and which, under a franchise from the municipality, has placed conduits for that purpose in the public streets, to the effect

Note. — Right of public-service corporation performing two distinct kinds of service to refuse to furnish one without the other.

In the absence of some qualification made at the time a public-service corporation which undertakes to perform two distinct kinds of service is granted its charter, reserving to it the right to furnish one kind of service only when the other is also furnished, it seems clear that no such right exists. The unreasonableness of upholding such a right would seem to be well illustrated by the case of a corporation formed,

that steam for heat will be supplied only to persons taking electricity from the company, is unreasonable, and cannot be enforced to deprive persons who do not take electricity, of the right to steam.

Same — by-product — right to control.

2. That a corporation undertaking to furnish electricity and steam heat to inhabitants of a municipal corporation, and securing from the municipality a franchise for that purpose, intends to use only the exhaust steam from the plant which manufactures the electricity, to supply the heat, does not, on the ground that such heat is merely a by-product, and that it could not furnish steam alone without loss, entitle it to deny the right to it to others than users of electricity.

Injunction — pleadings — absence of evidence.

3. An injunction will be granted on a complaint which is not supported by testimony, if it alleges facts stating a cause of action, and defendant fails to establish the affirmative defense, which is necessary to defeat recovery, and which is controverted by plaintiff's reply.

as is usual and common, to supply both gas and electricity for lighting purposes. Such a result clearly could not have been intended from the mere granting of the charter to such a corporation since it would deprive a large majority of citizens not able to utilize it of the use of either mode of lighting, or at least place them at the mercy of a corporation to which had been granted the valuable right of the use of the public streets.

As would be expected, few cases have passed upon the question here considered.

In *State ex rel. Deeney v. Butte Electric & Power Co.* — Mont. —, 115 Pac. 44, where it only appeared that the defendant was empowered by its franchise to furnish electricity, it was held that a rule that it would not serve electricity to anyone who stole its gas, until all reasonable charges for gas and electricity were paid, was unreasonable.

The court said: "It is not alleged that the defendant possesses a franchise to supply gas to the inhabitants of Butte. So far as it appears, its engagement in the manufacture and distribution of gas may be wholly without a franchise. If this is so, this part of its business stands upon the same footing as would dealing by it in electrical fixtures and other merchandise of the same character. No one would contend for a moment that a rule declaring that the defendant could cease to furnish electricity to any person who should be in default of payment of a bill for merchandise of the description mentioned would be within the purview of the powers granted by the franchise. It may be that the defendant has a gas franchise. That it has, however, is at best not a just inference from anything stated in the answer, but rather an inference from facts the existence of which rests altogether

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Same — issue undisposed of — effect.

4. That an issue of fact is undisposed of will not prevent the entry of judgment on the pleadings, if the same judgment must be entered regardless of what the findings might have been upon such issue.

Same — discontinuance of service by public-service corporation.

5. Injunction will lie to prevent a public-service corporation from wrongfully ceasing to furnish steam to a consumer for heating purposes, after the proper connections have once been made and the service has begun.

Same — defense — maintenance.

6. A corporation which has undertaken to furnish steam to the public for heating purposes cannot defeat an action to enjoin it from discontinuing service to a consumer, on the ground that the expenses of the suit would be paid by a rival corporation for the purpose of inducing the consumer to start litigation in order to harass and annoy the defendant.

(November 14, 1910.)

in surmise. The allegation on this subject is a mere conclusion. It is a crime to steal gas. Rev. Codes, § 8659. But the defendant has no more right to use its franchise to protect its private gas business, than it would have to protect its private merchandise business. Upon the facts as presented in this case, the relator was entitled to have the defendant furnish to him electricity upon the same footing with every other citizen. The defendant might prosecute him in the courts for a violation of the law, but could not assume to itself the power to punish him for the violation of a rule which it had no power to adopt."

In *Snell v. Clinton Electric Light Heat & P. Co.* 196 Ill. 626, 58 L.R.A. 284, 89 Am. St. Rep. 341, 63 N. E. 1082, it was held that an electric light company could not make payment for a transformer a condition of furnishing electricity to one whose building was wired by a third person, where it furnished transformers free of charge for buildings wired by itself, although it considered that the profits from the wiring justified furnishing transformers without extra charge.

The court said: "The transformer is just as much a necessary appliance in lighting houses as the pole on which it is fastened, or the wire that carries the electricity, or the boilers, and dynamo used in generating it. It is entirely immaterial who does the wiring of the house,—the electric light company or some other party; the transformer is necessary in either case. If the company does the wiring, that is a business distinct from that of furnishing electricity for lighting purposes, just as the putting in of gas and water pipes into a house is a distinct business from furnishing the gas or water to flow through them."

J. T. W.

ERROR to the District Court for Clear Creek County to review a judgment in plaintiffs' favor in a suit to enjoin defendants from shutting off plaintiffs' steam heat. Affirmed.

Statement by Gabbert, J.:

The material facts necessary to consider in determining the questions presented are, substantially, as follows: The Seaton Mountain Electric Light, Heat, & Power Company is a corporation organized for the purpose of manufacturing and selling electric light, heat, and power to the residents and inhabitants of the city of Idaho Springs, and has secured from the latter franchises authorizing it to carry on that business within the limits of the municipality. Pursuant to the authority thus obtained, the company installed pipes and other appliances in, through, and under the streets, avenues, and alleys of the city, for the purpose of supplying heat by means of steam. The parties named as defendants in error, at their own cost and expense, installed, or caused to be installed, in buildings which they owned or occupied, pipes, radiators, and other steam-heating fixtures and appliances, and by and with the consent of the Seaton Company connected such appliances with the pipe lines of the Seaton Company, and the latter, for several years, has been supplying steam to the defendants in error for heating purposes, which was utilized through these appliances. During this period these parties were obtaining electric current to light their respective buildings from another electric light company and its successor. The Gem Leasing Company was carrying on the business of supplying steam which the Seaton Company had contracted to furnish under some arrangement with the latter company. In August, 1907, the Gem Company caused to be served upon the defendants in error a notice to the effect that steam would not be supplied for heating purposes to any party or parties whomsoever unless they should at the same time use electric current supplied by the Seaton Company for lighting the premises in which steam obtained from that Company was used for heating, and that, on and after October 1st following, steam would not be supplied for heating purposes, except under such conditions. Shortly after the service of this notice, the defendants in error, as plaintiffs, brought suit, the purpose of which was to enjoin the plaintiffs in error, as defendants, from enforcing the condition stated in their notice; the averments of fact in their complaint being substantially as above stated.

The answer of the defendants, so far as
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material, and which we shall designate their "first defense," was as follows: It admitted that notice had been given, to the effect that steam for heating purposes would not be supplied the plaintiffs after the 1st of October, 1907, unless they used electric current supplied or furnished by the Seaton Company to light their buildings heated by such steam, and averred that it was their purpose to shut off from plaintiffs and refuse to supply them with steam on and after that date, unless the conditions of such notice were complied with. For further and separate answer, which we shall call the "second defense," they alleged that the principal product of the Seaton Company was electric current for light; that in manufacturing such current during certain portions of the year steam was employed; that the exhaust steam was used in supplying heat; that this exhaust was limited in its amount; that the heat supplied from this source was not more than sufficient to supply patrons of the company who purchased from it current for lighting purposes; and that, if they (the defendants) were required to furnish heat to others than its patrons taking light, it would be compelled to generate live steam, which would increase the expense of operating its plant. For further and separate answer, and as their last defense, they alleged that the suit was not being prosecuted by plaintiffs in good faith, for the reason that they had entered into an agreement with the United Hydro Electric Company, a competitor of the Seaton Company, whereby the Hydro Company had agreed to pay all expenses incurred by plaintiffs in the prosecution of their action, and that the Hydro Company had entered into the above arrangement with the plaintiffs to start litigation in order to harass and annoy the defendants, and for the purpose of gaining an unfair advantage over its competitor, the Seaton Company.

Thereafter the cause came on for hearing on the application of plaintiffs for a preliminary injunction, which was granted, restraining and enjoining the defendants from shutting off from plaintiffs steam heat, and directing that they continue to supply such heat to plaintiffs until the further order of the court. Afterwards the plaintiffs demurred to the last defense and the one preceding, which we have designated the "second." The demurrer as to the latter was overruled, and sustained as to the former. Plaintiffs then filed a replication, the purpose of which was to put in issue averments and allegations of the second defense. In this state of the pleadings, the case came on for final hearing before the court. Plaintiffs stated that

they did not desire to offer any evidence, but rested their case on the pleadings. Thereupon the defendants moved to dissolve the preliminary injunction and dismiss the case, which motion was overruled, when the defendants informed the court that they did not desire to offer any evidence, whereupon judgment was rendered in favor of plaintiffs, to the effect that the preliminary injunction be made permanent. The defendants have brought the case here for review on error.

Mr. E. M. Sabin for plaintiffs in error.

Messrs. A. D. Bullis and F. L. Collom, for defendants in error:

Defendant is legally bound to furnish steam heat to all persons living along the line of the streets through which the mains have been laid, and who have installed the necessary fixtures and appliances for receiving said heat.

20 Cyc. Law & Proc. p. 1160; 2 Beach, Corp. § 835; Portland Natural Gas & Oil Co. v. State, 135 Ind. 54, 21 L.R.A. 639, 34 N. E. 818; Haugen v. Albina Light & Water Co. 21 Or. 411, 14 L.R.A. 424, 28 Pac. 244; American Waterworks Co. v. State, 46 Neb. 104, 30 L.R.A. 447, 50 Am. St. Rep. 610, 64 N. W. 711; Olmsted v. Morris Aqueduct, 47 N. J. L. 333.

The question as to whether the rule sought to be enforced by it is reasonable or otherwise is one of law.

Shiras v. Ewing, 48 Kan. 170, 29 Pac. 320; Shepard v. Milwaukee Gaslight Co. 6 Wis. 539, 70 Am. Dec. 479; American Waterworks Co. v. State, 46 Neb. 104, 30 L.R.A. 447, 50 Am. St. Rep. 610, 64 N. W. 711; Smith v. Henry County, 15 Iowa, 385; Branham v. San Jose, 24 Cal. 585.

Such rule is, on its face, unreasonable, unjust, arbitrary, and oppressive.

Snell v. Clinton Electric Light, Heat & P. Co. 196 Ill. 626, 58 L.R.A. 284, 89 Am. St. Rep. 341, 63 N. E. 1082; State ex rel. Wood v. Consumers Gas Trust Co. 157 Ind. 345, 55 L.R.A. 245, 61 N. E. 674.

Gabbert, J., delivered the opinion of the court:

Quasi public corporations are required to serve the inhabitants of the territory in which they operate in the capacity for which they are organized, and in which they have secured a franchise; but have the right to prescribe for their convenience and security and the protection of the public such rules and regulations, with which their patrons must comply, as are reasonable and just. The reason for this rule is that, although quasi public corporations operating in cities under a franchise obtained from municipal authori-

ties are organized for private gain, the consideration for permitting them to occupy the streets of towns and cities to carry on their business is that thereby the inhabitants of such municipalities may be furnished with conveniences and necessities; hence it follows that, in return for the right to install appliances in the public streets, they assume the duty to furnish the commodities conducted through such appliances, to the inhabitants of the city granting such right, without discrimination and without denial except for good and sufficient cause. The Seaton Company is a corporation organized for the purpose of manufacturing and selling electric light and steam or water heat, has a franchise from the city of Idaho Springs to carry on that business within its corporate limits, has installed pipes and other appliances in and under the streets, through which to conduct the steam or water intended for heating purposes, and must, therefore, supply such of the inhabitants of that municipality with its products as comply with such rules and regulations of the company as it may lawfully impose; but such regulations must be reasonable, just, and lawful, not capricious, arbitrary, oppressive, or unreasonable; neither can they be discriminatory. Watauga Water Co. v. Wolfe, 99 Tenn. 429, 63 Am. St. Rep. 841, 41 S. W. 1060; Shiras v. Ewing, 48 Kan. 170, 29 Pac. 320; Shepard v. Milwaukee Gaslight Co. 6 Wis. 539, 70 Am. Dec. 479; 20 Cyc. Law & Proc. pp. 1160-1163; 2 Beach, Corp. § 835; Portland Natural Gas & Oil Co. v. State, 135 Ind. 54, 21 L.R.A. 639, 34 N. E. 818; Haugen v. Albina Light & Water Co. 21 Or. 411, 14 L.R.A. 424, 28 Pac. 244; Owensboro Gaslight Co. v. Hildebrand, 19 Ky. L. Rep. 993, 42 S. W. 351.

The first important question, then, to determine is whether or not the condition imposed by the notice which the defendants served upon plaintiffs is reasonable. It is clear from its own reading that it is not. Plaintiffs are required to take electric current for lighting purposes as a condition precedent to being furnished with steam for heat. This is simply coercion, and an attempt on the part of the defendants to compel the plaintiffs to purchase electric current which they may not want or need. If they can be permitted to do this, then they can also say to plaintiffs. "We will not furnish you with electric current unless you also take steam." It is their privilege to determine whether they desire one or both of the commodities which the Seaton Company manufactures and sells, and a condition which imposes an obligation to take both or neither is not only

unreasonable, but capricious, arbitrary, oppressive, and discriminatory.

Counsel for defendants contend that generating electricity for light and power purposes, as stated in the answer, is the principal business of the Seaton Company, and that the exhaust steam which is used for supplying heat is a by-product produced by the generation of electric current for light and power; that, if the steam-heating proposition were to be run independently, it could not be operated at a profit; that these circumstances and conditions must be considered in determining the reasonableness of the condition imposed by the notice; and that the defendants should not be compelled to furnish a by-product of the electric light plant, unless it is furnished in conjunction with the principal product, namely, electricity. While it is true that the Seaton Company is engaged in manufacturing and selling electric current, and utilizes the exhaust steam from the plant used in manufacturing the electric current for the purpose of furnishing heat, the business of the Seaton Company, so far as these two products are concerned, is separate and distinct. It did not secure a franchise from the city merely to furnish heat from a by-product or exhaust steam, but obtained the right to place and maintain underground lines of pipe under and through the streets, "for the purpose of conducting, transmitting, and distributing heat, either hot water or steam, for the purchase and use by said city and the residents and citizens thereof." It cannot excuse its proposed action on the ground that furnishing steam alone will entail a loss which can be avoided if electric current is also taken by the consumer for lighting purposes; neither will it be permitted to impose the condition that a consumer must purchase both of its products in order that its profits may be increased or loss prevented. The fallacy of the argument of counsel is at once apparent when we come to consider the conditions to which it would lead if upheld. If the Seaton Company, in manufacturing electric current, generated an excess of steam, it could require patrons, or those who proposed to become patrons, to purchase steam as a condition precedent to being supplied with electric current, although they might not require or have any use for steam heat whatever, should the contention of counsel for defendants be upheld. The results which would follow if defendants were permitted to enforce the condition of their notice at once stamp it as unreasonable and unjust. The consumer has the right to determine for himself which commodity he will take. It must be borne in mind that what has been said, in passing upon

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the condition which the defendants sought to impose by the notice under consideration, is limited to that condition, under the facts of this case, relative to that subject.

It is next urged that the court erred in making the injunction permanent without testimony. A plaintiff need not prove what is alleged in his complaint and admitted by the answer. *Cowan v. Cowan*, 16 Colo. 335, 26 Pac. 934; *Michael v. Mills*, 22 Colo. 439, 45 Pac. 429. The answer admitted the notice set up in the complaint, and in addition alleged that it was the intention of the defendants to enforce its terms. The sole question presented to the court under the pleadings was whether the condition which the defendants sought to impose by the notice was reasonable. On its face it is not, and it was incumbent upon the defense to plead facts which would justify the condition which they sought to impose upon the plaintiffs. If the defendants pleaded any such facts, they should have introduced evidence to establish them, for the reason that the burden of proving a fact rests upon the one who asserts the affirmative of an issue. *Little Pittsburg Consol. Min. Co. v. Little Chief Consol. Min. Co.* 11 Colo. 223, 7 Am. St. Rep. 226, 17 Pac. 760, 15 Mor. Min. Rep. 655; 1 Greenl. Ev. § 774. They sought to present this issue by pleading facts to the effect that the exhaust steam from the plant was but a by-product, and utilized for furnishing heat, and that they could not afford to furnish the latter to a patron unless he also purchased electric current for lighting purposes from them. If this was a good defense, it was affirmative in its nature, was controverted by plaintiffs, and the burden rested with defendants to establish it, and as they declined to offer any testimony, there was nothing for the court to consider on the subject of the reasonableness of the condition imposed by defendants imposing it. We have determined, however, that this defense was not good, and this brings us to a consideration of the next proposition urged by counsel for the defendants, to the effect that a judgment on the pleadings should not have prevailed when an issue of fact tendered by the answer was undisposed of.

A motion for judgment upon the pleadings should be sustained when, under the admitted facts, the moving party would be entitled to judgment on the merits, without regard to what the findings might be upon the facts upon which issue is joined. *Mills v. Hart*, 24 Colo. 505, 65 Am. St. Rep. 241, 52 Pac. 680; *Harris v. Harris*, 9 Colo. App. 211, 47 Pac. 841. This proposition rules the case at bar. From what we have already said, any finding of fact which the court might have made after hearing testimony on the issues tendered

by the portion of the answer under consideration would not have affected the rights of the parties to the action, or authorized any judgment different from that pronounced on the facts conclusively established by the pleadings of the respective parties. This is not a case where the defense interposed was defective, either in form or substance, but one where the facts therein stated could not affect the rights of the parties, whatever the finding of the court thereon might have been had testimony been introduced and considered. Aside from this, as already stated, the court properly disregarded this defense, when the defendants declined to introduce testimony to establish it; its averments being controverted by plaintiffs.

It is next urged that mandamus was the proper remedy, and that injunction is not. The Seaton Company was already furnishing steam for heating to the plaintiffs, but had notified them that after a certain date steam would be cut off, unless a condition, which we have determined could not be enforced, was complied with. Mandamus is a common-law remedy to compel action; injunction an equitable remedy to prevent action and maintain the parties *in statu quo*; so that a person desiring a commodity manufactured and sold by a quasi public corporation may resort to mandamus to compel a supply when the supply has not yet been commenced; and in equity, when the supply is being furnished, to enjoin its stoppage. 13 Enc. Pl. & Pr. p. 500; 20 Cyc. Law & Proc. p. 1164; Golden Canal Co. v. Bright, 8 Colo. 144, 6 Pac. 142; Sickles v. Manhattan Gaslight Co. 66 How. Pr. 314.

The final question urged upon our attention is that the court erred in sustaining the demurrer to the last defense. The weight of authority supports the rule that a champertous contract for the prosecution of a cause of action cannot be interposed as a defense, but can only be set up between the parties when the champertous agreement itself is sought to be enforced. 6 Cyc. Law & Proc. p. 881; 5 Am. & Eng. Enc. Law, 2d ed. pp. 830 et seq.; Hammon Contr. p. 429 §§ 239 et seq., Pennsylvania Co. v. Lombardo, 49 Ohio St. 1, 14 L.R.A. 785, 29 N. E. 573; Burnes v. Scott, 117 U. S. 582, 29 L. ed. 991, 6 Sup. Ct. Rep. 865; Forbes v. Mohr, 69 Kan. 342, 76 Pac. 827; Gage v. Downey, 79 Cal. 140, 21 Pac. 527, 855; Currency Min. Co. v. Bentley, 10 Colo. App. 271, 50 Pac. 920. There are, perhaps, some exceptions to this rule, but the case at bar does not fall within any of them.

The judgment of the District Court is affirmed.

OKLAHOMA SUPREME COURT.

OKLAHOMA CITY, Plff. in Err.,

v.

GEORGE REED.

(17 Okla. 518, 87 Pac. 645.)

Municipal corporation — defective street — injury — presumption of negligence.

In an action against a municipal corporation for personal injuries, there is no presumption that the plaintiff or defendant is guilty of negligence, and in order to entitle the plaintiff to recover, it is sufficient for him to show that the defendant was guilty of negligence, with nothing in the circumstances establishing contributory negligence, on his part; and when such facts are proven, it devolves upon the defendant to prove affirmatively that the plaintiff was guilty of contributory negligence.

(Burford, Ch. J., dissents.)

(September 7, 1906.)

ERROR to the District Court for Oklahoma County to review a judgment in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

Mr. G. A. Paul, for plaintiff in error:

If plaintiff could, by the exercise of reasonable prudence, have avoided the injuries, he cannot recover.

Guthrie v. Thistle, 5 Okla. 517, 49 Pac. 1003; Pitman v. El Reno, 2 Okla. 414, 37 Pac. 851, 4 Okla. 638, 46 Pac. 495; Guthrie v. Swan, 6 Okla. 423, 41 Pac. 84; Oklahoma City v. Reed, 87 Pac. 645.

Hainer, J., delivered the opinion of the court:

This was an action brought by George Reed against the city of Oklahoma City, to recover damages for personal injuries alleged to have been sustained by him on account of the negligence of the city in maintaining a dangerous obstruction on the sidewalk of one of its public streets. The cause was tried to a jury, and the plaintiff recovered a verdict for \$500, and judgment was entered in accordance therewith. From this judgment the city appeals.

It is assigned as error that the plaintiff's amended petition fails to state facts sufficient to constitute a cause of action, and therefore the court erred in not sustaining the defendant's objection to the introduction of evidence. Plaintiff in er-

ror contends that the amended petition did not sufficiently aver that the plaintiff was, at the time of the accident, in the exercise of ordinary care, and free from fault or negligence on his part. And it is further contended that it is incumbent upon the plaintiff to allege and prove that he was not guilty of contributory negligence. And in support of this contention the plaintiff in error has cited the case of *Pittman v. El Reno*, 4 Okla. 638, 46 Pac. 495, where the court laid down the rule that in a case where a municipal corporation is charged with negligence, "it was the duty of the plaintiff to establish in his case in chief the fact that he was not guilty of contributing in any manner to the injury received." We do not think the amended petition is subject to this objection.

The material averments of the amended petition were that the city had maintained, for a period of more than one year, a water hydrant about 22 inches high, and extending in the sidewalk about 40 inches from the outer edge thereof. That on the night of December 24, 1902, while the plaintiff was exercising due and proper care, and without fault on his part, he stumbled on and over said hydrant, and then and there fell on said sidewalk, whereby he sustained great and permanent injuries, having his right arm broken, etc. It will thus be seen that the plaintiff's amended petition not only charges the municipality with negligence, but also alleges that at the time the plaintiff received the injuries he was exercising due and proper care and that such injuries occurred without fault on his part. It is true, as stated by counsel for plaintiff in error, that a municipal corporation has the power to construct and maintain fire hydrants for the use and protection of the city. But while it has the right to construct and maintain such hydrants, they should not be placed in such a position as to obstruct and be an object highly dangerous to pedestrians who are traveling upon the sidewalks in accordance with the usual modes of travel. A municipal corporation is bound by law to use ordinary care to keep its sidewalks, as well as its streets, in reasonably safe condition for public use, in the ordinary modes of travel, by night as well as by day. And if it fails to do so, it is liable for injuries sustained by reason of such negligence. *Norman v. Teel*, 12 Okla. 69, 69 Pac. 791.

The law is well settled that a person traveling upon a sidewalk of a municipal corporation, which is in constant use by the public, has a right, when using the same with reasonable care, to presume and

act upon the presumption that it is reasonably safe for ordinary travel, and free from dangerous obstructions or other defects. *Dillon*, in his excellent treatise on *Municipal Corporations*, 2d ed. vol. 2, § 1024, states this doctrine as follows: "Where streets have been rendered unsafe by the direct act, order or authority of the municipal corporation (not acting through independent contractors, the effect of which will be considered presently), no question has been made, or can reasonably exist, as to the liability of the corporation for injuries thus produced, where the person suffering them is without contributory fault, or was using due care." The adjudicated cases are in conflict on the question whether the burden of proving contributory negligence, or its absence, is on the plaintiff or defendant. In Indiana and some other jurisdictions it has been held that the plaintiff cannot recover unless he alleges and proves that the injury occurred without negligence on his part; in other words, that he was not guilty of contributory negligence. And this was the rule adopted by our court in the case of *Pittman v. El Reno*, supra; but this decision, as we understand it, was placed upon that ground for the reason that the Indiana Code was then in force in Oklahoma, and that the decisions of the courts of that state were binding on our court while that statute remained in force here. But, on the other hand, the great weight of the American authorities, and the text writers, as well as of the English authorities, supports the doctrine that it devolves on the defendant to plead and prove contributory negligence; while all the courts seem to hold to the doctrine that, if the plaintiff's evidence establishes that he was guilty of contributory negligence on his part, that it precludes his recovery, no matter where the burden of proof rests.

In our opinion, the true and sound rule, and one which is in consonance with justice, is that there is no presumption that the plaintiff or defendant is guilty of negligence; and that in order to entitle the plaintiff to recover, it is sufficient for him to show that the defendant was guilty of negligence, with nothing in the circumstances establishing contributory negligence on his part. And when such facts are proven, it devolves upon the defendant to prove affirmatively that the plaintiff was guilty of contributory negligence. In *Am. & Eng. Enc. Law*, 2d ed. vol. 7, p. 455, this doctrine is clearly stated as follows: "Perhaps the true doctrine is that there is no presumption of either negligence or care which is applicable as a general rule in all cases, but that the question of the

burden of proof should be determined on the facts of each case according to whether they show a duty of care on the plaintiff or the defendant. On principle, it would seem sufficient to entitle the plaintiff to recover, for him to show a negligent injury by the defendant, with nothing in the circumstances establishing contributory negligence on his part; and this done, it would devolve upon the defendant to show the plaintiff's contributory negligence affirmatively."

In *Lincoln v. Walker*, 18 Neb. 244, 20 N. W. 113, the supreme court of Nebraska, in passing upon this question, said: "In view of the conflict in the authorities, we are compelled to adopt such rule as may seem most consonant with justice. This being so, there certainly is no presumption that the plaintiff was negligent. We therefore hold the rule to be, that if the plaintiff can prove his case without showing contributory negligence, it is a matter of defense, to be proved by the defendant." In *Hough v. Texas & P. R. Co.* 100 U. S. 213-225, 25 L. ed. 612-616, the Supreme Court of the United States has laid down the rule that in a case of this kind the burden of proof is upon the defendant to show contributory negligence. And to the same effect are the following authorities: *Washington & G. R. Co. v. Gladmon*, 15 Wall. 401, 21 L. ed. 114; *Wharton, Neg.* § 423, and authorities there cited in note 1; *Indianapolis & St. L. R. Co. v. Horst*, 93 U. S. 291, 23 L. ed. 898.

In *St. Louis & S. F. R. Co. v. Weaver*, 35 Kan. 412, 57 Am. Rep. 176, 11 Pac. 408-414, the supreme court of Kansas holds that the burden of proving contributory negligence on the part of the plaintiff rests upon the defendant. In the course of the opinion, Mr. Justice Valentine, speaking for the court, says: "It is claimed, however, that the burden of proof rests upon the plaintiff to show that he was not guilty of contributory negligence, and not upon the defendant to show that he was. The rule, however, in this state, is otherwise. *Kansas P. R. Co. v. Pointer*, 14 Kan. 38, 50; *Kansas City, L. & S. R. Co. v. Phillibert*, 25 Kan. 583. See also *Beach, Contrib. Neg.* 430, § 167. The law presumes that every person performs his duty, and this presumption continues until it is shown

affirmatively that he does not, or has not. Hence, wherever there is no evidence upon the subject, or where the evidence is equally balanced, this presumption in favor of the person in question requires that the findings of the court and jury should be that such person has performed his duty, and is not guilty of any culpable negligence, contributory or otherwise. Hence, while it may be said, in a general sense, that the burden of proving his case devolves upon the plaintiff, yet, if he has shown that the defendant was guilty of the negligence causing the injury complained of, and the evidence tending to show that he has performed his duty is at least equal to that which tends to show otherwise, he has made out his case. This is virtually throwing the burden of proof to show that the plaintiff has been guilty of culpable contributory negligence upon the defendant, and this has been the uniform holding of this court." The doctrine announced in *Pittman v. El Reno*, 4 Okla. 638, 46 Pac. 495, so far as it is in conflict with the rule herein announced, is overruled. It follows that the amended petition stated facts sufficient to constitute a cause of action in favor of the plaintiff and against the defendant, and therefore the court properly overruled the objection of the defendant to the introduction of evidence in support thereof. It seems to us that the evidence in this case clearly establishes that the plaintiff was in the exercise of ordinary care and caution at the time he received the injury, and that it was negligence on the part of the city in maintaining an obstruction that endangered the life and limb of the public who were traveling upon the sidewalk in question, and that the jury were fully warranted in finding the issues in favor of the plaintiff. And, moreover, the damages that were allowed by the jury seem to be reasonable under the circumstances.

Finding no error in the record which would justify a reversal of the cause, the judgment of the court below is affirmed.

Burwell, J., who presided in the court below, not sitting. All the other Justices concur, except Burford, Ch. J., who dissents.

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I. Introduction.

The question whether, in an action to recover damages for injuries to the person or to property caused by negligence, the burden of proving the fault or care of the person injured or damaged should be on the plaintiff or defendant, seems to be ever present before the courts, although in most jurisdictions the rule has been settled for many years. The importance of the subject is indicated by the very multitude of the decisions in which the question has been raised.

In a few of the older states, the rule was early adopted that the plaintiff shall not be deemed to have made out his case until he has alleged and proved not only the defendant's wrong, but his own proper conduct. The plaintiff must show as part of his own case that he was free from contributory negligence. This doctrine has been followed, however, in only a few jurisdictions. By far the greater number of

states have adopted the opposite rule, sometimes referred to as the rule of the Federal courts,—that contributory negligence is a matter of defense, and that therefore the burden of proving it by a preponderance of evidence is on the defendant. Among those jurisdictions adopting the rule that the burden is on the plaintiff are: Connecticut, Illinois, Indiana, Iowa, Maine, Massachusetts, Michigan, New Hampshire, New York, Rhode Island, and Vermont; and among those following the Federal courts are: Alabama, Arizona, Arkansas, California, Colorado, Dakota, Delaware, District of Columbia, Florida, Georgia, Indian territory, Kansas, Kentucky, Louisiana, Maryland, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Jersey, North Carolina, North Dakota, Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, West Virginia, Wisconsin, Washington. The rule that the burden is on the defendant also prevails in England and in Canada.

It is therefore apparent that the great weight of authority is on the side of the plaintiff on this question. It should also be noted that of the jurisdictions mentioned, in which the burden of proving freedom from contributory negligence was held to be on the plaintiff, the rule in Indiana has been changed by statute, so that at the present time in only comparatively a few jurisdictions is the plaintiff put to the disadvantage of proving the injured person's careful conduct.

In many of the cases involving negligence and contributory negligence, the question of who ought to have the burden of proving the injured person's conduct at the time of the accident is not of much practical importance, since, generally, evidence necessary to prove the defendant's negligence also shows the negligence or caution of the plaintiff.¹ If it was the plaintiff himself who was hurt, it is easy enough to get all the facts relating to his conduct leading up to the accident before the court or the jury; or if the injured person does not survive, but there are witnesses of the accident whose testimony can be obtained, and who are able to describe the injured person's conduct, and the evidence makes a case for the

jury, then the mere technical rule as to the burden of proof, in jurisdictions where it is held that the plaintiff must carry it, can be of very little help to the defendant. The jury may be told that the plaintiff, in order to recover, must establish that the injured person at the time of the accident was without fault, and that he must establish this by a preponderance of the evidence; that, if the evidence showing due care and the evidence showing contributory negligence balance, the verdict must be for the defendant; but practical experience has demonstrated that it is not to be expected that a jury in a negligence case will apply to the consideration of such a question the fine discrimination that a court might be looked upon to use. Therefore, where it is possible to obtain complete evidence as to just what happened at the time of the accident, very little hardship may be said to result to the plaintiff by the rule imposing upon him the burden of showing that he was without fault.²

There is a class of cases, however, in which this question as to the burden of proof of contributory negligence is of vital importance to the parties. These are the cases in which it is impossible to obtain any evidence of the injured person's conduct immediately preceding the accident. For example, a party of raftsmen is ordered up a river at night, to perform some special duty with reference to their regular employment. They are furnished with an unsafe, leaky boat, but, owing to the darkness, do not discover its condition. They set out on their trip and are never seen alive again, but the boat and their bodies are afterwards found at various points along the river. Assuming that evidence may be produced sufficient to establish the negligence of the master in furnishing an unsafe boat, it is manifest that here there can be no evidence whatever bearing upon the question of contributory negligence. The boat might have sunk because of its defective condition, or it might have been overturned by the carelessness of those who were in

¹ Paducah & M. R. Co. v. Hoehl, 12 Bush, 41.

Practically, this question often becomes rather one of the weight or preponderance of evidence, than technically one of burden of proof. Houston & T. C. R. Co. v. Cowser, 57 Tex. 293. Here the court is apparently using the term "burden of proof" in what will be termed in this note its secondary sense. See *infra*, II.

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² In *Schumacher v. Tuttle Press Co.* 142 Wis. 631, 126 N. W. 46, however, it is said that where a question of fact is close and doubtful, the question of which side has the burden of proof is always of great importance. Anyone who has tried a question of fact himself, upon evidence nearly balanced, has experienced the importance of the rule, and has frequently been compelled to decide such questions on the consideration alone that he upon whom lay the burden of proof had not been able to lift it. To have this burden wrongfully placed on the crucial point of a close case seems unquestionably to be the deprivation of a substantial, not of a mere technical, right.

it. If, then, no evidence can be produced bearing upon the care of the persons in the boat at the time of the accident, and no presumption is to be indulged in the absence of such evidence, that they were in the exercise of due care, it is manifest that the plaintiff cannot recover, no matter how culpable the fault of the defendant may have been. This question is often presented in railway crossing accidents where the negligence of the company may be proved, but where there is nothing pointing to the conduct of the person killed.³ It may happen in any case in which the accident is not seen. Under such circumstances, it may be conceived that the extremely practical question whether the plaintiff may recover or not may depend upon whether he must proceed in a state court or whether he may resort to a Federal tribunal.

It would seem that the question forming the subject of this note is as plain and as clear-cut as it is possible for any legal question to be. Nevertheless, in addition to the sharp conflict on the main question there is an astonishing amount of confusion in the cases as to subsidiary questions, induced by a careless use of terminology. It is often said, for instance, that the burden of proving contributory negligence is a shifting thing. It may start with the plaintiff, and then suddenly be thrown upon the defendant, and perhaps fall back again upon the plaintiff as the scenes of the trial change.⁴ On the other hand, there are many cases in which it is said that the burden of proof never shifts. If the plaintiff has it in the first place, he has it to the last; and if it rests upon the defendant at any stage of the trial, he must bear it to the end.⁵ Such decisions, while apparently in conflict, may not be so in reality. When one court declares that the burden of proof as to contributory negligence shifts, as if tossed back and forth from one party to the other, and another

court says that it remains fixed where the rules of procedure have placed it at the opening of the litigation, they are usually using the term "burden of proof" in different senses, as will be pointed out in the next subdivision of the note; and it is only by keeping this constantly in mind that these apparently conflicting decisions may be harmonized or even understood.

There is another question relating to this subject which does not seem to have been examined, and about which there appears to be considerable misunderstanding,—also due in some degree to a careless use of terminology. This question has to do with the bearing that certain presumptions as to negligence or absence of negligence have upon the burden of proof as to contributory negligence. Quite frequently the statement is made in the decisions that the rule that the burden of proving contributory negligence is on the defendant is founded on the presumption that men ordinarily exercise proper care to insure their own safety. Sometimes, when the subject is approached from another direction, the courts declare that, the rule being that the burden is on the defendant, it must necessarily follow that, in the absence of eyewitnesses to an accident, there is a presumption that the person killed was in the exercise of due care for his own safety. So, in jurisdictions where the burden of proving careful conduct is on the plaintiff, it follows it is said as a matter of course, in the absence of evidence to the contrary, that there is a presumption that the person injured was guilty of contributory negligence. An effort will be made to demonstrate, in the proper place in this note, the fallacy of this position; and to show the true relationship between such presumptions and the burden of proof. It is a matter of considerable importance that this should be understood, especially in jurisdictions where

³ In *Robinson v. New York C. & H. R. R. Co.* 65 Barb. 146, it is said: "Let us suppose, in order to test the justice and wisdom of requiring the injured party to prove affirmatively that he was free from negligence contributing to the injury, as a part of his case, that a person is seen near the track of a railroad company in health, and not under the influence of liquor, and immediately after the passage of a train of cars he is found mangled and dead upon the track, and it is shown that the train was moving at great speed, and the whistle was not sounded nor bell rung, nor other notice given of the approach of the train. In the case supposed, no one witnesses the stroke that kills. Now, how is the administrator of the deceased to recover against the company? He cannot prove that the

deceased was not guilty of negligence concurring to produce the death. If it must be proved in order to enable the plaintiff to recover, he is utterly remediless."

⁴ The burden of proving contributory negligence must in every case depend largely upon the facts of the particular case. 4 Am. & Eng. Enc. Law, p. 93.

⁵ The burden of proof is always upon him who assumes the affirmative of an issue, and never shifts from his shoulders to his adversary, and though the weight of evidence may shift from side to side according to the nature and respect of the proof, he must carry it all the way through to the end of the trial. *Beaty v. El Paso Electric R. Co.* — Tex. Civ. App. —, 91 S. W. 365.

the rule of the cases has been changed by statute.

II. What is meant by burden of proof.

In considering the question as to the burden of proof of contributory negligence, it is important at the outset, as already intimated, clearly to distinguish between the two senses in which the term "burden of proof" is or may be used. In running through the decisions, a strong impression will be left upon the reader that the courts do not always have this distinction in mind when speaking of the burden of proof with reference to contributory negligence. Many of the cases, however, which would otherwise be confusing, will be readily understood when it is remembered that the term is used in a double sense. This point has been made very clear by Mr. Elliott, who says: "The truth is that the same term is used to express two different things, and this accounts in the main for the apparent conflict among the authorities, although there are some cases in which the courts were led into error by the failure to discriminate. In one sense, the 'burden of proof' marks or expresses the burden or duty of the actor or party who has the risk or affirmative of the issue, and will lose the case if he does not in the end establish such issue, to ultimately prove or establish it. In another sense, the term means or expresses the burden or duty of a party, in order to succeed, of going forward at any particular stage with the evidence, as, for instance, where the other party has made a *prima facie* case by the evidence he has introduced, or by some presumption arising in his favor."⁶ The first sense mentioned by Mr. Elliott in which the term "burden of proof" is used is called by Professor Wigmore the risk of nonper-

suation of the jury.⁷ The second sense mentioned by Mr. Elliott in which the term is used is said by Professor Wigmore to relate to the duty of producing evidence to the judge.⁸ When it is said, therefore, that, as the trial proceeds, the burden of proof may be shifted from the party on whom it rested at first, by the proving of facts which raise a presumption in his favor,⁹ and that the test for determining the burden of proof is to consider which party would be successful if no evidence were given,¹⁰ it is evident that the term "burden of proof" is used in its secondary sense; that is, as implying a duty to introduce evidence for or against the issue, or, as Professor Wigmore would say, of introducing evidence to get the case past the judge, and into the hands of the jury. To take a concrete illustration. A person is killed at a railroad crossing, and the evidence procurable is sufficient to establish the negligence of the defendant. There is no evidence, however, of the conduct of the plaintiff just before the accident. The rule in the jurisdiction where the action must be tried is that the burden of establishing freedom from contributory negligence is on the plaintiff. There is also another rule, let it be assumed, in this jurisdiction, that in the absence of eyewitnesses to an accident, the presumption will be entertained that the injured person was in the exercise of due care for his own safety. If the plaintiff is successful in this jurisdiction, he must establish, by a preponderance of the evidence, two propositions: first, the negligence of the defendant, and, second, freedom of the deceased from contributory fault. This burden is assigned to the plaintiff at the very outset. It remains with him to the end, and no exigencies of the trial can shift it. Once the case is in the hands of the jury, the jurors must be instructed to find for

⁶ 1 Elliott, Ev. 184.

⁷ 4 Wigmore, Ev. § 2485.

⁸ 4 Wigmore, Ev. § 2487.

⁹ The burden of proof in any proceeding lies at first on that party against whom the judgment of the court would be given, if no evidence at all were produced on either side, regard being had to any presumption which may appear upon the pleadings. As the proceedings go on, the burden of proof may be shifted from the party on whom it rested at first, by his proving facts which raise a presumption in his favor. Stephens, Ev. art. 95.

¹⁰ Whenever litigation exists, somebody must go on with it; the plaintiff is the first to begin; if he does nothing, he fails. If he makes a *prima facie* case, and nothing is done to answer it, the defendant fails. The test, therefore, as to the burden or onus of proof, is simply to consider which

party would be successful if no evidence were given, or if no more evidence were given than has been given at a particular point of the case; for it is obvious that during the controversy in the litigation there are points at which the onus of proof shifts, and at which the tribunal must say, if the case stop there, that it must be decided in a particular manner. Such being the test, the burden cannot rest forever upon the one on whom it is first cast; but as soon as he in his turn brings evidence which *prima facie* rebuts the evidence against which he is contending, the burden shifts again, until there is evidence which once more turns the scale. That being so, the question as to the onus of proof is only a rule for deciding on whom the obligation rests of going further if he wishes to win. Jones, Ev. § 176.

the defendant unless the plaintiff has, by a preponderance of the evidence, established both propositions. This he must do to maintain his burden of proof as to the issue, that is, the burden of proof in the primary sense. At the close of the plaintiff's case, however, it is found that he has established a prima facie case as to the defendant's negligence, and has offered no testimony whatever on the question of the injured person's conduct at the time of the accident. The burden of proof as to the defendant's negligence in the second sense, that is, the duty of introducing evidence to controvert testimony offered on behalf of the plaintiff, now rests upon the defendant, because, on the issue of contributory negligence, a prima facie case is made for the plaintiff by the presumption alone that the person injured was in the exercise of due care. The burden of proof in the second sense, that is, the burden of introducing evidence to rebut this presumption, is then on the defendant; but, being unable to produce evidence on this point, the issue is, of course, with the plaintiff, and there is no question of contributory negligence for the jury. Whether the plaintiff wins or loses then depends upon whether he has established the defendant's negligence by a preponderance of evidence.

It is not accurate, however, to state that the burden of proof in the first sense has to do simply with the risk of nonpersuasion of the jury. In the illustration just taken, the issue is not for the jury, because the law presumes freedom from contributory negligence, and the defendant has been able to offer no evidence in rebuttal. The plaintiff wins nevertheless on this issue, by proving his freedom from contributory negligence by a preponderance of evidence, as much as he does on the issue of the defendant's negligence, if the jury should decide he has established that by a preponderance of the evidence. The burden was on the plaintiff at the beginning of the trial, to establish his freedom from contributory negligence. The presumption that he was in the exercise of due care at the time of the accident is the evidence which he offers on that issue. Since there is no evidence on the other side on that question, the plaintiff has, of course, sustained his burden as a matter of law. It would therefore seem more accurate to say that burden of proof in the first sense means the burden which the plaintiff has of establishing the issue by the preponderance of evidence, and that whether the intervention of a jury is necessary or not to determine whether he has done so is immaterial.

If, instead of having to rely on the presumption that the injured person was in

the exercise of due care at the time he was killed, a different situation be imagined, and it be assumed that the plaintiff survived his injuries, and brought the action for his own benefit, making out a prima facie case of negligence on the part of the defendant, and a prima facie case of absence of contributory negligence, it will be seen that the burden of proving contributory negligence in the second sense is then on the defendant. At the beginning of the trial, this burden was on the plaintiff, but, having made a case for himself, it passes to the defendant. This does not mean that the evidence the defendant offers on that question must preponderate. The burden is simply shifted to the defendant to introduce evidence. The plaintiff does not win unless the evidence as to freedom from negligence preponderates the evidence of the defendant as to contributory negligence; and the burden of proof in the first sense is not shifted, although the burden of introducing testimony on the issue has.

If an illustration is taken to represent a jurisdiction in which the burden of proving contributory negligence is held to be on the defendant, the same thing will be seen to be true. All that it is necessary to do in such jurisdictions is for the plaintiff to make out a prima facie case of the defendant's negligence. It often happens, however, that in so doing he discloses facts which open him to the suspicion of having been guilty of contributory negligence. His evidence, we may say, raises the presumption of contributory negligence. This does not relieve the defendant of establishing the issue of contributory negligence, if he relies upon that as a defense. It is often said that under such circumstances the burden of proof is shifted to the plaintiff; but this is so only when "burden of proof" is used in its secondary sense. It simply means that, the plaintiff's evidence being such as to raise a presumption of contributory negligence, he must come forth with sufficient evidence to overcome that presumption. In case no further evidence is introduced, the defendant wins his case, not because the burden of proof has been shifted to the plaintiff, but because the defendant, by means of the plaintiff's testimony, has established the issue of contributory negligence by a preponderance of the evidence. The burden of proving the issue in the primary sense has not shifted. It is simply the order of introducing the testimony that has shifted, the plaintiff furnishing the defendant with the evidence to sustain the defendant's burden on the issue.¹¹

¹¹ The first burden above described—the risk of nonpersuasion of the jury—never shifts, since no fixed rule of law can be

It has been said that the burden of proof and the weight of evidence should not be confounded: ¹² that burden of proof is a question of law for the court, and that weight of evidence is a question of fact for the jury. But, as has already been stated, it is the burden of proof only in the secondary sense that is for the court. The question whether a party has sustained the burden of an issue is sometimes decided by the court, and sometimes by the jury. The weight of evidence is, of course, for the jury.

said to shift. The law of pleading, or, within the stage of a given pleading, some further rule of practice, fixes beforehand the issuable facts, respectively apportioned to the case of each party; each party may know beforehand, from these rules, what facts will be a part of his case so far as concerns the ultimate risk of nonpersuasion. He will know from these rules that such facts, whenever the time comes, will be his to prove, and not the other party's, and that they will not be sometimes his and sometimes the other's, or possibly his and possibly the other's. The other party and himself will, of course, have their turns in proving their respective *facta probanda* (though under a strict system of pleading these terms of proof will be more clearly fixed before trial, and may occur at different stages, and not the same stage of the cause); and the putting in of evidence may therefore "shift" in the sense that each will take his turn in proving the respective propositions apportioned to him. But the burden does not "shift" in any real sense; for each may once for all ascertain beforehand from the rules of law the *facta probanda* apportioned to him, and this apportionment will always remain as thus fixed to whatever stage the cause may progress.

The second kind of burden, however,—the duty of producing evidence to satisfy the judge,—does have this characteristic referred to as a "shifting." It is the same kind of duty for both parties, but it may rest (within the same stage of pleading and upon the same issue and during one burden of the first sort) at one time upon one party, and at another time upon the other. Moreover, neither party can ascertain absolutely beforehand at what time it will come upon him, or cease to be upon him, or by what evidence it will be removed or created,—except so far as a presumption has by a rule of law been laid down as determining the effect attached to certain facts. Moreover, in a distinctive sense, this kind of burden "shifts," and the other does not, in that during the unchanged prevalence of the first kind of burden for one party, the second kind may be shared in turn by one and the other, though the first—the risk of nonpersuasion of the jury, should the case be left to their hands—has not come to an end. 4 Wigmore, Ev. § 2489.

For a discussion of this question with 33 L.R.A. (N.S.)

III. Foundation of rules.

The reason given for the rule that the burden of proving absence of contributory negligence is on the plaintiff is that, freedom from fault being necessary before he can recover, proof of such conduct is part of his case;¹³ that absence of negligence is a proposition necessarily involved in the one upon which the action is founded,¹⁴ that is, the plaintiff, in order to recover, must show that the negligence was solely that of the defendant.¹⁵ The plain-

reference to the doctrine of *res ipsa loquitur*, see note to Cleveland, C. C. & St. L. R. Co. v. Hadley, 16 L.R.A. (N.S.) 527, on "Relation of the doctrine of *res ipsa loquitur* to the burden of proof."

¹² In New Castle Bridge Co. v. Doty, 168 Ind. 259, 79 N. E. 485, it is said: "There is nothing mysterious or peculiar about the term 'burden of proof.' It stands simply for what is ordinarily meant by the use of the words. In pleadings, the party who assumes the affirmative of the issue or proposition has thereby, under a rule of law, laid upon him the necessity of maintaining the issue or proposition to the end, by being able, at the conclusion of the evidence, to point to a greater weight of evidence in support of the issue or proposition than appears against it; and this is all that the term 'burden of proof' implies. Furthermore, when applied to the question of contributory negligence, the rule operates in precisely the same way as in the determination of any fact or issue by the evidence, whether the affirmative is held by the plaintiff or by the defendant. But the burden of proof and weight of evidence should not be confounded. They have radically different meanings. The former is a question of law for the court, and the latter a question of fact for the jury."

¹³ The rule is based upon the theory that the absence of contributory negligence is a part of the plaintiff's case, and not a matter of defense. Guthrie v. Nix, 3 Okla. 136, 41 Pac. 343.

¹⁴ The burden is held to be upon the plaintiff for the reason that it is a subordinate proposition necessarily involved in the more general one upon which the action is founded, to wit, that the injury to the plaintiff was caused by the negligence or wrongful conduct of the defendant. Mayo v. Boston & M. R. Co. 104 Mass. 137.

¹⁵ Evidence on the part of the plaintiff must be such as would authorize the jury to find that the injury was occasioned solely by the negligence of the defendant. Burke v. Broadway & S. Ave. R. Co. 34 How. Pr. 239.

In an action for damages due to an injury received through a collision between two carriages, it was held that the burden of proving freedom from contributory negligence was on the plaintiff. Park v. O'Brien, 23 Conn. 339. The court said that the reason of this rule is that the plaintiff

tiff does not recover if he is negligent, because it cannot then be said that the accident was caused by the defendant's negligence, which would not have happened but for the plaintiff's own want of ordinary care.¹⁶ Upon this point, Judge Cooley has said: "When one sues to recover damages

for a negligent injury, the gravamen of his complaint is that he has been damaged by the wrongful and negligent action of the defendant, without having contributed thereto by negligent conduct of his own. The absence of contributory negligence is therefore a part of his case, and it is quite

must prove all the facts which are necessary to entitle him to recover, and this is one of those facts. It was necessary for the plaintiff to prove, first, negligence on the part of the defendant in respect to the collision alleged, and, secondly, that the injury to the plaintiff occurred in consequence of that negligence. But, in order to prove this latter part, the plaintiff must show that such injury was not caused in whole or in part by his own negligence, for, although the defendant was guilty of negligence, if the plaintiff's negligence contributed essentially to the injury, it is obvious that it did not occur by reason of the defendant's negligence. Therefore, the plaintiff would not prove enough to entitle him to recover by merely showing negligence on the part of the defendant, but he must go further, and also prove the injury to have been caused by such negligence by showing a want of concurring negligence on his own part contributing materially to the injury. Hence, to say that the plaintiff must show the latter is saying only that he must show that the injury was owing to the negligence of the defendant.

Referring to the language of the court in the last-mentioned case, as to the reason for the rule, the court in *Gulf, C. & S. F. R. Co. v. Shieder*, 88 Tex. 152, 28 L.R.A. 538, 30 S. W. 902, affirming — *Tex. Civ. App.*, 26 S. W. 509, said: "We think this reasoning fallacious. It assumes that plaintiff cannot recover unless it appears that the injury was caused solely by the negligence of the defendant, when the law is that he may recover when defendant's negligence is only one of several contributing causes, the defendant being able to defend where one of such causes is plaintiff's negligence, not on the ground that his own negligence was not the sole cause of the injury, but upon the ground that the law will not permit plaintiff to recover where it is shown that his own wrongful or negligent act contributed to the injury."

It has been held in Massachusetts and several other states that in actions of this kind the plaintiff must prove that he was free from contributory fault, or fail in his action. These decisions go upon the ground that there can be no recovery unless two conditions concur, to wit, negligence of the defendant and freedom of the plaintiff from contributory fault; and that it is incumbent on the plaintiff to show the existence of both conditions. The same proposition may be stated in another form: the defendant is liable to respond in damages only for an injury caused by his negligence. But if the negligence of the plain-

tiff concurred with that of the defendant to produce the injury, it cannot correctly be said that the same was caused by the negligence of the defendant. The meaning of the rule is that, to render the defendant liable, the injury must be the result of his negligence alone. Hence, to establish a cause of action, the plaintiff must show that the negligence of the defendant was the sole, proximate cause of the injury; and to do this, he must necessarily prove himself free from contributory fault. *Hoyt v. Hudson*, 41 Wis. 105, 22 Am. Rep. 714. ¹⁶ *Detroit & M. R. Co. v. Van Steinburg*, 17 Mich. 99.

The plaintiff is bound in all cases to show that the defendant is entirely responsible for the grievance complained of. It must appear from this showing that all the material negligence that led to the accident was on the part of the defendant, and that the plaintiff did not contribute towards it. The plaintiff must establish completely whose fault it was, and explain the whole transaction. *Michigan C. R. Co. v. Coleman*, 28 Mich. 440.

In *Owens v. Richmond & D. R. Co.* 88 N. C. 502, it is said that the class of cases which devolve this duty on the plaintiff assume the cause of action to consist in an act or omission involving not only negligence in the defendant, but the exercise of proper care by the injured party, both of which must coexist and co-operate as essential ingredients, to entitle the latter to compensatory damages. The cause of action is complex, consisting in the union of both these constituent elements, contributing to the same injurious result.

In *Lake Shore & M. S. R. Co. v. Miller*, 25 Mich. 274, the court said: "Though there is some conflict between the cases upon this question, we think the great weight of authority fully sustains the point raised by the plaintiff in error, that the burden of proof is equally upon the plaintiff to show that he acted with due care, or that his own negligence did not contribute to the injury, as that the defendant was guilty of such negligence; and we think this should be so held upon principle as well as upon authority; for, until the plaintiff has shown that he acted with due care, the mere proof of defendant's negligence and of the injury does not show that the injury was, in a legal sense, produced by this negligence of the defendant. . . . The absence of contributory negligence on the part of the plaintiff is therefore just as essential an element in the cause of action as the negligence of the defendants, and just as clearly constitutes a necessary part of the plaintiff's case; and until he has shown it, or

proper to say that he should show that he acted with due care."¹⁷ The accident not being the consequence solely of the wrong of either party, neither can show wrong against the other.¹⁸ A distinction, however, is pointed out in respect to this question of the burden of proof, between negligence actions and actions in tort not based

on negligence, there being no reason; it is said, for such a rule in actions of the latter sort.¹⁹

On the other hand, in jurisdictions where the opposite rule prevails, it is said that the rule placing the burden of proving absence of contributory negligence on the plaintiff violates all the analogies of the

until it in some way appears from the evidence, he does not make a *prima facie* case."

¹⁷ Teipel v. Hilsendegen, 44 Mich. 461, 7 N. W. 82.

If the accident was caused partly by the plaintiff's own negligence, then it was not, in a legal sense, caused by the negligence of the defendant. *Lesan v. Maine* C. R. Co. 77 Me. 85.

In *Adams v. Carlisle*, 21 Pick. 146, the court, in holding that it was incumbent upon the plaintiff suing for personal injuries received by reason of a defective highway, to show freedom from contributory negligence, said: "Otherwise, although the way be out of repair, it would not follow that plaintiff's loss was occasioned by it."

In an action to recover for injuries received by reason of a defect in the highway, where the question was whether evidence of due care could be introduced by the plaintiff without an allegation of due care in the declaration, the court, in holding such testimony admissible, said: "When a traveler on the highway has broken down, it is obvious that this may be attributed to either one of two causes; viz., his own negligence or the defect in the highway. Proof which negatives the one tends to establish the other, as the true and sole cause. This is the ground of the decisions cited in the argument to prove, as they do most fully, that the plaintiff must show that he was driving with due care. It is to negative carelessness, and prove that the accident was occasioned exclusively by the defect in the highway. The plaintiff, therefore, may give affirmative proof that he was driving with due care, because it establishes his main averment, and the one on which his right of action must rest, namely, that his loss was occasioned by reason of the defect in the highway." *May v. Princeton*, 11 Met. 442.

¹⁸ In *Button v. Hudson River R. Co.* 18 N. Y. 248, the court said: "In regard to all the circumstances essential to the cause of action, the plaintiff held, and was required to sustain, the affirmative. Among those circumstances were that the defendants were negligent, and that the injury resulted from that negligence. If the intestate was negligent, and his negligence concurred with that of the defendants in producing the injury, the plaintiff had no cause of action. The reason why no right of action will exist is that, both the in-

testate and the defendants being guilty of negligence, they were the common authors of what immediately flowed from it, and it was not a consequence of the negligence of either. The court cannot accurately, and will not undertake to, discriminate between them as to the extent of the negligence of each, and the share of the result produced by each; neither, therefore, could allege against the other any wrong, and without a wrong there can do no legal injury. In this view, the exercise of due care by the intestate was an element of the cause of action. Without proof of it, it would not appear that the negligence of the defendants caused the injury."

¹⁹ In *Hussey v. King*, 83 Me. 568, 22 Atl. 476, it is said: "There is, however, another class of actions in tort not based on negligence, in which the defendant's care, or want of care, is not in issue; in which some direct, positive act of the defendant makes the cause of action. In this class of actions there is no reason nor place for such a rule. The plaintiff makes a *prima facie* case by proving the defendant's act and the consequent injury. He has no occasion to prove the defendant's negligence, and hence has no occasion to prove his own due care in the first instance. In actions for assault upon the person, the plaintiff proves in the first instance only the defendant's blow. *Son assault demesne* must be shown by the defendant. We think actions for injuries caused by dogs or other dangerous animals are of this latter class. By the common law, the keepers of wild animals were unqualifiedly liable for all injuries done by such animals. No matter how carefully the keeper restrained and guarded his animals, his care did not exempt him if they did damage. The owners or custodians of animals not wild were liable for injuries done by them, if they knew of the injurious propensity of the animal. The most scrupulous care would not excuse them. One kept a wild animal at his peril, and also kept at his peril any animal which he knew to have an injurious disposition. He was practically an insurer against injury by them. His care or negligence was immaterial. In actions for injuries caused by such animals, the plaintiff had only to prove the keeping and the *scienter*. After much research, we do not find it directly held in any English case, ancient or modern, that in such actions the plaintiff must allege and prove the defendant's negligence and his own due care."

law,³⁰ and disregards a well-settled elementary rule of pleading.³¹ In these jurisdictions, contributory negligence being considered a mere matter of defense, it must be proved by the defendant like any other defense.³²

Among the reasons frequently given for

the rule that the burden is on the defendant is this: that there is a presumption that everyone is careful to avoid danger, and that therefore the rule should be such as it is declared to be in these jurisdictions.³³ It is declared that to hold that the plaintiff is bound to prove affirmatively

³⁰ In *Holmes v. Oregon & C. R. Co.* 6 Sawy. 275, 5 Fed. 523, in holding that the burden of proving contributory negligence is on the defendant, the court said that any other rule than this violates all the analogies of the law, and is practically illogical and unjust.

If this broad rule is adopted, even if we distinguish between such defenses as payment, release, satisfaction, etc., as relating to facts subsequent to the act complained of, we cannot see upon what ground the plaintiff is to be excused from proving that he is not an alien enemy if war exists, or that he was not in a state prison, or that the defendant was not acting under the authority of any statute in what he did, or, in cases where the defendant would not be responsible if he was a mere agent, that he was not acting as an agent. And at any rate, what possible ground of distinction can there be between the rule forbidding a plaintiff to recover when his negligence has contributed to the injury, and that which prevents a recovery for a fraud or trespass when the parties are *in pari delicto*? Yet we are not aware of any case in which it has been held that plaintiff in such actions must assume the burden of proving himself free from fault. *Hoyt v. Hudson*, 41 Wis. 105, 22 Am. Rep. 714; *Shearm. & Redf. Neg.* §§ 33, 34.

In *Bevis v. Vanceburg Teleph. Co.* 132 Ky. 385, 113 S. W. 811, it is said that it is true that before one can recover for another's negligence, the former must have been without such negligence as to have caused his own injury. But the question we are considering is not one of right to recover, but of the correct practice in the enforcement of the right.

³¹ In *Hocum v. Weitherick*, 22 Minn. 152, it is said that when the negligent act of the defendant, and the injury, the sufficiency of the former to produce the latter, and their relation to each other as proximate cause and effect, are the sole facts averred and admitted by the pleadings, or proved on the trial, a *prima facie* case is established. To require the plaintiff in addition to negative a possible defense by an averment in the complaint of his freedom from negligence would be to disregard a well-settled, elementary rule of pleading.

In *Paducah & M. R. Co. v. Hoehl*, 12 Bush, 41, the court said that the authorities are somewhat conflicting, but it seemed to the court that it was reversing a well-recognized rule of pleading to require the plaintiff to allege and prove the nonexistence of facts that, when established, would constitute a defense to his own action.

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³² The question was first passed upon by the supreme court of Missouri in *Thompson v. North Missouri R. Co.* 51 Mo. 190, 11 Am. Rep. 443, an action to recover for injuries to a passenger hurt while alighting from the cars, in which case it was held that negligence on the part of the plaintiff is a mere defense to be set up by the answer, and shown like any other defense, though, of course, to be inferred from the circumstances proved by the plaintiff upon the trial. The court said: "It seems to be illogical, and not required by the rules of good pleading, to compel a plaintiff to aver and prove negative matters in cases of this kind. In an ordinary complaint upon negligence, it is not necessary to aver that the plaintiff has taken due care. It is true the action may be defeated by showing that the plaintiff was guilty of such contributory negligence as would preclude a recovery, but that is a question for the jury to be determined upon the evidence, and not a matter of pleading. I cannot see what possible ground of distinction there can be between the rule forbidding a plaintiff to recover when his negligence has contributed to the injury, and that which prevents a recovery for a fraud or trespass when the parties are *in pari delicto*. Yet it would be difficult to find a case in which it has been held that the plaintiff in such actions must assume the burden of showing himself free from fault." (Opinion by Wagner, J.)

³³ Mr. Bailey, in his work on *Onus Probandi and Preparation for Trial*, p. 60, submits the following reasons in favor of the rule that the onus is with the defendant: "1. Because no English precedent can be found in which there is an allegation of due care by plaintiff in the declaration. 2. There is a presumption that everyone is careful to avoid danger, and the other rule would tend to violate such presumption. 3. It substantially calls for proof of a negative contrary to principles governing the subject of the onus. 4. The doctrine is not pretended to be based upon the capacity of parties injured to be sworn in their own behalf; and at common law in many instances, by reason of their incompetency to testify, plaintiff must, under that rule, have failed of proof. 5. And this reason is peculiarly applicable to the modern action for the value of a life."

The rule is founded on the presumption that a person is careful until the contrary appears. *Little Rock & Ft. S. R. Co. v. Cavenesse*, 48 Ark. 106, 2 S. W. 505.

The rule rests upon the principle that no person is presumed to have done wrong, or to have been in fault. He must be

that he was in the exercise of due care would be equivalent to saying that the law presumes that the person injured was guilty of contributory negligence.²⁴ This

shown to have been so. The same principle which requires proof against the defendant requires proof against the plaintiff, and negligence on the part of the plaintiff is purely a defensive proposition, and a part of the defendant's case. If evidence tending to establish that proposition comes out in the plaintiff's proof of the circumstances of the injury, it is, of course, available to the defendant, but it is treated in that case precisely as it would be treated if the evidence had been produced by him. It may be said to be weighed by the jury as his evidence, and the burden is on him that there shall be a preponderance of evidence against the plaintiff on the question of contributory negligence. The question is not whether the plaintiff has acquitted himself of negligence, but whether the defendant, by adopting what comes from the plaintiff's witnesses, and by what he produced himself, has a preponderance of evidence to the effect that the plaintiff had contributed to his injury by his own negligence. Harmon v. Washington & G. R. Co. 7 Mackey, 255.

In St. Louis & S. F. R. Co. v. Weaver, 35 Kan. 412, 57 Am. Rep. 176, 11 Pac. 408, it was said: "The law presumes that every person performs his duty; and this presumption continues until it is shown affirmatively that he does not or has not. Hence, whenever there is no evidence upon the subject, or where the evidence is equally balanced, this presumption in favor of the person in question requires that the findings of the court and jury should be that such person has performed his duty, and is not guilty of any culpable negligence, contributory or otherwise. Hence, while it may be said in a general sense that the burden of proving his case devolves upon the plaintiff, yet, if he has shown that the defendant was guilty of the negligence causing the injury complained of, and the evidence tending to show that he has performed his duty is at least equal to that which tends to show otherwise, he has made out his case. This is virtually throwing the burden of proof to show that the plaintiff has been guilty of culpable contributory negligence upon the defendant; this has been the uniform holding of this court."

If, from the whole evidence, contributory negligence such as would defeat a recovery be not shown by a preponderance of the evidence, and the negligence of the defendant be so shown, the action may be maintained. Each party starts in the trial with the presumption that he is free from negligence, and each, therefore, primarily assumes the burden of proving the negligence of the other. Schweinfurth v. Cleveland, C. C. & St. L. R. Co. 60 Ohio St. 215, 54 N. E. 89.

²⁴ In Durant v. Palmer, 29 N. J. L. 544, an action to recover damages for a nuisance consisting in the maintenance of an

open area way into which the plaintiff fell and was injured, it is said that the plaintiff is not bound to prove affirmatively that there was no want of ordinary care on his part, for that would be equivalent to saying that the law presumes that the person injured contributed by his negligence to the accident, and that such presumption, unless overcome by positive proof, is, of itself, sufficient to defeat recovery. Want of ordinary care is negligence, culpable negligence, not to be presumed, but to be proved by the party who avers it.

In Stewart v. Nashville, 96 Tenn. 50, 33 S. W. 613, it is said that when, to other considerations, is added the force of the presumption which is in accord with common experience, that any man of sound mind will ordinarily avoid personal injuries, it seems to us that the rule which imposes upon the plaintiff the burden of showing care, when there is nothing to suggest the want of it, is unsound, and not in harmony with the general rules of evidence.

In Hill v. New Haven, 37 Vt. 501, 88 Am. Dec. 613, it is said that the principle contended for, that a plaintiff should be compelled in advance to furnish evidence of the propriety of his own course of conduct, before any offer or attempt has been made to impeach it, seems quite contrary to the general rule of legal presumption which is always applied in other cases to human conduct, that it will be presumed rightful and proper until the contrary is made to appear.

In Milwaukee & C. R. Co. v. Hunter, 11 Wis. 167, 78 Am. Dec. 699, Paine, J., in criticizing the rule that the burden is on the plaintiff of showing absence of contributory negligence, said: "But my own opinion is, the doctrine as stated . . . is not sound upon principle. It seems to me directly in conflict with another well-settled and salutary rule, that negligence is not to be presumed. . . . Such a rule can only rest upon a presumption of negligence, for if the plaintiff's evidence has no tendency to prove any negligence, if he is required to disprove it, it can only be upon the ground that it is presumed."

Referring to the reason given for the rule by some of the courts, that the plaintiff, having taken the affirmative, in order to recover, must prove all the essential facts, including the fact that he was not guilty of concurring negligence, the court in Stewart v. Nashville, supra, said: "That he must prove the essential facts is admitted, and that he has proved them when he shows the injury and that the defendant's neglect is the proximate cause of it, seems to us clear, and that, nothing more appearing, he would be entitled to a recovery, unless it be assumed that proof of the accident raises *ipso facto* a presumption of plaintiff's negligence."

was the position taken by Judge Duer in an early New York case,²⁵ before the opposite rule was established in that state.

And in a jurisdiction in which it is held that the burden of proving absence of contributory negligence is on the plaintiff, it has been asserted that this is a reasonable rule, because there is no presumption that the accident was not caused by the negligence of the injured person.²⁶ So, it has been suggested that there is no justice in the rule placing the burden upon the

plaintiff because experience has shown that in a large number of accidents the injured persons were guilty of carelessness.²⁷

Judge Brewer, however, while he was on the bench in Kansas, pointed out the injustice of the rule placing the burden on the plaintiff, giving this as a reason why the opposite rule should prevail.²⁸ Such are the various reasons given by the courts in support of the two rules adopted. They will be further considered in connection with the discussion of the subject of the next subdivision of this note.

²⁵ In *Johnson v. Hudson River R. Co.*, 5 Duer, 21, it was said by Duer, J., that it is manifest, upon a slight consideration, that the proposition that the burden of proving freedom from contributory negligence is on the plaintiff, if admitted to be true, is equivalent to saying that in all cases the law presumes that the negligence of the person accidentally injured contributed to the accident, and that this presumption, unless overthrown by positive evidence, is alone sufficient to defeat a recovery. The presumption would be just as reasonable, if not more so, that accidental injuries in all cases where a compensation in damages is sought were in reality occasioned solely by the negligence of the defendant or his servants, so as to entitle the plaintiff to recover merely by proving that the accident happened and the injury followed, and in all cases casting upon the defendant the burden of repelling the presumption by demonstrative proof of its falsity.

²⁶ In *Hussey v. King*, 83 Me. 568, 22 Atl. 476, it is said: "In all actions based on negligence, in which the defendant's negligence is the gist of the action, the plaintiff, to make out a prima facie case, must affirmatively prove his own due care, and the defendant's negligence in the premises. This is a reasonable rule, for, when an injury occurs from somebody's negligence, there is no presumption that it was not from the negligence of the sufferer. Indeed, there is some presumption that the sufferer, by the exercise of ordinary care, might have avoided the injury. Hence, the rule that where a plaintiff charges negligence as the basis for his action, he must show that he himself was free from the fault of which he complains."

²⁷ To the reason suggested by Mr. Beach in his work on Contributory Negligence, for the rule, that, in a very large proportion of suits for personal injuries, common observation is that the negligence of the injured party has concurred to bring about the result complained of, and that, this being so, there would be no wrong done in any particular or individual case in requiring the plaintiff to show as a part of his case that he was not guilty of negligence, the court in *Stewart v. Nashville*, 96 Tenn. 50, 33 S. W. 613, replied that it may as well be answered, while it is no doubt true that many accidents are attrib-

utable to the heedlessness and recklessness of the parties injured, yet it is certainly so that many occur without such concurring negligence, and if the proportion between these two classes of cases is to be determined by the result of litigation involving claims for damages for personal injuries, it would possibly be found that a very large majority of these cases were of this latter, rather than of the former, class. With the imperfect data, however, which we have, we think it would be impossible to state the proportion of these respective classes with anything like mathematical accuracy, and unsafe to rest a rule of evidence upon them.

²⁸ In *Kansas P. R. Co. v. Pointer*, 14 Kan. 37, in holding that the burden of proving contributory negligence is on the defendant, Brewer, Judge, said: "We are aware of contrary decisions and that in some states it is held that the burden is on the plaintiff to show affirmatively that he exercised due care and was without fault. But if it is shown that a party has done wrong and caused injury thereby, is not a prima facie case for compensation made? Logically, the wrongdoer should always compensate, and the wrong and the injury always entitled to relief. When the wrong of both parties contributes to the injury, the law declines to apportion the damages, and so leaves the injured party without any compensation. This is not strictly justice. The wrongdoer causing injury ought not to be released from making any compensation simply because the injured party is also a wrongdoer, and helped to produce the injury. But many considerations, especially the difficulty of correctly apportioning the damages and determining to what extent the wrong of the respective parties was instrumental in causing the injury, uphold the rule so universally recognized, that where the wrong, the negligence, of both parties, contributes to the injury, the law will not afford any relief. But if the wrongdoer ought always to compensate for the injury he has wrought, and is relieved from the obligation to compensate only by the fact that the wrong of the injured party helped to cause the injury, it is incumbent on him to show such wrong. It is a matter of defense to avoid the consequences of his own wrong."

IV. Presumptions of care and negligence.

a. Relation to burden of proof.

Since freedom from contributory negligence may in some jurisdictions be shown by the presumption that an injured person was, at the time of the accident, in the exercise of proper care,²⁹ many judges in jurisdictions where the rule prevails that the burden of establishing the issue of contributory negligence is on the defendant, have fallen into the error of asserting that the rule is founded on the presumption. No particular harm could come from such a view if it went merely to the explanation of the origin or foundation of the rule. But when the question before the court is whether a presumption of due care exists under certain circumstances, it is quite important to know if the question whether there shall or shall not be a presumption that the injured person was in the exercise of due care for his own safety depends upon the rule that the burden of proving due care is on the plaintiff or not. If the rule that the burden of proving contributory negligence rests upon the defendant is founded upon the presumption that the injured person was in the exercise of due care, then, as a matter of course, it follows, when the question arises whether the injured person shall be presumed to have been free from contributory negligence, that it must be answered in the affirmative in every case where the rule prevails, that the burden of proving contributory negligence is on the defendant. And following out this line of reasoning,

²⁹ Contributory negligence may be shown by presumptions arising from circumstances already proved in the case. *Donaldson v. Mississippi & M. R. Co.* 18 Iowa, 280, 87 Am. Dec. 391.

³⁰ *Lawson, Presumptive Ev.* 133.

³¹ *Meehan v. Great Northern R. Co.* — Mont. —, 114 Pac. 781.

In those jurisdictions where the burden is on the plaintiff of proving affirmatively that he was not contributorily negligent, the presumption necessarily is that the plaintiff was contributorily negligent; but in other jurisdictions where the burden is not on the plaintiff of proving affirmatively that he was not contributorily negligent, the presumption is that he was not contributorily negligent. *Lawson, Presumptive Ev.* 2d ed. 133; *Nichols v. Baltimore & O. S. W. R. Co.* 33 Ind. App. 229, 70 N. E. 183, 71 N. E. 170.

Where the burden of proving contributory negligence is on the defendant, the law indulges the presumption that the injured person was in the exercise of ordinary care and diligence at all times in the discharge

it might and has, indeed, been said in jurisdictions where the burden of proving absence of contributory negligence is on the plaintiff, that it must necessarily follow that there is a presumption that the injured person was, at the time of the accident, guilty of contributory negligence. It is therefore of great importance to parties to litigations of this sort that the proposition that the rule as to the burden of proof depends upon the presumption, or that the presumption follows as a matter of course from the rule, should be carefully examined.

The idea that these presumptions relating to the conduct of the injured person and the burden of proof of contributory negligence are interdependent has been entertained by both text-book writers and the courts. Mr. Lawson, for example, says: "In those jurisdictions where the burden is on the plaintiff of proving affirmatively that he was not contributorily negligent, the presumption necessarily is that the plaintiff was contributorily negligent; but in other jurisdictions where the burden is not on the plaintiff of proving affirmatively that he was not contributorily negligent, the presumption is that he was not contributorily negligent."³² So the courts will say that where the burden of proving contributory negligence rests upon the defendant, the law presumes that a person exercises ordinary care for his own safety.³¹ Since in Oregon, says one court, the burden is on the defendant to show as a defense that the plaintiff, in a personal-injury case, has been guilty of contributory negligence, it must be assumed until otherwise shown, that a

of his duties, until the contrary appears. *Parsons v. Missouri P. R. Co.* 94 Mo. 286, 6 S. W. 464.

Where the burden of proving contributory negligence is on the defendant, the presumption is, in an action to recover for the death of a person killed through the alleged negligence of the defendant, that the deceased was, at the time of the accident, in the exercise of due care and diligence. *Crumpley v. Hannibal & St. J. R. Co.* 111 Mo. 152, 19 S. W. 820.

The burden being on the plaintiff to establish freedom from contributory negligence, an instruction that the law presumes that a passenger, while being conveyed by a carrier, acts with ordinary care, and that presumption will prevail unless the evidence in the case shows to the contrary; and therefore it will be presumed that the plaintiff was acting with ordinary care and prudence at the time of the alleged injury unless the contrary has been proved, was held properly refused. *Bonce v. Dubuque Street R. Co.* 53 Iowa, 278, 36 Am. Rep. 221, 5 N. W. 177.

minor has exercised the care and circumspection to be expected of one of his years of discretion.³² So, it is said that the rule requiring the plaintiff to establish his own freedom from negligence of necessity operates to prevent the application of the presumption in his favor.³³

It requires but a moment's reflection, however, to show that there is no such relation between the presumptions as to the plaintiff's actions at the time of the accident and the burden of proof as to contributory negligence as is asserted by these authorities. Of course, the term "burden of proof" is here used in its primary sense; that is, as meaning the burden of proving

the issue by a preponderance of evidence. It will be shown by cases cited in this subdivision of the note that in jurisdictions where it is held that the burden of proving absence of contributory negligence is on the plaintiff, a presumption is nevertheless entertained, under certain circumstances, that the injured person was in the exercise of due care. Here, then we have the burden of proof as to the injured person's conduct on the plaintiff, and also a presumption in his favor that the injured person was in the exercise of proper care. In such jurisdictions the presumption is often entertained that a passenger killed in a railroad accident was in the exercise

³² *Dubiver v. City & Suburban R. Co.* 44 Or. 227, 74 Pac. 915, 75 Pac. 693, 1 A. & E. Ann. Cas. 889.

In actions for injuries caused by negligence, contributory fault is, in the Federal courts, a matter of defense of which the burden of proof is upon the defendant; and consequently reasonable presumptions and inferences in respect to matters not proven or left in doubt should be in favor of the injured party. *Wabash, St. L. & P. R. Co. v. Central Trust Co.* 23 Fed. 738.

In *Bromley v. Birmingham Mineral R. Co.* 95 Ala. 397, 11 So. 341, it is said: "In this state the rule is firmly established that contributory negligence is matter of defense; that it is incumbent on the defendant to plead it, and the burden rests on the defense to sustain the plea by proof, unless the evidence offered by the plaintiff in support of his case establishes contributory negligence on his part, in which event it cannot be held that he has made out his own case. Contributory negligence being matter purely defensive under our decisions, it must follow that there are no presumptions against a plaintiff of a want of due care and diligence on his part, and that there is no burden on him to prove affirmatively that he exercised due care and diligence. The burden of proving contributory negligence resting on the defendant, it follows that where the proof shows injury, caused by the culpable negligence of the defendant, and the proof is wholly silent as to contributory negligence, the plaintiff is entitled to recover. In this respect the rule is different in this state from that which prevails in Massachusetts and some other states." To the same effect, *McDonald v. Montgomery Street R. Co.* 110 Ala. 161, 20 So. 317.

³³ *Nichols v. Baltimore & O. S. W. R. Co.* 33 Ind. App. 229, 70 N. E. 183, 71 N. E. 170.

The presumption of contributory negligence arose from the rule placing the burden of proving due care on the plaintiff. *Ibid.*

In Indiana the presumption is that one who is hurt at a railway crossing by a train was guilty of negligence. *Indianapolis Union R. Co. v. Neubacher*, 16 Ind. App. 21, 43 N. E. 576, 44 N. E. 669.

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³⁴ In *Bruce v. Brooklyn Heights R. Co.* 68 App. Div. 242, 74 N. Y. Supp. 324, it is said that if the injury happened to the passenger while occupying a seat provided by the company, the presumption of lack of contributory negligence would at once arise: but it is none the less proved by the plaintiff by establishing the facts which made it impossible for the passenger to contribute to the accident, as in the case of a collision or the derailing of the car.

In *Galena & C. Union R. Co. v. Yarwood*, 15 Ill. 468, where a passenger frightened by the fact that the car in which he was riding had left the track, jumped from the front platform and was hurt, it was said that proof that the plaintiff was a passenger, the accident, and the injury, made a prima facie case of negligence, and threw the burden of explaining upon the company.

And in a case involving the same facts it was held that before the plaintiff could recover, he must show not only that the injury to him was the result of the carelessness or negligence of the defendants, but also that he himself was without fault in producing the injury. *Galena & C. Union R. Co. v. Fay*, 16 Ill. 558, 63 Am. Dec. 323.

But on a second appeal of the former case (*Galena & C. Union R. Co. v. Yarwood*, 17 Ill. 509, 65 Am. Dec. 683), the point was made that there is a sensible distinction between persons receiving an injury while sustaining the relation of passenger to the defendant and those who do not, with respect to the burden of proof, and it was held, referring to the first case, that where the injured person was a passenger, a prima facie case was made by proof of the accident and the injury. The court said that where the plaintiff in the action does not sustain that relation to the defendant, he must, in addition to the accident and his own injury, affirmatively show his own freedom from carelessness or negligence in causing or contributing to produce it: and it was held that a proposed modification to an instruction that unless the plaintiff had proved to the satisfaction of the jury that his own carelessness or negligence did not contribute or assist to produce the injury complained of, then the jury should find for the defendant, was properly refused.

of due care.³⁴ There are also many cases in which it is held that the law does not indulge the presumption either of negligence or of the exercise of due care. It is manifest that these decisions must be erroneous if the burden of proof as to contributory negligence is dependent upon presumptions as to the injured person's conduct, or if the presumptions follow as a matter of course from the rule as to the burden of proof. The very harshness of the rule imposing the burden upon the plaintiff has led courts in jurisdictions where such a rule prevails to indulge, under certain circumstances (that is, where there are no eyewitnesses to the accident), a presumption in favor of the plaintiff that the deceased was free from contributory fault. This, of course, is inconsistent with the position that the rule as to the burden of proof is founded on the presumption, or that the presumption follows from the rule as to the burden of proof.

Again, if a statute should be passed in any jurisdiction abolishing all presumptions with reference to the conduct of the injured person at the time of the accident, and requiring that his negligence or freedom from fault be proved either by direct or circumstantial evidence, it will be seen that the question of who should bear the burden of proof of this issue would still remain. The rule, then, as to the burden of proof, is not founded or dependent upon any presumption of law as to negligence or absence of negligence on the part of the injured person.

It would seem that the true reason for the rule as to the burden of proof springs solely from public policy. It is this that fixes the rule that the plaintiff cannot recover if he has been guilty of contributory negligence, and it is this that assigns to the parties the burden of proving the various issues, including the injured person's conduct. It is, as pointed out by Judge Brewer in the case cited in the last subdivision, a question of justice. The question is: Who ought to carry this burden? In reaching a conclusion, the

fact, based upon experience, that men are ordinarily careful or careless at the time they are hurt, might have some influence. But this fact, sometimes referred to as a presumption, is not a presumption in its true sense,—that is, a presumption of evidence in favor of the one party or the other. Other considerations may enter into the policy of fixing the burden of proof. It may be influenced, for instance, by the consideration that one party or the other has more ready access to the evidence. The analogies of the law referred to in some of the cases with reference to the burden of proof as to certain defenses in other kinds of actions, and references to rules of pleading in actions not involving negligence, while helpful, should have no binding force upon the judgment as to where the burden of proof should lie as to contributory negligence. It is a mere question of fairness, of justice, as between the parties.

It is quite natural to think that rules as to the burden of proving the issue must have been established from the very first, but that rules as to presumption of conduct of the parties arose afterwards, as the exigencies of the trial demanded, owing to the failure of the parties to produce evidence as to certain points necessary to success. The rule might be established that the burden of proving absence of contributory negligence is on the plaintiff, and no serious inconvenience to the plaintiff arises from it until a case appeared in which it was impossible for him to offer any evidence on the subject of the injured person's conduct. In such a situation, the question would naturally arise whether a presumption of law ought to be entertained in his favor, to take the place of other evidence that the person hurt was not negligent. Whether this should be done or not is also a mere matter of policy, and entirely independent of the policy dictating the rule with reference to the burden of proof. If the law in any jurisdiction is that the burden of proving absence of contributory negligence is on the plaintiff, and

In *Lesan v. Maine C. R. Co.* 77 Me. 85, the court said: "By the negligence of a railroad company, a train of cars runs off the track, whereby passengers are injured. In such a case, the passenger ordinarily situated in the car, who sues for damages for his injury, would not be required to show any facts further than the occurrence itself. Proof of the accident tells all that can be told,—is *prima facie*, at least, the whole story. *Res ipsa loquitur*. . . . The injured party is passive in such a case. In the case, however, of a collision between a railroad train and the 33 L.R.A. (N.S.)

wagon of a traveler, the traveler plays usually an active part if connected with, or independent of, the acts of others, and the acts of the two parties conjunctively produce a collision. In such case, not much can be based upon inference and presumption. The prosecuting party must make it distinctly appear that his own remissness did not contribute in causing the injury."

³⁵ The law does not presume anyone to be negligent, especially when such negligence may result in his own personal injury. *Conroy v. Oregon Constr. Co.* 10 Sawy. 630, 23 Fed. 71.

in the same jurisdiction a presumption of law is indulged that the injured person was guilty of contributory negligence, and then a statute is passed changing the rule as to the burden of proof, and requiring the defendant to establish contributory negligence, it does not follow, as a matter of course, that the presumption as to the injured person's conduct must be changed; that, instead of indulging the presumption of contributory negligence, a presumption of the exercise of due care must be entertained. It is not necessary, in fact, that there should be any presumption, one way or the other, as to the injured person's conduct. The question whether or not there should be a presumption in favor of or against the plaintiff should be decided in its own merits, without reference to where the burden of proof lies.

Cases, therefore, in the same jurisdiction, holding that the burden of proving freedom from contributory fault is on the plaintiff, and that the plaintiff, under certain circumstances, is entitled to the presumption that the injured party was in the exercise of due care, are not inconsistent. Nor would the fact that the courts of any jurisdiction hold that the burden of proving contributory negligence is on the defendant preclude them from also establishing the rule that no presumption as to the injured person's conduct will be entertained, or even from deciding that a presumption will be indulged that the injured person was guilty of contributory negligence. The cases collected in this sub-

division of note fully sustain the views here set forth as to the relation between these presumptions and the burden of proof as to contributory negligence.

b. Negative statements of the rule.

1. The law does not presume negligence.

It is sometimes said that the law will not presume negligence either on the part of the defendant or on the part of the person suffering the injury.³⁵ This, it will be observed, is a holding merely that there is no affirmative presumption of negligence. It would not necessarily follow that there is a presumption as to the exercise of due care. Such a holding, as already pointed out, is no guide to the rule as to the burden of proof, since the absence of presumption only requires proof of the issue by a different kind of evidence; that is, by direct or circumstantial evidence.

2. The law does not presume contributory negligence.

It is said that the rule that negligence is never presumed applies to contributory negligence.³⁶ The statement that contributory negligence is not presumed will be found in many cases in jurisdictions where the burden of proving the injured person's conduct at the time of the accident is on the defendant.³⁷ The courts

Negligence, whether of plaintiff or defendant, is not presumed, and the burden of proving it is on the party by whom it is alleged. *Anderson v. Wilmington*, — Del. —, 70 Atl. 204; *Stidham v. Delaware City*, — Del. —, 67 Atl. 175.

In *Pittsburgh, C. C. & St. L. R. Co. v. Bennett*, 9 Ind. App. 92, 35 N. E. 1033, the court said that the law never presumes guilt or fault, and always casts upon the party asserting it, the burden of proving the same. But while this is true, and while, therefore, the plaintiff cannot recover unless he establishes the negligence of the defendant, it does not follow that the latter, in order to defeat a recovery, must show affirmatively that the plaintiff was himself at fault. The plaintiff is required to prove not only negligence, but unmixed negligence on the part of the defendant; and in order to make out a case of unmixed negligence, as a subordinate proposition, and necessarily involved in the same, the plaintiff must make it appear also that he, or the one in whose stead he sues, was himself in the exercise of proper care.

³⁵ Negligence is never presumed, and this applies to contributory negligence; the burden of proving it resting upon the defendant if it does not appear from testi-

mony produced by the plaintiff. *Bowring v. Wilmington Malleable Iron Co.* 5 Penn. (Del.) 594, 66 Atl. 369.

³⁷ *Aluminum Co. v. Ramsey*, 89 Ark. 522, 117 S. W. 508; *Little Rock & Ft. S. R. Co. v. Leverett*, 48 Ark. 334, 3 Am. St. Rep. 230, 3 S. W. 50; *Sanders v. Reister*, 1 Dak. 151, 46 N. W. 680; *Farris v. Southern R. Co.* 151 N. C. 483, — L.R.A.(N.S.) —, 66 S. E. 457; *Boney v. Atlantic Coast Line R. Co.* — N. C. —, 71 S. E. 87; *Houston & T. C. R. Co. v. Pollock*, — Tex. Civ. App. —, 115 S. W. 843; *Jacksonville Ice & Electric Co. v. Moses*, — Tex. Civ. App. —, 134 S. W. 379.

It has been definitely settled in Kentucky that it is not to be presumed, in the absence of evidence as to the care exercised by a person killed at a railroad crossing where he had a right to be, that he recklessly or carelessly imperiled his own life. *Cahill v. Cincinnati, N. O. & T. P. R. Co.* 92 Ky. 345, 18 S. W. 2; *Louisville & N. R. Co. v. Lucas*, 30 Ky. L. Rep. 359, 98 S. W. 308.

In *Clark v. Lancaster*, 229 Pa. 161, 73 Atl. 80, the court said that contributory negligence on the part of a plaintiff is no more to be presumed than the negligence of a defendant. The rule that a plaintiff must present a case clear of contributory negligence does not mean that, after prov-

often indicate their adherence to the erroneous view that the presumption and the burden of proof are interdependent by stating that the law will not presume the negligence of the plaintiff, "which must be established by the defendant,"³⁸ or by adding, "but the burden of establishing it rests upon the defendant."³⁹

ing affirmatively that the defendant's negligence caused the injury, he must prove negatively that he himself was not guilty of negligence that contributed to the result.

In *Pittsburgh, C. C. & St. L. R. Co. v. Noel*, 77 Ind. 110, an action to recover damages for the negligent burning of wood, the court said that the averment that the injury occurred without the fault of the injured party must be made and proved by the party making it; but at the same time it is a negative averment, and if the plaintiff is able to show the loss charged in his complaint, and that it was caused by the negligence of the defendant, as charged, without showing any contributory negligence or ground for inferring or reasonably suspecting such negligence, he will be entitled to recover without making direct and affirmative proof on that subject. In the absence of circumstances to show or suggest it, there is no presumption of contributory negligence.

In the absence of all proof on that subject, carelessness on the part of the plaintiff is not to be presumed. *Beatty v. Gilmore*, 16 Pa. 463, 55 Am. Dec. 514. The court said that the principle that carelessness in such a case would prima facie be presumed would involve intolerable hardship by protecting the culpable party in those instances where the chance of disaster is multiplied by the obscurity of night. To say that the very fact which increases the danger shall protect him who was the author of it by rendering the necessary proof difficult, or cutting it off altogether, seems too unreasonable to attract the deliberate sanction of tribunals created to watch over the interests of the community.

³⁸ *Holman v. E. E. Souther Iron Co.* 152 Mo. App. 672, 133 S. W. 379.

³⁹ *File v. Wilmington City R. Co.* — Del. —, 80 Atl. 623.

Similarly, in *Mynning v. Detroit, L. & N. R. Co.* 59 Mich. 257, 26 N. W. 514, an action to recover for the death of a person killed at a railroad crossing, it was held that a requested instruction that negligence is not to be presumed, but must be affirmatively proven by the party alleging it, and in the manner alleged in the declaration in the case; and in this case the burden of proof is on the plaintiff to show that the defendant is entirely responsible for the injury complained of by reason of, and in consequence of, the neglect charged in the declaration, and that the plaintiff's intestate did not contribute towards it,—should have been given.

³³ L.R.A.(N.S.)

3. The law does not presume freedom from contributory negligence.

In jurisdictions in which the burden of proving due care on the part of the person injured is held to be on the plaintiff, it is often asserted that there is no presumption that the plaintiff was free from fault.⁴⁰ This has often been held in New

The burden on the issue of contributory negligence rests upon the defendant; the burden of duty resting upon the person for whose death the action is brought. The law does not presume contributory negligence, but it must be alleged and proved; that is, the defendant must show such facts from which only one inference, that is, the plaintiff's negligence, can be drawn by men of ordinary reason and intelligence. *Farris v. Southern R. Co.* 151 N. C. 483, — L.R.A.(N.S.) —, 66 S. E. 457.

It is the law of Minnesota that the burden is on the defendant to establish contributory negligence on the part of a plaintiff. It is not presumed under any circumstances. *Lammers v. Great Northern R. Co.* 82 Minn. 120, 84 N. W. 728.

An instruction that when a person receives an injury by falling through an open trestle of a railway company, from which he dies, and neither the railway company nor its agents were the immediate cause of the fall, then the law presumes that his own negligence was the cause of his death, and before there can be a recovery it devolves upon the plaintiff to show by a preponderance of evidence that the deceased was free from fault, was held wrongfully to shift the burden of proof to the plaintiff. *Texas & St. L. R. Co. v. Orr*, 46 Ark. 182.

⁴⁰ *Pittsburgh, C. C. & St. L. R. Co. v. Welch*, 12 Ind. App. 433, 40 N. E. 650.

There is no presumption that a person killed at a railroad crossing was in the exercise of due care. *Day v. Boston & M. R. Co.* 96 Me. 207, 90 Am. St. Rep. 335, 52 Atl. 771.

That persons approaching railroad crossings were in the exercise of due care and prudence will not be presumed, and unless the evidence tends so to show, the plaintiff failed in one essential element of his case. *Boyden v. Fitchburg R. Co.* 72 Vt. 89, 47 Atl. 409.

In *McLane v. Perkins*, 92 Me. 39, 43 L.R.A. 487, 42 Atl. 255, it was urged that the rule in Maine was really this: "If the circumstances disclosed and left unexplained indicate any contributory negligence, then the burden is on the plaintiff to explain the circumstances, and to show that after all he was free from fault; but that if the circumstances disclosed do not indicate any contributory negligence, there can be no presumption of any such negligence, and there is nothing for the plaintiff to rebut or explain." But the court said that although the plaintiff's freedom from contributory negligence can sometimes be reasonably inferred from the circumstances,

York,⁴¹ as where, in the absence of eye-witnesses, a freight hand was killed in an

without direct evidence of what he did or left undone, yet in all cases plaintiff's freedom from fault must affirmatively appear in evidence, or, at least, by some legitimate inference from the evidence.

A person killed at a railroad crossing under circumstances as to which there was no witness cannot be presumed to have been in the exercise of due care, in an action to hold the railroad company liable for his death, where the burden of showing due care is on the plaintiff. *Shumm v. Rutland R. Co.* 81 Vt. 186, 19 L.R.A. (N.S.) 973, 69 Atl. 945.

But conceding without deciding the point, that a presumption does not exist in the case and remain throughout, that the plaintiff was not guilty of contributory negligence, or that he exercised due care, an error in so charging is harmless where no inference can be drawn from the charge that the jury was required to do something more by reason of the suggested presumption than to find negligence by preponderance of the evidence. *Toledo R. & Light Co. v. Rippon*, 8 Ohio C. C. N. S. 334, 28 Ohio C. C. 561.

It cannot be presumed that one who was killed at a railroad crossing was in the exercise of due care because nothing appears to the contrary. *Indiana, B. & W. R. Co. v. Greene*, 106 Ind. 279, 55 Am. Rep. 736, 6 N. E. 603.

In *Indianapolis v. Keeley*, 167 Ind. 516, 79 N. E. 499, the court said that before the enactment of the statute of 1899 (Acts 1899, p. 58, § 359a, Burns's 1901), the burden was on the party prosecuting an action for negligence, as a necessary part of his case, to establish affirmatively that the person so injured or killed did not, by his own want of ordinary care, contribute to produce the accident. In the application of the principle it was just as fatal to the cause of the plaintiff if he failed to show his freedom from fault as if it affirmatively appeared that his own carelessness proximately contributed toward producing his injuries. A plaintiff under the former rule was not clothed as a matter of law with any presumption of care or freedom from negligence, but, upon the trial, the inquiry was whether, from the evidence, it appeared affirmatively, either directly or by inference, that he did not by his own fault contribute to the accident.

No inference arises in favor of a woman who falls on a slippery sidewalk and is hurt, that because the facts found do not show that she was guilty of negligence contributing to the injury, she was free from contributory negligence. *McQueen v. Elkhart*, 14 Ind. App. 671, 43 N. E. 460. The court said that to hold that such an inference arises when there are no facts found tending to show either that she was or was not guilty of contributory negligence would be to supply by mere "presumption that which an unending rule requires should be established by proof." 33 L.R.A. (N.S.)

⁴¹ The rule in New York state is that there is no presumption, in the absence of evidence, that the deceased was in the exercise of due care. *Jones v. Ryan*, 125 App. Div. 282, 109 N. Y. Supp. 156.

There are no presumptions in favor of the plaintiff, the law imposing upon him the burden of proving by a fair preponderance of evidence not alone that the defendant has been guilty of negligence resulting in the injury, but that the plaintiff has been free from negligence contributing to the accident; and where there is no evidence of the exercise of any degree of care on the part of the plaintiff, and when there are no circumstances from which an inference may be fairly drawn, there is clearly no question for the jury. *Johnson v. Brooklyn Heights R. Co.* 34 App. Div. 271, 54 N. Y. Supp. 547.

An inference cannot be drawn from a presumption that the deceased would exercise care and prudence in regard to his own life and safety. *Axelrod v. New York City R. Co.* 109 App. Div. 87, 95 N. Y. Supp. 1072.

The jury cannot assume that the person for whose death the action is brought had not omitted to use ordinary precautions which a prudent man would take in the presence of danger. *Riordan v. Ocean S. S. Co.* 32 N. Y. S. R. 328, 11 N. Y. Supp. 56.

While looking at the evidence in the most favorable aspect for the plaintiff, if it points as much to contributory negligence as to absence of it, the plaintiff cannot recover, since he is not entitled to any presumption of lack of negligence under such circumstances. *Fowler v. New York C. & H. R. R. Co.* 74 Hun, 141, 56 N. Y. S. R. 307, 26 N. Y. Supp. 218; *Neddo v. Ticonderoga*, 77 Hun, 524, 28 N. Y. Supp. 887.

So it was held erroneous to instruct the jury that plaintiff in a crossing accident would be presumed to be free from fault if nothing else appeared in the case, on the ground that it could not be supposed that a man would bring an injury upon himself. *Warner v. New York C. R. Co.* 44 N. Y. 465. The court said there is no presumption of negligence against either party. It is the duty of the plaintiff to prove, and the right of the defendant who is charged with negligence causing an injury, that he should prove, by satisfactory evidence, that he did not contribute to the injury by any negligence on his own part. This proof in some form constitutes a part of the plaintiff's case. It must appear either from the circumstances of the case or from evidence directly establishing the fact to the satisfaction of the court and jury, that the plaintiff is free from any fault contributing to the injury. It may be assumed that the plaintiff or the party injured is anxious for his own safety; but it cannot be presumed that the plaintiff is free from fault if nothing else appears in the case, for the reason that

elevator accident,⁴³ or where a person leaving a railroad company's yards by a way not provided by the company was run over and killed,⁴³ or where a person was found dead at a railroad crossing.⁴⁴ The fact that one conjecture as to the injured person's conduct is more probable than an-

other is declared by an Illinois court to be no ground for indulging the presumption as to the exercise of due care.⁴⁵ The mere fact of the happening of an accident is not sufficient to raise the presumption of the injured person's freedom from contributory negligence.⁴⁶ The law, in fact, raises no

some evidence is required to overcome such presumption, and the plaintiff would be thereby relieved from proving, either by direct evidence or the surrounding circumstances, that he is not in any fault.

⁴³ Where a freight hand was caught between an ascending elevator and the combing of the hatch of a vessel, and killed, a charge that if the deceased was rightfully on the elevator at the time of the injury, in the absence of testimony of an eyewitness of the accident, the jury might assume that he received his injury in the performance of his duty, and had not omitted the precautions which a prudent man would take in the presence of a known danger,—was held erroneous, because permitting the plaintiff in an action to recover for the death, to establish the cause of action without evidence as to contributory negligence. *Riordan v. Ocean S. S. Co.* 124 N. Y. 655, 26 N. E. 1027.

⁴³ It is not to be presumed that a person leaving a railroad company's yards by a way not provided by the company was free from negligence, when run over and killed by one of the company's engines, but the burden is upon the plaintiff to prove it, either by direct or circumstantial evidence. *Parsons v. New York C. & H. R. R. Co.* 85 Hun, 23, 66 N. Y. S. R. 166, 32 N. Y. Supp. 598.

⁴⁴ If a person should be found killed at a railroad crossing, no human eye having witnessed the accident, and an action should be brought for his death, the plaintiff could not recover, since there would be no evidence from which the jury could infer that the deceased, at the time of the accident, was in the exercise of that care which the law requires of him. *Cordeil v. New York C. & H. R. R. Co.* 75 N. Y. 330.

⁴⁵ In *Chicago & A. R. Co. v. Crowder*, 49 Ill. App. 154, where it appeared that a brakeman met his death in some unknown manner, either by falling off of the caboose, or being struck or knocked off, the cause of the death being largely speculative, the court said that the true rule as to the character of the proof required of the exercise of due care on the part of the party injured is, that when the circumstances attending an accident are in evidence, the absence of evidence of fault on the part of the injured party will justify an inference and be accepted as proof of the exercise of ordinary care. But where, as in this case, there is an absence

of evidence of the conduct and acts of the deceased at the time of the accident or injury, the fact that he acted with due care cannot be regarded as proven because one conjecture is more probable than another. When the evidence is as consistent with carelessness as with the exercise of due care on the part of the person injured, there is neither proof nor inference to justify a recovery.

⁴⁶ No presumption of freedom from negligence arises from the happening of an accident. *Whalen v. Citizens' Gaslight Co.* 151 N. Y. 70, 45 N. E. 363.

No presumption arises from the happening of the injury, and the proof of the defendant's negligence, that the deceased was free from blame. *Jencks v. Lehigh Valley R. Co.* 33 App. Div. 635, 53 N. Y. Supp. 625.

No inference arises from the fact that locomotive crossing signals were inadequate, that a person killed at a crossing was free from contributory negligence, and to support an action for his death, the plaintiff has the affirmative of that question, and the burden of showing that the negligence of the deceased did not contribute to the calamity. *Miller v. New York C. & H. R. R. Co.* 81 Hun, 152, 62 N. Y. S. R. 734, 30 N. Y. Supp. 751.

The mere happening of an accident does not give rise to the presumption of absence of contributory negligence, but such negligence must be proved affirmatively. *Skapura v. National Sugar Ref. Co.* 83 App. Div. 21, 81 N. Y. Supp. 1085.

The mere happening of an accident by stepping upon a bridge of ice on a sidewalk, when it was covered with a light snow, does not make the question of contributory negligence one for the jury. *Weston v. Troy*, 139 N. Y. 281, 34 N. E. 780.

Contributory negligence on the part of a passenger cannot be presumed from the mere fact of injury, but must be proved; and, on the other hand, the proof of an injury to a passenger on the car of a common carrier casts upon it the burden of proving that the injury was occasioned by inevitable casualty, or some other cause which human care and foresight could not prevent, or by contributory negligence of the plaintiff, unless the proof on the part of the plaintiff tends to show that the injury was occasioned by either of those causes. *Boone v. Oakland Transit Co.* 139 Cal. 490, 73 Pac. 243.

presumption of negligence against either the plaintiff or the defendant from the fact of the injury.⁴⁷

c. Positive statements of the rule.

1. Presumption that injured person was guilty of negligence.

In several jurisdictions the positive rule that the injured person is presumed to have been guilty of contributory negligence

is laid down. This was quite frequently held in the early Indiana cases, before the adoption of the statute later referred to in this note.⁴⁸ Where a person was run over at a railroad crossing, the fault was held to be *prima facie* his own,⁴⁹ and the rule applied to injuries both to person and property.⁵⁰ But since the passage of the statute putting the burden of proving contributory negligence on the defendant, it was held that the presumption of such negligence does not attach to the plaintiff

⁴⁷ *Gulf, C. & S. F. R. Co. v. Shieder*, 88 Tex. 152, 28 L.R.A. 538, 30 S. W. 902, affirming — Tex. Civ. App. —, 26 S. W. 509.

Negligence is not to be attributed to a person killed at a railroad crossing from the fact that he was on the track at the time of the accident. *Chicago, R. I. & G. R. Co. v. Clay*, — Tex. Civ. App. —, 119 S. W. 730.

From the fact of injury at a railroad crossing no presumption arises as to the guilt or innocence of either party. *Gahagan v. Boston & M. R. Co.* 70 N. H. 441, 55 L.R.A. 426, 50 Atl. 146.

But where the burden of proving contributory negligence is on the defendant, it was held that a person having been killed while attempting to cross a railroad track at a regular crossing, the presumption of negligence would not arise from the mere fact that the deceased was killed on the track at that place. *Louisville, C. & L. R. Co. v. Goetz*, 79 Ky. 442, 42 Am. Rep. 221. In this case it appeared that the deceased was a careful, thrifty farmer, familiar with the territory at and near the intersection of the road as well as the time when the trains usually pass at the point at which he was killed. The train was running at a speed of 30 miles an hour, and the evidence made it doubtful whether the deceased could have avoided the injury by the exercise of the utmost vigilance on his part unless he had kept off the track until the train passed. It was held, under the circumstances, that the question of contributory negligence was properly left to the jury.

⁴⁸ See *infra*, VIII. a, 1.

⁴⁹ *Oleson v. Lake Shore & M. S. R. Co.* 143 Ind. 405, 32 L.R.A. 149, 42 N. E. 736.

He must affirmatively show that he did not contribute to the injury before he is entitled to recover for such injury. *Smith v. Wabash R. Co.* 141 Ind. 92, 40 N. E. 270; *Cincinnati, I. St. L. & C. R. Co. v. Howard*, 124 Ind. 280, 8 L.R.A. 593, 19 Am. St. Rep. 96, 24 N. E. 892; *Pittsburgh, C. C. & St. L. R. Co. v. Fraze*, 150 Ind. 576, 65 Am. St. Rep. 377, 50 N. E. 576; *Hancock v. Lake Erie & W. R. Co.* 21 Ind. App. 10, 51 N. E. 369.

A presumption attaches in all cases that the fault was *prima facie* that of the plaintiff, and hence, before there can be a recovery, this presumption must be overcome by some affirmative evidence tending to prove the exercise of due care by the

plaintiff when he was injured by the negligent conduct of the defendant. *Pittsburgh, C. C. & St. L. R. Co. v. Bennett*, 9 Ind. App. 92, 35 N. E. 1033.

In *Cincinnati, H. & I. R. Co. v. Butler*, 103 Ind. 31, 2 N. E. 138, an instruction proceeding upon the theory that the presumption of law is that the injury occurred without the fault of the plaintiff, and that the burden was on the railroad company to show by a fair preponderance of evidence that he was heedless or careless, was held erroneous in an action to recover damages for injuries received at a public crossing. The court said that the idea conveyed by it was that certain facts inculcating the defendant being proved to the satisfaction of the jury, they should find for the plaintiff unless it was proved by a fair preponderance of evidence that the injury resulted from his own carelessness; thus, in effect, directing them to find for the plaintiff in event they were unable to determine from the evidence whether the plaintiff had or had not been guilty of concurring negligence; that the jury were authorized by the instruction to infer that upon establishing the defendant's negligence and the plaintiff's injury, the plaintiff had a right to their verdict, and that right continued until it was shown by a fair preponderance of evidence that the injury was the result of his own carelessness. This was an exact reversal of the rule.

In *Hathaway v. Toledo, W. & W. R. Co.* 46 Ind. 25, an instruction that when a person crossing a railroad track is injured by collision with a train, the fault is *prima facie* his own, and he must show affirmatively that his fault or negligence did not contribute to the injury, before he is entitled to recover for such injury, was approved.

For discussion of the question as to the presumption of care exercised by a person approaching a railroad crossing, see note to *Hanna v. Philadelphia & R. R. Co.* 4 L.R.A. (N.S.) 344.

⁵⁰ When a person is injured while crossing a railroad track, either in person or property, by a collision with a train, the fault is *prima facie* his own, and he must affirmatively show that his fault or negligence did not contribute to the injury to entitle him to a recovery. *Louisville, N. A. & C. R. Co. v. Stommel*, 126 Ind. 35, 25 N. E. 863.

in a crossing case from the mere fact that he was injured.⁵¹ After a verdict, even where the presumption of carelessness prevails, this presumption gives way to the contrary presumption that everything has been done to prove the plaintiff entitled to the verdict.⁵²

It has also been held in Maine that a person injured at a railroad crossing is presumed to have been at fault.⁵³

2. Presumption that the injured person was in the exercise of due care.

Usually in jurisdictions where the

burden of proving contributory negligence is held to be on the defendant, the courts do not stop with saying that there is no presumption that the injured party was guilty of contributory negligence, but hold that a positive presumption exists that he was, at the time of the accident, in the exercise of due care. Ordinarily the presumption is that a person with the love of life common to all exercises such due care as the circumstances permit to protect himself from injury.⁵⁴ This rule has been laid down in a number of jurisdictions.⁵⁵ It has been applied in the case of an injury

⁵¹ Nichols v. Baltimore & O. S. W. R. Co. 33 Ind. App. 229, 70 N. E. 183, 71 N. E. 170.

⁵² Hence, if the defendant asserts that the verdict is wrong because of a variance between the complaint and the proof, or because the plaintiff was guilty of contributory negligence, the burden is upon such defendant to establish the assertion. This may be done by the answers of the jury to interrogatories; but these must disclose such a state of facts in relation to the variance or contributory negligence of the plaintiff as will clearly antagonize the general verdict, and overcome the presumption attending it. Indianapolis Union R. Co. v. Neubacher, 16 Ind. App. 21, 43 N. E. 576, 44 N. E. 669.

⁵³ A collision between a traveler in the highway and a railroad train at a highway crossing is prima facie evidence of negligence on the part of the traveler. Hooper v. Boston & M. R. Co. 81 Me. 260, 17 Atl. 64.

To the contention that contributory negligence should not be presumed, and that if plaintiff's evidence did not indicate its existence, the plaintiff was entitled to recover unless the defendants adduced evidence that it did exist, the court replied that the law in Maine was unmistakably and inexorably the other way. McLane v. Perkins, 92 Me. 39, 43 L.R.A. 487, 42 Atl. 255.

⁵⁴ Eidson v. Chicago, R. I. & P. R. Co. — Kan. —, 116 Pac. 485.

The law does not presume negligence, but it presumes, until the contrary is shown, that everyone in a given situation will act and has acted prudently and with a due regard for his own safety. Toledo, P. & W. R. Co. v. Chisholm, 27 C. C. A. 663, 49 U. S. App. 700, 83 Fed. 652.

The burden is not on the plaintiff to show affirmatively that the accident causing his intestate's death was not the result of contributory negligence or want of reasonable care and caution on the part of the decedent. Denver & R. G. R. Co. v. Ryan, 17 Colo. 98, 28 Pac. 79. The court said that, in the absence of evidence, direct or circumstantial, the law never presumes any party to have been guilty of negligence. On the contrary, it presumes everyone to have been diligent, or free from negligence, unless L.R.A. (N.S.)

til negligence is affirmatively shown. This presumption of diligence, or of freedom from negligence, attends both plaintiff and defendant. Hence, to warrant a verdict against the defendant on the ground of his negligence, the law requires that his negligence shall be affirmatively shown by a preponderance of the evidence; and in like manner, to warrant a verdict against the plaintiff on the ground of his contributory negligence, the law requires that his contributory negligence shall be affirmatively shown by a preponderance of the evidence. On the one side, the negligence of the defendant is relied on as the gist of the action; on the other side, the contributory negligence of the plaintiff is relied on as the gist of the defense.

But in Central R. Co. v. Smith, 74 Md. 212, 21 Atl. 708, it was held that where the burden is on the defendant to prove contributory negligence, an instruction that the plaintiff is entitled to the benefit of the presumption that persons ordinarily take care of themselves, and the defendant is entitled to the benefit of the principle that, in exceptional cases, persons are heedless, should have been omitted; but the court held that the error was unprejudicial, as the whole question as to the contributory negligence can be fairly left to the jury.

⁵⁵ The law presumes that a person injured through the negligence of a defendant was in the exercise of due care. Fairgrieve v. Moberly, 29 Mo. App. 142; Collins v. Star Paper Mill Co. 143 Mo. App. 333, 127 S. W. 641; Heine v. St. Louis & S. F. R. Co. 144 Mo. App. 443, 129 S. W. 421. See note to Hendrickson v. Great Northern R. Co. 16 L.R.A. 261.

Where the evidence discloses negligence of the defendant as a proximate cause of the injury, the presumption is that the injured person was in the exercise of reasonable care. Newton v. Wabash R. Co. 152 Mo. App. 167, 132 S. W. 1195.

The burden is on the defendant to remove the presumption that the person for whose death the action was brought was in the exercise of due care at the time of the accident. Stewart v. Raleigh & A. Air Line R. Co. 141 N. C. 253, 53 S. E. 877.

In Cassidy v. Angell, 12 R. I. 447, 34 Am. Rep. 690, it is said that there is ordinarily a certain degree of presumption

to a passenger, resulting in death;⁵⁶ and in case of an injury to a servant.⁵⁷ Where, for example, an employee, killed in coupling cars, is shown to have been in the line of his duty at the time of the accident, the law, it is said, will presume that he was in the exercise of ordinary care.⁵⁸ In the

absence of evidence as to the acts of the deceased immediately prior to a collision at a crossing, it has been held that the plaintiff is entitled to the presumption that the deceased used due care to avoid injury.⁵⁹ This has been held even where the burden of proving absence of con-

that a person of ordinary intelligence will not purposely expose himself to danger.

In the absence of satisfactory proof to establish the defense of contributory negligence, the plaintiff must be presumed to have been without fault. *Gordon v. Richmond*, 83 Va. 436, 2 S. E. 727.

The plaintiff need not prove the freedom of the intestate from fault or negligence, since contributory negligence is a defense, to be affirmatively proved; and it will be presumed that the injured party was in the exercise of due care until the contrary is made to appear. *Little Rock & Ft. S. R. Co. v. Eubanks*, 48 Ark. 400, 3 Am. St. Rep. 245, 3 S. W. 808.

In the absence of any evidence to the contrary, the law presumes that, at the time of the accident resulting in the death of a person, the deceased did his duty and exercised reasonable care and caution. *Cox v. Wilmington City R. Co.* 4 Penn. (Del.) 102, 53 Atl. 569; *Reed v. Queen Anne's R. Co.* 4 Penn. (Del.) 413, 57 Atl. 529.

In the absence of any evidence tending to show that the plaintiff was chargeable with negligence contributing to the injury of which he complains, the presumption of law is that he was free from such negligence, and the burden is upon the defendant to prove such contributory fault, if the same is relied upon as a defense. *Hoyt v. Hudson*, 41 Wis. 105, 22 Am. Rep. 714.

In the absence, therefore, of an eyewitness to the accident, it is the duty of the court to assume, unless it is shown to the contrary, that at the time of the accident, the person injured was in the exercise of due care. The plaintiff being entitled to invoke this presumption, the defendant has the burden of overthrowing it by evidence sufficient to do so. This burden is not sustained by the production of evidence which leaves the question of contributory negligence in doubt. If, under the evidence, reasonable men may honestly differ, the ultimate question is one of fact for the jury. *Cameron v. Great Northern R. Co.* 8 N. D. 124, 77 N. W. 1016.

In a negligence case where there is no eyewitness to the accident, it will be presumed, in the absence of any evidence to the contrary, that the deceased used ordinary care and caution; which presumption is sufficient to permit recovery if negligence is shown on the part of the defendant. *Gilbert v. Ann Arbor R. Co.* 101 Mich. 73, 125 N. W. 745.

Where no one saw an accident which was the occasion of a person's death, and there was no circumstantial evidence indicating precisely where or how it occurred, save that the deceased was drowned in the defend-

ant's canal, it was held that contributory negligence would not be presumed. *Platte & D. Canal & Mill. Co. v. Dowell*, 17 Colo. 376, 30 Pac. 68. The court said that contributory negligence is a defense, to be established as are other defenses.

⁵⁶ When the injury to a passenger results in his death, and therefore he can give no testimony as to his conduct on the occasion of the injury, the law presumes, in the absence of direct testimony or rebutting circumstances, that he exercised reasonable and ordinary care; and if negligence in fact existed on his part, it must be shown by positive evidence or from the attending circumstances of the accident. *Wood v. Philadelphia, B. & W. R. Co.* — Del. —, 76 Atl. 613.

⁵⁷ In a personal-injury case, the presumption is that the plaintiff, a servant, performed his duty, until the contrary is made to appear. *Bluedorn v. Missouri P. R. Co.* 108 Mo. 439, 32 Am. St. Rep. 615, 18 S. W. 1103.

⁵⁸ *Liston v. St. Louis Transfer R. Co.* 149 Mo. App. 231, 130 S. W. 381.

⁵⁹ *Rollins v. Chicago, M. & St. P. R. Co.* 71 C. C. A. 615, 139 Fed. 639.

In the absence of all evidence relating to due care on the part of a person injured at a railroad crossing, there is a presumption that he was free from contributory negligence; and the burden of proving such negligence rests upon the defendant throughout the case. *Chesapeake & O. R. Co. v. Steele*, 29 C. C. A. 81, 54 U. S. App. 550, 84 Fed. 93.

In *Blauvelt v. Delaware, L. & W. R. Co.* 206 Pa. 141, 55 Atl. 857, it was conceded that, in the absence of evidence showing the contrary, the presumption is that a person who was killed at a railroad crossing did his duty as he approached the scene of the accident, by stopping, looking, and listening.

One killed at a railroad crossing who seemed to have used due care in looking for trains as he approached the crossing, until he passed beyond the sight of witnesses, is presumed to have done his duty, and not to have been guilty of contributory negligence at the point of crossing. *Hanna v. Philadelphia & R. R. Co.* 213 Pa. 167, 4 L.R.A. (N.S.) 344, 62 Atl. 643.

Where a traveler is killed at a railroad crossing, and the negligence of the railroad company is established, in the absence of evidence to the contrary, the presumption is, though perhaps slight, that the traveler did his duty in approaching the crossing. *Southern R. Co. v. Bryant*, 35 Va. 212, 28 S. E. 183.

In *Wakelin v. London & S. W. R. Co.*

tributory negligence is deemed to be on the plaintiff;⁶⁰ showing that it does not follow, as before pointed out, that where this burden is on the plaintiff, the injured person must be presumed to have been guilty of negligence. In jurisdictions in which the plaintiff does not have to show that

the injured person was in the exercise of due care, it has been held that, in the absence of evidence to the contrary, there is a presumption that a pedestrian, before attempting to cross railroad tracks, stopped, looked, and listened.⁶¹ The same presumption attaches to a person injured

56 L. J. Q. B. N. S. 229, L. R. 12 App. Cas. 41, 55 L. T. N. S. 709, 35 Week. Rep. 141, 51 J. P. 404, a crossing accident case, Lord Watson said: "The difficulty of dealing with the question of onus in cases like the present arises from the fact that in most cases it is well-nigh impossible for the plaintiff to lay his evidence before a jury or the court without disclosing circumstances which either point to, or tend to rebut, the conclusion that the injured party was guilty of contributory negligence. If the plaintiff's evidence were sufficient to show that the negligence of the defendants did materially contribute to the injury, and threw no light upon the question of the injured party's negligence, then I should be of opinion that, in the absence of any counter evidence from the defendants, it ought to be presumed that, in point of fact, there was no such contributory negligence. Even if the plaintiff's evidence did disclose facts and circumstances bearing upon that question, which were neither sufficient *per se* to prove such contributory negligence, nor to cast the onus of disproving it on the plaintiff, I should remain of the same opinion."

⁶⁰ Where there is no eyewitness of the accident, while the rule is not relaxed that the plaintiff must show that his intestate was without fault, yet the presumption, in the absence of any evidence to the contrary, obtains that the deceased used ordinary care and caution in attempting the crossing, and such presumption is sufficient, under the rule, to permit the plaintiff to recover upon showing negligence in the defendant. *Adams v. Iron Cliffs Co.* 78 Mich. 271, 18 Am. St. Rep. 441, 44 N. W. 270.

In the absence of proof tending to show the contrary, where a person is injured by an accident to which there were no eyewitnesses, the presumption is that he was in the exercise of due care. *Van Doorn v. Heap*, 160 Mich. 199, 125 N. W. 11.

So, the court may refuse to take the case from the jury although it does not definitely appear that a person killed at a railroad crossing used any precautions to avoid the collision. *Lyman v. Boston & M. R. Co.* 66 N. H. 200, 11 L.R.A. 364, 20 Atl. 076.

For other cases discussing the question as to presumption of due care, see *supra*, IV., note 34.

⁶¹ *Baltimore & P. R. Co. v. Landrigan*, 191 U. S. 461, 48 L. ed. 262, 24 Sup. Ct. Rep. 137; *Petty v. Hannibal & St. J. R. Co.* 88 Mo. 306; *Chicago, R. I. & P. R. Co. v. Hinds*, 56 Kan. 758, 44 Pac. 993.

Where there is no direct evidence that a traveler did not stop, look, and listen 33 L.R.A. (N.S.)

before he entered upon a railroad crossing, the presumption of law is that he did his full duty, and observed the precautions which it prescribed. *McBride v. Northern P. R. Co.* 19 Or. 64, 23 Pac. 814.

It is not incumbent on plaintiff, suing to recover damages for the death of a person killed at a railroad crossing, affirmatively to show that, before attempting to cross the track, the deceased stopped and looked and listened. The common-law presumption is that everyone does his duty until the contrary is proved; and in the absence of all evidence on the subject, the presumption is that the decedent observed the precaution which the law prescribes before he attempted to cross defendant's road. *Pennsylvania R. Co. v. Weber*, 76 Pa. 157, 18 Am. Rep. 407.

In *Weiss v. Pennsylvania R. Co.* 79 Pa. 387, a crossing-accident case, it was held that where the plaintiff had made out a case of negligence against the defendant, and no contributory negligence appeared, the presumption of law was that deceased had done all that a prudent man would do, under the circumstances, to preserve his own life, and that he had stopped and looked and listened. The onus of proving contributory negligence was thus clearly cast upon the defendant.

In *Schum v. Pennsylvania R. Co.* 107 Pa. 8, 52 Am. Rep. 468, a crossing-accident case, where no one saw the occurrence, and there was no evidence whatever whether in fact the person killed, for whose death the action was brought, stopped and looked and listened, it was held that the presumption was that he did, and that proof of such fact was no part of the plaintiff's case. The court said the presumption is one of fact merely, and may be rebutted.

In a crossing-accident case, where the facts developed by the plaintiff do not indicate contributory negligence, the plaintiff affirmatively to prove that he stopped, looked, and listened, the presumption being that he did so, and the burden of proving that he did not being on the defendant. *Steele v. Northern P. R. Co.* 21 Wash. 287, 57 Pac. 820.

In *Atchison, T. & S. F. R. Co. v. Hill*, 57 Kan. 139, 45 Pac. 581, it was held that where a person killed at a railroad crossing which was obscure and dangerous approached the tracks at night, no one seeing the accident, the presumption was that he exercised ordinary care, and, as the court could not say that this was overcome by the evidence, the case was declared to be a proper one for the jury.

Where there is a failure of the evidence proving or tending to prove that the person

while in the street;⁶² and to minors under a certain age.⁶³ It has been held that the presumption will be entertained that a decedent, who met his death by falling through an unguarded hatchway, was, at the time of the accident, in the exercise of due care;⁶⁴ and that a person who was

killed by catching his foot in a switch frog, and being run over, was in the exercise of due care at the time of the accident, and that it devolves upon the railroad company to prove that he was not, in order to relieve itself of the liability fixed upon it by its negligent act causing the death.⁶⁵

injured did not stop, look, and listen before crossing railroad tracks, the jury is required to presume that the person injured did exercise ordinary care, and was not guilty of contributory negligence. *Whaley v. Vidal*, — S. D. —, 132 N. W. 248.

⁶² The presumption will be indulged that a person killed while attempting to cross a street car track by being struck by a car was, in approaching the track, in the exercise of due care. *Eckhard v. St. Louis Transit Co.* 190 Mo. 593, 89 S. W. 602.

The law presumes that a person killed by a car while walking on a street car track was in the exercise of due care, in the absence of evidence to the contrary. *Goff v. St. Louis Transit Co.* 199 Mo. 694, 9 L.R.A. (N.S.) 244, 98 S. W. 49.

The presumption that a person killed while crossing a street railroad track was in the exercise of due care, and looked and saw the car, was held not overcome by testimony of the motorman that the deceased "did not seem to look or notice anything," and of the conductor, that he "did not see or look back at all." *Powers v. St. Louis Transit Co.* 202 Mo. 267, 100 S. W. 655.

In an action to recover for the death of the driver of a wagon, struck by a car while the deceased was endeavoring to turn out of the track, it was held, in the absence of any evidence on the question, that the deceased was in the exercise of due care in endeavoring to discover the approach of cars, and in looking out for his own safety. *McKenzie v. United R. Co.* 216 Mo. 11, 115 S. W. 13.

Where there was no evidence to show that a person injured while attempting to cross street car tracks failed to look or listen for the car, it was held that the case would not be taken from the jury, since the presumption obtained that the plaintiff did what common prudence and ordinary care demanded of her. *Priesmeyer v. St. Louis Transit Co.* 102 Mo. App. 518, 77 S. W. 313.

⁶³ The defendant has the burden of overcoming the presumption that a child under fourteen years of age is incapable of contributory negligence. *Hazlerigg v. Dobbins*, 145 Iowa, 495, 123 N. W. 196.

The burden is on the defendant to rebut the presumption that a person killed at a railroad crossing, who was under the age of fourteen years, was incapable of contributory negligence. *Virginia-Carolina R. Co. v. Clawson*, 111 Va. 313, 68 S. E. 1003.

⁶⁴ *Ward v. Dampskibsselskabet Kjoeben-haven*, 136 Fed. 502.

Where there was a stair landing between two stories of a building, and in the wall

next to the landing, and in line with a bannister extending down the stairs, there was an unguarded window, and a boy was seen to start down the stairs, and when next seen was in the air outside of the building, having fallen through the window, whence he dropped to the ground and was killed, one of the theories of the defendant as to the cause of the accident was that the boy was sliding down the bannister, and in some manner slipped off and went through the window; but there was no sufficient evidence to support such a presumption, and the court held that until there was evidence which bore on the question, the presumption obtained that the deceased was careful instead of negligent, and it was for the defendant to overcome that presumption by positive or circumstantial evidence proving him to have been careless. *Rogers v. Meyerson Printing Co.* 103 Mo. App. 683, 78 S. W. 79.

The presumption is that a person injured by falling down a dark stairway was in the exercise of due care, until there is evidence introduced tending to establish that fact. *Strickland v. F. W. Woolworth & Co.* 143 Mo. App. 528, 127 S. W. 628.

⁶⁵ *Lee v. International & G. N. R. Co.* 89 Tex. 583, 36 S. W. 63.

Likewise where an express messenger is injured by a collision between the train in which he was riding and another, he is presumed to have exercised due and proper care at the time of the accident. *Baltimore & O. R. Co. v. McKenzie*, 81 Va. 71.

Where the evidence of the death of a servant is circumstantial, the law presumes that he was in the exercise of due care at the time of the accident, and the burden is upon the defendant to prove contributory negligence, unless the same appears from plaintiff's testimony. *Chesapeake & O. R. Co. v. Rowsey*, 108 Va. 632, 62 S. E. 363.

If a person killed by negligent management on the part of a railroad company of its cars met his death while walking on a sidewalk where he had a right to be, the company, in order to escape liability to answer in damages for his death, must show that he was guilty of some want of ordinary care in placing himself in the position where he was killed. If there is no evidence upon the subject, the presumption is that he was not lacking in ordinary care. *Phillips v. Milwaukee & N. R. Co.* 77 Wis. 349, 9 L.R.A. 521, 46 N. W. 543.

In *Jacksonville Electric Co. v. Sloan*, 52 Fla. 257, 42 So. 516, an instruction that a person killed by an electric shock, or from any other cause resulting from the negligence of another, is presumed in law to

This presumption, of course, like other presumptions, may be overcome by evidence rebutting it.⁶⁶ This was declared in *Rhode Island*,⁶⁷ a jurisdiction in which it is held that the burden of proving absence of contributory negligence is on the plaintiff. There was no eyewitness to the accident, and the presumption was invoked on behalf of the plaintiff. The court recognized the presumption, but held that it was overcome by other circumstances. It will therefore be seen that in *Rhode Island*, it

is not held that the injured person must be presumed to have been guilty of contributory negligence because of the rule that the burden of proving freedom from negligence is on the plaintiff.

In railroad-crossing cases, it is often held that the presumption that the person injured was in the exercise of due care at the time of the accident may be overcome by evidence that he could have seen the danger had he looked.⁶⁸ And the presumption may be met by a presumption of

have been in the exercise of reasonable care for himself, unless it is shown by a preponderance of evidence that he knew of the danger, and carelessly and negligently risked his life or person by some act of omission or commission on his part,—was held not to be misleading, but that it stated the law correctly, since the burden of proving plaintiff's negligence is on the defendant.

See note to *Hendrickson v. Great Northern R. Co.* 16 L.R.A. 261, on "Presumption as to exercise of due care by person who is found to have been killed by the alleged negligence of another." *Baltimore & P. R. Co. v. Landrigan*, 191 U. S. 461, 48 L. ed. 262, 24 Sup. Ct. Rep. 137.

⁶⁶ The presumption is available in cases where there is an absence of evidence showing the actual occurrence, but like other presumptions, it ceases in the light of actual facts. *Rich v. Chicago, M. & St. P. R. Co.* 78 C. C. A. 663, 140 Fed. 79.

The presumption that, in the absence of evidence upon the subject, the deceased was in the exercise of due care, cannot stand against positive and uncontradicted proof that, had he taken proper precautions which the law required of him, he could have avoided the danger. *Tomlinson v. Chicago, M. & St. P. R. Co.* 67 C. C. A. 218, 134 Fed. 233.

The presumption indulged in favor of the plaintiff, that he was free from negligence contributing to the injuries sued for, will be overcome by specific averments of facts which show that he knew, or had opportunity to know, of the danger, and, knowing of the danger, did not use care commensurate therewith. *Lafayette v. Fitch*, 12 Ind. App. 134, 69 N. E. 414.

⁶⁷ In *Judge v. Narragansett Electric Lighting Co.* 21 R. I. 128, 42 Atl. 507, the court said that all that was intended by the court in its decision in the *Cassidy Case* (*Cassidy v. Angell*, 12 R. I. 447, 34 Am. Rep. 690) was that, in a case presenting the same facts, the plaintiff was entitled to the benefit of a presumption that the deceased was in the exercise of the care of a person of ordinary prudence, nothing appearing to the contrary. The court did not intend to change, nor consider that it was changing, the rule which had always been considered a settled rule in *Rhode Island*, that the burden of proving the exercise of due care rests on the plaintiff. Though the court held the plaintiff entitled to the benefit L.R.A. (N.S.)

fit of the presumption stated in such case, yet if evidence is adduced by the defendant, tending to rebut this presumption, the burden still rests on the plaintiff to satisfy the jury by a preponderance of the evidence that deceased was in the exercise of due care.

In a concurring opinion, *Rogers, J.*, in alluding to this point, said: "The doctrine referred to, when couched in plain and unmistakable terms, it seems to me, amounts to this: that in negligence cases there is a presumption in favor of the plaintiff that the deceased was in the exercise of due care; and that, resting on such presumption, the plaintiff is not required to offer any evidence, either direct or circumstantial, showing freedom from contributory negligence, until such presumption has first been rebutted. That must mean that the burden of rebutting the so-called presumption rests upon the defendant; for if the plaintiff, in putting in his case, himself presented evidence, either direct or circumstantial, rebutting such presumption, he would throw himself out of court; and if he presented evidence supporting such presumption, it would necessarily be evidence tending to show due care, and then he would not be relying on the presumption so-called, but upon evidence; and the evidence, in my opinion, is what he must solely rely on, there being no presumption about it."

For other cases discussing presumptions as to due care, see *supra*, IV., note 34.

⁶⁸ Where the undisputed evidence shows that if the deceased, who was killed at a railroad crossing, had used his senses of hearing and seeing, as the law required him to do, he could have seen and heard the train in time to avoid injury, the presumption that he was in the exercise of due care is overcome. *Rollins v. Chicago, M. & St. P. R. Co.* 71 C. C. A. 615, 139 Fed. 639.

The court having told the jury that, as a matter of law, every person is presumed to be in the exercise of due care for his own safety, an instruction in a crossing-accident case, that the presumption that the deceased used due care in approaching the crossing in order to avoid injury is entirely destroyed where it appears from the evidence that if he had looked and listened before driving upon the crossing, he must have seen or heard the train approaching, does not invade the province of

equal force of like care on the part of those in charge of the train; or it may be entirely overcome if the facts and circumstances clearly established admit of no other conclusion than that, if the deceased had stopped, looked, and listened, he would have seen the train. Whether the presumption has been rebutted is for the jury, unless the evidence to the contrary is clear, positive, and credible, and either uncontradicted or so indisputable in weight and amount as to justify the court in holding that a verdict against it must be set aside as a matter of law.⁶⁹

d. Instinct of self-preservation.

1. Introductory statement.

The conclusion that a presumption must be indulged that a person injured by the

the jury. *Rogers v. Rio Grande Western R. Co.* 32 Utah, 367, 125 Am. St. Rep. 876, 90 Pac. 1075. The court said that it was proper to tell the jury that a person approaching a railroad crossing will be presumed to be in the exercise of due care. It was equally proper to tell them in what way, and when, this presumption might cease to be operative. The presumption is by no means a conclusive one, but is, at most, evidentiary, and its legal effect in one sense amounts only to a statement in another form that negligence is never presumed as a matter of law. Nor did the court in any way invade the province of the jury in the instruction, but it left it for them to say whether the presumption was overcome or not.

In an action for the death of a person killed at a railroad crossing, where the evidence tended to prove that the deceased had a clear view of the railroad track for a considerable distance, it was held erroneous to charge in substance, that if the jury believed the defendant guilty of negligence, and there was no evidence to the contrary, then the presumption is, though slight, that plaintiff's intestate did his duty and what the law required of him in approaching the crossing, since this authorized the jury to rest the verdict upon a presumption in favor of the plaintiff, instead of upon the facts proven and the inferences reasonably to be drawn therefrom. *Southern R. Co. v. Hansbrough*, 107 Va. 733, 60 S. E. 58.

In an action to recover for injuries received by a collision between a street car and a vehicle, it is error to charge that, in the absence of evidence showing that the injured person stopped, looked, and listened before crossing the track, it would be presumed that he did, where it is shown that the horse of the deceased came out of the darkness on a gallop, that the motorman did everything in his power to stop the car, that the deceased almost got across the track before he was struck, that the horse

negligence of another was, at the time, in the exercise of due care, may be reached on the erroneous supposition that such a presumption must be entertained wherever the burden of proving contributory negligence is held to be upon the defendant. And the opposite presumption—that is, that the injured person was guilty of contributory negligence—may be erroneously held to exist because the burden of proving absence of contributory negligence is on the plaintiff.

Irrespective, however, of the question of where the burden of proving contributory negligence lies, the presumption as to the injured person's conduct may be based solely on the fact that the instinct of self-preservation is so strong that men will ordinarily exercise due care to prevent injury to themselves. The presumption of contributory negligence may be based on

was sweaty, indicating that it had been driven rapidly, that he was so gentle as to stand after the crash, quietly, with two of his feet in the curbing of the sidewalk, and that the cart was in such a position when struck as to indicate that the deceased saw the approaching car, and took a diagonal course across the tracks ahead of it. *Los Angeles Traction Co. v. Conneally*, 63 C. C. A. 92, 136 Fed. 104.

In *St. Louis & S. F. R. Co. v. Chapman*, 71 C. C. A. 523, 140 Fed. 129, a crossing-accident case, where the movements of the deceased had been traced almost up to the moment of the accident, and he had been shown to have gone upon a crossing in the nighttime, known to him to be dangerous, it was held palpably misleading, under such a state of facts, to tell the jury that there was no eyewitness to the accident, and that because there was no one to tell just how it happened, the law presumes that, at the time of the accident, the deceased was exercising due care, and that the burden was upon the defendant to overcome such presumption, and that there was a further presumption that the deceased looked and listened for approaching engines before venturing upon the tracks, and adopted the requisite precautions.

In the absence of any evidence in an action to recover for the death of a person killed at a railroad crossing, that the deceased was in the exercise of due care, the presumption that he looked and listened, and was in the exercise of ordinary care to avoid possible collision with passing trains, is overcome by the logical and irresistible conclusion that deceased, had he listened, could have heard the train which killed him, and had he looked, he must have seen it in time to avoid the collision. *Porter v. Missouri P. R. Co.* 199 Mo. 82, 97 S. W. 880.

⁶⁹ *Unger v. Philadelphia, B. & W. R. Co.* 217 Pa. 100, 66 Atl. 235.

But this presumption does not furnish sufficient evidence of absence of contribu-

the fact alone that experience has shown that, in spite of this instinct, in a very large number of accidents the injured person has been at fault. The rule that no presumption will be indulged one way or the other may be based upon the fact that experience has proved that injured persons are sometimes careful and sometimes careless, and that it is impossible to ascertain from these cases whether in any particular instance the person hurt is likely to have been in the exercise of due care. Undoubtedly the rule that a presumption of due care arises from the instinct of self-preservation arose out of the desire of the courts to relieve plaintiffs, under certain circumstances, from the harshness of the rule placing upon them the burden of proving absence of contributory negligence.⁷⁰

2. Plaintiff entitled to presumption although he has the burden of proving due care.

The cases cited in this subdivision of the

note show that the rule that the burden of proving absence of contributory negligence is on the plaintiff is not founded on the presumption that the injured person was guilty of contributory negligence, but, on the contrary, that a presumption of due care may exist in favor of the plaintiff although the burden of proof as to the issue of contributory negligence is upon him. It is said, for example, in Illinois, where this burden is held to be on the plaintiff, that the natural instinct prompting the preservation of life, and the avoidance of injury and consequent suffering and pain, may be taken into consideration where there is no eyewitness to an accident on the question whether the deceased or the person injured was exercising due care.⁷¹ In Iowa it is held that where direct and positive evidence cannot be obtained that a person found dead at the foot of an elevator shaft was in the exercise of due care, it is proper for the jury to consider the instinct of men which naturally leads them to avoid danger, as evidence of due care on

tory negligence to take the case to the jury, where it appears that a person of mature faculties and unimpaired senses attempts to cross the tracks in a railroad yard at night, and steps in front of a road engine and tender, backing at the rate of 6 miles an hour, and is killed. *Rich v. Chicago, M. & St. P. R. Co.* 78 C. C. A. 663, 149 Fed. 79.

⁷⁰ In *Ames v. Waterloo & C. F. Rapid Transit Co.* 120 Iowa, 640, 95 N. W. 161, it is said that the origin in Iowa of the rule as to the presumption of the exercise of due care, indulged because of the instinct of self-preservation, is due to the peculiar doctrine announced by the court in the early cases, that the burden of showing affirmatively freedom from contributory negligence is on the plaintiff; and it was introduced in order to avoid the injustice of such a doctrine in cases where there was no evidence whatever, one way or the other, as to the exercise of care by the injured party, and no such evidence was obtainable, by reason of the death of the party injured, and the absence of any proof as to the circumstances attending the injury.

⁷¹ *Chicago & E. I. R. Co. v. Beaver*, 190 Ill. 36, 65 N. E. 144.

There is in all men a natural instinct of self-preservation, and such instinct is an element of evidence which the jury may take notice of, and, in the absence of all testimony upon the subject, find that a deceased party, in obedience to the ordinary instincts of mankind, exercised that care for his safety which a prudent man would, under the same conditions, have made use of. *Broadbent v. Chicago & G. T. R. Co.* 64 Ill. App. 231.

Where there was no eyewitness to the killing of a person at a railroad crossing, the fact that the deceased was a steady, 33 L.R.A. (N.S.)

sober, and industrious man, in good health, and so situated that it was fairly inferable that the instinct of self-preservation was as strong in him as in other men, it was held that these facts of themselves might be considered on the question whether he exercised due care, and that they legally tended to prove the fact. *Chicago, B. & Q. R. Co. v. Gunderson*, 174 Ill. 405, 51 N. E. 708.

Where a brakeman who was riding on cars he had uncoupled fell off directly after a collision, and was run over and killed, and the evidence showed that the lantern of the deceased was first seen to fall, followed by the deceased himself, and there was no evidence of negligent conduct on his part, the court said the presumption of law must be, where the fact is not susceptible of direct proof, that a person does not voluntarily incur danger or the risk of death, and that, in view of the known condition, he was exercising due care for his own safety. *Chicago Terminal Transfer R. Co. v. Reddick*, 131 Ill. App. 515.

An instruction that the jury might take into consideration with other facts and circumstances in the case, the instinct which naturally leads men to avoid injury and preserve their own lives, in determining whether the deceased was using due care for his own safety, was held not misleading, where there was evidence of facts and circumstances and the character and habits of the deceased from which the jury might rightfully find that he was in the exercise of ordinary care. *Collision v. Illinois C. R. Co.* 239 Ill. 532, 88 N. E. 251.

In *Collision v. Illinois C. R. Co.* supra, it is said: "It is true that there is an instinct of self-preservation common to all, and that such instinct raises a presumption against an affirmative act tending to

the part of the deceased.⁷² And where a conductor and a brakeman who were standing side by side on a flat car of a backing gravel train saw the headlight of an approaching engine, and signaled for the emergency brakes, which were instantly applied, and the conductor, in anticipation thereof, braced himself and saved himself from being thrown off, but the brakeman was thrown and killed, it was held that as the question of contributory negligence of the deceased hinged entirely upon whether he had used reasonable care and caution in bracing himself in anticipation of the shock which would result from the application of the brakes, and as there was no

evidence on this point, an instruction that the jury might take into consideration the instinct of self-preservation in determining whether the deceased had been in the exercise of due care was proper.⁷³ And where a boy was smothered in some manner by the falling of oats upon him while in a bin into which he had been sent, it was held, in an action to recover for his death, that the boy being dead, the case was aided by the presumption that he was in the exercise of due care when he received his injuries.⁷⁴ The decisions in Maine do not seem to be in harmony upon this point. In a case in which a gig went off from a bridge upon which there was no

destroy life, such as suicide, and raises a presumption as to the conduct of a person where there is a known danger to be avoided. The presumption is based upon human experience that a man will, in the presence of danger, act in accordance with the instinct of self-preservation, but that instinct is only operative when danger is perceived. The law recognizes that there are persons who are careless, heedless, and inattentive, as well as those who are prudent and careful, and that the instinct of self-preservation does not uniformly lead men to exercise care to ascertain whether conditions exist which are likely to inflict injury. To establish and apply a general presumption in favor of care would obviate the necessity of making proof of the fact which this court has uniformly held must be made."

For cases holding that circumstantial evidence may be aided by presumption, see *infra*, V., note 79.

⁷² *Hopkinson v. Knapp & S. Co.* 92 Iowa, 328, 60 N. W. 653.

Where a clinker puller went under a locomotive to work, and while there another engine collided with it, and caused it to run over him, it was held in an action brought to recover for his death, that an instruction that the jury might consider the instinct which naturally leads men to avoid injury and preserve their own lives, and the presumption that they will ordinarily do so, was good, there being no direct evidence of what the deceased was doing at the time of accident, or how he came to receive his injuries. *Morbey v. Chicago & N. W. R. Co.* 116 Iowa, 84, 89 N. W. 105.

Where a nine-year-old boy fell off of a sidewalk and was killed, and no one saw the accident, this was held to be a proper case for the application of the rule that the presumption is that a person will exercise due care for the preservation of his own life. *Schnee v. Dubuque*, 122 Iowa, 459, 98 N. W. 298.

⁷³ *Phinney v. Illinois C. R. Co.* 122 Iowa, 488, 98 N. W. 358.

Where a boy employed in a sawmill was killed by a board violently thrown from the saw, and at the moment of

the injury the deceased was not observed by any witness, and the manner in which the boy came in contact with the saw, and the agency, if any, of the deceased in bringing it about, were matters of which no witness was able to speak of his own knowledge, it was held that there was a presumption of due care on the part of the deceased which the jury was entitled to consider. *Woolf v. Nauman Co.* 128 Iowa, 261, 103 N. W. 785.

In an action for the death of a girl killed by an explosion of a substance sold for kerosene oil, it was held that where there was no living witness of the explosion, or of the circumstances under which the deceased met her death, the administrator of her estate was entitled to the presumption of due care on her part, arising from the common instinct of self-preservation which naturally leads a normal person to avoid danger. *Ellis v. Republic Oil Co.* 133 Iowa, 11, 110 N. W. 20.

Where there were no eyewitnesses to the killing of a section foreman by the backing of a train upon him as he was about to cross a railroad track, it was held that the presumption arising from the instinct of self-preservation would be sufficient to sustain the burden of proof in the first instance that the deceased was not at fault for the accident. *Christopherson v. Chicago, M. & St. P. R. Co.* 135 Iowa, 409, 124 Am. St. Rep. 284, 109 N. W. 1077. The court said that it is true that such presumption cannot prevail against evidence which shows that the injured party could not have exercised due care. But unless the evidence conclusively shows contributory negligence, the presumption of the instinct of self-preservation should be taken into account; and the jurors, had the case been submitted to them, would have been justified in assuming that deceased was not doing a negligent act when he was injured, if the injury could be accounted for without contributory negligence on his part.

⁷⁴ *Meier v. Way, J. L. & Co.* 136 Iowa, 302, 125 Am. St. Rep. 254, 111 N. W. 420.

Where there are no eyewitnesses of a transaction in which a party is injured, and in which he may or may not have been guilty of contributory negligence, the natural instinct of self-preservation may be

railing, and plaintiff was hurt, it was said that, in the absence of all opposing proof, it may not be too much to infer care from common experience, when essential to personal security.⁷⁵ In later cases, however, it has been held that the presumption as to freedom from negligence will not be indulged merely because of the instinct of self-preservation.⁷⁶ In New Hampshire, it has been held that the exercise of due care on the part of a person injured at a rail-

road crossing may, under some circumstances, be inferred from the ordinary habits and dispositions of prudent men and the instinct of self-preservation.⁷⁷ But that this alone is not sufficient to discharge plaintiff's burden of proving due care.⁷⁸ Freedom from negligence may, however, it is declared, be inferred from this instinct and other circumstantial evidence, such as the careful habits of the deceased.⁷⁹ And the rule in New York is that the instinct

considered as bearing upon his conduct. *Stephenson v. Sheffield Brick & Tile Co.* — Iowa, —, 130 N. W. 586.

But in *Bell v. Clarion*, 113 Iowa, 126, 84 N. W. 962, an action to recover for injuries received by reason of a defective sidewalk, an instruction to the effect that, in view of the instinct of self-preservation, a presumption arises that the injured person was careful, which presumption will prevail unless overcome by evidence satisfying the jury that the injured person was negligent, was held erroneous. The court said that "this statement of the law, if it were correct, would entirely revolutionize the doctrine, well established in this state, that the plaintiff has the burden of proving freedom from contributory negligence. If a presumption of due care is to be entertained, then the burden of proof would in practically every case be upon the defendant to show that the plaintiff was negligent. The mere statement of this proposition," said the court, "is sufficient to show that it is erroneous. The lower court was no doubt misled by the ambiguous use of the term 'presumption,' which is found in some of the cases. Frequently that word is used as indicating merely an inference which may be drawn from certain facts; and where it has been used in the previous decisions of this court in this connection it must be so interpreted. . . . In the present case the inference to be drawn from the instinct of self-preservation could properly be considered by the jury, and . . . [the court] would not therefore be justified in sustaining the contention of defendant that there was no evidence of want of contributory negligence on the part of deceased. . . . But that is a very different thing from saying to the jury that a presumption arises therefrom requiring evidence to the satisfaction of the jury to overcome it."

⁷⁵ *Foster v. Dixfield*, 18 Me. 380.

⁷⁶ In *Chase v. Maine C. R. Co.* 77 Me. 62, 52 Am. Rep. 744, in holding that the instinct of self-preservation does not afford proof of the absence of contributory negligence, the court said that such a consideration is by no means evidence, for if it were so, a jury might accept it as conclusive evidence. That it is no more than an accompaniment or an appurtenance of evidence; that it may have some influence upon the interpretation of facts affirmatively presented; that it pertains to those natural laws in connection with which all

evidence may be weighed; it may give character or force to facts already proved, but that it does not of itself add or create proof; that it is rather an argument or mode of reasoning upon evidence. Continuing, the court said: "But the weakness of the plaintiff's position lies in the fact that this motive for personal safety does not operate upon the minds of men until they can clearly see that they are endangered by their carelessness. It does not keep them from careless acts. The danger is often not seen until too late to be extricated from it. The careless act usually precedes the moment when the natural instincts for self-preservation are aroused. And a man is quite prone to take risks. And a man is careless to take a risk in crossing a railroad in advance of a coming train. We all know that he often does it. There is no doubt that the intestate was impelled by all his instincts and love of life to save himself when he saw that the horrible danger was upon him. But how the unfortunate man got into the awful situation no one seems to know and no evidence explains to us. It seems to be an unexplained catastrophe."

In *McLane v. Perkins*, 92 Me. 39, 43 L.R.A. 487, 42 Atl. 255, it is said that if freedom from contributory negligence is sought to be established by inference, it must be by inference from facts in evidence in the case. It cannot be inferred from general conduct, nor from the habits or instincts of mankind, nor from the argument that men are likely to be careful in danger. It is as true that men are careless as that they are careful.

⁷⁷ *Lyman v. Boston & M. R. Co.* 66 N. H. 200, 11 L.R.A. 364, 20 Atl. 976.

⁷⁸ The instinct of self-preservation is not alone sufficient to establish due care on the part of a pedestrian, killed while attempting to cross a railroad track in front of a moving train. *Wright v. Boston & M. R. Co.* 74 N. H. 128, 8 L.R.A. (N.S.) 832, 124 Am. St. Rep. 949, 65 Atl. 687.

⁷⁹ Where a brakeman was killed while ascending a ladder on a car by being struck by an overhead bridge, and there was no evidence that the deceased was insane, intoxicated, or possessed of suicidal intent, it was held that the exercise of due care could be inferred from the ordinary habits and disposition of prudent men, and the instinct of self-preservation, taken in connection with other circumstantial evidence in the case, and that the attempt

of self-preservation may be taken into consideration in determining the injured person's conduct at the time of the accident, but that a presumption of due care or an inference of due care cannot be based solely upon that fact.⁸⁰ In one case a coal driver was killed by the falling of a heavy iron grating upon him. The grating swung on hinges and was used to cover an opening in the sidewalk through which the coal was delivered, the grating being open or swung back at such time. The deceased was observed immediately before the accident standing near his cart, which was then backed to within a foot of the hatchway where the coal was to be dumped. A moment after another coal driver coming out of the hatchway was struck in the breast by the feet of the deceased, as he

was borne to the earth by the grating. What happened in this short interval was not observed by any eyewitness. The plaintiff attempted to prove that the deceased was called upon in the performance of his duty to go into the basement to secure the signature of some official of the city to whom the coal was being delivered, to a ticket showing the weight of the load he had to deliver. This evidence was rejected by the trial court and the plaintiff was nonsuited. This was held error. The court said the jury had the right to infer from all the facts that the deceased was called to the place where he received his injuries, in the performance of his duty, and had not omitted the precaution which a prudent man would take in the presence of a known danger. That he had some

to ascend the ladder at the time and place he did was due solely to his inadequate understanding of the risk. *Miller v. Boston & M. R. Co.* 73 N. H. 330, 61 Atl. 360.

In *Huntress v. Boston & M. R. Co.* 66 N. H. 185, 49 Am. St. Rep. 600, 34 Atl. 154, a crossing-accident case, it is said that when there is no evidence of insanity, intoxication, or suicidal purpose, and no evidence on the question of the plaintiff's care, except the instinct provided for the preservation of animal life, it may be inferred from this circumstantial proof that, for some reason consistent with ordinary care and freedom from fault on his part, his attempt to cross was due to his inadequate understanding of the risk.

See also IV., note 77, *supra*.

A plaintiff suing for the death of a person killed at a railroad crossing is not required in all cases to prove that the deceased looked and listened, since it may be inferred, in view of the circumstances, that he did what a prudent man would do to save his life, and was governed by the instinct of self-preservation. *Lyman v. Boston & M. R. Co.* 66 N. H. 200, 11 L.R.A. 364, 20 Atl. 976.

⁸⁰ The culpability of the defendant must be affirmatively proved before the case can go to the jury, but the absence of any fault on the part of the plaintiff may be inferred from circumstances; and the disposition of men to take care of themselves and keep out of difficulty may properly be taken into consideration. *Johnson v. Hudson River R. Co.* 20 N. Y. 65, 75 Am. Dec. 375, affirming 6 Duer, 633.

While the absence of contributory negligence need not be established by direct evidence, but may rest upon inferences properly drawn from the surrounding facts and circumstances, an inference of due care cannot be based solely upon the presumption that the person whose life is exposed to danger will adopt proper means to protect himself. *McSweeney v. Erie R. Co.* 93 App. Div. 496, 87 N. Y. Supp. 836.

Although want of contributory negligence may be established from inferences 33 L.R.A. (N.S.)

which may be properly drawn from the surrounding facts and circumstances, such inferences cannot be drawn from a presumption that a person will exercise care and prudence in regard to his own life and safety, for the reason that human experience is to the effect that persons exposed to danger will frequently forego the ordinary precautions of safety. And when the circumstances point as much to the negligence of the deceased as to its absence, or point in neither direction, a nonsuit should be granted. *Wiwirowski v. Lake Shore & M. S. R. Co.* 124 N. Y. 420, 26 N. E. 1023.

In *Reynolds v. New York C. & H. R. R. Co.* 58 N. Y. 248, it was said that the jury might infer that a person killed at a railroad crossing was governed by the natural instinct of self-preservation, and would not put himself recklessly and consciously in peril of death; but that men are careless, and subject themselves thereby to injury, is the common experience of mankind; and when injured, no presumption exists in the absence of proof that they were exercising due care at the time.

The inference of freedom from contributory negligence cannot be drawn from the presumption that one will exercise care and prudence in regard to his own life and safety. *O'Reilly v. Brooklyn Heights R. Co.* 82 App. Div. 492, 81 N. Y. Supp. 572.

When a person has been killed at a railroad crossing, and there are no witnesses of the accident, the circumstances must be such as to show that the deceased exercised proper care for his own safety. When the circumstances point just as much to the negligence of the deceased as to its absence, or point in neither direction, the plaintiff should be nonsuited. The presumption that every person will take care of himself from regard to his own life and safety cannot take the place of proof; because human experience shows that persons exposed to danger will frequently forego the ordinary precautions of safety. *Cordell v. New York C. & H. R. R. Co.* 75 N. Y. 330.

reason for taking the position where he was injured was altogether probable; and it was unreasonable to suppose that he carelessly placed himself in a position to be injured. The court approved the rule that the absence of any fault on the part of the plaintiff may be inferred from the circumstances, in connection with the ordinary habits, conduct, and motives of men, and that the character of the defendant's negligence may be such as prima facie to prove the whole issue.⁸¹

3. Plaintiff entitled to presumption where burden of proving contributory negligence is on defendant.

In jurisdictions in which the burden of proving contributory negligence is on the defendant, it is also held that the absence of any fault upon the part of a person killed by the negligence of another may be inferred from the circumstances, in con-

nection with the ordinary habits, conduct, and motives of men, and that the natural instinct of self-preservation in the case of a sober and prudent man stands in the place of positive evidence.⁸² In the absence of all evidence on the subject, it would not be presumed that the deceased did not exercise proper care, for he had the greatest incentive to caution to protect his own life.⁸³ The law of self-preservation as well as of self-defense raises the presumption that everyone will exercise ordinary care to look out for himself.⁸⁴ The presumption stands in the place of positive evidence, and is sufficient to warrant a recovery in the absence of countervailing testimony.⁸⁵ So, where no one saw a person killed at a railroad crossing, and there is no evidence whether he looked or listened before attempting to cross, the instinct of self-preservation might be taken into consideration on the question whether he was in the exercise of due care.⁸⁶ And where

⁸¹ Galvin v. New York, 112 N. Y. 223, 19 N. E. 675.

⁸² Thomas v. Delaware, L. & W. R. Co. 19 Blatchf. 533, 8 Fed. 729.

In Gay v. Winter, 34 Cal. 153, the question was thus put by the court: "Where the testimony as to the defendant's conduct does not also show what was the conduct of the plaintiff, must the plaintiff go further and show that he exercised proper caution and prudence, or that no negligence on his part contributed in any degree to the injury? If, under the circumstances of the case, he is able to show what his conduct was, it would be no hardship to require him to prove himself blameless; but suppose he is unable, as in the present case, to show by direct testimony what his conduct was,—is the jury bound, as a matter of law, to return a verdict for the defendant, notwithstanding his fault is clearly established; or, which amounts to the same thing, is the court in such a case bound to nonsuit the plaintiff?" While the court admitted the general rule, that the burden of proof is on the plaintiff to make a case which will leave him blameless, it did not understand that it followed that he must prove affirmatively in all cases that he exercised ordinary care and diligence. In the absence of any direct proof, the jury is at liberty to infer ordinary care and diligence on the part of the plaintiff from all the circumstances of the case, his character and habits, and the natural instinct of self-preservation. To hold otherwise would be in effect to presume negligence on the part of one in excuse of negligence on the part of another. If the plaintiff makes a case which does not show his own negligence, the case should go to the jury.

⁸³ Hemingway v. Illinois C. R. Co. 52 C. C. A. 477, 114 Fed. 843.

So, where a person was engaged in unloading a car, and was thrown from the

car and killed by its sudden starting, it was held that absence of fault on the part of the deceased might be inferred from the general and known disposition of men to take care of themselves and to keep out of the way of difficulty and danger, where the evidence was conflicting, tending to create doubt as to whether the deceased was in fault, in bringing upon himself his misfortune. Northern C. R. Co. v. State, 31 Md. 357, 100 Am. Dec. 69.

⁸⁴ Jackson Knife & Shear Co. v. Hathaway, 27 Ohio C. C. 745.

⁸⁵ Northern P. R. Co. v. Spike, 57 C. C. A. 384, 121 Fed. 44.

As the love of life and the instinct of self-preservation are the highest motives for care in any reasoning being, they will stand for proof of care until the contrary appears. Cleveland & P. R. Co. v. Rowan, 66 Pa. 393.

⁸⁶ Atchison, T. & S. F. R. Co. v. Hill, 57 Kan. 139, 45 Pac. 581.

In the absence of evidence to the contrary, a jury may infer from the universal instinct of self-preservation, that a person about to cross an electric street railway track both looked and listened before venturing to do so. Kansas City-Leavenworth R. Co. v. Gallagher, 68 Kan. 424, 64 L.R.A. 344, 75 Pac. 469.

Where there is no evidence that a person killed at a railroad crossing looked or listened for an approaching train before he went upon the track, the law presumes from the natural instinct of self-preservation that he both looked and listened. Atchison, T. & S. F. R. Co. v. Baumgartner, 74 Kan. 148, 85 Pac. 822, 10 A. & E. Ann. Cas. 1094.

A person approaching a railroad crossing has the right to presume that the company will obey an ordinance of the city regulating the speed of its trains, and requiring to be placed on every moving train after

a person approached a street car track on a dark night, with an umbrella over his head, and went in front of a car approaching at an unlawful rate of speed, and was killed, and no one knew whether he looked or listened before stepping upon the track, it was held that the presumption that he was in the exercise of due care, and looked and listened, would be indulged.⁸⁷

The rule is held to be especially justifiable in crossing-accident cases where the circumstances are such that the injured person, even by the use of his senses, might not have seen or heard the train.⁸⁸ Where there is no evidence of the fact, the presumption is said to be against contributory negligence, even in the absence of any statute making it a matter of affirmative defense.⁸⁹ And it has even been held that

sunset certain lights, and requiring the engine bell to be rung, and when, in an action to recover for the death of a person killed at a crossing, these presumptions, together with the presumption that the deceased was, at the time of the accident, in the exercise of due care, are indulged, the plaintiff will be entitled to recover unless it conclusively appears from the evidence adduced by him, either by the direct or cross-examination of his own witnesses, that the deceased was guilty of negligence contributing directly to his own injury; and in order to overcome the presumption, and to defeat plaintiff's action, it devolves upon the defendant to show by the weight of the evidence a failure on the part of the deceased to exercise ordinary care to avoid the injury, and that his failure to exercise such care was its proximate cause, and so direct and immediate that, but for the want of such ordinary care, the injury would not have occurred. *Weller v. Chicago, M. & St. P. R. Co.* 164 Mo. 180, 86 Am. St. Rep. 592, 64 S. W. 141.

The plaintiff being rendered unconscious by being struck by a train at a crossing, and unable, therefore, to tell what she was doing immediately before the accident, and being able to produce no witness on that point, is entitled to certain presumptions, one being that, because of the natural instinct of love of life, she was in the exercise of due care. *Stotler v. Chicago & A. R. Co.* 200 Mo. 107, 98 S. W. 509.

In *Davis v. Kansas City Belt R. Co.* 46 Mo. App. 180, it was held that an instruction that the instinct of self-preservation is not a proper consideration for the jury in determining whether a person injured at a railroad crossing exercised due care would be erroneous in Missouri, where the burden of proving contributory negligence is on the defendant, and where the plaintiff is presumed to have been in the exercise of ordinary care. The court said that whether or not sufficient evidence is produced by defendant to overcome this presumption, founded on the prevailing in-

where, according to the admissions of the plaintiff, the accident may have occurred through his fault, and there is nothing to lead the jury to the conclusion that it did not, this will not warrant an instruction to find for the defendant.⁹⁰ And, finally, it has been held that the rule as to the presumption arising from the instinct of self-preservation will prevail, whether the action is brought by the administrator of a deceased person, or by the plaintiff in his own behalf.⁹¹

4. Presumption not to stand for proof of fact.

In Indiana, where, before the passage of a statute declaring to the contrary, the burden of proving contributory negligence

instinct of self-preservation, and standing to the credit of the plaintiff, is a question for the jury.

It is not required in all actions for the death of a person killed at a railroad crossing, that the plaintiff prove affirmatively that his intestate looked or listened. It may be inferred, in view of the circumstances, that the deceased, governed by the instinct of self-preservation, did what a prudent man ordinarily would do to save his life. *Hendrickson v. Great Northern R. Co.* 49 Minn. 245, 16 L.R.A. 261, 32 Am. St. Rep. 540, 51 N. W. 1044.

⁸⁷ *Riska v. Union Depot R. Co.* 180 Mo. 168, 79 S. W. 445.

In an action to recover for injuries received by one who was struck by a horse and wagon as he was crossing the street, it is not necessary for the plaintiff to prove by a preponderance of evidence, that he was exercising the care and caution of an ordinarily careful and prudent man in the manner in which he was using or crossing the street at the time of the accident, since this would deprive him, at the very outset, of the presumption that every man of sound mind will avoid personal injuries. *Burke v. Citizens' Street R. Co.* 102 Tenn. 409, 52 S. W. 170.

⁸⁸ *Lyman v. Boston & M. R. Co.* 66 N. H. 200, 11 L.R.A. 364, 20 Atl. 976.

⁸⁹ *Norton v. North Carolina R. Co.* 122 N. C. 910, 29 S. E. 886.

⁹⁰ *German-American Lumber Co. v. Brock.* 55 Fla. 577, 46 So. 740. The court said that in an action against the master to recover damages for injuries to the servant as a result of the master's negligence, the presumption that arises from the instinct of self-preservation and the known disposition of men to avoid injury to themselves constitutes a prima facie inference that the servant exercised ordinary care and was free from contributory negligence; and burden of showing such negligence is on the defendant.

⁹¹ *Jackson Knife & Shear Co. v. Hathaway,* 27 Ohio C. C. 745.

was on the defendant, it was held that the presumption of due care, arising from the instinct of self-preservation, would not be allowed to stand in place of proof of the fact. The court could not conceive the correctness of the doctrine that the presumption that men will avoid danger rather than to court or defy it will be sufficient to overcome the necessity for some evidence of the absence of contributory fault. Such a doctrine was said, in the judgment of the court, to be in direct conflict with the decided cases in the Indiana courts.⁹² It was declared that the rule requiring the plaintiff to establish freedom from contributory negligence did not require him to make proof, and then proceed, by the application of a presumption of law, to furnish the proof for him, but he was required to establish the fact.⁹³

⁹² Pittsburgh, C. C. & St. L. R. Co. v. Bennett, 9 Ind. App. 92, 35 N. E. 1033.

⁹³ Nichols v. Baltimore & O. S. W. R. Co. 33 Ind. App. 229, 70 N. E. 183, 71 N. E. 170.

⁹⁴ The instinct of self-preservation is to be taken into consideration for the purpose of establishing freedom from contributory negligence only where direct evidence on this point is not obtainable. Burk v. Walsh, 118 Iowa, 397, 92 N. W. 65.

Where there is direct evidence as to the circumstances of the accident, the presumption is not to be entertained. Ames v. Waterloo & C. F. Rapid Transit Co. 120 Iowa, 640, 95 N. W. 161.

In an action to recover for injuries received by a fall down a coal shaft, there was direct testimony as to the circumstances under which the accident happened, bearing upon the plaintiff's care or lack of care. It was held that, in view of such testimony, it was erroneous to instruct the jury that the instinct of self-preservation might be taken into consideration in determining whether the plaintiff was free from contributory negligence. Salyers v. Monroe, 104 Iowa, 74, 73 N. W. 606.

Where there is direct evidence of contributory negligence at the instant of the accident, this will not be overcome by a pure presumption with reference to the exercise of care at some other time. Ames v. Waterloo & C. F. Rapid Transit Co. *supra*.

Ordinarily where one is killed and there are no eyewitnesses of the transaction, the law will presume that the person killed was in the exercise of ordinary care, and doing nothing to jeopardize his life or limb. But this rule does not obtain where there are eyewitnesses. Wilson v. Illinois C. R. Co. — Iowa, —, — L.R.A.(N.S.) —, 129 N. W. 340.

⁹⁵ The presumption of the exercise of due care and caution on the part of one approaching a place of danger is essentially inferior in probative force to credible evidence, either direct or circumstantial, ex- 33 L.R.A.(N.S.)

5. When presumption may be invoked.

It would seem that if the presumption of due care arising from the instinct of self-preservation is to be entertained, it should be invoked only when direct or circumstantial evidence on the issue of contributory negligence is not obtainable; as where there are no witnesses of the conduct of the injured person at the time of the accident; and this is the holding of some of the cases.⁹⁴ It is, as has been said, essentially inferior in probative force to credible evidence.⁹⁵ Direct evidence, for example, that a boy attempted to board a moving elevator, is much stronger than any presumption could be that he was in the exercise of due care.⁹⁶ If there is direct evidence, there is no room for the in-

planatory of the actual occurrence; and in those courts where the presumption underlies the rule that the burden of proving contributory negligence rests upon the defendant, and must be maintained by a fair preponderance of the evidence, its force and influence are so largely embodied in the enforcement of that rule, that it has little independent application, save that it rests upon a general but not invariable rule of human experience which may and should be considered in determining the credibility of evidence, and the weight to be given to it, when these matters are not otherwise entirely clear. Wabash R. Co. v. De Tar, 4 L.R.A.(N.S.) 352, 73 C. C. A. 166, 141 Fed. 932.

In Bell v. Clarion, 113 Iowa, 126, 84 N. W. 962, it was said that it had been fully settled in Iowa, that, in the absence of any direct evidence whatever, the instinct of self-preservation may be considered, and will constitute a sufficient basis for the inference of want of contributory negligence; but where there is direct evidence as to whether or not the injured party was negligent, then the inference is entitled to but little, if any, weight. The court supposed that the idea involved in the latter proposition is that the direct evidence as to what took place is of higher character than the inference drawn from the instinct of self-preservation; and surely, declared the court, it must be conceded that in such a case the inference is entitled to but little consideration, if any.

⁹⁶ In A. M. Rothchild & Co. v. Levy, 118 Ill. App. 78, where a boy, attempting to get upon an elevator, fell down the shaft and was killed, and it was necessary for the plaintiff, in order to establish due care on the part of the deceased, to prove that the latter attempted to board the elevator when it was at rest, but there was direct evidence that he attempted to board it when it was ascending, it was held that he could not be aided by the presumption that arises from the instinct of self-preservation.

ference from such a presumption.⁹⁷ So, where there was evidence that the injured person took a danerous position upon a locomotive tender and was thrown off, it was held that the presumption would not be taken into consideration.⁹⁸ A similar conclusion was reached where the person for whose death the action was brought was seen to step from behind a moving wagon in front of an advancing car.⁹⁹ It is also held that where the injured person is living and can speak, that he must do so.¹⁰⁰

It has been denied, however, that this presumption applies only where direct or circumstantial evidence is not available. It has even been held that the presumption is strong enough to overcome the testimony of an eyewitness.¹

e. Presumption based upon presumption.

Although it is held in some jurisdictions that the presumption of due care based on the instinct of self-preservation will be indulged, a further presumption cannot be based thereon. So, where action was brought to recover for the death of a

person killed on attempting to cross a street car track by being struck by a car approaching at a high rate of speed, it was held that the presumption arising from the instinct of self-preservation could not be used to establish the alleged fact that the deceased, on leaving the curbing, 17 feet from the street car track, looked in the direction from which the car was coming, and seeing it further south from a line of wagons which partially obstructed his view, and which must have extended at least 150 feet along the track, calculated that if the car was approaching at a lawful rate of speed, he would have time to cross the track before the car would reach him.² And while a jury may presume, in the absence of any evidence as to the conduct of a person killed at a railroad crossing at the time of the accident, that he both looked and listened for an approaching train, this presumption is not a circumstance in proof, and does not furnish a legitimate foundation for a second presumption that he was on the track at the time he was struck because he had lost control of a team of horses that he was driving.³

⁹⁷ The instinct of self-preservation planted in all persons may, in a proper case, be allowed some weight as raising an inference of care. But where the party who has the burden of proving care can show by direct evidence what care was exercised, he should show it by such evidence; and if the direct evidence shows care, or want of it, there is no room for mere inference. *Dunlavy v. Chicago, R. I. & P. R. Co.* 66 Iowa, 435, 23 N. W. 911.

⁹⁸ In an action by a brakeman to recover for injuries received by being thrown off of the tender by the sudden starting of the train, the testimony being that the plaintiff, in the nighttime, and when the train was in motion, jumped or stepped from the top of a box car into a narrow space between the end of the tool chest and the side of the tender, it was held that the presumption arising from the instinct of self-preservation could not be taken into consideration. *Whitsett v. Chicago, R. I. & P. R. Co.* 67 Iowa, 150, 25 N. W. 104.

⁹⁹ In *Ames v. Waterloo & C. F. Rapid Transit Co.* 120 Iowa, 640, 95 N. W. 161, it was said that had there been no evidence whatever as to the circumstances surrounding the deceased at the time his injury was received, or as to how the accident occurred, the presumption would be entertained that, prompted by the instinct of self-preservation, the deceased was taking reasonable precaution for his own safety; but as several witnesses saw deceased just as he stepped forward from behind the moving wagon and was struck by the car, and the fact that there was such evidence as to what occurred, prevents the presumption which would otherwise be drawn from the instinct of self-preservation from being entertained.

tion which would otherwise be drawn from the instinct of self-preservation from being entertained.

¹⁰⁰ Where the injured person is living, and does or can testify to the facts and circumstances, and in what manner the injury was received, the natural instinct which leads rational persons to avoid injury to their persons as far as possible is not an element of evidence proper for the consideration of the jury on the question whether the plaintiff was, at the time of the injury, exercising ordinary care and prudence. *Reynolds v. Keokuk*, 72 Iowa, 372, 34 N. W. 167.

¹ *Northern P. R. Co. v. Spike*, 57 C. C. A. 384, 121 Fed. 44.

In *Davenport, R. I. & N. W. R. Co. v. De Yeager*, 112 Ill. App. 537, the court denied that this rule applied only in cases in which there were no eyewitnesses to the accident, saying that the mere fact that the eye of a witness may have incidentally rested upon the deceased at the time of and just before the injury ought not to deprive the plaintiff of the presumption arising from the instinct of self-preservation.

² *Ames v. Waterloo & C. F. Rapid Transit Co.* 120 Iowa, 640, 95 N. W. 161.

³ *Atchison, T. & S. F. R. Co. v. Baumgartner*, 74 Kan. 148, 85 Pac. 822, 10 A. & E. Ann. Cas. 1094.

It does not follow from the presumption that the deceased, who was killed at a railroad crossing, looked and listened before going upon the track, coupled with the fact that at any point within 10 yards from the crossing he might have seen the

Likewise, where a switchman standing on the footboard of an engine, in some manner fell off and was run over and killed, and the theory of the plaintiff was that the footboard was defective, and broke by reason of the weight of the deceased upon it, and the theory of the defendant was that the deceased first fell off, and the footboard broke by striking against his body as the engine passed over him, it was held that the presumption of due care arising from the instinct of self-preservation would not raise a corresponding presumption in support of the theory of the plaintiff as to the cause of the accident, relieving him from the burden of proving the negligence of the defendant, and that the injury was caused by such negligence.⁴

f. Rebuttal of presumption.

If the presumption as to the exercise of

train which killed him for 50 yards along the track, and that he was on level ground, in broad daylight, without obstruction when there was no train from the other direction, that he would have seen the train in time to prevent the accident, and that, therefore, in going upon the track in front of it, he was guilty of contributory negligence, as a matter of law. *Schum v. Pennsylvania R. Co.* 107 Pa. 8, 52 Am. Rep. 468.

⁴ *Powers v. Pere Marquette R. Co.* 143 Mich. 379, 106 N. W. 1117.

⁵ Because the natural instinct of self-preservation generally prompts men to acts of care and caution when approaching or in the presence of danger, there is, in the absence of credible evidence of actual fact in any instance, a presumption of the exercise of due care and caution; but, like other presumptions of fact arising from the ordinary or usual conduct of men, rather than from what is invariable or universal, this presumption is disputable, and cannot exist where it is incompatible with the conduct of the person to whom it is sought to apply it, which may be shown by the testimony of eyewitnesses to his movements, or by evidence of the physical surroundings and other conditions at the time. *Wabash R. Co. v. De Tar*, 4 L.R.A. (N.S.) 352, 73 C. C. A. 166, 141 Fed. 932.

Where no one witnesses an accident, the presumption that the deceased was in the exercise of due care may be indulged, but such presumption may be rebutted by facts and circumstances to the contrary. *Rietveld v. Wabash R. Co.* 129 Iowa, 249, 105 N. W. 515.

Although a jury may infer ordinary care and diligence on the part of an injured person from love of life, or instinct of self-preservation, and the known disposition of men to avoid injury, the presumption that a person run over was in the exercise of due care may be overcome, of course, by

due care on the part of the person injured is to have any weight where other evidence is procurable upon that issue, the presumption may, of course, be overcome by such evidence.⁶ So, the presumption arising from the instinct of self-preservation was held overcome by evidence that the deceased, a section man who was killed while walking on the railroad tracks on his way homeward, knew when the train was due, there being nothing to distract his attention, or excuse him from exercising due care, it also appearing that his hearing was good, and that he could have heard the rattle or the rumble of the train 400 feet away.⁶ And the presumption that a person killed at a railroad crossing was in the exercise of due care may be rebutted by evidence that from a point 155 feet from a crossing, and every step of the way from that point to the crossing, there was nothing to prevent the deceased from seeing the

proof to the contrary. *Dewald v. Kansas City, Ft. S. & G. R. Co.* 44 Kan. 586, 24 Pac. 1101.

The presumption that a person killed at a railroad crossing was in the exercise of due care may be overcome by evidence that he was not. *Crawford v. Chicago G. W. R.* 109 Iowa, 433, 80 N. W. 519.

In *Waldron v. Boston & M. R. Co.* 71 N. H. 362, 52 Atl. 443, it is said that if the great majority of men when approaching a railroad crossing take some precautions against being injured by passing trains, which precautions are deemed reasonable, and if, in the absence of direct evidence, this general custom of mankind may become evidence that the deceased in a given case used similar reasonable precautions to avoid danger, the fact remains that some men, under similar circumstances, are careless and negligent to the extent of hazarding their lives upon the performance of foolhardy feats. It follows, therefore, that when it is shown what the deceased did or omitted to do for his protection, evidence derived from the instinct most men possess of securing their own safety in crossing a railroad track could not be used to prove that he used the same degree or kind of care. Its only office would be to furnish a test by which to determine the reasonableness of his known acts, not to contradict them or minimize their importance.

See also *supra*, IV., notes 66, 67, 68, and 69.

⁶ *Baker v. Chicago, R. I. & P. R. Co.* 95 Iowa, 163, 63 N. W. 667.

When the plaintiff is the representative of a deceased person killed by the alleged negligence of a railroad company, and no evidence can be given of the use made by the deceased of his eyes and ears, the law will assume that he was negligent if the evidence shows that by a vigilant use of his senses he could have seen or heard the

approaching train if he had looked down the track in the direction from which it was coming; and where the evidence also shows that the deceased was a man forty-two years of age, in the possession of all his faculties, and that he nevertheless rode in a buggy behind a team which walked from that point to and upon the railroad crossing, and discovered the approach of the train only when the horses were upon the track.⁷ Whether the presumption has been overcome may be a question for the jury.⁸ But the fact that the presumption may be overcome by direct evidence does not mean that it will be overthrown

by the mere fact of the injury; ⁹ for, manifestly, if it might be so overcome, it would be without value.

V. Jurisdictions holding burden on plaintiff.

a. in general.

In a few jurisdictions, the rule has been steadily maintained that the burden of proving the injured person's conduct at the time of the accident is on the plaintiff. This is the rule in Connecticut¹⁰ and in Illinois.¹¹

approaching train in time to avoid it. *Ingersoll v. New York C. & H. R. R. Co.* 6 Thomp. & C. 416.

⁷ *Bressler v. Chicago, R. I. & P. R. Co.* 74 Kan. 256, 86 Pac. 472.

But the mere fact that the deceased was struck by an approaching engine the presence of which with steam up and ready to move was known to him does not conclusively show he did not take reasonable care for his own safety, so as to rebut the presumption of due care arising from the instinct of self-preservation, where the engine was moving in an unusual manner which the deceased had no reason to anticipate. *Christopherson v. Chicago, M. & St. P. R. Co.* 135 Iowa, 409, 124 Am. St. Rep. 284, 109 N. W. 1077.

This presumption was held not overcome by evidence of a witness for the plaintiff that the deceased had an umbrella over his head at the time of the accident, and the witness did not notice him lift his umbrella before he was struck by the car, and the witness could not notice that it was drawn down over his head, and could not say that he raised the umbrella, or that he either looked to the right or to the left. *Riska v. Union Depot R. Co.* 180 Mo. 168, 79 S. W. 445.

⁸ Where a person was killed at a railroad crossing, and no one saw the accident or the manner of approach of the deceased, or how he went upon the crossing, it was urged by the company that because of the deceased's opportunity to see and hear the approach of the train if he had stopped and looked or listened, it was evident that he did not do so; and on the part of the plaintiff, that because of the absence of required signals and the unlawful speed of the train, deceased would not have known of its approach by stopping and listening, nor by looking at the points from which the train could be seen by him; and it was held that whether the circumstances were such as to overcome the presumption that deceased, prompted by the instinct of self-preservation, did exercise the care required of him, was a question for the jury. *Dalton v. Chicago, R. I. & P. R. Co.* 104 Iowa, 26, 73 N. W. 349.

⁹ Where an accident results in instant death, the law, out of regard to the in-

stinct of self-preservation, presumes the deceased was, at the time, in the exercise of due care; and this presumption is not overthrown by the mere fact of injury, but the burden rests upon the defendant to rebut it. *Northern P. R. Co. v. Spike*, 57 C. A. 384, 121 Fed. 44.

The law, out of regard to the instinct of self-preservation, presumes that the deceased, at the time of the accident, was in the exercise of due care; and this presumption is not overthrown by the mere fact of injury. *Flynn v. Kansas City, St. J. & C. B. R. Co.* 78 Mo. 195, 47 Am. Rep. 99.

¹⁰ *Clark v. Connecticut Co.* 83 Conn. 219, 76 Atl. 523; *O'Connor v. Connecticut R. & Lighting Co.* 82 Conn. 170, 72 Atl. 934; *Elliott v. New York, N. H. & H. R. Co.* — Conn. —, 80 Atl. 283; *Cottle v. New York, N. H. & H. R. Co.* 82 Conn. 142, 72 Atl. 727.

¹¹ *Chicago v. Major*, 18 Ill. 349, 68 Am. Dec. 553; *Chicago & A. R. Co. v. Gretzner*, 46 Ill. 74; *Kepperly v. Ramsden*, 83 Ill. 354; *Rogers v. Chicago, B. & Q. R. Co.* 117 Ill. 115, 6 N. E. 889; *Chicago & A. R. Co. v. Adler*, 129 Ill. 335, 21 N. E. 846; *Blanchard v. Lake Shore & M. S. R. Co.* 126 Ill. 416, 9 Am. St. Rep. 630, 18 N. E. 799; *North Chicago Street R. Co. v. Eldridge*, 151 Ill. 542, 38 N. E. 246; *Jorgenson v. Johnson Chair Co.* 169 Ill. 429, 48 N. E. 822, affirming 67 Ill. App. 80; *Hawk v. Chicago, B. & N. R. Co.* 147 Ill. 399, 35 N. E. 139; *Dallemand v. Saalfeldt*, 175 Ill. 310, 48 L.R.A. 753, 67 Am. St. Rep. 214, 51 N. E. 645; *Chicago & E. I. R. Co. v. Heerey*, 203 Ill. 492, 68 N. E. 74; *Macon v. Holcomb*, 205 Ill. 643, 69 N. E. 79; *George B. Swift Co. v. Gaylord*, 229 Ill. 330, 82 N. E. 299; *Casey v. Adams*, 137 Ill. App. 404, affirmed on another point in 234 Ill. 350, 17 L.R.A. (N.S.) 776, 123 Am. St. Rep. 105, 84 N. E. 933; *Stack v. East St. Louis & Suburban R. Co.* 245 Ill. 308, 92 N. E. 241; *Chicago & A. R. Co. v. Crowder*, 49 Ill. App. 154; *Foster v. Onderdonk*, 54 Ill. App. 254; *Werk v. Illinois Steel Co.* 54 Ill. App. 302, affirmed in 154 Ill. 427, 40 N. E. 442; *Cleveland, C. C. & St. L. R. Co. v. Butler*, 55 Ill. App. 594; *Chicago & A. R. Co. v. Stewart*, 71 Ill. App. 647; *Peoria v. Adams*, 72 Ill. App. 662; *Schneider v.*

So, it has been held in the latter state that the plaintiff is bound to prove more than enough to raise a fair presumption of negligence on the part of the defendant.¹² In an action to recover damages sustained through the frightening of a horse by a box car left standing in such a position as to project over the line of a street, it was

said that, conceding that fault was imputable to the defendant in the location of the car, it would not follow that the defendant would be accountable for the plaintiff's injury unless the plaintiff should also prove that such fault was the proximate cause of the injury, and that he himself was in the exercise of due care for his own

North Chicago Street R. Co. 80 Ill. App. 306; Illinois C. R. Co. v. Batson, 81 Ill. App. 147; Potter v. Sjorgren, 91 Ill. App. 530; Chicago North Shore R. Co. v. Green, 93 Ill. App. 105; Hewes v. Chicago & E. I. R. Co. 119 Ill. App. 393, affirmed in 217 Ill. 500, 75 N. E. 515; Lehigh Valley Transp. Co. v. Cook, 138 Ill. App. 405; Rizzo v. Elgin, J. & E. R. Co. 151 Ill. App. 269.

In Calumet Iron & Steel Co. v. Martin, 115 Ill. 358, 3 N. E. 456, it was said that from the earliest case in the Illinois reports, where the question was passed upon, to the present time,—a period of more than thirty years,—the general rule has been declared and recognized in opinions announced from time to time that, in order to recover for injuries from negligence, it must be alleged and proved that the party injured was, at the time he was injured, observing due or ordinary care for his personal safety.

¹² In Price v. Henagan, 5 Ill. App. 234, an instruction that the plaintiff was not bound to prove more than enough to raise a fair presumption of negligence on the part of the defendant, and of the injury resulting to himself, and that having done this, he is entitled to recover unless the defendant produces sufficient evidence to rebut this presumption, was held erroneous, in that it wholly ignored the necessity of proof on the part of the plaintiff that he was in the exercise of due care at the time of the accident. The court said that to entitle the plaintiff to recover, the law requires that he should prove not only negligence on the part of the defendant, and resulting injury to himself, but also that he was not guilty of any negligence or want of care which contributed to the injury.

In Illinois C. R. Co. v. Trowbridge, 31 Ill. App. 190 (an action to recover damages for the killing of a team of horses on defendant's right of way, based upon the alleged negligence of the defendant by reason of failure to fence the right of way), it was held that the duty of using ordinary care is rested on the plaintiff, and that it was error to instruct the jury upon this question that the burden of proof rested upon the defendant.

In Chicago, B. & Q. R. Co. v. Hazzard, 26 Ill. 373 (an action by a passenger to recover damages for personal injuries received while alighting from a car), it was said that the plaintiff must allege and show affirmatively that the defendants were guilty of negligence, and also that he himself exercised proper care.

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But in Illinois C. R. Co. v. Simmons, 35 Ill. 242, the statements in the last-mentioned case (26 Ill. 373) were said to have been *dictum*, the court holding that failure to allege this fact would be cured by verdict.

Where the plaintiff, who was on a south-bound car, was struck by an advancing north-bound car, an instruction requiring the jury to find, in order to entitle the plaintiff to recover, first, negligence of the defendant, causing the injury; and second, ordinary "precaution, forethought, and care" on the part of the plaintiff; and which told them that if the accident happened by reason of the plaintiff failing to exercise such ordinary care, he could not recover, was held good, where it appeared that before the accident the plaintiff had gone around in front of the south-bound car, and had gotten upon its footboard on the side next to the advancing north-bound car, which he saw, and where, at the time of the accident, he was swinging his head and body out in front of the advancing car. Schneider v. North Chicago Street R. Co. 80 Ill. App. 306.

Where a brakeman, in violation of the rules of the company, went between moving cars to uncouple them, and was hurt, it was held that he could not recover, since the burden was upon him to show freedom from contributory negligence, and this act was an act of negligence. Chicago & A. R. Co. v. Myers, 95 Ill. App. 578.

Where a switchman while on top of a car was struck by a low overhead bridge with which he was familiar, it was held that there could be no recovery in the absence of a showing on his part of the exercise of due care for his own safety. Anderberg v. Chicago & N. W. R. Co. 98 Ill. App. 207. In this case the deceased stood upon the top of a car with his back towards the structure, in which position he remained until he was struck. This, of course, was an affirmative showing of contributory negligence.

Where recovery is sought for the death of a person killed at a railroad crossing, it is not enough for the plaintiff to show that the defendant was running its train at a high and unusual rate of speed, at a rate prohibited by ordinance, that it failed to comply with the statute requiring a bell to be rung or a whistle to be blown, since the burden is still on the plaintiff to prove that the deceased, at the time of the accident, was in the exercise of ordinary care to avoid injury. Imes v. Chicago, B. & Q. R. Co. 105 Ill. App. 37.

safety, since the burden of proof on these questions rested on the plaintiff.¹³

Recognizing that the rule is that the burden is on the plaintiff, some doubt has been expressed whether an instruction to the jury that the plaintiff must prove that the injured person was in the exercise of due care is equivalent to the expression, "The burden of proof is upon the plaintiff."¹⁴

¹³ *Harrigan v. Chicago & I. R. Co.* 53 Ill. App. 344.

In an action to recover for injuries received by the explosion of a compressed-air tank in defendant's packing house, refusal to charge that in cases of this nature the mere fact of the accident, of itself alone, is not any evidence of negligence on the part of the defendant, but that, before the plaintiff can recover, he must prove that the defendant was guilty of negligence which caused the injury, and that the plaintiff himself was free from any want of ordinary care, prudence, vigilance, and caution for his own safety, was error. *Omaha Packing Co. v. Murray*, 112 Ill. App. 233.

To sustain an allegation that the plaintiff was negligently ordered into a dangerous position, in which he was injured, the burden was held to be on the plaintiff to prove affirmatively that, at the time of the injury, he was acting under the orders of a superior whose orders it was the plaintiff's duty to obey; that the danger was known to the superior, or that, by the exercise of reasonable care for plaintiff's safety, should have been known; that the plaintiff did not know the danger, and could not have known it by the exercise of reasonable care for his own safety; and that he was free from negligence which in any manner contributed to the injury. *Wiggins Ferry Co. v. Hill*, 112 Ill. App. 475.

In an action to recover for the death of a person killed at a railroad crossing, the plaintiff must prove that the deceased, at the time of the accident, was in the exercise of ordinary care and caution for his own safety. *Baltimore & O. S. W. R. Co. v. Ayers*, 119 Ill. App. 108.

So, refusal to instruct that the burden of proof is upon the plaintiff to show not only that the defendant was guilty of negligence, but that he himself was not guilty of negligence or carelessness, was held error. *Dyer v. Talcott*, 16 Ill. 300.

In *Chicago City R. Co. v. Freeman*, 6 Ill. App. 608, an action to recover damages for personal injuries received through the alleged improper management of defendant's cars and turntable, it was held that an instruction which ignored the necessity of proof of care on the part of the plaintiff was erroneous.

The rule in Illinois is that, in suits for personal injuries caused by the negligence of another, the plaintiff must allege and prove that he was at the time in the exercise of due care; and in an action for

Prior to 1889, in Indiana the burden of proving absence of contributory negligence was on the plaintiff.¹⁵ Before the statute became effective, the Indiana courts uniformly held that one seeking to recover damages because of the negligence of another must aver and prove his own freedom from the contributory negligence.¹⁶ In Iowa the plaintiff must also show not only the negligence of the defendant, but absence

death, the burden is upon the administrator to show that the deceased exercised ordinary care to avoid the injury. *Illinois C. R. Co. v. Nowicki*, 148 Ill. 29, 35 N. E. 358, affirming 46 Ill. App. 566.

But an instruction that a street railroad company must, in operating its cars, employ due care to avoid injuring those who are rightfully using that part of the street occupied by its tracks, was held not misleading because of the fact that it omitted all reference to due care for the safety of persons driving or crossing the tracks, where this point was fully covered in other instructions. *West Chicago Street R. Co. v. Schulz*, 217 Ill. 322, 75 N. E. 495.

¹⁴ In *North Chicago Street R. Co. v. Louis*, 138 Ill. 9, 27 N. E. 451, the court doubted whether the expression, "In this case the plaintiff must prove that she exercised ordinary care," etc., was equivalent in meaning to the expression, "The burden of proof is upon the plaintiff;" but conceding that it was, the court held that the instruction was still insufficient, because the rule is that the plaintiff is bound to prove the exercise of due care by a preponderance of the evidence.

¹⁵ *Chicago, I. & L. R. Co. v. Turner*, 33 Ind. App. 264, 69 N. E. 484; *Cincinnati, H. & I. R. Co. v. Duncan*, 143 Ind. 524, 42 N. E. 37; *Baltimore & O. S. W. R. Co. v. Young*, 146 Ind. 374, 45 N. E. 479; *Boswell v. Wakley*, 149 Ind. 64, 48 N. E. 637; *O'Neal v. Chicago & I. Coal R. Co.* 132 Ind. 110, 31 N. E. 669; *Oleson v. Lake Shore & M. S. R. Co.* 143 Ind. 405, 32 L.R.A. 49, 42 N. E. 736; *Terre Haute Street R. Co. v. Tappenbeck*, 9 Ind. App. 422, 36 N. E. 915; *Sirk v. Marion Street R. Co.* 11 Ind. App. 680, 39 N. E. 421; *McQueen v. Elkhart*, 14 Ind. App. 671, 43 N. E. 460; *Lake Shore & M. S. R. Co. v. Boyts*, 15 Ind. App. 640, 45 N. E. 812; *Salem v. Walker*, 16 Ind. App. 687, 46 N. E. 90; *Louisville & N. R. Co. v. Espenscheid*, 17 Ind. App. 558, 47 N. E. 186; *Wabash R. Co. v. Miller*, 18 Ind. App. 59, 48 N. E. 663; *Lake Shore & M. S. R. Co. v. Boyts*, — Ind. App. —, 43 N. E. 667; *Wamsley v. Cleveland, C. C. & St. L. R. Co.* 41 Ind. App. 147, 82 N. E. 190, rehearing denied in 41 Ind. App. 155, 83 N. E. 640.

¹⁶ *Nichols v. Baltimore & O. S. W. R. Co.* 33 Ind. App. 229, 70 N. E. 183, 71 N. E. 170.

It is too well settled to admit of debate that a party who sues for an injury to person or property resulting from negligence

of contributory negligence.¹⁷ So, an instruction that if the injury to the plaintiff was caused by the neglect of defendant's employees to exercise reasonable care, etc., the plaintiff could recover, unless the jury

must prove that he was himself without negligence. *Lyons v. Terre Haute & I. R. Co.* 101 Ind. 419.

It is not the rule in Indiana that the party insisting on contributory negligence must prove the facts from which such negligence is to be inferred. *Hartzell v. Louisville, N. A. & C. R. Co.* 15 Ind. App. 417, 44 N. E. 315.

The burden is on the plaintiff in an action to recover damages for the death of a person killed while walking on a railroad track, to show that the deceased was, at the time of the accident, in the exercise of due care. *Lamport v. Lake Shore & M. S. R. Co.* 142 Ind. 269, 41 N. E. 586.

The onus is always upon the plaintiff not only to show the negligence of the defendant, but to establish by some affirmative evidence, either direct or circumstantial, his own freedom from fault contributing to the injury. *Pittsburgh, C. C. & St. L. R. Co. v. Bennett*, 9 Ind. App. 92, 35 N. E. 1033.

The rule is not that absence of contributory negligence may be assumed unless plaintiff's fault affirmatively appears. *Trout v. Elkhart*, 12 Ind. App. 343, 39 N. E. 1048.

Where the plaintiff grounds his right of recovery upon the negligence of the defendant, he must allege and prove that he was himself not guilty of contributory negligence. *Cincinnati, W. & M. R. Co. v. Hiltzhauer*, 99 Ind. 486.

In an action to recover for the death of a brakeman knocked off by a car by a water plug standing too near the track, it was held that failure of the evidence to show that the deceased was free from contributory negligence was fatal to recovery. *Pennsylvania Co. v. Finney*, 145 Ind. 551, 42 N. E. 816.

Where the only facts appearing in a special verdict were that the plaintiff, a drayman, hitched his horse at the corner of a railroad station, and that a train came along upon one of the cars of which was a pile driver, which struck a wire stretched across the track, breaking it and causing a number of telephone poles to fall, which in turn knocked over a ladder, which struck the plaintiff's horse, it was held that the plaintiff could not recover. *Hartell v. Louisville, N. A. & C. R. Co.* 15 Ind. App. 417, 44 N. E. 315. The court said that where, as here, the facts exemplifying the plaintiff's conduct are not set forth with sufficient fullness to enable the court to say whether or not he was himself in the exercise of due care, or free from contributory negligence, then the plaintiff must fail, because he has not sustained the burden which the law imposes upon him. The facts contained in the verdict, said the court, did not indeed show

should further find that the plaintiff's carelessness directly contributed to produce the injuries, was held erroneous because under it the jury would be required to find for the plaintiff if there were no evidence

the plaintiff to have been guilty of negligence, neither did they show him not to have been guilty of contributory negligence. Under such circumstances, the defendant was entitled to judgment.

The care taker of stock riding in a cattle car instead of a caboose, has, in an action to recover for injuries received in a wreck, the burden of showing that he was justified in riding where he did. *Lake Shore & M. S. R. Co. v. Teeters*, — Ind. App. —, 74 N. E. 1014.

The rule that where a plaintiff seeks to recover for injury or damage to property by reason of the negligence of the defendant, he is required to show in his complaint absence of fault or negligence on his part, extends and applies to actions where the negligent act or acts of the defendant consist in allowing water to flow upon the premises of the plaintiff. *Cleveland, C. C. & St. L. R. Co. v. Wisheart*, 161 Ind. 208, 67 N. E. 993.

For cases under the statute, see *infra*, VIII. a, 1.

¹⁷ *Greenleaf v. Illinois C. R. Co.* 29 Iowa, 14, 4 Am. Rep. 181; *Donaldson v. Mississippi & M. R. Co.* 18 Iowa, 280, 87 Am. Dec. 391; *Muldowney v. Illinois C. R. Co.* 32 Iowa, 176; *Carlin v. Chicago, R. I. & P. R. Co.* 37 Iowa, 316; *Way v. Illinois C. R. Co.* 40 Iowa, 341; *Benton v. Central R. Co.* 42 Iowa, 192; *Murphy v. Chicago, R. I. & P. R. Co.* 45 Iowa, 661; *Gorman v. Minneapolis & St. L. R. Co.* 78 Iowa, 509, 43 N. W. 303; *Waud v. Polk County*, 88 Iowa, 617, 55 N. W. 528; *Gregory v. Woodworth*, 93 Iowa, 246, 61 N. W. 962; *Crawford v. Chicago G. W. R. Co.* 109 Iowa, 433, 80 N. W. 519; *Wissler v. Atlantic*, 123 Iowa, 11, 98 N. W. 131; *Calloway v. Agar Packing Co.* 129 Iowa, 1, 104 N. W. 721; *Buchholtz v. Radcliffe*, 129 Iowa, 27, 105 N. W. 336; *Connolly v. Des Moines Invest. Co.* 130 Iowa, 633, 105 N. W. 400; *Dulley v. Consolidated Block Coal Co.* 147 Iowa, 225, 30 L.R.A.(N.S.) 1067, 124 N. W. 609.

The rule that the burden of proving absence of contributory negligence is on the plaintiff applies to an action for injuries due to the negligent administration of a drug by a dentist. *Rabe v. Sommerbeck*, 94 Iowa, 656, 63 N. W. 458.

In *Gwynn v. Duffield*, 66 Iowa, 708, 55 Am. Rep. 286, 24 N. W. 523, it was held that an instruction that the burden of proof rests upon the plaintiff to sustain his cause of action by a preponderance of the evidence did not clearly enough show that the burden of proving absence of contributory negligence is upon the plaintiff, although the court said it might not feel justified in reversing upon this ground alone.

In an action to recover for injuries received by catching hand in mill machinery,

whatever respecting his negligence.¹⁸ And in an action to recover for the death of a person run down and killed by a locomotive, an instruction that if the evidence in the case failed to show that the deceased, at the time of the accident, contributed to his death by his own negligence or want of

proper care, then plaintiff was entitled to recover, was held wrong because of the fact that it placed the burden of the issue of contributory negligence on the defendant, whereas it should be on the plaintiff.¹⁹

This is also the rule in Maine,²⁰ and in Massachusetts.²¹ In the latter state this

it was held that an instruction that unless plaintiff "has shown by a preponderance of the evidence that he was not guilty of a failure to exercise ordinary care, or that if he was, such negligence in no way contributed to his receiving the injury that he complains of, then he is not entitled to recover in this case," was not open to the criticism that it allowed recovery even though the plaintiff were guilty of slight negligence. *Wilder v. Great Western Cereal Co.* 130 Iowa, 263, 104 N. W. 434.

¹⁸ *Nelson v. Chicago, R. I. & P. R. Co.* 38 Iowa, 564.

But an instruction in substance that if plaintiff showed what his acts were, and if they did not appear to be negligent, the jury would be justified in finding that he was free from negligence, while not proper as an abstract proposition, since it may happen, and sometimes does, that the person injured is guilty of negligence in what he omits to do, was upheld where the facts of the case were such that it seemed certain that the plaintiff was not guilty of contributory negligence unless it was by reason of something which he did. *Raymond v. Burlington, C. R. & N. R. Co.* 65 Iowa, 152, 21 N. W. 495 (rehearing).

In an action to recover for injuries received by being thrown from a wagon by reason of the fact that the horse which plaintiff was driving stepped into a hole in a defective bridge, an instruction that, in order to find for the plaintiff, the jury must believe from the evidence that, in attempting to cross the bridge, he used ordinary care and prudence, but if the plaintiff knew of the defect, or if it was apparent, and could have been seen by him with ordinary care and prudence, and he imprudently and recklessly drove his horse upon the same, and the accident happened in consequence of such imprudence and carelessness, or if it could have been avoided by the exercise of ordinary care and prudence, they must find for the defendant, was proper, since it did not require the defendant to assume the burden of proving contributory negligence. *Rusch v. Davenport*, 6 Iowa, 443.

In an action to recover for personal injuries received while alighting from a car, an instruction that if the jury found that the plaintiff failed to use ordinary care, and that her failure in any degree contributed to her injury, their verdict should be for the defendant, was held not open to the objection that it threw the burden of proving contributory negligence upon the defendant, where, in the same instruction, the jury were expressly told that as to the issue of the plaintiff's contributory negli-

gence, the burden of proof was upon her to establish by a preponderance of evidence that she was in the exercise of ordinary care and caution, and not guilty of negligence which contributed to her injuries. *Hutcheis v. Cedar Rapids & M. C. R. Co.* 128 Iowa, 279, 103 N. W. 779.

¹⁹ *Patterson v. Burlington & M. R. Co.* 38 Iowa, 379.

²⁰ *Kennard v. Burton*, 25 Me. 39, 43 Am. Dec. 249; *Benson v. Titcomb*, 72 Me. 31; *Lesan v. Maine C. R. Co.* 77 Me. 85; *Merrill v. North Yarmouth*, 78 Me. 200, 57 Am. Rep. 794, 3 Atl. 575; *Giberson v. Bangor & A. R. Co.* 89 Me. 337, 36 Atl. 401; *Day v. Boston & M. R. Co.* 96 Me. 207, 90 Am. St. Rep. 335, 52 Atl. 771; *Colomb v. Portland & B. Street R. Co.* 100 Me. 418, 61 Atl. 898.

The burden is on the plaintiff to show that no want of ordinary care on his part contributed in the slightest degree to the injury complained of. *Ward v. Maine C. R. Co.* 96 Me. 136, 51 Atl. 947.

And it was held that to entitle a plaintiff to recover in an action in trespass for the death of a cow, plaintiff must prove that the loss sustained occurred without fault on his part, and in consequence of the neglect of defendant. *Waldron v. Portland, S. & P. R. Co.* 35 Me. 422.

In an action to recover for injuries received by reason of a defective highway, the plaintiff is bound to prove that he was in the use of ordinary care at the time of the accident, or he will not be entitled to a verdict; the defendant is not bound to prove that the plaintiff's carelessness was the cause of the injury, in order to be relieved from liability. *Merrill v. Hampden*, 26 Me. 234.

Where a woman was injured by jumping off of a car in which she had been invited by the station agent to sit while the waiting room was being cleaned, it was held that the burden was on the plaintiff to prove that she was not guilty of contributory negligence; that is, that she had a good excuse for her act. The court said that the same evidence which describes the occurrence may be proof enough upon the point, but that if not, other proof must be adduced. *Shannon v. Boston & A. R. Co.* 78 Me. 52, 2 Atl. 678.

²¹ *Wilson v. Charlestown*, 8 Allen, 137, 85 Am. Dec. 693; *Warren v. Fitchburg R. Co.* 8 Allen, 227, 85 Am. Dec. 700; *Butterfield v. Western R. Corp.* 10 Allen, 532, 87 Am. Dec. 678; *Hickey v. Boston & L. R. Co.* 14 Allen, 429; *Bigelow v. Rutland*, 4 Cush. 247; *Holly v. Boston Gaslight Co.* 8 Gray, 123, 69 Am. Dec. 233; *Mayo v. Boston & M. R. Co.* 104 Mass. 137; *Allyn*

principle was applied in the case of a collision between vessels in a harbor.²² And in an action by a woman to recover for injuries received by the overturning of a sleigh, due to the unsafe condition of a highway, it was held that the burden of proof was not on the defendant to show that the plaintiff was violating a city ordi-

nance at the time of the accident.²³ In the case of injury to a child, the burden of showing due care on the part of the parents was held to be on the plaintiff.²⁴

In New Hampshire, the burden of proving the proper conduct of the injured person is placed on the plaintiff,²⁵ and this is also the rule in Michigan.²⁶

v. Boston & A. R. Co. 105 Mass. 77; Southworth v. Old Colony & N. R. Co. 105 Mass. 342, 7 Am. Rep. 528; Hinckley v. Cape Cod R. Co. 120 Mass. 257; Smith v. Boston Gaslight Co. 129 Mass. 318; Corcoran v. Boston & A. R. Co. 133 Mass. 507; Wheelwright v. Boston & A. R. Co. 135 Mass. 225; Peverly v. Boston, 136 Mass. 366, 49 Am. Rep. 37; Gaffney v. Brown, 150 Mass. 479, 23 N. E. 233; Moore v. Boston & A. R. Co. 159 Mass. 399, 34 N. E. 366; Murphy v. Boston & A. R. Co. 167 Mass. 64, 44 N. E. 1087; Chase v. Maine C. R. Co. 167 Mass. 383, 45 N. E. 911; Tumalty v. New York, N. H. & H. R. Co. 170 Mass. 164, 49 N. E. 85; Hilton v. Boston, 171 Mass. 478, 51 N. E. 114; Brown v. New York, N. H. & H. R. Co. 181 Mass. 365, 63 N. E. 941; Spellman v. Dyer, 186 Mass. 176, 71 N. E. 295; Rogers v. Boston & M. R. Co. 187 Mass. 217, 72 N. E. 945; Jordan v. Old Colony Street R. Co. 188 Mass. 124, 74 N. E. 315; Gorham v. Milford, A. & W. Street R. Co. 189 Mass. 275, 75 N. E. 634; Finnick v. Boston & M. Street R. Co. 190 Mass. 382, 77 N. E. 600; White v. New York, N. H. & H. R. Co. 200 Mass. 441, 86 N. E. 923; Prince v. Lowell Electric Light Corp. 201 Mass. 76, 87 N. E. 558; Lundergan v. New York, N. H. & H. R. Co. 203 Mass. 460, 89 N. E. 25.

The burden is always on the plaintiff to prove that he himself was in the exercise of due care, or that the injury was not in any way attributable to any want of proper care on his part. Murphy v. Deane, 101 Mass. 455, 3 Am. Rep. 390.

To entitle the plaintiff to recover for damages due to a collision of vehicles in the highway, he must show that the injury was attributable to the misconduct of the defendant, and under such circumstances as to exonerate himself from all neglect of duty. Parker v. Adams, 12 Met. 415, 46 Am. Dec. 694.

In an action to recover for the death of a person killed at a railroad crossing, caused on the gross negligence, carelessness, and unfitness of the railroad company's servants in failing to have the gates lowered when the train was about to cross the street, or in giving proper warning or signals at the crossing, the burden is on the plaintiff to show that the deceased was in the exercise of due care. Walsh v. Boston & M. R. Co. 171 Mass. 52, 50 N. E. 53.

In an action brought either for the death of a person struck and killed while walking along a railway track, or to recover for conscious suffering, it is incumbent on the plaintiff to prove that the deceased was in the exercise of due care at the time of the accident.²³

upon the plaintiff to prove that the deceased was in the exercise of due care. Adams v. Boston & N. Street R. Co. 191 Mass. 486, 78 N. E. 117.

The burden is always upon the plaintiff to establish either that he himself was in the exercise of due care, or that the injury is in no way attributable to any want of proper care on his part. Murphy v. Deane, supra.

²² An instruction that, in order to enable the plaintiff to recover, it must appear that the accident was not caused by any negligence or want of skill on his part, was upheld. Carsley v. White, 21 Pick. 254, 32 Am. Dec. 259. The court said: "In cases of injury upon the land, occasioned by the collision of two carriages, or by the driving of the carriage of one against the person or property of another, it is well settled that the *onus probandi* is upon the plaintiff to show that he was using ordinary care and diligence; otherwise it cannot be shown that the injury was not attributable to his own negligence.

. . . The same principle, somewhat extended, applies to collisions on the water."

²³ Tuttle v. Lawrence, 119 Mass. 276. The court said that if, at the time of the accident, she was doing an unlawful act, and that unlawful act contributed to cause the alleged injury, she was not in the exercise of that due care which she is obliged to prove in order to recover. The allegation of due care implies not only that the plaintiff was not negligent, but also that she was not acting in violation of law when the alleged injury occurred. On the issue of due care, the plaintiff had the burden of proof, and if she failed to sustain the burden, she must fail in her action.

²⁴ In an action to recover for the death of a child run over by a street car, the burden of proof is on the plaintiff to show that a want of care on the part of his parents did not contribute to produce the injury. Wright v. Malden & M. R. Co. 4 Allen, 289.

²⁵ Hutchins v. Macomber, 68 N. H. 473, 44 Atl. 602; Waldron v. Boston & M. R. Co. 71 N. H. 362, 52 Atl. 443.

In a suit for injury upon a railroad crossing, as in all cases of negligence, the plaintiff is bound to prove that his injury was not due to his own fault, but was caused by the fault of the defendant. Gahagan v. Boston & M. R. Co. 70 N. H. 441, 55 L.R.A. 426, 50 Atl. 146.

²⁶ Daniels v. Clegg, 28 Mich. 32; LeBaron v. Joslin, 41 Mich. 313, 2 N. W. 36; Thompson v. Flint & P. M. R. Co. 57 Mich.

In a few of the earlier cases of New York, it was held that the burden of proving contributory negligence was on the defendant.²⁷ It was said that there was no precedent of the common law for the opposite position.²⁸ But the courts of that state very soon allied themselves with the

jurisdictions placing the burden upon the plaintiff, and, in the absence of statute, this has ever since remained the rule.²⁹ Harshly as the rule was acknowledged to operate in some cases, it was nevertheless admitted by one court to be too thoroughly established in the jurisprudence of the

300, 23 N. W. 820; Tracey v. South Haven Twp. 132 Mich. 492, 93 N. W. 1065; Detroit & M. R. Co. v. Van Steinburg. 17 Mich. 99; Mynning v. Detroit, L. & N. R. Co. 67 Mich. 677, 35 N. W. 811, same case on earlier appeal, 59 Mich. 259, 26 N. W. 514, 64 Mich. 93, 8 Am. St. Rep. 804, 31 N. W. 147.

In an action to recover damages against a vessel for collision, a statement in 1 Western Law Journal, 30, "In cases of collision, the burden of proof is on the plaintiff, not only to show negligence on the part of the defendant, but ordinary care on his own part," was cited with approval. Drew v. The Chesapeake, 2 Dougl. (Mich.) 33.

In an action for the death of a person run down by a street car, the plaintiff must show that the deceased did not, by any act of his, assist in producing the accident. Kelly v. Hendrie, 26 Mich. 255.

In a crossing-accident case, an instruction that the plaintiff is not bound to prove more than enough to raise a fair presumption of negligence on the part of the defendant, and of resulting injury to herself, and that if she does this, she is entitled to recover unless the defendant produces evidence sufficient to rebut the presumption, was held erroneous. Lake Shore & M. S. R. Co. v. Miller, 25 Mich. 274.

But the rule that the burden of proving freedom from contributory negligence is on the plaintiff only requires of him that he should put in evidence the facts and circumstances attending the injury; and if these show negligent conduct in the defendant from which the injury followed as a direct and proximate consequence, and do not show any contributory negligence in the plaintiff, a prima facie case for the jury is made out. He cannot be required to go further than this in negating his own fault, and in many cases where there are no eyewitnesses, it would be impossible. Teipel v. Hilsendegen, 44 Mich. 461, 7 N. W. 82.

The rule does not require him to go so far as to repel a supposed presumption that, in case of a collision between a traveler and a railroad train at a crossing, the injured person did not look or listen, or, if he looked and listened, that he heedlessly disregarded the knowledge so obtained. Guggenheim v. Lake Shore & M. S. R. Co. 66 Mich. 150, 33 N. W. 161.

²⁷ Curran v. Warren Chemical & Mfg. Co. 36 N. Y. 153, 3 Abb. Pr. N. S. 240; Robinson v. New York, C. & H. R. R. Co. 65 Barb. 146; Johnson v. Hudson River R. Co. 5 Duer, 21.

²⁸ In Hackford v. New York C. R. Co. 6 33 L.R.A.(N.S.)

Lans. 381, affirmed in 53 N. Y. 654, it is said that no precedent of common-law declaration in case for negligence can be found in which the plaintiff asserts that he was free from negligence, nor any decision that he is bound to make such proof. But when, on the trial, there is evidence of negligence on the part of the plaintiff, whether it comes from the plaintiff's or defendant's witnesses, the plaintiff must overcome it in order to entitle himself to recover. In this way, and in this way only, is the plaintiff bound to disprove his own negligence.

²⁹ Button v. Hudson River R. Co. 18 N. Y. 248; Cordell v. New York C. & H. R. R. Co. 75 N. Y. 330; Becht v. Corbin, 92 N. Y. 658; Connolly v. Knickerbocker Ice Co. 114 N. Y. 104, 11 Am. St. Rep. 617, 21 N. E. 101; Wiwirowski v. Lake Shore & M. S. R. Co. 124 N. Y. 420, 26 N. E. 1023; Weston v. Troy, 139 N. Y. 281, 34 N. E. 780; Spencer v. Utica & S. R. Co. 5 Barb. 337; Whalen v. Citizens' Gaslight Co. 151 N. Y. 70, 45 N. E. 363; Getman v. Delaware, L. & W. R. Co. 162 N. Y. 21, 56 N. E. 553; Atwater v. Veteran, 52 Hun. 613, 26 N. Y. S. R. 945, 6 N. Y. Supp. 907; Mulligan v. New York C. & H. R. R. Co. 58 Hun, 602, 33 N. Y. S. R. 534, 11 N. Y. Supp. 452; Fowler v. New York C. & H. R. R. Co. 74 Hun, 141, 26 N. Y. Supp. 218, affirmed in 147 N. Y. 717, 42 N. E. 722; Neddo v. Ticonderoga, 77 Hun, 524, 28 N. Y. Supp. 887; affirmed 148 N. Y. 735, 42 N. E. 724; Scully v. New York, L. E. & W. R. Co. 80 Hun, 197, 30 N. Y. Supp. 61, affirmed in 151 N. Y. 672, 46 N. E. 1151; Sickles v. New Jersey Ice Co. 80 Hun, 213, 30 N. Y. Supp. 10, reversed on another point in 153 N. Y. 83, 46 N. E. 1042; Myers v. New York C. & H. R. R. Co. 82 Hun, 36, 31 N. Y. Supp. 153; Mahon v. Burns, 13 Misc. 19, 34 N. Y. Supp. 91; Ryan v. New York C. & H. R. R. Co. 17 App. Div. 221, 45 N. Y. Supp. 542; Sparks v. Siebrecht, 19 App. Div. 117, 45 N. Y. Supp. 993; Caven v. Troy, 32 App. Div. 154, 52 N. Y. Supp. 804; Vincent v. Alden, 45 App. Div. 627, 61 N. Y. Supp. 62; Sutherland v. Troy & B. R. Co. 74 Hun. 162, 26 N. Y. Supp. 237; Winterfield v. Second Ave. R. Co. 49 N. Y. S. R. 435, 2 N. Y. Supp. 801; Spitzer v. Nassau Newspaper Delivery Exp. Co. 44 N. Y. Supp. 1129, affirmed in 20 Misc. 327, 45 N. Y. Supp. 682; Leary v. Fitchburg R. Co. 53 App. Div. 52, 65 N. Y. Supp. 699; Bruce v. Brooklyn Heights R. Co. 68 App. Div. 242, 74 N. Y. Supp. 324; Jackson v. Union R. Co. 77 App. Div. 161, 78 N. Y. Supp. 1096; Voorhees v. Hudson River Tel. Co. 109 App. Div. 465, 95 N. Y. Supp. 703,

state to be ignored or questioned.³⁰ The same rule has been adopted in Rhode Island.^{30a}

In Vermont, although the rule is that the burden is on the plaintiff,³¹ the courts have endeavored to soften it somewhat. In an action to recover for injuries received by reason of the insufficiency of a highway, it is not necessary that the plaintiff should prove affirmatively that he was acting carefully and prudently at the time of the accident. The court said evidence which proves affirmatively that an injury was

caused by a defect in a highway must necessarily, to a certain extent, show negatively that it was not caused by anything else. To this extent, and this only, can it be said that the burden of proof is on the plaintiff in such a case to show at the outset that his own negligence did not cause or contribute to his injury.³²

In jurisdictions where the doctrine prevails that the burden of proving absence of contributory negligence is on the plaintiff, the rule is sometimes stated to be that, if wilfulness and wantonness are not charged,

1167; *LaDuke v. Hudson River Teleph. Co.* 124 App. Div. 106, 108 N. Y. Supp. 189; *Boyce v. New York City R. Co.* 126 App. Div. 248, 110 N. Y. Supp. 393; *Paladino v. Staten Island Midland R. Co.* 127 App. Div. 183, 111 N. Y. Supp. 715; *Enders v. Brooklyn Union Elev. R. Co.* 131 App. Div. 170, 115 N. Y. Supp. 155; *Maercker v. Brooklyn Heights R. Co.* 137 App. Div. 49, 122 N. Y. Supp. 87; *Aubrey v. Hudson Valley R. Co.* 139 App. Div. 318, 123 N. Y. Supp. 1052; *McLain v. Van Zandt*, 7 Jones & S. 347; *McMahon v. New York Elev. R. Co.* 18 Jones & S. 507; *Ingersoll v. New York C. & H. R. R. Co.* 6 Thomp. & C. 416; *Beisegel v. New York C. R. Co.* 14 Abb. Pr. N. S. 29; *Burke v. Broadway & S. Ave. R. Co.* 34 How. Pr. 239; *Thies v. Thomas*, 77 N. Y. Supp. 276; *Butler v. Buffalo, R. & P. R. Co.* 142 App. Div. 282, 126 N. Y. Supp. 823; *Murray v. Troy & W. T. Bridge Co.* 15 N. Y. Week. Dig. 16; *De Benedetti v. Mauchin*, 1 Hilt. 213.

³⁰ *Peaslee v. Chatham*, 69 Hun, 389, 23 N. Y. Supp. 628.

It is well settled in New York that the plaintiff in an accident case assumes the burden of showing that the injury occurred without fault on the part of the person injured, or of giving evidence from which the jury may infer that he was without fault, and that his act did not contribute to the casualty. *Rodrian v. New York, N. H. & H. R. Co.* 125 N. Y. 526, 26 N. E. 741, reversing 55 Hun, 606, 28 N. Y. S. R. 625, 7 N. Y. Supp. 811.

Failure to show absence of contributory negligence is fatal. *Cusick v. Interurban Street R. Co.* 86 N. Y. Supp. 758.

Plaintiff held properly nonsuited for not establishing that a person for whose death the action was brought was free from contributory negligence. *McDermott v. Third Ave. R. Co.* 44 Hun, 107, affirmed in 115 N. Y. 670, 22 N. E. 1126.

It is not enough that there is sufficient evidence to go to the jury on the defendant's negligence, since the plaintiff is bound to show freedom from contributory negligence. *Axelrod v. New York City R. Co.* 109 App. Div. 87, 95 N. Y. Supp. 1072.

In an action to recover for injuries to a horse and wagon while in the defendant's custody, the character of the horse being the main fact upon which the defense of contributory negligence was based, and being assailed by evidence, the burden

of proving that the horse was not vicious, or of showing that this did not contribute to the accident, was held to be on the plaintiff. *Hale v. Smith*, 78 N. Y. 480.

The burden of showing that a person killed on railroad tracks while attempting to rescue his property from injury or destruction was free from contributory negligence is on the plaintiff. *Morris v. Lake Shore & M. S. R. Co.* 148 N. Y. 182, 42 N. E. 579.

In an action to recover for injuries received by a collision between a cart and a railroad car going in the same direction, the plaintiff must show that the collision proceeded exclusively from the negligent acts of the defendant, and not from his own negligent acts, or his own negligent acts combined with those of the defendant. *Suydam v. Grand Street & N. R. Co.* 41 Barb. 375.

In an action brought to recover for injuries received by a brakeman struck by a low bridge, it was held that the plaintiff must bear the burden of satisfying the jury by a preponderance of evidence that he was free from contributory negligence, and that he did not know that it was a low bridge, and also to satisfy the jury that, in the exercise of ordinary care and caution, he could not ascertain that it was a low bridge. *Williams v. Delaware, L. & W. R. Co.* 39 App. Div. 647, 57 N. Y. Supp. 203.

^{30a} *Judge v. Narragansett Electric Lighting Co.* 21 R. I. 128, 42 Atl. 507.

³¹ *Bovee v. Danville*, 53 Vt. 183; *Boyd v. Fitchburg R. Co.* 72 Vt. 89, 47 Atl. 409.

³² *Hill v. New Haven*, 37 Vt. 501, 88 Am. Dec. 613.

And in *Winifred Bros. v. Rutland R. Co.* 71 Vt. 48, 42 Atl. 980, it is said that the plaintiff is not bound to prove as a distinctive affirmative proposition that the injured person was not guilty of negligence. It is a negative rather than an affirmative proposition. The burden is upon the plaintiff to show that the defendant's negligence was the sole, operative cause of the injury, which is equivalent to saying that no want of due care on the part of the intestate helped to cause the accident.

But in *Walker v. Westfield*, 39 Vt. 246 (a defective-highway case), it is said that in order for the plaintiff to make a case upon which he may safely rest, it is neces-

the plaintiff must prove that he was in the exercise of due care.³³ This, of course, relieves the plaintiff from the burden of proving that issue, because, even conceding that contributory negligence existed, this would not relieve the defendant from liability.

In actions where contributory negligence would defeat plaintiff's right of recovery, it devolves upon him to prove that the injured person was in the exercise of ordinary care at the time he was hurt, although absence of contributory negligence is not alleged in the declaration.³⁴ As a consequence of the rule, if the plaintiff's case is barren of all evidence of freedom from contributory negligence, he cannot recover.³⁵ In an action brought to recover for the death of a servant, it up-

peared that the deceased and others, at the time of the accident, were engaged in mending a belt which connected machinery with an overhead shaft. The belt had been slipped from the pulley, and the shaft left revolving, and in some unknown manner the deceased was caught and drawn around the shaft, receiving fatal injuries. There was nothing in the evidence to show how the accident happened. It was held that, under the circumstances, the rule must be applied that in an action to recover damages for the death of a plaintiff's intestate, where there is neither direct nor circumstantial evidence which points either to the presence or absence of contributory negligence, the plaintiff cannot recover without some affirmative evidence to show that the decedent was not guilty of contributory

necessary that he should submit a state and character of evidence upon which the jury would be authorized to find affirmatively both that the defect in the road operated to produce the accident, and that no want of care on his part contributed to it. This is what he assumes, and this burden goes with him throughout the case; and in the end he must be able to have the jury, upon the whole evidence, find affirmatively the same that was necessary to be established by his opening evidence at the time he rested upon making his prima facie case. If the defect in the road did thus operate, and no fault of his contributed, then it was produced wholly by the defect in the road; if his fault contributed, then it was not produced wholly by the defect in the road, and he cannot be allowed to recover for the consequences of an accident to which his own fault contributed, however slightly, even though the accident would have happened if his fault had not contributed to it.

³³ Wilfulness and wantonness not being charged, it devolves upon the plaintiff in an action for personal injuries to prove that he was in the exercise of due care at the time of the accident. *Wilson v. Illinois C. R. Co.* 109 Ill. App. 542, affirmed in 210 Ill. 603, 71 N. E. 398.

When wilfulness is not charged, the plaintiff, in order to recover, must make out a case of unmixed negligence, and that he was without fault. *Louisville, N. A. & C. R. Co. v. Shanks*, 94 Ind. 598.

If the injury was not wilful, a judgment on a special finding cannot be sustained where the finding leaves it uncertain whether the plaintiff was guilty of contributory negligence. *Brannen v. Kokomo, G. & J. Gravel Road Co.* 115 Ind. 115, 7 Am. St. Rep. 411, 17 N. E. 202.

³⁴ *Wilson v. Illinois C. R. Co.* 109 Ill. App. 542, affirmed in 210 Ill. 603, 71 N. E. 398.

³⁵ *Kane v. Williams*, 140 App. Div. 857, 125 N. Y. Supp. 641; *Lake Shore & M. S. R. Co. v. Miller*, 25 Mich. 274.

If there is no evidence either way, plain-

tiff fails to sustain the burden. *Tripp v. Wells*, 104 Me. 29, 18 L.R.A. (N.S.) 1145, 70 Atl. 533.

It is the duty of the court to instruct the jury to return a verdict for the defendant. *Allyn v. Boston & A. R. Co.* 105 Mass. 77.

A verdict in plaintiff's favor will be set aside. *Bedford v. Neal*, 143 Ind. 425, 41 N. E. 1029, 42 N. E. 815.

Where the plaintiff's case is silent on the question of contributory negligence, he cannot recover, since absence of contributory negligence is as much a part of his case as proof of the negligence of the defendant. *Tompkins v. Barnes*, 130 N. Y. Supp. 320.

It is not sufficient that the evidence is silent, and there is nothing therein tending to prove either contributory negligence or freedom therefrom on the part of the plaintiff. It is an affirmative allegation which is necessary to the statement of a cause of action, that the plaintiff was injured without any negligence on his part; and the burden rests upon him to prove it. It is well settled that where the circumstances point just as much towards the negligence of the injured party as to its absence, or points in neither direction, he cannot recover. *Huntingburgh v. First*, 15 Ind. App. 552, 43 N. E. 17.

Where there is neither direct nor circumstantial evidence which points either to the presence or absence of contributory negligence on the part of a decedent, there can be no recovery. *Wieland v. Delaware & H. Canal Co.* 167 N. Y. 19, 82 Am. St. Rep. 707, 60 N. E. 234.

The complaint under such circumstances should be dismissed. *McLain v. Van Zandt*, 7 Jones & S. 347.

Where the evidence fails to show directly or inferentially that the person for whose death the action was brought used that degree of care which was incumbent upon him under the circumstance, the evidence fails to meet the burden imposed by the law in such cases, of showing that the deceased was free from fault, and the case

negligence.³⁶ Of course, where a plaintiff offers no evidence that the injured person was in the exercise of due care, but, on the contrary, the whole evidence on which his case rests shows that he was careless, he cannot recover, and the court may rightfully instruct the jury, as a matter of law, that the action cannot be main-

tained.³⁷ Where there is no direct evidence either of care at the time of the accident, or the contrary, and the circumstances of the accident are not sufficiently disclosed to warrant any inference either of care or negligence, the plaintiff fails to make out his case.³⁸ Some proof, at least, is necessary to the success of plaintiff's

cannot, therefore, be submitted to the jury. *Perez v. Sandrowitz*, 180 N. Y. 397, 73 N. E. 228.

³⁶ *Scialo v. Steffens*, 105 App. Div. 592, 94 N. Y. Supp. 305.

³⁷ *Gahagan v. Boston & L. R. Co.* 1 Allen, 187, 70 Am. Dec. 724; *Detroit & M. R. Co. v. Van Steinburg*, 17 Mich. 99.

If the whole evidence introduced by the plaintiff has no tendency to show care on his part, but, on the contrary, shows that he was careless, it is the duty of the court to direct the jury as a matter of law to return a verdict for the defendant. *Warren v. Fitchburg R. Co.* 8 Allen, 227, 85 Am. Dec. 700.

³⁸ *Mosher v. Smithfield*, 84 Me. 334, 24 Atl. 876.

The burden is on the plaintiff to show due care on his part and negligence on the part of the defendant; and if there is no evidence of such care on his part, the plaintiff is not entitled to recover, and this may be ruled as a matter of law. *Halloran v. Worcester Consol. Street R. Co.* 192 Mass. 104, 78 N. E. 381.

In an action for a negligent injury, the plaintiff must prove his freedom from negligence; and in the absence of evidence to the point, he should be nonsuited. *Geoghegan v. Atlas S. S. Co.* 3 Misc. 224, 22 N. Y. Supp. 749, judgment affirmed in 6 Misc. 129, 25 N. Y. Supp. 1116.

A four-year-old boy having been run over in the street, and there being no evidence as to what he was doing at the time, and nothing to show that he was in the exercise of due care, it was held that an action to recover for the injuries could not be maintained. *Stock v. Wood*, 136 Mass. 353.

Where a car, standing on a side track, was run into by another car, which caused it to run over a section foreman, it was held that there could be no recovery for his death where there was no evidence to show what he was doing at the time of the accident, or how he happened to be behind the car, since the burden is on the plaintiff to show that the deceased was in the exercise of due care. *Lizotte v. New York C. & H. R. R. Co.* 196 Mass. 519, 83 N. E. 362.

In an action to recover for the death of a general repair man who, while on the roof of a building, was killed by coming in contact with an electric wire or wires, where there was nothing to show what he was doing from the time he began to ascend the ladder which led to the skylight, until ten minutes later, when he was seen writhing upon the roof with his hands

over the defendant's wires, and there was no circumstance to throw the slightest light upon the question of the exercise of due care during the interval, it was held that the plaintiff could not recover. *Ralph v. Cambridge Electric Light Co.* 200 Mass. 566, 86 N. E. 922.

In *Von Atzinger v. New York C. & H. R. R. Co.* 83 Hun, 120, 31 N. Y. Supp. 632, absence of evidence in a crossing-accident case, in answer to such questions as: Did the deceased listen for the train? Did he look for it at any of the points at which he could have seen its approach? Did he see it before he drove his horse over the road near the crossing? If he did, how did he come to get in front of the engine? Did he try to avoid it, and if he did so, what did he do? Did he fail to see it? If so, what was the cause or reason for that?—was held fatal to plaintiff's case, since the court held that freedom from contributory negligence can never be presumed, and cannot be inferred from proof of the accident, or of negligence on the part of the defendant.

It is incumbent upon the plaintiff to prove by some facts or circumstances from which a fair inference can be drawn that his intestate was free from contributory negligence. *O'Brien v. New York C. & H. R. R. Co.* 129 App. Div. 288, 113 N. Y. Supp. 320.

While the obligation to show freedom from contributory negligence may be discharged by showing surrounding facts and circumstances from which the jury can infer that the person injured did not, by his acts or conduct, contribute to the injury, yet there must be affirmative evidence from which the jury may properly infer that the person so injured discharged his duty under the circumstances. *Ryan v. New York C. & H. R. R. Co.* 17 App. Div. 221, 45 N. Y. Supp. 542.

While slight evidence will do where direct testimony is impossible, there must be some facts or circumstances from which freedom from contributory negligence may be inferred. *Palcheski v. Brooklyn Heights R. Co.* 69 App. Div. 440, 74 N. Y. Supp. 987.

Undoubtedly, where there is no eyewitness of an accident, and death results, slight evidence will exonerate the decedent from the charge of want of care; yet there must be some proof,—some facts justifying the inference that contributory negligence may not be imputed to him. *Wilson v. New York Mills*, 107 App. Div. 99, 94 N. Y. Supp. 1090.

action.³⁹ It is sometimes held that in cases of fatal accidents, where there is no eyewitness to the conduct of the injured person, the rule with respect to the evidence by which due care is proved is not so rigid.⁴⁰ The burden, however, still remains upon the plaintiff.⁴¹ There must, as before stated, be something from which absence

of fault may be inferred.⁴² So, where all that was known about the movements of the deceased was that he was hurrying down a flight of dimly lighted stairs, and that somewhere on the last flight he fell and was almost instantly killed, it was held that an action to recover for his death could not be maintained, there being no

³⁹ If the evidence offered wholly fails to show that the person for the death of whom the action was brought was using due care, the plaintiff cannot recover. *Riley v. Connecticut River R. Co.* 135 Mass. 292.

Some proof of the absence of contributory negligence is requisite, and although the fact that the plaintiff was free from fault may frequently be inferred from the facts and circumstances of the case, still, whenever that cannot be done, it must be proved by direct evidence. In other words, it must appear in some way that the injury was caused solely by the fault or neglect of the defendant. *Van Lien v. Scoville Mfg. Co.* 14 Abb. Pr. N. S. 74.

In an action to recover damages for injuries received by a collision between a street car and a truck, there can be no recovery where there is no evidence to show whether or not the driver took any precautions to avoid the accident. *Byrnes v. Interurban Street R. Co.* 84 N. Y. Supp. 193.

In *Chadbourn v. Delaware, L. & W. R. Co.* 6 Daly, 215 (an action for injuries to a horse and wagon struck at a railroad crossing), it was held that plaintiff's evidence not disclosing contributory negligence, the burden of proving such negligence was on the defendant.

In *St. Louis Nat. Stock Yards v. Burns*, 97 Ill. App. 175 (an action to recover damages for the death of a switchman killed while in the performance of his duty), there being no evidence, or any fair inference from any evidence, tending to show that the deceased exercised such care and precaution as were required for his own safety, and there being no reasonable excuse for his failure to do so, this was held fatal to recovery, since the burden of proof was on the plaintiff to show this.

In *Lauster v. Chicago, M. & St. P. R. Co.* 43 Ill. App. 534 (an action brought to recover damages for the death of a person supposed to have been killed at a railroad crossing), no person having been a witness to the accident, it was held that a peremptory instruction for the defendant was proper, there being nothing to show that the deceased, at the time of the accident, was in the exercise of due care.

⁴⁰ In *Rodrian v. New York, N. H. & H. R. Co.* 125 N. Y. 526, 26 N. E. 741, reversing 55 Hun, 606, 28 N. Y. S. R. 625, 7 N. Y. Supp. 811, it is said that in case of a death accident at a railroad crossing, it must often happen that the circumstances immediately preceding it and the acts and conduct of the deceased are left in great obscurity. But the rules of law governing

the right of recovery are the same as in other cases, although slighter evidence of compliance with the duty cast upon the plaintiff might be deemed sufficient than where the injured person was alive and competent to testify.

In *Pruey v. New York C. & H. R. R. Co.* 41 App. Div. 158, 58 N. Y. Supp. 797, affirmed in 166 N. Y. 616, 59 N. E. 1129, it was said that in a crossing-accident case where there is no eyewitness of the occurrence, there is a relaxation of the rule requiring strict proof that the deceased was vigilant and observant as he advanced toward the track. The regulation exists in its entirety, said the court, but the proofs presented may be inferential, may be dependent upon circumstances, and still be adequate to satisfy the court of the absence of contributory negligence.

In *Charters v. Palmer*, 113 App. Div. 108, 98 N. Y. Supp. 887 (an action brought to recover for the death of a street cleaner who, while crossing the street in a diagonal direction, was run down from behind by a heavily laden vehicle and killed), in holding that the fact that the deceased was looking straight in the direction in which he was going at the moment he was struck did not show that he was not exercising proper care, the court said that while the degree of care required to be exercised by the deceased was the same as if he had not been killed, yet, owing to the fact of his death and the difficulty in proving freedom from contributory negligence in such cases, the rule with respect to the evidence of care was not so rigid.

⁴¹ Where death results from injury, and where there are no eyewitnesses of the transaction, there is a relaxation in the proof required, but the burden of establishing the absence of contributory negligence still remains unshaken. *Scheir v. Quirin*, 77 App. Div. 624, 78 N. Y. Supp. 956, affirmed in 177 N. Y. 568, 69 N. E. 1130.

⁴² Although in the case of the death of an injured person, less evidence is required to establish freedom from contributory negligence than though the injured person was living and could testify, the burden of proof still rests upon the representative of the deceased to introduce some evidence upon that point. *Zaun v. Long Island R. Co.* 139 App. Div. 719, 124 N. Y. Supp. 511.

Although less evidence is required of a personal representative as to contributory negligence of the deceased than would be required in the case of a surviving person, in such cases, some evidence must be

evidence from which freedom from contributory negligence could be inferred.⁴³ And where, in an action to recover for the death of a person killed at a railroad crossing, it appears that listening and looking would not have been unavailable to avoid danger, and there is no evidence of the movements of the deceased from the time when he was last seen, a quarter of a mile away from the crossing, until the moment of the accident, there can be no recovery, since the plaintiff has failed to sustain the burden of proving that the decedent was not guilty of contributory negligence.⁴⁴

The question whether, under such circumstances, the presumption of due care arising from the instinct of self-preservation is sufficient evidence to sustain the plaintiff's burden, has already been considered.⁴⁵ Where the requirement as to the proof of due care is less rigid in the case of death and absence of eyewitnesses to the accident, it has been held that the fact that a person injured at a railroad crossing testifies that she does not remember anything concerning the happening of the accident does not put her in the same position in this respect as a plaintiff suing to recover for the death of a person killed at a crossing.⁴⁶

It has been held that the plaintiff, to entitle him to submit his case to the jury, must produce evidence sufficient to render reasonable a finding that he was free from

fault.⁴⁷ So, for example, where the action was brought to recover for injuries received by reason of a horse falling through a defective highway bridge, and the only evidence of how the accident happened was that of the plaintiff, who said: "We were coming to the Smithfield bridge,—there is a descending,—coming down the hill. The horse was trotting down the hill,—the horse she touched on the bridge,—she was on the bridge somewhere, either the sixth or seventh plank, I can't exactly tell which. I saw the horse when she pitched forward, and I didn't see anything more at all,"—it was held that she had failed to show due care.⁴⁸

And where the only evidence offered by the plaintiff in an action to recover for the death of a person killed by a street car was that the deceased, upon leaving one car, immediately passed around the rear end of it and attempted to cross a parallel track upon which a car running in the opposite direction was approaching, and which struck and killed him, and the only witness to the accident, testifying on behalf of the plaintiff, said that he did not see the deceased look in any direction before he attempted to cross, it was held that there was no evidence from which freedom of the deceased from contributory negligence could be inferred.⁴⁹ Likewise, where it appeared that there was a space of 6 inches between the steps of a car and the station platform, and that the platform

given from which the jury can find that the intestate did exercise the care required by law. *Axelrod v. New York City R. Co.* 109 App. Div. 87, 95 N. Y. Supp. 1072.

While it is true that in the case of the death of the injured person, there being no eyewitnesses of the occurrence, slight evidence may suffice, there still must be some fact or circumstance proven from which an inference may be drawn that the deceased exercised due care. *Jones v. Ryan*, 125 App. Div. 282, 109 N. Y. Supp. 156.

While the rule that the plaintiff must bear the burden of showing the want of contributory negligence in death cases has been somewhat relaxed in regard to the amount and kind of proof required, and especially where there are no eyewitnesses of the accident, yet it has not been abrogated in such cases, and it applies in the case of children as well as adults. *Gallagher v. New York City R. Co.* 124 App. Div. 868, 109 N. Y. Supp. 515.

There being no circumstances disclosed which tend to prove freedom of the deceased from contributory negligence, a recovery cannot be had for his death. *Goodhines v. Chase*, 100 App. Div. 87, 91 N. Y. Supp. 313.

⁴³ *Jones v. Ryan*, 125 App. Div. 282, 109 N. Y. Supp. 156.

⁴⁴ *Wieland v. Delaware & H. Canal Co.* 33 L.R.A. (N.S.)

167 N. Y. 19, 82 Am. St. Rep. 707, 60 N. E. 234.

⁴⁵ See *supra*, IV. d.

⁴⁶ *Drago v. New York C. & H. R. R. Co.* 139 App. Div. 828, 124 N. Y. Supp. 374. The court said that the courts have gone a long way in holding that where a plaintiff's intestate has been killed, thus rendering impossible the giving of testimony by such intestate, inferences may be indulged to the effect that such intestate was free from contributory negligence. But we know of no case where it has been held that the injured party may be excused from giving evidence tending to free such party from the charge of contributory negligence by simply saying that he or she cannot remember as to the circumstances or facts of the accident, without giving any evidence that such want of recollection was caused by the accident which is complained of.

⁴⁷ *Gahagan v. Boston & M. R. Co.* 70 N. H. 441, 55 L.R.A. 426, 50 Atl. 146.

⁴⁸ *Mosher v. Smithfield*, 84 Me. 334, 24 Atl. 876.

⁴⁹ *Axelrod v. New York City R. Co.* 109 App. Div. 87, 95 N. Y. Supp. 1072.

Where it appeared that the plaintiff attempted to cross a street from one corner to another, and as he left the curb, saw a car approaching a block or a block and a

was 14 inches lower than the lowest step of the car, and a passenger, whose left leg was shorter than the right, attempted to alight at about dusk, and when he reached the lower step, put out his cane to feel the platform, because he could not see it, and then stepped down safely with his left foot, but, in attempting to reach the platform with his right foot, stepped into the space between the steps and the platform, and

half away, and when he reached the track was struck by it, and there was nothing to prevent his having seen the position of the car at any time before reaching the track, had he looked, it was held that he had not sustained the burden of showing that he was free from contributory negligence. *Lynch v. Third Ave. R. Co.* 88 App. Div. 604, 85 N. Y. Supp. 180.

Where the evidence showed that a person who was killed by a street car saw the car 8 or 10 feet away just as he was about to cross the track, but observed it to slow up, whereupon he proceeded to cross, but that the car, instead of coming to a standstill, afterwards went ahead at full speed, striking the deceased just as he was about to step upon the track, it was held that the plaintiff had failed to show that the negligence of the deceased did not contribute to the accident. *Thompson v. Metropolitan Street R. Co.* 89 App. Div. 10, 85 N. Y. Supp. 181.

The plaintiff cannot recover in an action brought for the death of a boy killed while playing in the street, by a car, where the plaintiff's testimony showed that the boy was struck while attempting to run across the tracks, but does not indicate whether the deceased saw the car or made an effort to discover whether a car was approaching from either direction, and the fact that a boy was following the decedent at the time does not aid the plaintiff's case. *Sobol v. Union R. Co.* 122 App. Div. 817, 107 N. Y. Supp. 656.

⁵⁰ *Gabriel v. Long Island R. Co.* 54 App. Div. 41, 66 N. Y. Supp. 301.

⁵¹ *Gallagher v. Proctor*, 84 Me. 41, 24 Atl. 459; *Louisville & N. R. Co. v. Orr*, 84 Ind. 50; *West Chicago Street R. Co. v. Liderman*, 187 Ill. 463, 52 L.R.A. 655, 79 Am. St. Rep. 226, 58 N. E. 367; *Arnold v. Delaware & H. Canal Co.* 16 N. Y. S. R. 310, 1 N. Y. Supp. 409; *Fay v. Hartford & S. Street R. Co.* 81 Conn. 330, 71 Atl. 364; *Chicago, B. & Q. R. Co. v. Dewey*, 26 Ill. 255, 79 Am. Dec. 374; *Alton v. English*, 69 Ill. App. 197; *Deikman v. Morgan's L. & T. R. & S. S. Co.* 40 La. Ann. 787, 5 So. 76.

Plaintiff is bound to show affirmatively not only the culpable negligence of the defendant, but that a person killed thereby was, at the time of the accident, conducting himself with ordinary prudence and discretion. *Fox v. Glastenbury*, 29 Conn. 204.

The burden of proving his own freedom from negligence is as much a part of the plaintiff's case as is the burden of proving the defendant's negligence; and if he fails

was injured, it was held that the evidence did not show absence of contributory negligence.⁵⁰

The plaintiff must establish two propositions: one, the negligence of the defendant; and the other, due care on the part of the person injured.⁵¹ It has been said that plaintiff's evidence must be such as to make out a prima facie case of freedom from contributory negligence,⁵² or a clear

to prove either the one or the other, he has not proved facts sufficient to constitute a cause of action. *Eades v. Clark*, 23 Jones & S. 132, 11 N. Y. S. R. 725.

In *McDaniel v. Acme Brewing Co.* 113 Ga. 80, 38 S. E. 404, it was held that a servant seeking to recover for an injury takes the burden upon himself of establishing negligence on the part of the master and due care on his own part. In that case there was no direct evidence that the plaintiff's husband, for whose death the action was brought, who was a servant of the defendant, was in the exercise of due care at the time of his death, nor were there any circumstances in proof from which the jury could legitimately have drawn an inference to this effect. It was therefore held that a nonsuit was properly granted.

Where a party seeks to recover damages for a loss which has been caused by negligence or misconduct, he must be able to show that his own negligence or misconduct has not concurred with that of the other party in producing the injury; and the burden of proof is upon the plaintiff to show not only negligence on the part of the defendant, but also that he exercised proper care and circumspection; or, in other words, that he was not guilty of negligence. *Aurora Branch R. Co. v. Grimes*, 13 Ill. 585.

So, in an action to recover damages for death due to the alleged negligence of the defendants, it was held that an instruction which imposed upon the defendants the burden of proving the negligence of the deceased and the absence of it in themselves was erroneous. *Brunswick v. Strilka*, 30 Ill. App. 186.

An instruction in effect, that if the negligence of the plaintiff and the defendant both contributed to the injury, the verdict should be for the defendant, was held proper, on the ground that where a party seeks to recover damages for a loss which has been caused by negligence or misconduct, he must be able to show that his own negligence or misconduct has not concurred with that of the other party in producing the injury; and the burden of proof is upon the plaintiff to show not only negligence on the part of the defendant, but also that he exercised proper care and circumspection; or, in other words, that he was not guilty of negligence. *Wabash R. Co. v. Jensen*, 99 Ill. App. 312.

⁵² In an action for the death of a traveler killed at a railroad crossing, the plaintiff's evidence must be such as to make a prima

affirmative case.⁵³ Being a part of his case, it is said that he must establish the fact by a preponderance of the evidence,⁵⁴

facie case of freedom from contributory negligence. *Popke v. New York, N. H. & H. R. Co.* 81 Conn. 724, 71 Atl. 1098.

In an action to recover for injuries received while driving upon a defective highway in the nighttime, it was held that the plaintiff is bound to make out a prima facie case on freedom from contributory negligence as well as on other points. *Barber v. Essex*, 27 Vt. 62. The court, however, said that the requisite is rather that he was not guilty of negligence than that he should prove any positive diligence. And as in other negative propositions which it is often incumbent upon a party to establish, as where suits or indictments are brought for omissions of duty, after such negative evidence of the alleged fact as may be presumed to be in the power of the party is shown, the burden of proof is changed upon the other side. That appears to have been the case here. The plaintiff's case showed an acknowledged case of no negligence on his part except in regard to darkness. There seems to have been no question in regard to plaintiff's want of care, except in regard to the darkness of the night, and unless it can be assumed as a general proposition that ordinarily one is not allowed to travel a highway with a team in the nighttime, and we think it must be regarded as the general right of everyone to travel in this mode in the nighttime; and it was for the defendant, if there is no other testimony to show want of ordinary care, to prove that the night was so dark as to render it unsafe for travel.

⁵³ The plaintiff must make out a clear affirmative case of negligence on the part of the defendant, unmixed with any degree of negligence on the part of the deceased, contributing to the injury sustained. *Ernst v. Hudson River R. Co.* 24 How. Pr. 97.

⁵⁴ *Gilman v. New York City R. Co.* 107 N. Y. Supp. 770; *Chicago & A. R. Co. v. Stone*, 109 Ill. App. 517.

The absence of contributory negligence is an element of plaintiff's cause of action and a part of his case; and he has the burden of showing that he or his intestate was guilty of no negligence contributing to produce the injury or death. *Winslow v. Boston & A. R. Co.* 11 N. Y. S. R. 831.

In cases where contributory negligence may be claimed, the absence thereof is part of the plaintiff's case, and the burden of satisfying the jury on that point by a preponderance of evidence rests upon him. *Schindler v. New York, L. E. & W. R. Co.* 1 N. Y. S. R. 289.

The plaintiff must prove by a preponderance of evidence that he was in the exercise of due care at the time of his injury. *Chicago, B. & Q. R. Co. v. Levy*, 160 Ill. 385, 43 N. E. 357, reversing 57 Ill. App. 365.

In an action to recover for the death of a person hit by a street car, the plaintiff is properly nonsuited where he fails to es-

tablish by a preponderance of evidence the deceased's freedom from contributory negligence. *Kruck v. Connecticut Co.* — Conn. —, 80 Atl. 162.

And an instruction that the burden is upon the plaintiff to prove by the greater weight of the evidence, not only the negligence of the defendant, as charged in the declaration, but also to prove by the greater weight of the evidence that the deceased was free from negligence which contributed to the collision which caused his death; and "if you find from all the evidence in the case that the plaintiff has not so proven both of these facts, you shall find the defendant not guilty,"—was held properly to state the rule as to the burden of proof, and it was declared that such instruction should have been given where the principle sought to be covered thereby was not fully stated in other instructions. *Chicago, B. & Q. R. Co. v. Appell*, 103 Ill. App. 185.

In an action by a woman to recover for the death of her husband, killed at a railroad crossing, it is necessary for her to prove by a preponderance of evidence that at the time, and immediately preceding the occasion on which he received the injury causing his death, deceased was in the exercise of ordinary care for his own safety, unless it should be shown that the defendant wilfully and wantonly inflicted such injuries. *Chicago & A. R. Co. v. Stone*, 109 Ill. App. 517.

The burden is upon one who was injured while attempting to cross railway tracks at a highway crossing to show by a preponderance of the evidence that he vigilantly used his eyes and ears to ascertain if a train was approaching; and if this is not shown by a preponderance of evidence, the plaintiff cannot recover. *Cincinnati, I. St. L. & C. R. Co. v. Howard*, 124 Ind. 280, 8 L.R.A. 593, 19 Am. St. Rep. 96, 24 N. E. 892.

To hold a railroad company liable in damages for the death of a pedestrian killed at a street crossing, plaintiff must show by a preponderance of the evidence that the deceased was in the exercise of due care, which cannot be sustained by mere conjecture and speculation. *Wright v. Boston & M. R. Co.* 74 N. H. 128, 8 L.R.A. (N.S.) 832, 124 Am. St. Rep. 949, 65 Atl. 687.

So, failure of the plaintiff, who was hurt by falling through a hole in the floor from which a trapdoor had been removed, to show by a preponderance of evidence that he was, at the time of the accident, in the exercise of ordinary care for his own safety, was held fatal to recovery. *Mutual Wheel Co. v. Mosher*, 85 Ill. App. 240.

In an action by a servant to recover for injuries received by using a broken and defective hay cutter belonging to his employer, an instruction that, to authorize a recovery, the plaintiff must prove by a preponderance of evidence, that he was exercising that degree of care and caution at

by affirmative, positive proof.⁵⁵ Or, as has been said, the case starts at zero, and the plaintiff is called upon to establish affirmatively absence of contributory negli-

gence.⁵⁶ It is not enough that the facts proven permit an inference that the deceased was free from contributory negligence, but the inference sought must be the

the time of the injury which a reasonably prudent and cautious man would have exercised, was held not erroneous by reason of a modification by the addition of the following words: "And in the situation that plaintiff was placed, as shown by the evidence." *Donley v. Dougherty*, 174 Ill. 582, 51 N. E. 714.

⁵⁵ *Keller v. Gaskill*, 9 Ind. App. 670, 36 N. E. 303; *Wyman v. Berry*, 106 Me. 43, 75 Atl. 123; *Gahagan v. Boston & L. R. Co.* 1 Allen, 187, 79 Am. Dec. 724; *Tully v. Fitchburg R. Co.* 134 Mass. 499; *Greamer v. West End Street R. Co.* 156 Mass. 320, 16 L.R.A. 490, 32 Am. St. Rep. 456, 31 N. E. 391; *Dobbins v. Brown*, 119 N. Y. 188, 23 N. E. 537; *Stopp v. Fitchburg R. Co.* 80 Hun, 178, 29 N. Y. Supp. 1008.

The plaintiff must show by positive evidence that he was in the exercise of due care. *Chaffee v. Boston L. R. Corp.* 104 Mass. 108.

The plaintiff must satisfy the jury as an affirmative fact to be established by him that, as a necessary part of his case, at the time of the accident he was in the exercise of due care. *Gleason v. Bremen*, 50 Me. 222.

In *Lesan v. Maine C. R. Co.* 77 Me. 85, the court said that the plaintiff must produce affirmative proof, directly or indirectly, that he was not himself guilty of any negligence which helped to cause the accident. Sometimes this is impliedly shown by the proof of the manner of the injury. That is, by proving the defendant's negligence. The same proof may exculpate the plaintiff from any charge of negligence. It may be inferred that a plaintiff was, at the time of the accident, using due care, from the absence of all appearance of fault upon his part in the circumstances under which the accident happened. To state the requirement more precisely, the plaintiff must show affirmatively, or it must affirmatively appear, that he was himself in the use of due care. If it so appears from a full account of the circumstances attending the occurrence, whether the evidence be put in for one purpose or another, then he does affirmatively sustain the burden obligatory upon him.

To entitle a plaintiff to recover for injuries received by reason of the negligence of the defendant, it is incumbent upon him affirmatively to prove at least two propositions; one, that his injuries were caused by the negligence of the defendant; and two, that no failure to exercise reasonable care on his part contributed to bring about his injuries. *Ouellette v. Grand Trunk R. Co.* 106 Me. 153, 76 Atl. 280.

It is for the plaintiff by affirmative evidence to establish to the satisfaction of the jury his own freedom from negligence contributing to the injury of which he complains. *Gaynor v. Old Colony & N. R. Co.* 100 Mass. 208, 97 Am. Dec. 96. 33 L.R.A.(N.S.)

⁵⁶ *Bruce v. Brooklyn Heights R. Co.* 68 App. Div. 242, 74 N. Y. Supp. 324.

Among the allegations a plaintiff in a personal-injury case must support by proof in order to entitle him to recover is that of ordinary care. It is an affirmative fact, to be established as an essential part of the plaintiff's case, and before the defendants are required to set up a defense of contributory negligence; and if, on the whole testimony on this point, the weight of evidence is against the plaintiff, he cannot recover. *Mosher v. Smithfield*, 84 Me. 334, 24 Atl. 876.

In an action to recover for the death of a person killed by coming in contact with an electric wire, it was held that when the action of both parties must have concurred to produce the injury, it devolves upon the plaintiff to show that he was not himself guilty of negligence; but he must show affirmatively that he was in the exercise of due and reasonable care when the injury happened. *Clements v. Louisiana Electric Light Co.* 44 La. Ann. 692, 16 L.R.A. 43, 32 Am. St. Rep. 348, 11 So. 51.

In a highway case the town is not bound to show that plaintiff's carelessness or want of care was the cause of the injury. It must affirmatively appear that ordinary care was exercised in passing over the highway, or that the injury was in no degree attributable to any want of care on the part of the plaintiff. *Mosher v. Smithfield*, supra.

In an action to recover for personal injuries received by collision with a train at a railroad crossing, the plaintiff must establish by affirmative evidence his freedom from contributory negligence. He must show that he approached the crossing with due care and caution, alert to discover the first sign of coming danger. *Smith v. Maine C. R. Co.* 87 Me. 339, 32 Atl. 967.

To hold a town liable for injuries due to a defective highway, the traveler must show affirmatively that he was in the exercise of due care. *Tripp v. Wells*, 104 Me. 29, 18 L.R.A.(N.S.) 1145, 70 Atl. 533.

Where a traveler is killed while crossing street railroad tracks, by collision with a car, in an action to recover for his death, the plaintiff must show by affirmative evidence that the deceased was in the exercise of due care. *Mathes v. Lowell, L. & H. Street R. Co.* 177 Mass. 416, 59 N. E. 77.

Recovery cannot be had for the death of a person stepping directly in front of a street car and being killed, without affirmative proof that the deceased was in the exercise of due care. *Gleason v. Worcester Consol. Street R. Co.* 184 Mass. 290, 68 N. E. 225.

The burden is upon the plaintiff of showing affirmatively, either by direct evidence or the drift of surrounding circumstances, that a person killed at a railroad crossing,

only one which can fairly and reasonably be drawn from the facts proven.⁵⁷

If the evidence as to negligence and absence of negligence on the part of the person injured balances, the plaintiff does not sustain his burden.⁵⁸ If the circumstances proved are equally consistent with negligence or care, the verdict should be

for the defendant.⁵⁹ Under such circumstances, it has been held that a nonsuit must be granted.⁶⁰ Although it would seem not to be necessary for plaintiff, as part of his proof of due care, to introduce evidence of sobriety, nevertheless, where intoxication is alleged, or there is evidence of it, the burden, it seems, is not only on the plaintiff to introduce evidence in re-

for whose death the action is brought, was himself without fault, and approached the crossing with prudence and care, and with senses alert to the possibility of approaching danger. *Tolman v. Syracuse, B. & Q. R. Co.* 98 N. Y. 198, 50 Am. Rep. 649.

The burden of showing affirmatively, either by direct evidence or by surrounding circumstances, that the plaintiff was free from contributory negligence, is upon the plaintiff. *Beckwith v. New York C. & H. R. Co.* 54 Hun, 446, 7 N. Y. Supp. 719, 721, affirmed in 125 N. Y. 759, 27 N. E. 408.

⁵⁷ *O'Reilly v. Brooklyn Heights R. Co.* 82 App. Div. 492, 81 N. Y. Supp. 572.

⁵⁸ In view of the fact that the burden of proof is upon the plaintiff to prove that his own want of ordinary care did not contribute to the injury, if the testimony be in exact *equilibrio* upon the question of the plaintiff's sobriety at the time of the injury, the jury will not be justified in finding that he was sober. *Hubbard v. Mason City*, 60 Iowa, 400, 14 N. W. 772.

An instruction that if the jury find that the injuries complained of were in any degree contributed to by the fault, want of care, or negligence of the plaintiff, then the plaintiff could not recover, was held erroneous, since to justify a verdict against the plaintiff it was not necessary, as the instruction implied, that the jury should find affirmatively that the plaintiff was guilty of contributory negligence. They were bound to render such verdict if they simply failed to find that he was not guilty. *Gwynn v. Duffield*, 66 Iowa, 708, 55 Am. Rep. 286, 24 N. W. 523.

In *Raymond v. Burlington, C. R. & N. R. Co.* — Iowa, —, 17 N. W. 923, although the court instructed the jury that the burden was on the plaintiff to prove that he was free from contributory negligence, it added that the requirement of the law was sufficiently complied with when the plaintiff's testimony failed to show contributory negligence. This was held to be erroneous, because it shifted the burden from the plaintiff to the defendant. It was said that the plaintiff cannot recover if the evidence is in *equilibrio*.

⁵⁹ *Crafts v. Boston*, 109 Mass. 519; *Mahon v. Burns*, 13 Misc. 19, 34 N. Y. Supp. 91.

If the facts proved point as much to negligence on the part of the injured person as to its absence, or point in neither direction, a recovery cannot be had. *Caven v. Troy*, 12 App. Div. 154, 52 N. Y. Supp. 804. To the same effect. *Murray v. Troy & W. T. Bridge Co.* 15 N. Y. Week. Dig. 16.

Assuming that the evidence admitted

raised a doubt as to plaintiff's contributory negligence, or the circumstances pointed as much one way as the other, or pointed in neither direction, the plaintiff cannot recover. *Door v. McCullough*, 8 App. Div. 327, 40 N. Y. Supp. 806.

If from the whole evidence it cannot be determined whether the plaintiff was free from contributory negligence, the finding and judgment must be against him. *Brannen v. Kokomo, G. & J. Gravel Road Co.* 115 Ind. 115, 7 Am. St. Rep. 411, 17 N. E. 202.

Where different inferences are deducible from the facts which appear, and are equally consistent with those facts, it cannot be said that the plaintiff has maintained his case. *Mosher v. Smithfield*, 84 Me. 334, 24 Atl. 876.

It is not enough to prove facts from which either the conclusion of negligence or the absence of negligence may be with equal fairness drawn, but the burden is upon the plaintiff to establish that there was no contributory negligence. *Hart v. Hudson River Bridge Co.* 84 N. Y. 56. In this case, action was brought for the death of a woman who walked off of an open drawbridge. As the evidence stood, there was no proof either way, and the court said it was by no means clear, in the absence of evidence, that the deceased was not chargeable with contributory negligence. It was not sufficient that the evidence in this respect was equally balanced, and it was essential that at least a *prima facie* case should be established.

The plaintiff must prove that death was caused solely by the negligence of the defendant, and that the want of care on the part of the deceased in no way made any contribution to the result; and the two points must be established by competent proof, and must not be left to speculation. *Morrison v. Metropolitan Teleph. & Teleg. Co.* 30 Abb. N. C. 143, 69 Hun, 100, 23 N. Y. Supp. 257.

The jury cannot be permitted to guess that a person killed by being wound around a revolving shaft, due to the fact that his clothing caught in a setscrew, used reasonable care and prudence in going near the shaft, and that he was caught without any fault or negligence on his part, without any evidence to support that proposition, and when the evidence fails to disclose whether he was free from negligence, plaintiff cannot recover. *Huff v. American Fire Engine Co.* 88 App. Div. 324, 84 N. Y. Supp. 651.

⁶⁰ In such a case a nonsuit must be granted. *Jencks v. Lehigh Valley R. Co.* 33 App. Div. 635, 53 N. Y. Supp. 625; *McAuliffe v. New York C. & H. R. Co.* 85 App. Div. 187, 83 N. Y. Supp. 200; *Lamb v. Union R. Co.* 195 N. Y. 260, 88 N. E. 371.

buttal, but it is necessary for him to establish the fact of sobriety by a preponderance of the evidence.⁶¹

The burden of proving freedom from contributory negligence rests upon the plaintiff from the beginning until the end of the trial. The burden of introducing evidence to controvert the testimony offered on behalf of the plaintiff may rest upon the defendant after the plaintiff has made out a prima facie case, but the burden of proving the issue, assigned to the plaintiff in the first place, does not shift.⁶²

Under the rule that the burden is on the

plaintiff to show freedom from contributory negligence, it ordinarily follows that where it does not appear that the plaintiff acquiesced in a driver's negligence, if the latter was negligent, the presumption is that the plaintiff co-operated with the driver, and the latter's negligence will preclude a recovery. Hence, before there can be a recovery, it must appear affirmatively that the plaintiff had no control over the team or the conveyance; that the same was in charge of a careful and competent driver, or at least, a driver whom the plaintiff had good reason to believe to be such, and that

⁶¹ In *Cramer v. Burlington*, 42 Iowa, 315 (an action to recover damages for injuries sustained on account of being precipitated over a set-off in a sidewalk), it was held that when it becomes material to inquire whether the plaintiff was sober, and the defendant introduces some testimony tending to show that the plaintiff was intoxicated, the burden of overcoming this testimony is shifted upon the plaintiff; and the jury, in order to find upon the issue for the plaintiff, must be able to find from a preponderance of all the testimony, that the plaintiff was sober. In a dissenting opinion, Beck, Judge, said: "The conclusion of the majority of the court is based upon the position that a state of intoxication, even the first stage, is inconsistent with the exercise of care; and that where intoxication of plaintiff was shown, the burden of proof was then shifted upon him to show that, notwithstanding his intoxication, he did exercise care. But why impose a burden upon him to further prove care when his condition of intoxication did not warrant the conclusion of his inability, want of will, or absence of intention to exercise care? It is imposing a burden of proof where no necessity of proof exists, for we have seen that no inference of carelessness is necessarily to be drawn from the existence of the first stage of intoxication. In order, then, to show his care, he is not required to rebut the evidence of his intoxication. The majority of the court hold that the intoxication of the plaintiff must be denied by rebutting evidence before plaintiff can establish care. This can only be true on the ground that intoxication in all degrees—the first as well as all others—renders it necessary to infer carelessness. It will be observed, too, that care, according to the views of the majority, is to be shown by establishing sobriety,—by rebutting the proof of intoxication. This would render it utterly impossible for a man in any stage of intoxication to show that he did exercise care. The majority say if he was drunk, he can only show care by proving that he was sober; if his drunkenness be established or conceded, he must be held to be careless. This is a more severe penalty in the nature of a disability imposed upon intoxication than I think just. I am of the opinion that the rule adopted by the court below is correct; namely, the jury should determine

from the evidence whether the intoxication of plaintiff was such as to authorize the inference of want of care for his safety."

In an action to recover for injuries due to a defective sidewalk, the defendant having alleged that the plaintiff was intoxicated at the time of the accident, it was held that an instruction that the defendant had the burden of establishing the claim of intoxication by a preponderance of evidence, or, in other words, that the plaintiff would be presumed to have been sober until the contrary was shown, was erroneous, as in conflict with the rule announced in *Cramer v. Burlington*, the last-mentioned case. *Hubbard v. Mason City*, 60 Iowa, 400, 14 N. W. 772.

If the testimony be in exact *equilibrio* upon the question of the plaintiff's sobriety at the time of the injury, the jury will not be justified in finding that he was sober. *Ibid.*

In *Abingdon v. McGrew*, 42 Ill. App. 109, an action to recover damages for injuries sustained by falling upon a defective sidewalk, where it appeared that, at the time of the accident, the plaintiff was intoxicated, it was held that an instruction by which the jury were told that the degree of intoxication must be such that the plaintiff was incapacitated from using ordinary care and diligence, and that the burden of proof to establish that, by a preponderance of evidence, was with the defendant, was erroneous, since the burden of proof was upon the plaintiff to show that, at the time of the accident, he was in the exercise of ordinary care. If the evidence was evenly balanced as to whether the plaintiff, owing to his drunken condition, was exercising ordinary care, there could be no recovery.

In *Chicago City R. Co. v. Lewis*, 5 Ill. App. 242 (an action to recover damages for the death of a person who, while in a state of intoxication, was run over at night by a street car), it was said that the burden was on the plaintiff to show not only that the deceased used due care and circumspection to avoid danger, but that the defendant was guilty of want of care.

⁶² See *supra*, II. See also V., note 60. *supra*.

The burden throughout the trial is upon the plaintiff to show affirmatively, either by direct evidence or the drift of surrounding circumstances, that the person for whose

the plaintiff himself was without fault otherwise.⁶³ And the plaintiff must show not only that the driver was in the exercise of due care, but he must prove that the person injured was free from contributory negligence.⁶⁴ The burden of proving freedom from contributory negligence is upon an infant as well as upon an adult, varying in degree only, which degree depends upon natural capacity, physical development, training, habits of life, surroundings, and the like.⁶⁵

It has been suggested in one Vermont case, that there might be stronger reasons for applying the rule that the burden of proving absence of contributory negligence

is on the plaintiff in the case of collisions between persons and railroad trains than in other cases; ⁶⁶ but nowhere else has such a distinction been thought of.

Where, by reason of defendant's demurrer to the declaration, the defendant defaults as to the facts sufficiently alleged and essential to constitute a cause of action, and thereby admits them, it has been held not necessary for the plaintiff to prove use of ordinary care on the hearing in relation to damages. But it is competent for the defendant to prove any fact or circumstance tending to show that the injury was not occasioned wholly or at all by his negligence, but wholly or in part by the

death the action was brought was free from negligence contributing thereto. *Lamb v. Union R. Co.* 195 N. Y. 260, 88 N. E. 371.

But an instruction in substance that if the plaintiff showed his acts in the transaction, and they "failed" to show contributory negligence, the burden upon this point would be shifted, while not correct as an abstract rule of law, was upheld where there was no question of negligence by reason of an omission, and no question in regard to the surrounding circumstances, and where the only question was as to whether the injured person, in view of the conceded circumstances, was negligent in what he did. *Raymond v. Burlington, C. R. & N. R. Co.* 65 Iowa, 152, 21 N. W. 495 (rehearing).

⁶³ *Lake Shore & M. S. R. Co. v. Boyts*, — Ind. App. —, 43 N. E. 667.

In an action to recover for injuries received while a passenger in a wagon driven by another person, it is incumbent upon a plaintiff to prove affirmatively not only that he wanted of due care on his own part contributed to the injury, but likewise, that there was none on the part of the driver. *Orr v. Oldtown.* 99 Me. 190, 58 Atl. 914.

Where plaintiff was injured by reason of a defective bridge, and her father was driving at the time, it was held incumbent upon her to establish the fact that he was driving with due care. *Mosher v. Smithfield*, 84 Me. 334, 24 Atl. 876.

⁶⁴ Where the evidence showed that the driver of a vehicle struck at a railroad crossing looked and listened on approaching the crossing, but there was no evidence that he deceased did so, the court found that there was no affirmative evidence establishing freedom from contributory negligence, and consequently held that the plaintiff was not entitled to recover. *Durkee v. Delaware H. Canal Co.* 88 Hun, 471, 69 N. Y. S. R. 9. 34 N. Y. Supp. 978.

⁶⁵ *Ardolino v. Reinhardt*, 130 App. Div. 19. 114 N. Y. Supp. 508.

In an action for an injury to a child of tender years, based on negligence, who may or may not have been *sui juris* when the injury happened, if the fact is material, as bearing upon the question of contributory negligence, the burden is upon the plaintiff to give some evidence that the party injured was not capable, as a matter of fact, 3 L.R.A. (N.S.)

of exercising judgment and discretion. *Stone v. Dry Dock, E. B. & B. R. Co.* 115 N. Y. 104, 21 N. E. 712. The court said that this rule would seem to be consistent with the principle of law well settled in New York, that in an action for a personal injury, based on negligence, freedom from contributory negligence on the part of the party injured is an element of the cause of action.

And a fifteen-year-old boy suing for injuries received by a defective sidewalk is only bound to prove that he was exercising such care as a person of his age would be expected to exercise. *Dowd v. Chicopee*, 116 Mass. 93.

In an action to recover for the death of a child struck by a street car, the plaintiff is bound to prove that his intestate was, at the time of the injury, in the exercise of such care as might reasonably be expected of children of the age of the deceased, or which ordinary children of his age, under similar conditions, would exercise. *Beale v. Old Colony Street R. Co.* 196 Mass. 119, 81 N. E. 867.

In an action to recover for injuries due to the bite of a dog, it is necessary for the plaintiff, although a boy, to show that he was in the exercise of due care. *Plumley v. Birge*, 124 Mass. 57, 26 Am. Rep. 645.

⁶⁶ In *Hill v. New Haven*, 37 Vt. 501, 88 Am. Dec. 613, in referring to cases in which it is held that where injuries have been received by collisions between railroad trains and persons on railroad tracks, the burden is on the plaintiff to show affirmatively that he was not guilty of contributory negligence, the court said: "It is manifest that there may be reasons for applying a different rule to this class of cases from the fact that the cars and engines of the road run upon a fixed and permanent track that cannot be deviated from, and from the peculiarly dangerous and uncontrollable power by which they are operated, so that a person who has placed himself within their range and power might properly be called upon to explain by his evidence how he came there before receiving damages for his injury. Whether in such cases a rule of evidence shall be adopted varying from that in general use between ordinary parties, we have no occasion to decide; it is enough for this

negligence of the plaintiff; and in proving these facts he assumes the burden.⁶⁷

b. Discharge of burden by circumstantial evidence.

The plaintiff, in discharging his burden as to the issue of contributory negligence,

case to say that we see no ground for its adoption in cases like the present, and the long and uniform course of trials of such actions of this state have shown no necessity for it."

⁶⁷ Daniels v. Saybrook, 34 Conn. 377.

One of the consequences of a default is a prima facie admission by the defendant of the truth of the allegation of the complaint that the person killed by the alleged negligence of the defendant was in the exercise of due care at the time of the accident, and the assumption by the defendant of disproving such allegation. Norris v. New York, N. H. & H. R. Co. 78 Conn. 314, 61 Atl. 1075.

⁶⁸ Winslow v. Boston & A. R. Co. 11 N. Y. S. R. 831.

⁶⁹ Chicago, B. & Q. R. Co. v. Gunderson, 174 Ill. 495, 51 N. E. 708; Fay v. Hartford & S. Street R. Co. 81 Conn. 330, 71 Atl. 364; Elgin, J. & E. R. Co. v. Hoadley, 220 Ill. 462, 77 N. E. 151; Stollery v. Cicero & P. Street R. Co. 243 Ill. 290, 90 N. E. 709; Broadbent v. Chicago & G. T. R. Co. 64 Ill. App. 231; Rusch v. Davenport, 6 Iowa, 443; Murphy v. Chicago, R. I. & P. R. Co. 45 Iowa, 661; Clements v. Louisiana Electric Light Co. 44 La. Ann. 692, 16 L.R.A. 43, 32 Am. St. Rep. 348, 11 So. 51; French v. Brunswick, 21 Me. 29, 38 Am. Dec. 250; Lake Shore & M. S. R. Co. v. Miller, 25 Mich. 274; Wood v. Danbury, 72 Conn. 69, 43 Atl. 554; Gorman v. Minneapolis & St. L. R. Co. 78 Iowa, 509, 43 N. W. 303; Lyman v. Boston & M. R. Co. 66 N. H. 200, 11 L.R.A. 364, 20 Atl. 976; Hutchins v. Macomber, 68 N. H. 473, 44 Atl. 602; Gahagan v. Boston & M. R. Co. 70 N. H. 441, 55 L.R.A. 426, 50 Atl. 146; Chisholm v. State, 141 N. Y. 246, 36 N. E. 184; Sullivan v. Syracuse, 77 Hun, 440, 29 N. Y. Supp. 105; Harper v. Delaware, L. & W. R. Co. 22 App. Div. 273, 47 N. Y. Supp. 933; Caven v. Troy, 32 App. Div. 154, 52 N. Y. Supp. 804; Vincent v. Alden, 45 App. Div. 627, 61 N. Y. Supp. 62; Browne v. New York C. & H. R. R. Co. 87 App. Div. 206, 83 N. Y. Supp. 1028.

Such care may be inferred from all the circumstances shown to exist immediately prior to and at the time of the injury, and, in determining such question, the jury may properly take into consideration the instincts prompting to the preservation of life and the avoidance of danger. Cleveland, C. C. & St. L. R. Co. v. Keenan, 190 Ill. 217, 60 N. E. 107.

In Illinois C. R. Co. v. Kief, 111 Ill. App. 354, it was said, in referring to the last mentioned case: "While that case seems

is not confined to any particular kind or species of evidence.⁶⁸ He may establish his freedom from fault by circumstantial evidence.⁶⁹ The rule is that the plaintiff's case must be made out either by direct evidence, or by such circumstances as justify a fair inference that the injured person was free from contributory negli-

to hold generally that in cases of this character the plaintiff is entitled to the presumption, omitting the qualification as to the absence of eyewitnesses to the accident, the facts recited in the opinion fail to disclose whether or not there were eyewitnesses to the accident involved in the case. We may therefore properly assume that there were none."

Where no one saw the killing, direct evidence as to due care is unnecessary. Illinois C. R. Co. v. Nowicki, 148 Ill. 29, 35 N. E. 358, affirming 46 Ill. App. 566.

In actions to recover damages for negligence resulting in death, where there are no eyewitnesses of the accident, the freedom of the deceased from contributory negligence may be inferred, by proof of facts and circumstances from which it may fairly be inferred that he was not in fault. Noble v. New York C. & H. R. R. Co. 20 App. Div. 40, 46 N. Y. Supp. 645; Wieland v. Delaware & H. Canal Co. 30 App. Div. 85, 51 N. Y. Supp. 776.

In Cincinnati, H. & D. R. Co. v. McMullen, 117 Ind. 439, 10 Am. St. Rep. 67, 20 N. E. 287, an action to recover damages for the death of a conductor alleged to have been caused by a defective brake, it was said that a verdict for the plaintiff would be upheld if, from all the facts and circumstances proved in the case, the inference arose that the deceased was, at the time of the accident, exercising proper caution, and that his death was caused while he was using the defective brake, even though there was no direct evidence given by persons who saw the deceased at the moment of the accident.

In Johnson v. Hudson River R. Co. 20 N. Y. 65, 75 Am. Dec. 375, affirming 6 Duer, 633, it is said that the true rule is this: The jury must eventually be satisfied that the plaintiff did not, by any negligence of his own, contribute to the injury. The evidence to establish this may consist in that offer to show the nature or cause of the accident, or in any other competent proof. To carry a case to the jury, the evidence on the part of the plaintiff must be such as, if believed, would authorize them to find that the injury was occasioned solely by the negligence of the defendant. It is not absolutely essential that the plaintiff should give any affirmative proof touching his own conduct on the occasion of an accident. The character of the defendant's delinquency may be such as to prove prima facie the whole issue; or the case may be such as to make it necessary for the plaintiff to show by independent evidence that

ence.⁷⁰ The burden of establishing affirmatively freedom from contributory negligence may be successfully borne though there were no eyewitnesses of the accident, and even although its precise cause and manner of occurrence are unknown. If, in such case, the surrounding facts and circumstances reasonably indicate or tend to establish that the accident might have occurred without negligence of the deceased, that inference becomes possible, in addition to that which involves a careless or wilful disregard of personal safety, and so, a question of fact may arise, to be solved by a jury, and require a choice between possible but divergent inferences. If, on the other hand, those facts and circumstances,

did not bring the misfortune upon himself.

In an action to recover for personal injuries where there were no eyewitnesses of the accident, the plaintiff put in such proofs of the attendant facts as were attainable under the circumstances, and from these it was by no means clear that the interstate was at fault. It was held that plaintiff was entitled to go to the jury. *Teipel v. Hilsendegen*, 44 Mich. 461, 7 N. W. 82. ⁷⁰ *Waldele v. New York C. & H. R. R.*, 19 Hun, 60.

It is as much the duty of the plaintiff to show either by direct testimony, or by facts and circumstances by which it may be reasonably inferred, that he was himself free from negligence, as to establish the fact that the defendant was guilty of negligence. *Muhr v. New York*, 15 Daly, 12, 16 N. Y. S. R. 688, 2 N. Y. Supp. 59. The court said: "It is true that plaintiffs in negligence actions seldom fail to do this; and hence dismissals on the ground are rare. But when a case arises on uncontradicted evidence requiring the court to dismiss the complaint or direct a verdict, it is its duty to do so."

In order to recover, the plaintiff must show by direct proof or by circumstances that the deceased was free from contributory negligence. *Jencks v. Lehigh Valley R.*, 33 App. Div. 635, 53 N. Y. Supp. 625. The plaintiff must make it appear either by direct evidence, or else by inferences fairly deducible from the facts proved, that a person killed at a railroad crossing was free from contributory negligence. *Auliffe v. New York C. & H. R. R. Co.*, 33 App. Div. 187, 83 N. Y. Supp. 200.

⁷¹ *Tolman v. Syracuse, B. & N. Y. R. Co.*, 19 N. Y. 198, 50 Am. Rep. 649.

Where a traveler fell off of a defectively built bridge and was killed, and there was no eyewitness to the accident, it was held that, although the burden was on the plaintiff to establish freedom from contributory negligence, this might be inferred by the jury from the circumstances. *Ryan v. Bristol*, 63 Conn. 26, 27 Atl. 309.

In a case in which a rear-end freight brakeman was killed by being struck by an overhead bridge just as he had reached the top of a ladder on a car, it was held that, although the burden of proof was on the plaintiff to show that the deceased was in the exercise of due care in ascending the ladder, and there was no direct evidence disclosing his conduct at the time of the accident, nevertheless, the exercise of such care could have been found from circumstantial evidence. *Miller v. Boston & M. R. Co.* 73 N. H. 330, 61 Atl. 360.

coupled with the occurrence of the accident, do not indicate or tend to establish the existence of some cause or occasion of the latter which is consistent with the exercise of proper prudence and care, then the inference of negligence is the only one left to be drawn, and the burden resting upon the plaintiff is not successfully borne, and a nonsuit for that reason becomes inevitable.⁷¹

It has been held that the exercise of due care on the part of the person injured need not be shown by affirmative,⁷² that is, by direct, evidence, but may be shown by evidence which excludes fault on the part of the plaintiff,⁷³ or by facts and circumstances from which absence of fault may be

the top of a ladder on a car, it was held that, although the burden of proof was on the plaintiff to show that the deceased was in the exercise of due care in ascending the ladder, and there was no direct evidence disclosing his conduct at the time of the accident, nevertheless, the exercise of such care could have been found from circumstantial evidence. *Miller v. Boston & M. R. Co.* 73 N. H. 330, 61 Atl. 360.

⁷² The exercise of due care on the part of the person injured need not be shown by affirmative evidence. *Cassidy v. Angell*, 12 R. I. 447, 34 Am. Rep. 690; *Gaffney v. Brown*, 150 Mass. 479, 23 N. E. 233.

⁷³ It is not necessary that the plaintiff prove freedom from contributory negligence by direct evidence. If this be shown by evidence which excludes fault on the part of the plaintiff, the allegation of due care is established as effectually as by affirmative testimony. All the circumstances under which the injury was received being proved, if they show nothing in the conduct of the plaintiff, either of acts or neglect, to which the injury may be attributed, in whole or in part, the inference of due care may be drawn from the absence of all appearance of fault. *Mayo v. Boston & M. R. Co.* 104 Mass. 137.

It is not necessary that any positive act of care should be proved, since freedom from contributory negligence may be inferred from the absence of fault when sufficient circumstances are shown fairly to exclude the idea of negligence on the part of the person injured. *Prince v. Lowell Electric Light Corp.* 201 Mass. 276, 87 N. E. 558.

The rule is that while the plaintiff is bound to establish his freedom from negligence contributing to the accident, if all the circumstances under which the injury was received are proved, and the evidence excludes fault on the part of the plaintiff, and there is nothing in the conduct of the plaintiff, either of acts or of neglect, to which the injury might be attributed, in whole or in part, due care may be inferred from the absence of all appearance of fault. *Wolpers v. New York & Q. Electric Light & P. Co.* 91 App. Div. 424, 86 N. Y. Supp. 845.

fairly inferred.⁷⁴ Circumstances appearing from the proof offered to show the nature of the accident and cause of it will often be sufficient for this purpose.⁷⁵ But the fact that due care on the part of the injured person is not inconsistent with the circumstances proved is not enough to satis-

fy plaintiff's burden.⁷⁶ Where the circumstances are relied upon in the absence of direct evidence, to show a lack of contributory negligence, they should point by a fair and reasonable inference to such conclusion.⁷⁷

But if there is no eyewitness to the kill-

⁷⁴ Absence of contributory negligence may be shown by proving facts and circumstances from which it may be fairly inferred, and if all the circumstances under which an accident took place are put in evidence, and, upon an examination of them, nothing is found in the conduct of the plaintiff to which negligence can fairly be imputed, the mere absence of fault may justify the jury in finding due care on his part. *Hinckley v. Cape Cod R. Co.* 120 Mass. 257.

In *Foster v. Dixfield*, 18 Me. 380, it was held that if the burden was on the plaintiff to prove the exercise of due care in an action to recover damages for personal injuries, which might well be doubted, such proof might be deduced from the circumstances of the case. The court said that if direct and positive proof to this effect is essential, the party who sustains an injury by reason of a defect in the highway when alone, or when the transaction is witnessed by no other eye, would be without remedy.

⁷⁵ In *Adams v. Carlisle*, 21 Pick. 146, an action to recover for injuries alleged to have been due to a defective highway, it was said: "It is a very difficult question what kind and degree of evidence are sufficient to stand as prima facie proof of this fact, and, in the absence of all controlling evidence, to establish it. That the person driving was commonly careful and skilful, that there was no apparent cause for the accident but the bad condition of the highway, the position in which the carriage was at the time, are all circumstances upon which jurors may pass their judgment, and infer that due skill and care were used. Circumstances arising out of the proof offered to show the nature of the accident and the cause of it will generally be such as to enable a jury to judge satisfactorily whether the carriage was driven with ordinary care and skill."

In *Texas & N. O. R. Co. v. Crowder*, 63 Tex. 502, in which a brakeman was killed, it was thought, by catching his foot between unfilled ties and being run over, the court said that the true rule in this class of cases is that the servant seeking to recover for an injury takes the burden upon himself of establishing negligence on the part of the master, and due care on his own part. "There is no doubt," continued the court, "that cases occur in which the accident is of such character as of itself, when considered in connection with the facts which necessarily appear in showing the accident, to amount to sufficient proof of the want of due care by a defendant, and of the exercise of due care by a plaintiff, 33 L.R.A. (N.S.)

to authorize a jury to find both facts without any direct proof on either point; but this does not affect the question of burden of proof, but relates rather to the sufficiency of the evidence furnished by the accident itself. The burden of proof resting on a plaintiff upon the issues of negligence of the defendant, and his own exercise of due care, requires that he should show the facts surrounding and leading to the accident, and if from these, when shown, a jury may reasonably infer negligence in the defendant contributing to the injury, and the exercise of due care by the plaintiff when he is entitled to a verdict; but if he does not show how the accident occurred by which he was injured, by showing his own relation to it and the other surrounding facts, some or all of which may appear from the character of the accident itself, then he has not gone with his evidence as far as the law requires him to go to authorize a recovery."

The rule that the burden of proving due care is on the plaintiff is not now the rule in Texas. See *infra*, VI. a.

⁷⁶ That the deceased in a railway crossing accident might have come to his death, when, upon some supposable theory not inconsistent with the surrounding circumstances, he may have been free from fault, is not sufficient. The fact that the circumstances point just as clearly to his negligence as to his freedom from the same is sufficient to preclude a recovery. *Pittsburgh, C. C. & St. L. R. Co. v. Bennett*, 9 Ind. App. 92, 35 N. E. 1033.

In an action to recover for the death of a brakeman supposed to have been knocked off of a car in passing by a coal chute, it was held that an instruction that the jury might infer that the deceased was in the line of his duty and in the exercise of proper care, if such inference was in perfect harmony with the established facts, was held misleading, and therefore erroneous. *Perigo v. Chicago, R. I. & P. R. Co.* 55 Iowa, 326, 7 N. W. 627. The court says it was not necessary for the plaintiff to show by direct and positive evidence that the deceased at the time of the accident was in the line of his duty and exercising proper care. It was sufficient if such was the reasonable inference from the facts proved. But such inference is not to be gathered from the facts which are simply not inconsistent with it.

⁷⁷ *Voorhees v. Hudson River Teleph. Co.* 109 App. Div. 465, 95 N. Y. Supp. 703, 1167.

In *Miller v. Louisville, N. A. & C. R. Co.* 128 Ind. 97, 25 Am. St. Rep. 416, 27 N. E. 339, a man driving a buggy, and accompanied by his wife, attempted to cross

ing of a person, his administrator may establish the exercise of ordinary care on the part of the deceased by the highest proof of which the case is capable, including the habits of deceased, and any other facts and

circumstances from which the jury may rightfully find that he was exercising such care.⁷⁸ It has been held that the circumstantial evidence may be aided by the presumption of due care arising from the in-

railroad tracks at highway crossing in front of an approaching train. It was held that, although the husband's contributory negligence could not be imputed to the wife, still she herself not having been affirmatively shown to have been free from contributory negligence, there could be no recovery. The court said that the fact that there was no contributory negligence may undoubtedly be inferred from circumstances, but, to authorize such an inference, there must be evidence of circumstances from which the inference can be legitimately drawn. There were no circumstances in the case before the court authorizing such an inference. The intestate approached the crossing known to her to be dangerous, and approached it when a train was in full view; she took no precautions to warn her husband, or to avert the threatened danger, although slight care might have avoided it.

Where a person who stepped off of a street car on one track was killed by a car approaching from the opposite direction on another track, and there was nothing in the evidence to show what the deceased had done from the time he stepped off of one car until he was hit by the other, it was held that there could be no recovery, since there was not sufficient showing of want of contributory negligence. *Evansville Street R. Co. v. Gentry*, 147 Ind. 408, 37 L.R.A. 378, 62 Am. St. Rep. 421, 44 N. E. 311. The court said: "It is true that but little evidence may be needed to negative contributory negligence on the part of one injured by the act of another. The instincts of self-preservation, and the desire to avoid injury or pain to one's self, might be sufficient, in connection with some slight, positive testimony; whether circumstantial or otherwise, to enable us to conclude that one who suffers an injury did not help to bring it upon himself. But there must be some evidence of due care. So many instances are known to us of lack of prudence, forgetfulness, and absent-mindedness or like want of ordinary care on the part of otherwise prudent and thoughtful persons, that we cannot conclude without some facts proved, some circumstances shown, that a person's injury was not brought upon him through his own inexcusable fault."

If there is only a partial disclosure of the facts, and no evidence is offered showing the conduct of the party injured in regard to matters specially requiring care on his part, the data for such an inference are not sufficient. It can be warranted only when circumstances are shown which fairly indicate care or exclude the idea of negligence on his part. *Hinckley v. Cape Cod R. Co.* 120 Mass. 257. 33 L.R.A. (N.S.)

⁷⁸ *Stollery v. Cicero & P. Street R. Co.* 243 Ill. 290, 90 N. E. 709.

In an action to recover damages for the death of a person killed at a railroad crossing, evidence as to the careful habits of the deceased is competent on the question of due care, where no person witnessed the accident. *Chicago & A. R. Co. v. Wilson*, 225 Ill. 50, 116 Am. St. Rep. 102, 80 N. E. 56.

It was urged that evidence that an engineer saw a person struck at a railroad crossing would render inadmissible evidence as to the careful habits of the deceased, in an action to recover damages for his death; but the court failed to decide the point, because the evidence did not clearly show that the engineer really saw the accident. *Ibid.*

But opinions of witnesses as to the general character of one killed at a railroad crossing, for carefulness, are not admissible on the question of his freedom from contributory negligence. *Chase v. Maine C. R. Co.* 77 Me. 62, 52 Am. Rep. 744.

So, it was held that, in a case in which a person was found fatally injured in an unguarded pit in a public highway, and no witness saw the accident, evidence of the habits of the deceased as to temperance, heedlessness, etc., might be considered on the question whether he was in the exercise of due care; also that he lived near and must have known of the danger. *Cassidy v. Angell*, 12 R. I. 447, 34 Am. Rep. 690.

Where a freight train broke apart, and a brakeman, while in the performance of his duties, fell between the cars and was killed, and there was nothing to show that he was careless, it was held that there was sufficient evidence from which the jury might infer that the deceased was in the exercise of due care, the case not being one where it is incumbent upon the plaintiff to prove that he did a particular act by way of precaution. *Thyng v. Fitchburg R. Co.* 156 Mass. 13, 32 Am. St. Rep. 425, 30 N. E. 169.

Where an employee was killed by falling down an elevator shaft after the elevator had passed up, it was held that due care on the part of the deceased might be inferred from evidence that he was an intelligent, sober, and careful youth, there being no eyewitness to the accident and no countervailing evidence. *Dallemand v. Saalfeldt*, 175 Ill. 310, 48 L.R.A. 753, 67 Am. St. Rep. 214, 51 N. E. 645.

In an action to recover for the death of an engineer killed in a boiler explosion, where there was no witness to testify to the question whether he was, at the time of the accident, exercising due care, it was held that testimony to show that the de-

instinct of self-preservation.⁷⁹ But the fact alone that the injury occurred is not sufficient evidence of the injured person's care or freedom from negligence contributing to his injury.⁸⁰ The fact that the locomotive whistle was not blown or the bell rung is not sufficient in itself to establish freedom from contributory negligence of a person who was injured by a collision with a train

ceased had the reputation of being a careful and competent engineer, and of being a sober man, was admissible. *Illinois C. R. Co. v. Prickett*, 210 Ill. 140, 71 N. E. 435.

The fact that there was no eyewitness to an accident will not prevent the plaintiff from recovering, since he is not bound to show by direct evidence that the deceased was free from negligence, and freedom from fault may appear from testimony showing the age and condition of life of the decedent, his general constitution, habits, and surroundings, that he was lawfully at the place of the accident, that he was not intoxicated at the time, and was, on the contrary, in full possession of his faculties. *Chicago, R. I. & P. R. Co. v. Keely*, 103 Ill. App. 205.

⁷⁹ On the question of due care of a person killed at a railroad crossing, evidence as to the careful habits of the deceased may be aided by the presumption of the instinct of self-preservation in persons possessed of their natural faculties. *Chicago & A. R. Co. v. Wilson*, 225 Ill. 50, 116 Am. St. Rep. 102, 80 N. E. 56.

In *Cincinnati, I. St. L. & C. R. Co. v. Howard*, 124 Ind. 280, 8 L.R.A. 503, 19 Am. St. Rep. 96, 24 N. E. 892, an action to recover for injuries received by plaintiff by being struck by a railroad train at a highway crossing, an instruction that, if all of the circumstances under which the injury occurred were put in evidence, and, upon an examination of them, nothing was found in acts or omissions showing contributory negligence, or ground for suspecting or inferring such negligence, on the part of the plaintiff, the inference of care upon her part might be drawn from the absence of all appearance of fault, either positive or negative, on the part of the plaintiff, in the circumstances under which the injury was received; that, in considering the question of due care on her part, the jury had the right to take into consideration, together with the other facts and circumstances in the case, the instinct of self-preservation and the known and ordinary disposition of all persons to guard themselves against danger,—was held erroneous, since it told the jury substantially that if there was nothing in the evidence tending to show contributory negligence, the jury might, without proof, infer that there was no such negligence.

But in *Illinois C. R. Co. v. Kief*, 111 Ill. App. 354, it was held that an instruction that the jury might take into considera-

tion, with other facts, the instinct and assumptions which naturally lead men to avoid injury and preserve their own lives, was erroneous where there were evidences to the accident.

See also *supra*, IV. d.

⁸⁰ *Waldron v. Boston & M. R. Co.* 187 N. H. 362, 52 Atl. 443.

So, a bill of exceptions which did not aver that there was evidence tending to prove due care and caution, or tending to prove facts from which due care and caution could reasonably be inferred, was not to present a case upon which judgment for the plaintiff could be sustained. *Jones v. Illinois C. R. Co.* 106 Ill. 597.

A verdict for the plaintiff in an action to recover for the death of a person killed at a railroad crossing cannot be supported by evidence that the deceased was run over and killed by the defendant's engine at a crossing in a deep cut, where the engine was behind time, running at an unusual and dangerous rate of speed, and approached the crossing coming down a grade without the sound of a whistle bell, as required by statute, since it does not affirmatively appear, either by direct or circumstantial evidence, that the deceased was free from contributory fault. *Ind. B. & W. R. Co. v. Greene*, 106 Ind. 55 Am. Rep. 736, 6 N. E. 603.

⁸¹ *Cincinnati, I. St. L. & C. R. Co. v. Howard*, 124 Ind. 280, 8 L.R.A. 503, 19 Am. St. Rep. 96, 24 N. E. 892.

⁸² In an action to recover for the death of a boy caught in unguarded cogwheels, no person having seen the accident, and no witness having informed the court that it happened that the boy became entangled in the cogwheels, it was held that the plaintiff could not recover, since there was no affirmative evidence, either by direct evidence or by legitimate inference from any evidence in the case, that he was in the exercise of due care, and did not negligently contribute to the injury. *Cunningham v. Bath Iron Works*, 92 Me. 501, 43 Atl. 106. The court said that the intestate was not wholly passive in the defendant's care at the time of the injury, like a passenger seated in a railway car at the time of a collision. He was himself in the exercise of an active agency of his own, involving a right and duty to regulate and control his movements in such a manner that no fault of care on his part should contribute to his injury.

care and circumspection properly to be demanded from one in his situation, it was held that the plaintiff could not recover.⁸³

The doctrine that there must be proof of some circumstances besides the accident itself, to establish freedom from contributory negligence, has also been applied in the case of a brakeman who, in some unknown manner, fell off of the cars and was

killed;⁸⁴ of a track inspector killed while operating a tricycle on the car tracks;⁸⁵ of a watchman who fell into an open area way;⁸⁶ of a person hurt by slipping on the ground at a place where the boards of a sidewalk had been removed;⁸⁷ of a person who fell off of a bridge in the night;⁸⁸ of a pedestrian killed on a railroad track;⁸⁹ of a person who fell at night into an exca-

⁸³ *Hinckley v. Cape Cod R. Co.* 120 Mass. 257.

⁸⁴ In an action to recover for the death of a brakeman killed by falling off of the cars, it was held, where the evidence was such that it was impossible to tell how the intestate fell from the cars, or what he was doing at the time, that the plaintiff could not recover. *Corcoran v. Boston & A. R. Co.* 133 Mass. 507.

⁸⁵ Where a track inspector was operating a tricycle on the tracks of defendant, and was last seen alive driving the vehicle about five minutes ahead of a train which struck and killed him, but there was no evidence of what he was doing at the time he was struck, it was held that there was not sufficient evidence that he was exercising due care at the time of the accident. *Tyndale v. Old Colony R. Co.* 156 Mass. 503, 31 N. E. 655.

⁸⁶ In an action brought to recover for the death of a watchman who fell into an open area way, in the nighttime, in an alley with which he was familiar, and the evidence did not show how the accident happened, and there was no plausible theory which would account for it, it was held that the plaintiff had furnished no proof from which freedom of the deceased from fault could be determined, and that therefore there could be no recovery. *Bond v. Smith*, 113 N. Y. 378, 21 N. E. 128.

⁸⁷ In an action to recover for injuries received by slipping on the ground at a place where the boards of a sidewalk had been removed, it was held that where there was no evidence to show that the plaintiff exercised any care or took any precaution, or in any way walked or attempted to walk over the place in question in any different manner from what she did over the sidewalk that had not been removed, there was no testimony from which freedom from contributory negligence could be shown, which was fatal to recovery. *Neddo v. Ticonderoga*, 77 Hun, 524, 60 N. Y. S. R. 344, 28 N. Y. Supp. 887, affirmed in 148 N. Y. 735, 42 N. E. 724.

Likewise, where it appeared that a careful, prudent, and healthy man left his home at 2 o'clock in the afternoon in December, and that his body was found early the next morning at a street corner about 3 or 4 feet from the sidewalk, the body lying face downward on the ground and frozen stiff, the nose flattened somewhat, apparently from the pressure against the ground, and the theory was that the deceased met his death by falling on account of a defective sidewalk, it was held that

there was no evidence from which due care on his part could be inferred, no person having seen him at the time of his death. *Chicago v. Carlin*, 141 Ill. App. 118.

⁸⁸ In an action brought to recover for the death of a man killed by falling off of a bridge, where it appeared that there was no railing on the bridge, and that the night of the accident was dark, and that the deceased was familiar with the place and presumably knew of its dangerous character, and he was found at the foot of an abutment of the bridge suffering from injuries in consequence of which he died, it was held that there was no evidence showing freedom from contributory negligence, and that this was fatal to plaintiff's recovery. *Peaslee v. Chatham*, 69 Hun, 389, 52 N. Y. S. R. 695, 23 N. Y. Supp. 628.

⁸⁹ Where it appeared that the deceased was using the railroad tracks as a highway, at a locality with which he was familiar with the movement of trains, and that he stepped into the opening between two cars to avoid a train, and then stepped out upon a parallel track and was almost immediately killed, and there was no evidence that he looked or listened to see if there were any approaching trains while he was on the track, and, if so, how many, it was held that there was no evidence from which freedom from contributory negligence could be inferred. *Ryan v. New York C. & H. R. R. Co.* 17 App. Div. 221, 45 N. Y. Supp. 542.

Similarly, where the theory of the plaintiff's case was that the deceased, for whose death the action was brought, was struck by a south-bound passenger train at a street crossing, and the only evidence was that the deceased and a companion had left a near-by clubhouse and proceeded towards the crossing, but just before the approach of the passenger train, two men were seen standing at the crossing in the dark, one of them looking in the direction from which the train was coming, and that afterwards the body of the deceased was found a few feet north of the crossing, it was held that there was no evidence from which freedom from contributory negligence could be found, it being a physical impossibility that a man standing at a crossing and struck by a south-bound train could be found immediately after the accident north of the crossing. *Meinrenken v. New York C. & H. R. R. Co.* 92 App. Div. 618, 86 N. Y. Supp. 1075.

In an action to recover for the death of a boy run over by a horse car, the plain-

vation in a street;⁹⁰ of one who fell through a skylight in the roof of a building;⁹¹ of a servant who was caught in the endless chain of coal conveyer;⁹² and of a traveler who slipped on icy steps.⁹³ Very slight circumstances, however, in connection with the happening of the accident, may be sufficient to warrant the inference that the person injured was in the exercise of due care. Where, for instance, although no one saw the accident, the evidence warranted the belief that the deceased, an engineer, fell from the footboard while in the act of oiling the engine when in motion, and was killed, and it appeared that the deceased

was a competent and careful engineer, and there was some evidence tending to show that the engine could not well be oiled, on account of its peculiar construction, except when in motion, and there would have been no danger in so doing if the footboard had been in order, and that this was the usual mode of oiling the engine, and that the deceased was seen a few moments before the accident in the observance of due care, it was held that it could not be maintained that there was an entire want of evidence to sustain the averment of the declaration that the deceased used due care and diligence for his personal safety.⁹⁴ A distinc-

tiff having rested his case without giving any evidence of the manner in which the accident occurred, none of his witnesses having seen the boy until he was under the horse's feet or beneath the car, it was held that there could be no recovery. *Squire v. Central Park, N. & E. R. Co.* 4 Jones & S. 436.

⁹⁰ In an action brought to recover for the death of a person who fell at night into an excavation in a street with which she was familiar, and there was no testimony whatever showing directly what care or caution she exercised in approaching the excavation, or showing any circumstance from which absence of negligence on her part might be presumed, it was held that the plaintiff could not recover. *Caven v. Troy*, 32 App. Div. 154, 52 N. Y. Supp. 804.

⁹¹ Where the deceased was hired to work in a hotel, and was directed to go to the cleaning girl's room on the roof, and was told where to go to receive instructions as to the location of the room, and in some manner, after reaching the roof, fell through a skylight in a different part of the roof from that in which she would naturally go to reach the cleaning room, and was killed, it was held that there were no circumstances from which freedom from contributory negligence could be inferred. *Kane v. Whitaker*, 33 App. Div. 416, 54 N. Y. Supp. 85.

And where a workman fell from an elevator into a shaft leading to a tunnel, and the theory of the plaintiff was that the fall was caused by the absence of a guard rail on one side of the car, but there was no evidence that anyone saw the accident, so that the manner of his exit from the cage was unknown, it was held that plaintiff could not recover. *Conlin v. Rogers*, 39 N. Y. S. R. 51, 14 N. Y. Supp. 782.

⁹² And where a servant temporarily engaged in working at a coal conveyer was, in some unknown manner, caught in the endless chain and killed, it was held that there was no evidence from which freedom from contributory negligence could be inferred. *Palcheski v. Brooklyn Heights R. Co.* 69 App. Div. 440, 74 N. Y. Supp. 987.

⁹³ Where the evidence was that the person for whose death the action was brought was seen to ascend the icy steps of

an elevated railroad station until he had reached a spot within three or four steps of the upper platform, when he stopped, leaned against a low rail, and fell over sidewise across the rail, it was held there could be no recovery, there being no fact bearing upon the question of contributory negligence upon which to go to the jury. *McMahon v. New York Elev. R. Co.* 18 Jones & S. 507.

⁹⁴ *Missouri Furnace Co. v. Abend*, 107 Ill. 44, 47 Am. Rep. 425.

In *Illinois C. R. Co. v. Cozby*, 174 Ill. 109, 50 N. E. 1011, it was held that it did not follow that there was no evidence tending to show that a switchman who was run over and killed was, at the time of the accident, in the exercise of due care, because of the fact that no witness saw the deceased at the moment he was run over and killed, where there was evidence to show that he was a sober, temperate man, was very careful, was possessed of all of his faculties, eyes, hearing, limbs, sight, and body, and that he was young and active, that he was in the discharge of his duties in obedience to the orders of his superior, and was discharging them in the ordinary and customary mode. The court said that ordinary care could be established by circumstantial as well as direct evidence.

In *Chicago & E. I. R. Co. v. Beaver*, 199 Ill. 36, 65 N. E. 144, an action to recover for the death of a person killed at a railroad crossing, it was held that it could not be said that the evidence did not warrant the inference that the deceased, at the time of the accident, was in the exercise of due care, where it appeared that there was no eyewitness to the killing, and the proof showed that the deceased was nineteen years of age, in good health, and in full possession of all his mental faculties, was going home when he was killed, was a member of a temperance society, and shortly before the accident was seen by several persons and appeared to be in a normal condition; where, for a number of years he had lived in the vicinity of the crossing, was familiar with the surroundings, knew when trains were due to pass, the train running over him being an extra work train, and where it also appeared that the whistle was not blown or the bell of the

tion has been suggested between injuries to passengers while seated peaceably in a conveyance, and injuries to other persons, with respect to the evidence necessary to establish freedom from contributory negligence. In the case of an injury to a passenger under such circumstances, it would seem that mere proof of the accident, showing the negligence of the defendant, would be sufficient.⁹⁵

The practical question, of course, in all these cases, is whether the circumstances in evidence are sufficient to establish or make a prima facie case of absence of contribu-

tory negligence, and these facts vary with every case. In an action to recover damages for the death of a person killed at a railroad crossing, where there was no witness to the accident, it was held that freedom from contributory negligence could be inferred from evidence that the deceased started about midnight to walk towards the crossing, in the direction of his home, and that he was sober, and that the situation of the cars standing near the crossing would not have led one to think they were suddenly to be moved across the street.⁹⁶ In an action to recover for injuries due to

locomotive sounded within half a mile of the crossing, and that the view of approaching trains was obstructed.

And where an experienced brakeman of good habits was last seen alive in the proper performance of his duties, and a moment later the train broke in two, and he, in some unknown manner, fell between the cars and was killed, it was held that it could not be said that there was no evidence which authorized the court to submit the question of due care on the part of the deceased to the jury, who had the right to consider all the circumstances, including the known habits of the deceased and the instinct of self-preservation, with which all men are imbued. The court declared that if the cause or manner of the death was wholly unknown, it might be that a different rule would prevail. *Burns v. Chicago, M. & St. P. R. Co.* 69 Iowa, 450, 58 Am. Rep. 227, 30 N. W. 25.

In an action to recover for the death of a steamship engine oiler, caused by the fact that a bonnet and stem of a cushion valve blew out from the seat, it cannot be said that there was no proof that the deceased was free from contributory negligence, where the evidence discloses that he was in the ordinary performance of his duty at the time of the accident, which he had no reason to anticipate, and that he was seen stretching his hand up towards a throttle valve but a moment before the happening of the accident, which it was necessary for him to do in order to turn on the steam, and that then, in a moment, the rushing sound of steam was heard. *Hoes v. Ocean S. S. Co.* 56 App. Div. 259, 67 N. Y. Supp. 782.

⁹⁵ In *McLane v. Perkins*, 92 Me. 39, 43 L.R.A. 487, 42 Atl. 255, it was said, by way of illustration, that "when a plaintiff is injured while merely passive in the care of the defendant, without any active agency of his own in the matter, it is fairly inferable that he did not contribute to the injury. In the case of an injury to a passenger in his seat in a railroad train, caused by the train leaving the track or by collision, he is merely passive in the care of the railroad company, and his freedom from fault affirmatively appears from the shown circumstances. In his seat in the place assigned to him by the railroad company, he evidently could do nothing to

bring about or prevent such an accident. In the case of the engineer or conductor of the train, or in the case of any person who might be exercising any active agency in the matter, such freedom from fault would not be apparent. So, in a disaster to an unseaworthy ship, a person on board shown by the evidence to be merely passive in the place assigned to him would affirmatively appear to be without fault, while other persons on board not shown by the evidence to be merely passive in their proper places would need to show by other evidence their freedom from fault."

So, the circumstances may sometimes show that a person killed by the negligence of another was in the exercise of due care, as in the case of a passenger injured by the negligence of a railroad company while sitting in his seat doing nothing. In the absence of affirmative evidence tending to show that the plaintiff, himself being an actor, as where one is struck at a railroad crossing, exercised on his part the care and effort incumbent on him to avoid the injury, he cannot maintain his suit. *Day v. Boston & M. R. Co.* 96 Me. 207, 90 Am. St. Rep. 335, 52 Atl. 771.

But in *Dickey v. Maine Teleg. Co.* 43 Me. 492, a passenger, in a stagecoach injured by the overturning of the coach, caused by striking a wire stretched across a highway, was held bound to show affirmatively the exercise of due and proper care and vigilance on his part. The point, however, discussed in the preceding cases, was not discussed, and the decision turned upon the imputable negligence of the driver.

⁹⁶ *Chicago & A. R. Co. v. Carey*, 115 Ill. 115, 3 N. E. 519.

In an action to recover for the death of a person killed at a railroad crossing, no one having seen the accident, evidence that the engineer saw the body of the deceased roll off the pilot of his engine, that the tracks were somewhat obstructed by the position of another train, that the deceased was seen a moment before he was struck standing on the crossing between the rails of the track on which the engine which struck him was approaching, that the deceased was a sober, good, hard-working man, strong and sound, and that he was evidently attempting to cross the track at the time of the accident, for the purpose of reaching his home, was held sufficient

escaping gas, it appeared that the plaintiff, who was too young to testify, was found insensible by the dead body of his mother, in the morning, when the room in which they slept was broken open. The gas had escaped from a crack in the pipe laid by the defendant through the street. There were no gas fixtures in the room, and no evidence that the plaintiff or his mother had notice of escaping gas, or were conscious of its presence in the room in time to leave or to take any precautions to prevent the consequences by opening doors or windows. There was evidence that, on the day before the accident, there was no smell of gas in the street, and there was also evidence that the mother was a sober and prudent woman. It was held that the jury might well have

found that the crack in the pipe and the escape of gas first occurred some time during the night of the accident; and that would be justified in finding that neither the plaintiff nor his mother was charged with want of ordinary care in preventing or escaping the result.⁹⁷ Where the trolley on an electric car filled with passengers exploded, and the flames shot out and seemed to envelop the whole car, the passengers rushed to escape as a witness said, "All seemed to be leaping from the car in every direction"), and the plaintiff immediately afterwards was found unconscious on the ground at the rear of the car, and afterwards neither she nor her husband was able to tell how they got out of the car, it was held that there was

no support for the inference of due care. *Illinois C. R. Co. v. Nowicki*, 148 Ill. 29, 35 N. E. 358.

In *Chicago, B. & Q. R. Co. v. Gunderson*, 174 Ill. 495, 51 N. E. 708, where a man was killed at a railroad crossing, and no person saw the accident, it was held that freedom from contributory negligence on the part of the deceased could be inferred from the fact that, at the time of the accident, he was waiting for a freight train to pass by, which would naturally attract his attention; that he could not see very far to the east, from which direction another train was approaching at an unlawful rate of speed; and that there was no evidence that the deceased knew this extra train was running at that time and at that speed; there being full proof that the deceased was a steady, sober, and industrious man, in good health, and so situated that it was fairly inferable that the instinct of self-preservation was as strong in him as in other men.

In *Pruey v. New York C. & H. R. R. Co.* 41 App. Div. 158, 58 N. Y. Supp. 797, affirmed in 166 N. Y. 616, 59 N. E. 1129, it was held that freedom from contributory negligence could be inferred in a crossing accident case, from the darkness of the morning at the time of the accident, the moist condition of the atmosphere, the approach of the engine upon a wet track without light and without giving customary signals, the presence of a strong wind and the rumble of a freight train, although there was no evidence that the deceased looked and listened as he approached the crossing.

That there was no eyewitness to the killing of a person attempting to cross railroad tracks at a highway crossing does not necessarily preclude recovery on the theory that the deceased, by looking in the direction from which the train came, might have seen it in time to avoid the accident, where it appeared that the deceased was an educated, temperate man, forty-five years old, of good physical capacity, with good eyesight and hearing, and careful and cautious in disposition and temperament

and was, at the time of the accident, walking across a railroad track upon a plank in the nighttime, and was struck by an express train masked from him both by freight cars and an abrupt curve which rushed upon him at a high rate of speed without warning. *Woodworth v. New York C. & H. R. R. Co.* 55 App. Div. 23, 66 N. Y. Supp. 1072.

⁹⁷ *Smith v. Boston Gaslight Co.* 129 Mass. 318.

Where it was one of the duties of a laborer to sweep grain which had fallen from cars that were being unloaded from the track, and when last seen alive, he was taken a broom apparently for this purpose, and disappeared, and a few minutes afterwards standing cars beside which he had to work were forcibly struck by a freight car, and after the accident, the laborer was found dead near the track, with the broom, it was held that these circumstances were sufficient from which to infer that the deceased was in the exercise of due care. *Maguire v. Fitchburg R. Co.* 158 Mass. 379, 15 N. E. 904. The court held that while due care must be shown by the plaintiff, in order that it may be seen that an injury to him was not occasioned by contributory negligence on his part, it is not necessary that any positive act of care shall be proved. It may be inferred from mere absence of fault, when such circumstances are shown fairly to exclude the idea of negligence on his part. A person is in the place where he may be fully engaged in duties which he is properly there to perform, under circumstances which do not require the exercise of special caution on his part against the acts or negligence of others, he is in the exercise of due care. A passenger sitting quietly in his seat in a railroad car is so far as relates to the management of the train, in the exercise of due care. When laborers are set to work upon a railroad track upon the assurance, expressly or implied, that the use of such track is suspended, they are not guilty of negligence if they continue their work without constantly watching for coming trains.

dence from which due care could be inferred, it not being expected that she could, under the circumstances, act with deliberation.⁹⁸ And where the evidence and the answer established the fact that a brakeman, in the discharge of his duty, mounted a ladder on a car, taking hold of a round which, owing to an old break, easily discoverable by the defendant if an inspection had been made, and not seen by the deceased on account of the darkness of the

night and the necessary haste of its use, gave way, causing him to fall and be crushed by the train,—this was held necessarily to negative carelessness on the part of the deceased.⁹⁹

In the following cases the circumstantial evidence of freedom from contributory negligence has been held insufficient to satisfy plaintiff's burden: Where the evidence was that the deceased approached a railroad crossing with a small shawl over her head

⁹⁸ Beattie v. Boston Elev. R. Co. 201 Mass. 3, 86 N. E. 920.

Where it appeared that the plaintiff, as she was about to alight from the rear platform of a street car, requested the conductor to wait a moment for a team to pass, which was approaching at a high rate of speed on the side of the car on which she was, and that after it had passed, as she was putting one foot from the lower step to the ground, she was injured by the sudden starting of the car, it was held that there was evidence from which the jury would be warranted in finding that she was in the exercise of due care. Hutchins v. Macomber, 68 N. H. 473, 44 Atl. 602.

In an action to recover for injuries received from contact with an electric wire which had fallen to the ground, the plaintiff, who was the only witness of the accident, testified that his horse had fallen down in the street, and that he was unable to bring it into action with the reins, that he stepped down from the wagon in which he was seated, in the early morning light, with no reason to expect the electric light wires to be in the way, and came in contact with the wire with his feet, receiving a shock which rendered him unconscious. It was held that these circumstances were sufficient from which to infer freedom from contributory negligence, and that it was immaterial that he was found with the wire between his fingers. Wolpers v. New York & Q. Electric Light & P. Co. 91 App. Div. 424, 86 N. Y. Supp. 845.

Freedom from contributory negligence might be inferred, it was held, from the circumstances that the plaintiff—a woman forty-three years of age, who was thrown from a wagon in which she was riding, by the wheels striking against stones in the highway,—was, at the time of the accident, with her husband in the wagon, which was drawn by a single horse that was gentle and had never run away, and that they were driving down a steep hill with the brake applied to the wheels, that the plaintiff was looking ahead when the wheel on the husband's side of the wagon struck a stone, and she was tipped forward, and that, before she could gather herself up, the wagon struck a second time, and she was thrown to the ground and severely injured. Newell v. Stony Point, 59 App. Div. 237, 69 N. Y. Supp. 583.

⁹⁹ Jones v. New York C. & H. R. R. Co. 10 Abb. N. C. 200.
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In Hart v. Hudson River Bridge Co. 80 N. Y. 622, the person for whose death the action was brought fell off of a bridge and was drowned. The trial court reversed on the ground that due care on the part of the plaintiff had not been shown. The court of appeals held that there had been. Commenting on his case, Westbrook, J., in Jones v. New York C. & H. R. R. Co. supra, said that the action was tried before himself, and that the plaintiff was nonsuited, because, as he supposed, there was an entire absence of proof to show how the deceased fell, if she fell at all, through the open draw of the defendant's bridge, and, consequently, the freedom of the deceased from contributory negligence was entirely unproved. The appellate tribunal must, therefore, have reached the conclusion that the only facts which were shown, to wit, the starting of the deceased from East Albany to return to Albany in time to reach the open draw, the splashing as of something falling in the river, the wetting of the pier above the surface of the water, and the spot where the body was found, were sufficient to take it to the jury, and if sufficient for that purpose, then, of course, they were also ample to sustain a verdict for the plaintiff if one had been so found.

In an action to recover for the death of a person who, while skating, broke through the ice on a river and was drowned, the evidence being that there were two cuttings where the ice had again formed and become thick enough to bear up a person skating, but that upon a third the ice was only three quarters of an inch thick, and that it was while skating upon this ice that the accident happened, and that the ice on all of the cuttings was of the same color,—it was held that the circumstances were sufficient to support the inference that the deceased was in the exercise of due care, a statute requiring persons engaged in cutting ice to guard the cuttings by a sufficient fence until the ice which reformed had attained a thickness of 6 inches; and it was held immaterial that the deceased knew that he was skating on an ice cutting, it not being shown that he knew that the ice was unsafe. Sickles v. New Jersey Ice Co. 80 Hun, 213, 61 N. Y. S. R. 761, 30 N. Y. Supp. 10. But this case was reversed in 153 N. Y. 83, 46 N. E. 1042, on the ground that the facts showed contributory negligence.

and ears, and there was not the slightest evidence that she looked up or down the track before attempting to cross, or stopped or listened, and the only evidence offered was that she appeared to be looking directly in front of her, and where it appeared that the track on which the train came that killed her was free to observation for at least 700 feet from a point on the highway 8 feet from the nearest track, it was held that freedom from contributory negligence had not been shown.¹⁰⁰ On a dark, foggy night a brakeman was sent back from the engine over the top of a moving train of freight cars, to see if any part of the train had broken apart. That was the last seen of him alive. The train had,

in fact, broken in two, and his dead body was found in the center of the track between the rails, and there were indications that he had struck on his feet between the tracks, and that he had been run over by that part of the train which was detached from the engine. It was held, in an action to recover for his death, that the plaintiff had failed to sustain the burden of showing due care.¹ Where one of the crew of a vessel lying at anchor was drowned, but no one saw the accident, the theory as to the cause of his death being that he fell through an improperly guarded gangway,—there being no direct evidence, however, that this was the fact, or that his exit from the ship was acci-

¹⁰⁰ *Rodrian v. New York, N. H. & H. R. Co.* 125 N. Y. 526, 26 N. E. 741, reversing 55 Hun. 606, 28 N. Y. S. R. 625, 7 N. Y. Supp. 811.

In *Pittsburgh, C. C. & St. L. R. Co. v. Bennett*, 9 Ind. App. 92, 35 N. E. 1033, an action to recover for the death of a person killed at a railroad crossing, the circumstances surrounding the accident were not proved. No one saw the deceased immediately before or at the time he was struck. His body was found near the street crossing, the face and forehead cut and bruised, the left shoulder crushed, and the neck broken. How he reached the point where he met his death the evidence did not disclose. There was evidence from which it might have been found that he was sitting stupefied by intoxication on the end of a cross-tie, or from which the jury might have found that he was not intoxicated. It also appeared that there was an unobstructed view of approaching trains of fully 930 feet from the crossing. The court held that this evidence did not show that the deceased was free from contributory negligence.

The mere fact that there was a change in the gait of a horse approaching a crossing, from a trot to a walk, does not warrant the inference that the person driving looked and listened for an approaching train, so that it may be said that the plaintiff has sustained the burden which the law puts upon him of establishing freedom from contributory negligence on the part of the driver, who was killed by a collision with a train. *McSweeney v. Erie R. Co.* 93 App. Div. 496, 87 N. Y. Supp. 836.

So, where the person for whose death the action was brought was driving four horses attached to an empty stone wagon, over a railroad track where the highway crossed at an acute angle, and the testimony presented by the plaintiff showed that the deceased had a clear and unobstructed view of the approaching train for more than a hundred feet from the crossing, if he had turned and looked partially backward, and that his horses were gentle and could have been stopped quickly, it was held that there could be no recovery.

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McAuliffe v. New York C. & H. R. R. Co. 85 App. Div. 187, 83 N. Y. Supp. 200.

In *Seidman v. Long Island R. Co.* 104 App. Div. 4, 93 N. Y. Supp. 209, a crossing accident case, it is said that it is only where the accident results in death, and there are no eyewitnesses of the occurrence, that it has been held in New York that freedom from contributory negligence may be established by circumstantial evidence. "I know of no authority," said Hirschberg, P. J., "for the proposition that a plaintiff, other than the representative of a deceased person, can successfully support the burden of proof upon this subject without some direct evidence that he did not, in fact, see the threatened and apprehended danger. Where sight is impossible for any reason, and the person subsequently injured has failed to look because of that circumstance, or where the danger is so remote that, if seen, it might nevertheless be disregarded in the exercise of proper care, the rule, of course, is otherwise; but in this case, it was undisputed that the track was straight and unobstructed for many hundred feet, and there was an abundance of proof to the effect that the day was clear and the vision wholly unobscured, and, the plaintiff having actually looked for the train, the noise of which he concededly heard, I think it was incumbent upon him to testify expressly as to whether or not he saw it, rather than to leave that essential fact to be determined by deduction or conjecture."

¹ *Geyette v. Fitchburg R. Co.* 162 Mass. 549, 39 N. E. 188.

In an action to recover for the death of a switchman supposed to have been killed while riding on a moving car, by striking a switch, it appeared that the deceased was seen walking towards the car with a lantern, to get a ride. When the car was opposite the switch, a bang was heard, and the switch shook, and the light on top of it went out. The deceased was found fatally injured, on the track with his lighted lantern on his arm, 10 or 12 feet from the switch, and on the opposite side of it from the point where he was last seen before the accident. Other evidence

dental,—it was held that there could be no recovery.²

In an action to recover for injuries received by a collision between a car and a vehicle driven on the street, it appearing that the plaintiff was driving upon the tracks of a street surface railway operated by electricity, in a suburban community with which he was familiar, where he knew the cars must approach him from the rear,

and that he was passing down a grade, where it was more difficult to stop a car than would have been the case on level ground or where the grade was running the other way, it was held freedom from contributory negligence could not be inferred from these facts, in the absence of direct evidence upon the point, and that therefore a nonsuit should have been granted.³

And where it was the duty of an office

showed that the deceased had probably struck the switch while he was riding on the car, but nothing further appeared to show how the accident happened. It was held that the plaintiff could not recover, because he had failed to show that the deceased, at the time of the accident, was in the exercise of due care. *Dacey v. New York, N. H. & H. R. Co.* 168 Mass. 479, 17 N. E. 418.

Where it was the duty of the person for whose death the action was brought, to place oil or grease in cups above the bearing of a large pulley wheel, and the only evidence touching on the accident was that shortly before his death he was seen with a pail in his hand getting grease with which to perform this duty, and, a little later, part of his body was found on a platform near the shafting and between the shafting and the grease barrel, and the rest in the bottom of the pit underneath the large pulley wheel and on the inside of the rim of the wheel; that the grease pail was standing on the platform on the other side of the shafting from that on which the body was found; and that the guard rail which had been in front of and protecting the large wheel was found on the floor of the room, torn forcibly from its fastening,—it was held that there was insufficient evidence from which the deceased's freedom from fault could be inferred. *Wilson v. New York Mills*, 107 App. Div. 99, 94 N. Y. Supp. 1090.

In an action to recover for the death of an engineer, alleged to have been caused by the defective condition of the engine and floors of defendant's electric light works, where the only evidence offered by the plaintiff was that the deceased was found dead on the floor of the engine room in a passageway, between the rapidly revolving fly wheel and the wall of the building, with the top of his skull cut off, which indicated that he was probably struck by the fly wheel or some of its attachments, it was held that the plaintiff could not recover, since there was no evidence to show that the deceased, at the time of the accident, was in the exercise of due care. *McCarty v. Clinton Gaslight Co.* 193 Mass. 76, 78 N. E. 739.

In *McLane v. Perkins*, 92 Me. 39, 43 L.R.A. 487, 42 Atl. 255, it appeared that a master sent a number of servants in a small leaky boat or punt, up a river at night in order to raft and send logs down to a mill. Nothing was seen after they left the shore to indicate their position,

except a light from a lantern apparently moving along the surface of the water at about the position they were supposed to be, and this finally disappeared. There were no cries or anything to indicate a disaster, but several days afterwards their bodies were found at various places along the shore, and the evidence was sufficient to indicate that they came to their deaths by drowning a short time after they set out. It was held that these circumstances were not sufficient to warrant the inference of freedom from contributory negligence.

² *Geoghegan v. Atlas S. S. Co.* 146 N. Y. 369, 40 N. E. 507.

Where a servant fell into a vat of superheated tanning fluid, and was so severely scalded that he died, the evidence showed that the plank over the vat and upon which he was standing, in some manner, slipped and let him in. There being no other evidence of how the accident happened, it was held that the plaintiff, in an action to recover for the servant's death, had not shown freedom of the deceased from contributory negligence. *Scheir v. Quirin*, 77 App. Div. 624, 78 N. Y. Supp. 956, affirmed in 177 N. Y. 568, 69 N. E. 1125.

In an action to recover for the death of a woman suffocated by illuminating gas, it was the theory of the plaintiff that when the deceased retired she left the gas burning, and that, by reason of certain repairs in the mains by employees of the defendant, of which the deceased had no notice, the pressure was removed so as to cause the light to go out, and then shortly afterwards reasserted itself so as to cause the gas to flow unlighted from the open fixture. The deceased was last seen alive late in the evening of a Saturday night. She had spent the evening with the sister of a man to whom she was engaged to be married, and had left the house very happy. The acts of negligence complained of happened at 7 o'clock the next morning. Somewhere between half past 8 and 9 o'clock on that morning, the deceased was found in bed in her room partially dressed and almost wholly unconscious, the gas escaping from the open cock and the room being filled with gas. She died without having regained consciousness. It was held that the burden of proving freedom from contributory negligence had not been sustained by the plaintiff. *Hamma v. Haverhill Gaslight Co.* 203 Mass. 572, 89 N. E. 1043.

³ *Johnson v. Brooklyn Heights R. Co.* 34 App. Div. 271, 54 N. Y. Supp. 547.

In an action to recover for the death of

boy at the end of a day's work to load the office books upon a truck, and take them to a vault in the basement by means of a freight elevator, and he was found dead at 6:30 o'clock, at the bottom of the shaft, while the elevator was at the top, and all the evidence as to how the accident happened was that the elevator had been left at the bottom of the shaft half an hour before, and that there was blood on the door leading to the elevator and above, and that the plaster above was cracked, indicating that the deceased had been crushed between the elevator platform and the wall, it was held that there was not sufficient proof of freedom from fault on the part of the deceased to warrant recovery.⁴

So, in an action brought to recover for

a person killed by a street car, where it appeared from the plaintiff's evidence that the deceased was not seen for several minutes before the accident, that when last seen he was on the north side of the road, and when found dead, he was on the south side across the track, it was held that it was purely conjectural whether the deceased was in the exercise of due diligence or not, and that therefore the plaintiff could not recover. *Cox v. South Shore & B. Street R. Co.* 182 Mass. 497, 65 N. E. 823. The court said: "What he did in the meantime, what care he exercised, whether he tried to cross the tracks in front of an approaching car and fell, whether he stood too near the track with the intention of boarding the car, whether he was seized with an attack of heart disease or vertigo, are all matters upon which there is no evidence."

In an action to recover for the death of a passenger thrown off of the front platform of a car while rounding a curve, it was held that freedom of the deceased from contributory negligence could not be inferred, from the fact that he left the interior of the car where he was perfectly safe, and took a place upon the platform. *Bruce v. Brooklyn Heights R. Co.* 68 App. Div. 242, 74 N. Y. Supp. 324.

And where a woman started on an errand to a railroad station, and went upon the railroad tracks in the nighttime, and was struck and killed, and it appeared that she was seen by the engineer just before the accident, erect and facing the locomotive, between the rails of the track on which it was approaching her, and there was no evidence as to her acts or thoughts from the time when she started on the errand until the instant before she was struck, it was held that there was not enough evidence from which freedom from contributory negligence could be inferred. *Moore v. Boston & A. R. Co.* 159 Mass. 399, 34 N. E. 366.

Although recovery is permitted in some cases for negligence causing death, without positive evidence of eyewitnesses as to the conduct of the deceased at the time of the

the death of a person, alleged to have been due to negligence of a town in the maintenance of a highway, where no one saw the accident, it was held that the plaintiff could not recover, the evidence being such as to leave no doubt that he undertook to drive with a horse and pung over a road across which was flowing at the time a stream of water 30 or 40 rods wide, and in some places not less than 3 feet deep, with a current moving at the rate of 5 miles an hour, and carrying upon its surface cakes of ice, some of which were 25 or 30 feet in diameter; and that at some stage of his journey, and in some way, he and his horse got out of the road, and were precipitated into the deeper channel of the river below, and drowned. A direction for the defend-

accident, it was held that this could not be done where plaintiff's husband, a bicycle rider, who was killed at night on the tracks of a street railroad company, was shown to have been, shortly before the accident, not in a condition to proceed with safety upon a bicycle along a street occupied in part by a street railway. *Chicago North Shore R. Co. v. Green*, 93 Ill. App. 105.

⁴ *Lowry v. Anderson Co.* 96 App. Div. 465, 89 N. Y. Supp. 107.

Where the deceased, a woman twenty-six years of age, in good health and in full possession of her faculties, was seen to step from a drawbridge to the stationary part of the bridge, with which she was familiar, just before the draw began to swing open, and then was seen to walk a few feet to the gate, which had been closed, and then to turn back and walk toward the open space, and was heard to scream, and was found dead in the river a few hours later, it was held that the circumstances were not sufficient from which to draw the inference of freedom from contributory negligence. *Murray v. Troy & W. T. Bridge Co.* 15 N. Y. Week. Dig. 16.

Where a telephone employee was killed by an electric current while adjusting a wire connecting the house of a subscriber with the main line, and there was no evidence as to his movements just before he received the shock, the only witness testifying as to his conduct having seen him ascend the pole until he disappeared from view in the foliage, and having heard him calling the office and talking with the operator after he had evidently made the connection and having immediately afterwards heard an outcry of distress, and having seen the deceased falling through the branches of the trees to the ground, it was held that there was not enough evidence to warrant invoking the rule that due care may be proved if enough circumstances appear from which the jury can infer that nothing in the conduct of the plaintiff or his intestate contributed to his injury. *French v. Sabin*, 202 Mass. 240, 88 N. E. 845.

was upheld on the ground that this
ence indicated contributory negligence
be part of the deceased.⁵

c. Injury to property.

he rule that the burden is upon the
ntiff to prove that the injured person
free from contributory negligence ap-
s to injuries to property as well as to
ries to the person.⁶ As, for example,
re a quantity of wood is destroyed by
through the negligence of the defend-
7 In fact, in Indiana, even since the
age of the statute requiring the defend-
and not the plaintiff, to assume the
len of this issue, it has been held that
rule that the burden is on the plaintiff
establishing the conduct of the injured
ty still obtains, the statute applying
to injuries to the person.⁸

Merrill v. North Yarmouth, 78 Me. 200,
Am. Rep. 794, 3 Atl. 575.

he burden is on the plaitniff to show not
the defects of the highway in a case in
ch this is alleged as the cause of his
uries, but he must also show that he was
he exercise of due care. Adams v. Car-
e, 21 Pick. 146. The court said: "It
a very difficult question what kind and
ree of evidence are sufficient to stand
prima facie proof of this fact, and, in
absence of all controlling evidence, to
ablish it. That the person driving was
monly careful and skilful, that there
no apparent cause for the accident but
bad condition of the highway, the posi-
in which the carriage was at the time,
all circumstances upon which jurors
y pass their judgment, and infer that
skill and care were used. Circumstan-
arising out of the proof offered to show
nature of the accident and the cause
it will generally be such as to enable a
y to judge satisfactorily whether the car-
ge was driven with ordinary care and
ll."

Cincinnati, W. & M. R. Co. v. Hiltz-
er, 99 Ind. 486; Ft. Wayne v. Coombs,
Ind. 75, 57 Am. Rep. 82, 7 N. E. 743;
isville, N. A. & C. R. Co. v. Stommel, 126
l. 35, 25 N. E. 863.

See also *infra*, V., note 33.

For cases as to presumption of negligence
case of injuries to person or property,
supra, IV., note 50.

Pennsylvania Co. v. Gallentine, 77 Ind.

See *infra*, VIII. a, 1.

Chicago & A. R. Co. v. Gretzner, 46 Ill.

⁹In Indianapolis & St. L. R. Co. v.
ans, 88 Ill. 63, it is said that it is true
it in cases where the negligence of defend-
t in gross, the allegation of due care by
plaintiff is regarded as proved where it
shown that the want of due care on the
rt of plaintiff, if any, is but slight in com-
rison with the negligence of the defend-
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d. Comparative negligence.

The cases establishing the doctrine of
comparative negligence hold that there
must be fault on the part of the defendant,
and no want of ordinary care on the part
of the plaintiff; but that where there is
fault on both sides, the plaintiff may in
some cases recover; as where it appears
that his negligence is slight, and that the
negligence of the defendant is gross. This
rule holds even when the slight negligence
of the plaintiff in some degree contributes
to the injury.⁹ It will be seen that even
where this doctrine prevails, the injured
person may be guilty of such negligence
as will defeat his right of action, and as
to such negligence the plaintiff would still
have the burden of proof.¹⁰ But the doc-
trine of comparative negligence, once preva-
lent in Illinois, has been repudiated.¹¹

ant. The burden of proof, however, is on the
plaintiff even in such case, to establish the
freedom of plaintiff from such negligence
as would defeat the action.

Under the doctrine of comparative negli-
gence, the onus in establishing the relative
degrees of negligence is not thrown on the
defendant. Chicago, B. & Q. R. Co. v.
Harwood, 90 Ill. 425.

The rule of comparative negligence has
not changed or modified the general rule
requiring the injured party, in order to re-
cover for the negligence causing his injury,
to observe due or ordinary care for his per-
sonal safety, and authorizing him to re-
cover for such injuries where he has ob-
served such care. Calumet Iron & Steel Co.
v. Martin, 115 Ill. 358, 3 N. E. 456.

¹¹Wenona Coal Co. v. Holmquist, 152
Ill. 581, 38 N. E. 946.

In North Chicago Street R. Co. v. El-
dridge, 151 Ill. 542, 38 N. E. 246, an in-
struction that, as a matter of law, the
burden of proof in a case in which the
plaintiff was injured while attempting to
step off of a car is upon the plaintiff, and
that, if the negligence of the plaintiff and
the defendant was equal, or nearly so, the
verdict should be for the defendant, was
held erroneous, the court stating that the
doctrine of comparative negligence has been
greatly modified, if not wholly repudiated,
and that the rule which the court was com-
mitted to is that a plaintiff, before he can
recover on the ground of mere negligence,
must show that the injury of which he com-
plains was caused by the negligence of the
defendant, and that he himself, at the time,
was in the exercise of ordinary care.

In Cleveland, C. C. & St. L. R. Co. v.
Butler, 55 Ill. App. 594, where a servant
was injured while standing on the step at
the rear of a tender, it was held that an in-
struction that if the plaintiff was guilty
of some negligence in riding where he did,
still this would not prevent a recovery
if the jury further believed from the evi-
dence, that the negligence of the plaintiff

e. Pleading.**1. In general.**

In jurisdictions requiring the plaintiff to prove absence of contributory negligence,

was slight as compared with the negligence of the defendant, and that the negligence of the defendant was gross, was erroneous, since the burden always rests with the plaintiff, when seeking to recover for an injury caused by the mere negligence of the defendant, to show that he exercised ordinary care.

But with the abrogation of the doctrine of comparative negligence, the old law was reinstated, and it was held that a party seeking to recover damages for negligence must show that his own negligence has not concurred with that of the other party in producing the injury. *West Chicago Street R. Co. v. Boeker*, 70 Ill. App. 67.

¹² *Mt. Vernon v. Dusouchett*, 2 Ind. 586, 54 Am. Dec. 467; *Wabash & E. Canal v. Mayer*, 10 Ind. 400; *Evansville & C. Street R. Co. v. Hiatt*, 17 Ind. 102; *Toledo W. & W. R. Co. v. Bevin*, 26 Ind. 443; *Hathaway v. Toledo, W. & W. R. Co.* 46 Ind. 25; *Louisville, N. A. & C. R. Co. v. Boland*, 53 Ind. 398; *Gormley v. Ohio & M. R. Co.* 72 Ind. 31; *Brannen v. Kokomo, G. & J. Gravel Road Co.* 115 Ind. 115, 7 Am. St. Rep. 411, 17 N. E. 202; *Bier v. Jeffersonville, M. & I. R. Co.* 132 Ind. 78, 31 N. E. 471; *Cincinnati, H. I. R. Co. v. Duncan*, 143 Ind. 524, 42 N. E. 37; *Evansville & T. H. R. Co. v. Weikle*, 6 Ind. App. 340, 33 N. E. 639; *Lake Erie & W. R. Co. v. Hancock*, 15 Ind. App. 104, 43 N. E. 659; *Torongo v. Salliotte*, 99 Mich. 41, 57 N. W. 1042; *Junction Min. Co. v. Ench*, 111 Ill. App. 346.

The plaintiff must allege not only the defendant's negligence in the act complained of, but he must allege that he was himself free from negligence contributing to the injury or loss for which he would recover. *Richmond Gas Co. v. Baker*, — Ind. —, 39 N. E. 552.

A petition which does not allege plaintiff's freedom from contributory negligence does not state a cause of action. *Brown v. Illinois C. R. Co.* 123 Iowa, 239, 98 N. W. 625.

The declaration in an action for damages received by a person by driving against a public nuisance in a street must show that there was no fault on the plaintiff's part. *Mt. Vernon v. Dusouchett*, 2 Ind. 586, 54 Am. Dec. 467.

So, a complaint alleging that the plaintiff, a brakeman, was injured by a collision due to the carelessness of an incompetent engineer, of whose incompetency and carelessness the defendant had notice, was held insufficient for the reason that it contained no sufficient averments that the plaintiff did not by his own fault or negligence contribute to the injury received. *Evansville & C. R. Co. v. Dexter*, 24 Ind. 411.

The plaintiff suing for the death of a person killed while attempting to cross a

it is held that he must allege in his declaration or complaint that the injured person was, at the time of the accident, in the exercise of due care.¹³ The general allegation that the plaintiff was without fault is enough to satisfy the rule.¹³ But a gen-

railroad track must show that the deceased himself was guilty of no negligence which contributed to the injury. *Cincinnati & M. R. Co. v. Eaton*, 53 Ind. 307.

A complaint in an action to recover damages to a hotel set on fire by the sparks from defendant's locomotive is defective, which fails to allege that the plaintiff was guilty of no negligence contributing to the injury. *Louisville, N. A. & C. R. Co. v. Boland*, 53 Ind. 398.

To constitute a cause of action at common law, for the killing of stock, it is necessary to allege not only the negligence of the defendant, but also the freedom of the plaintiff for contributory negligence. *Jeffersonville, M. & I. R. Co. v. Lyon*, 55 Ind. 477.

In an action to recover for injuries due to the attack of a vicious dog, it is necessary that the plaintiff allege that he was without contributory negligence. *William v. Moray*, 74 Ind. 25, 39 Am. Rep. 76.

So, a complaint which alleged that the defendant so negligently constructed a fence across a stream that it caused the water to be dammed up, and to destroy property belonging to the plaintiff, was held bad for the reason that there was no allegation that the injury was sustained without the fault of the plaintiff, and there were no facts averred from which such freedom from negligence on the part of the plaintiff could be inferred. *Stevens v. Lafayette & C. Gravel Road Co.* 99 Ind. 392.

In an action to recover for injuries received by the bite of a savage dog, the complaint must allege that the plaintiff was without fault, or facts from which it can be inferred that he was not guilty of contributory negligence. *Eberhart v. Kester*, 96 Ind. 478.

In *Chicago, R. I. & P. R. Co. v. Clough*, 134 Ill. 586, 25 N. E. 664, 29 N. E. 184, it is said that if the declaration contains no allegation of due care and caution on the part of the plaintiff, the defendant, if he desires to avail himself of the omission, should either interpose a demurrer, or by other appropriate action call the attention of the court to the omission at some time before final judgment. The error may be cured by verdict.

And in *Cahill v. Illinois C. R. Co.* 137 Iowa, 577, 115 N. W. 216, it is declared that failure to allege freedom from contributory negligence may be cured by amendment after the statutory period for bringing the action has expired.

And in *Baltimore & O. S. W. R. Co. v. Then*, 159 Ill. 535, 42 N. E. 971, affirming 59 Ill. App. 561, failure to plead freedom of plaintiff from contributory negligence was held cured by a verdict.

¹³ *Louisville, N. A. & C. R. Co. v. Smith*.

eral averment that an injury was inflicted without any fault or negligence on the part of the injured party is controlled by a statement of the specific facts and circumstances upon which the general averment is based.¹⁴ The averment must either be expressly made in the complaint that the injury occurred without the fault or negligence of the plaintiff, or it must clearly appear from the facts which are alleged that such must have been the case.¹⁵ If there be no general averment, but a statement of the facts in such a way as to ex-

clude the presumption of contributory fault on plaintiff's part, this will be sufficient.¹⁶ It is, however, essential that it be clearly shown that the injured person was free from contributory negligence.¹⁷ In an action to recover for the death of a person run over by a locomotive, it has been held that an averment that the deceased was lawfully upon the track of the railroad does not satisfy the requirement;¹⁸ nor does the allegation that a passenger was killed in attempting to alight from a moving train at a station.¹⁹ Where the complaint

58 Ind. 575; *Gregory v. Woodworth*, 93 Iowa, 246, 61 N. W. 962.

An allegation that plaintiff's injury was caused wholly by the negligence and carelessness of the defendant, and without the fault or negligence of the plaintiff, was held sufficiently to negative contributory negligence. *Wilson v. Trafalgar & B. C. Gravel Road Co.* 83 Ind. 326.

But an allegation that the plaintiff "has been in all things wholly blameless and without fault" is not a sufficient allegation of freedom from negligence at the particular time of the injury. *Richmond Gas Co. v. Baker*, — Ind. —, 39 N. E. 552.

If it be alleged that the injury occurred without the fault or negligence of the plaintiff, this averment will be sufficient, unless it plainly and clearly appear from the other facts stated, that the injury was produced by the fault or negligence of the plaintiff. *Ft. Wayne v. De Witt*, 47 Ind. 391.

If a complaint contain a general averment that the injury was received without any fault on the part of the plaintiff, it is sufficient in this respect, unless the facts pleaded make it appear, notwithstanding such general averment, that plaintiff's negligence contributed to the injury. *Lake Erie & W. R. Co. v. Hancock*, 15 Ind. App. 104, 43 N. E. 659.

¹⁴ *Peirce v. Oliver*, 18 Ind. App. 87, 47 N. E. 485.

¹⁵ *Maxfield v. Cincinnati, I. & L. R. Co.* 41 Ind. 269; *Jeffersonville, M. & I. R. Co. v. Goldsmith*, 47 Ind. 43; *Jackson v. Indianapolis & St. L. R. Co.* 47 Ind. 454; *Higgins v. Jeffersonville, M. & I. R. Co.* 52 Ind. 110; *Louisville, N. A. & C. R. Co. v. Schmidt*, 106 Ind. 73, 5 N. E. 684; *Ohio & M. R. Co. v. Smith*, 5 Ind. App. 560, 32 N. E. 809; *Romona Oolitic Stone Co. v. Johnson*, 6 Ind. App. 550, 33 N. E. 1000; *Pittsburgh, C. C. & St. L. R. Co. v. Welch*, 12 Ind. App. 433, 40 N. E. 650; *Wahl v. Shoulders*, 14 Ind. App. 665, 43 N. E. 458; *Peirce v. Oliver*, 18 Ind. App. 87, 47 N. E. 485; *Lake Erie & W. R. Co. v. Arnold*, 26 Ind. App. 190, 59 N. E. 394; *Ft. Wayne v. De Witt*, 47 Ind. 391.

A direct averment of want of contributory negligence is unnecessary where it is evident from the facts stated that there was no contributory negligence. *Duffy v. Howard*, 77 Ind. 182.

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¹⁶ *Lake Erie & W. R. Co. v. Hancock*, 15 Ind. App. 104, 43 N. E. 659.

It was the settled law of Indiana before changed by statute, that where negligence is the issue, it must be a case of unmixed negligence, and that this must be made to appear by the complaint. This may be done by an averment that the plaintiff was without fault or negligence contributing to the loss or injury, or by such a statement of facts as show that he was thus without fault. *Louisville, N. A. & C. R. Co. v. Lockridge*, 93 Ind. 191.

¹⁷ *Ft. Wayne, C. & L. R. Co. v. Gruff*, 132 Ind. 13, 31 N. E. 460.

If he cannot set up such a combination of facts as show that he is free from negligence on his part, he must, by proper allegation, set up that the injury was caused by the wanton or wilful negligence of defendant, such as in law amounts to gross negligence and a reckless disregard of the consequences of his neglect. *Denman v. Johnston*, 85 Mich. 387, 48 N. W. 565.

¹⁸ *Indianapolis, P. & C. R. Co. v. Keely*, 23 Ind. 133.

In *Lake Erie & W. R. Co. v. Hancock*, 15 Ind. App. 104, 43 N. E. 659, a crossing accident case, where there was no allegation concerning plaintiff's freedom from contributory negligence, it was held that the allegation, "and without any fault or negligence on the part of the plaintiff, the said locomotive came in close proximity to said horse and plaintiff, while then and there attempting to cross railroad at said point, and frightened said horse, and caused him to turn around and upset or turn said buggy over, and throw plaintiff with great force and violence to the ground, fracturing her skull," and otherwise injuring her, was an insufficient allegation of facts to show freedom from contributory negligence within the rule.

¹⁹ *Jeffersonville R. Co. v. Hendricks*, 26 Ind. 228. The court said it is difficult to perceive upon what principle that fact alone can be regarded as any evidence that the passenger did not, by his own negligence, contribute to the injury. In many cases, the very nature of the casualty would doubtless afford prima facie evidence that the injury did not result from any fault of the passenger; but in such cases, the inference would be drawn rather from

showed that the plaintiff, a passenger on defendant's railroad, on account of the crowded condition of the car, in company with several other passengers, with the permission of the conductor, got on the top or roof of one of the coaches, and, while the train was passing under a low bridge, was knocked off of the car and injured, it was held that these facts fell far short of showing freedom from contributory negligence, within the rule that such absence of fault may be inferred from the facts alleged, in the absence of a direct averment of freedom from contributory negligence.²⁰ And it was held that absence of such negligence on the part of the plaintiff did not clearly appear where it was set out in substance that it was the duty of the plaintiff to manage a certain hoisting apparatus, which had become damaged and broken in such a manner as to cause the cable passing over a pulley

the cause producing the injury, than from the mere fact of the injury itself. But however this may be, the principle stated is one of evidence only, and not of pleading.

The rule that where there is no averment in the complaint of freedom of the plaintiff from contributory negligence, the facts stated must clearly show that he was without fault, is not satisfied by an allegation that the plaintiff, a passenger on defendant's train, had never been at a certain station where he was going before; that when the train arrived there it was dark, the wind blowing and the rain falling; that the train slackened its speed so that he could with safety have alighted therefrom had there been a suitable platform or place to receive him; that the conductor informed him that they had now arrived at such station and ordered him to alight; that he, in pursuance of such order and entirely relying on this instruction, stepped off of the train as directed; but, by reason of defendant having negligently failed to provide a suitable place for his reception, he fell and was thrown under the train, it appearing that the plaintiff was a man of mature age, presumed to have been in possession of all of his faculties. *Cincinnati, W. & M. R. Co. v. Peters*, 80 Ind. 168.

²⁰ *Maxfield v. Cincinnati, I. & L. R. Co.* 41 Ind. 269.

And an allegation in a complaint that the defendant was a common carrier, and that on a certain day he undertook to carry the wife of the plaintiff, and that, by reason of the careless, negligent, and inefficient management of the horses and vehicle in which she was being carried, she was violently thrown from the vehicle and sustained great injuries, whereby plaintiff was damaged, etc., was held insufficient, it not being alleged that she was free from fault, and it not clearly and satisfactorily appearing from the facts pleaded that the injury occurred without contributory fault

to run off and become entangled in the machinery and boxing about the same; that the defendant had neglected to repair the same, although promising to do so; that it was the plaintiff's duty to disentangle the rope whenever it ran off of the pulley; that he was injured while engaged in this work, without any fault whatever on his part as to the rope becoming entangled, or in his efforts to disentangle it.²¹

The allegation of freedom from contributory negligence must relate to and apply to the time and the act of the injury.²² And in an action to recover for damages by fire allowed to escape from a railroad, it is not enough to allege that the fire was suffered to escape through the negligence of the defendant, and without fault of the plaintiff, since this is not an averment that the loss resulted without any negligence of the plaintiff.²³

On the other hand, in an action to recover

on her part. *Wahl v. Shoulders*, 14 Ind. App. 665, 43 N. E. 458.

²¹ *Romona Oolitic Stone Co. v. Johnson*, 6 Ind. App. 550, 33 N. E. 1000.

²² *Lake Erie & W. R. Co. v. Arnold*, 26 Ind. App. 190, 59 N. E. 394. In this case the action was brought to recover for injuries received by a passenger by being ejected from a train, and the averment in the complaint that the plaintiff was sitting quietly in his seat, that he said nothing offensive to anyone, and that he conducted himself in a proper manner, was held insufficient to show that he was free from fault, since it did not show what afterwards took place while he was on the platform of the car from which he was ejected, the complaint being silent as to the conduct of the plaintiff at the particular time that the alleged assault and battery occurred.

In an action to recover for damage to horses due to the breaking down of a defective bridge, allegation that the driver used due and ordinary care after the team and wagon were upon the bridge was held not equivalent to an allegation that the injury was caused without the fault or negligence of the plaintiff, since it does not show that the driver may not have been guilty of the grossest carelessness in driving upon the bridge in its defective condition. *Riest v. Goshen*, 42 Ind. 339.

²³ *Wabash, St. L. & P. R. Co. v. Johnson*, 96 Ind. 40. The court said: "It is one thing to aver that the fire escaped without the negligence of the plaintiff, and quite another to show that he did not contribute to the injury, for his contribution may have been in some matter occurring before or after the fire was suffered to escape. It is not sufficient to show freedom from negligence on one point out of several; the care incumbent upon the plaintiff must extend to all points material to his cause of action."

damages for injuries to hotel property by the operation of a railroad, an allegation that the negligence of the defendant caused the building to jar and violently vibrate, so as to crack the brick walls and plastering, to loosen the same, to tear the wall paper, thereby greatly injuring and damaging the property by causing the walls to settle, become out of plumb and greatly weakened, was held sufficient to show absence of contributory negligence on the part of the plaintiff.²⁴

And in an action to recover for injuries received by a passenger due to the derailment of a train, an allegation that the defendant did not keep its road in good repair, but carelessly permitted a broken and defective rail resting on a rotten and defective cross-tie, to remain for a long time in a dangerous and unsafe condition, by means whereof the train of cars on which plaintiff was being carried was thrown off the track and precipitated down an embankment, by means whereof the plaintiff was injured, was held sufficient in the absence of a direct allegation of freedom from contributory negligence, the averments of the complaint being deemed sufficient to show that the injury was caused solely by the carelessness of the company in failing to repair its road track.²⁵ And in an action to recover for the death of a fireman, where the plaintiff alleged that the deceased went under the engine to clean the ash pit in the regular line of his duty, and that the brakes were set, and that he was run over by the sudden starting of the engine due to the force of a collision caused by the negli-

gence of the defendant, this was held to be enough.²⁶

And in an action to recover for injuries received because of the negligent shooting of a gas well with nitroglycerin, an allegation that the "said explosion, and each and all of said injuries and damages to plaintiff, and to said well, were each and all caused, produced, and occasioned solely and entirely by the unskilfulness and negligence of defendants in shooting said well," was held to be a sufficient allegation of plaintiff's freedom from contributory negligence.²⁷

The very allegation of the injury, however, may in some cases of itself negative contributory negligence. In an action for damages for malpractice, a complaint alleging that the defendants, as practising physicians and surgeons, undertook to set a broken arm of the infant son of the plaintiff, and that by reason of their unskilfulness, negligence, and want of care in treating the broken arm, it became inflamed and mortified, and had to be amputated, was held not bad on the theory that it failed to allege that the amputation of the arm was necessary without the fault of the plaintiff or the boy, since the allegation that the injury was caused by the want of professional skill and care could not be sustained, if it were made to appear that the negligence of the plaintiff or the boy contributed to it.²⁸ And even in ordinary negligence cases, it has been held that the plaintiff need not allege absence of negligence in his complaint, since that allegation is always involved in the assertion that the injury was caused by the defendant's negligence.²⁹

²⁴ Pittsburgh, C. C. & St. L. R. Co. v. Velch, 12 Ind. App. 433, 40 N. E. 650.

²⁵ Michigan S. & N. I. R. Co. v. Lantz, 29 Ind. 528.

A complaint showing that the plaintiff, while seated as a passenger in one of the defendant's cars, was hurt by reason of the fact that a bridge belonging to the defendant broke down and precipitated the train into the river, the accident being caused by the negligence of the defendant, was held not defective on the theory that there was no statement of facts by which it was shown that the plaintiff himself was without fault, since the relation which he occupied to the railroad company, and the situation in which he was placed, required nothing of him except to remain passive while being carried, all presumption of negligence on his part being rebutted by the averments of the complaint. Bedford, S. & B. R. Co. v. Rainbolt, 99 Ind. 551.

In an action to recover for injuries received by a passenger due to the sudden starting of the train when she was about to alight, it was held that freedom from contributory negligence could be inferred from an allegation in the complaint that,

on arriving at the station at which she was entitled to leave the train, the defendant stopped its train, that the plaintiff immediately and without delay proceeded as far as the door of the car, and that, while in the act of stepping out of the door onto the platform, the train suddenly started without any warning from the defendant, which caused her to be thrown to the floor of the car and hurt. Ohio & M. R. Co. v. Smith, 5 Ind. App. 560, 32 N. E. 809.

²⁶ Chicago & E. I. R. Co. v. Stephenson, 33 Ind. App. 95, 69 N. E. 280.

²⁷ Indiana Nitroglycerine & Torpedo Co. v. Lippincott Glass Co. 165 Ind. 361, 75 N. E. 649.

²⁸ Scudder v. Crossan, 43 Ind. 343.

²⁹ Even where the burden of proving contributory negligence is held to be with the plaintiff, it has been held that the plaintiff need not allege absence of negligence in his complaint, since that allegation is always involved in the allegation that the injury was caused by the defendant's negligence, to prove which it is necessary for the plaintiff to show, and the burden is upon him to establish, that his own negligence did not cause or contribute

The rule that, in actions by infants to recover damages for personal injuries, it is not necessary to aver, in direct or express terms, that the parents or custodians are free from contributory fault, cannot be invoked in support of the proposition that it is not necessary in an action by a father to recover damages on account of the death of his son nine years of age, to aver in the complaint that such child was so injured without fault on his part.³⁰ If the court cannot say as a matter of law that the child was *sui juris*, it is not necessary to aver that the child was without fault.³¹

It has been held that the rules as to the

allegation of due care apply even in suits before a justice of the peace,³² and in the case of injuries to property as well as to the person.³³

.2. Knowledge of dangers or defects.

The question has many times arisen in master and servant cases where the injury was caused by certain dangers and defects of which the servant might have known, whether it is necessary for the plaintiff to allege absence of such knowledge in order to entitle him to recover for the negligence of the master. This subject will

to the injury. *Lee v. Troy Citizens' Gas-light Co.* 98 N. Y. 115.

A direct averment that, "by reason and in consequence" of defendant's negligence, a collision by which plaintiff was injured took place, impliedly negatives any other cause of action, and the plaintiff will not be entitled to a verdict unless he affirmatively establishes that his negligence did not contribute to the accident. *Benedict v. Union Agri. Soc.* 74 Vt. 91, 52 Atl. 110.

It is the rule in Vermont that in actions to recover damages occasioned by the defendant's negligence, the burden is upon the plaintiff to show that such negligence was the sole operating cause of the injury, —that no want of due care on the part of the plaintiff helped to produce it. But it is not necessary that this should be alleged in the declaration. It is enough if the declaration states that the insufficiency of a bridge, in an action brought to recover for injuries received by the falling of the bridge, was the sole cause of the accident. And where it alleges that the damages occurred "by reason" of such insufficiency, the idea of the plaintiff's negligence is precluded. *Mobus v. Waitsfield*, 75 Vt. 122, 53 Atl. 775.

In *Potter v. Chicago & N. W. R. Co.* 20 Wis. 534, 91 Am. Dec. 444, an action to recover for the death of a child killed while attempting to alight from a train, it was held unnecessary for the plaintiff to allege that the deceased at the time of the accident was in the exercise of ordinary care, or was free from contributory negligence; but this was on the theory that the complaint, without this averment, sufficiently alleged that the negligence of the defendant was the sole immediate cause of the accident. "It is unnecessary for us," said the court, "to decide the question, so much discussed by counsel, whether the plaintiff at the trial, to make out a *prima facie* case, must prove both the negligence of the defendant and ordinary care on the part of the deceased; for whatever may be our opinion on that subject, we must hold in accordance with long and well-established practice, that the complaint is sufficient."

³⁰ *Terre Haute Street R. Co. v. Tappenbeck*, 9 Ind. App. 422, 36 N. E. 915.

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In such an action a general averment that the parents were free from contributory fault does not include the averment that the child was also free from fault contributing thereto, and therefore a complaint which does not allege that the child was without negligence is defective. *Ibid.*

³¹ In an action to recover damages for the death of a boy who, while on his way to school, fell into a large body of water that was allowed to accumulate by the side of a street, and was drowned, it was held that failure of the plaintiff to allege facts from which it could be determined that the boy, who was seven years of age, did not comprehend the danger to which he was subjected, would not render the complaint demurrable, where there was nothing alleged by which the court could say, as a matter of law, that the child was *sui juris*, and the facts specifically averred did not show him to have been guilty of contributory negligence, and where there was a general averment that he was free from fault. *Elwood v. Addison*, 26 Ind. App. 28, 59 N. E. 47.

³² A complaint in an action for the killing of a mule was held insufficient, even on a motion to arrest, where there was a failure to allege freedom from contributory negligence on the part of the plaintiff, and the fact that the action was brought before a justice of peace, where the same strictness of pleading is not required, was held immaterial. *Cincinnati, W. & M. R. Co. v. Stanley*, 4 Ind. App. 364, 30 N. E. 103.

³³ In *Louisville, N. A. & C. R. Co. v. Boland*, 53 Ind. 398, it was urged that the rule should not be applied to cases of injury to property, which is incapable either of diligence or of negligence; that it should be applied only in cases where the injury is personal. But the court perceive no distinction in principle in this respect between injuries to the person and to property, and said that where one's own negligence contributes to an injury to his property inflicted by the carelessness of another, he can no more recover damages than if the injury were to his person. In such cases of concurrent negligence, the law affords no remedy.

not be discussed in this note because it belongs more properly to the doctrine of the assumption of risk,³⁴ although it is quite frequently stated as a species or branch of the doctrine of contributory negligence.³⁵ Indeed, the doctrine of assumption of risk, as well as its relation to the doctrine of contributory negligence, seems to be in much confusion.³⁶

3. General denial.

Where the rule is that the burden is on the plaintiff to show freedom from contributory negligence, it has been held that the question of negligence on the part of the plaintiff arises under the general denial.³⁷ So, in an action to recover for injuries received by plaintiff while a passenger, a special answer alleging that the injuries resulted from the carelessness of the plaintiff was held properly stricken out on motion, as this fact was provable under the general denial.³⁸ And in an action to recover damages to a horse and omnibus, caused by leaving an obstruction in a street unlighted and unguarded, it was held that a paragraph in an answer, following a general denial, which set up that the plaintiff was guilty of contributory negligence, was properly rejected. The court said that in such actions the burden is upon the plaintiff to allege and prove that he was without fault which contributed to the injury. The plaintiff having averred

that the injury occurred through the negligence of the defendant, without any fault on his part, the only appropriate answer was a denial. The defendant could not confess and avoid.³⁹

4. Shifting of burden.

It sometimes happens that where the burden of proving absence of contributing negligence is on the plaintiff, the defendant unnecessarily sets up contributory negligence in his answer, but this does not throw upon him the burden of this issue.⁴⁰ So, where the defendant unnecessarily pleaded that the plaintiff was guilty of contributory negligence, it was held that an instruction: "But as to material affirmative allegations and defenses of the answer, the burden of proof devolves upon the defendant, and they must be established by a preponderance of the evidence," was erroneous.⁴¹ An instruction that the burden of proving negligence rests on the party alleging it is not correct in a case in which the answer unnecessarily alleges that the plaintiff was guilty of contributory negligence, since, even in that case, the burden is on the plaintiff to establish his freedom from fault.⁴² But under a statute providing for damages received by reason of defective bridges, culverts, or highways, which placed the burden of proving absence of contributory negligence on the plaintiff, it was held that where the defendant in his answer de-

³⁴ The rule prohibiting a recovery for a defect known to the servant which the master had not promised to remove does not rest upon the ground of contributory negligence upon his part, but upon his contract under which he entered the service of the master. In such a case, it is not a question of negligence on the part of the servant, but of the risk assumed by him. *Lake Erie & W. R. Co. v. Wilson*, 189 Ill. 89, 59 N. E. 573.

³⁵ In an action to recover for injuries due to a defective ladder on a car, it was held unnecessary for the plaintiff to allege that he himself did not know, or in the exercise of ordinary care would not himself have known, of the defect complained of. *Thompson v. Great Northern R. Co.* 70 Minn. 219, 72 N. W. 962. This was put on the ground that contributory negligence is a matter of defense. The court said that the plaintiff's assumption of risk is but a species or branch of the defense of contributory negligence, and, hence, that the burden of establishing it rests upon the defense.

³⁶ See article on "Assumption of Risk," by Walter M. Glass, 18 Case and Comment, 81. See also note to *Scheurer v. Banner Rubber Co.* 28 L.R.A.(N.S.) 1207, "May servant assume the risk of dangers created by the master's negligence." 3 L.R.A.(N.S.)

³⁷ *Evansville & C. R. Co. v. Hiatt*, 17 Ind. 102.

³⁸ *Indianapolis & C. R. Co. v. Rutherford*, 29 Ind. 82, 90 Am. Dec. 336.

So, special paragraphs of an answer simply tending to show contributory negligence on the part of the plaintiff were held demurrable. *Louisville & N. R. Co. v. Orr*, 84 Ind. 50.

³⁹ *Plymouth v. Fields*, 125 Ind. 323, 25 N. E. 346.

⁴⁰ *Indianapolis & St. L. R. Co. v. Evans*, 88 Ill. 63.

⁴¹ *Hawes v. Burlington, C. R. & N. R. Co.* 64 Iowa, 315, 20 N. W. 717.

⁴² *Gamble v. Mullin*, 74 Iowa, 99, 36 N. W. 909.

In an action to recover for an injury alleged to have been due to defendant's negligence in driving on a highway, an instruction that the burden of proof was upon the plaintiff to prove the negligence of the defendant, that being the gist of the case; but that, when the defendant relied upon the fact that the plaintiff conducted himself carelessly, the burden was upon the defendant to show that the plaintiff had not used ordinary care, was held erroneous, because of the latter part of the direction. *Lane v. Crombie*, 12 Pick. 177.

Although plaintiff's petition in an action to recover for personal injuries should

nies all of the allegations of the petition, and then pleads contributory negligence on the part of the plaintiff, and sets out certain particular acts of the plaintiff, and alleges that, by reason of such acts, plaintiff was injured, the burden of proving such facts is thrown upon the defendant.⁴³

VI. Jurisdictions holding burden on defendant.

a. In general.

The doctrine that contributory negligence is not a part of the plaintiff's cause of action, but is a defense to be alleged and proved like any other defense, is maintained in England and in Canada, and in by far the greater number of states in this coun-

tain an allegation of freedom from contributory negligence, yet, if no such allegation is made and the defendant alleges plaintiff's contributory negligence, the issue on that question is the same as though plaintiff had made the proper averment, and the burden of proof is still on the plaintiff to establish the fact of his own freedom from fault. It is error in such a case to throw the burden upon the defendant, and allow plaintiff to recover merely upon overcoming such proof of negligence on plaintiff's part as the defendant may introduce. *Cahill v. Illinois C. R. Co.* 137 Iowa, 577, 115 N. W. 216.

⁴³ *Falls Twp. v. Stewart*, 3 Kan. App. 403, 42 Pac. 926. To the same effect, *Independent Twp. v. Guldner*, 7 Kan. App. 699, 51 Pac. 943.

⁴⁴ 15 Wall. 401, 21 L. ed. 114.

⁴⁵ *Inland & Seaboard Coasting Co. v. Tolson*, 139 U. S. 551, 35 L. ed. 270, 11 Sup. Ct. Rep. 653; *Texas & P. R. Co. v. Volk*, 151 U. S. 73, 38 L. ed. 78, 14 Sup. Ct. Rep. 239; *Griffin v. Overman Wheel Co.* 9 C. C. A. 542, 21 U. S. App. 151, 61 Fed. 568; *Union P. R. Co. v. Novak*, 9 C. C. A. 629, 15 U. S. App. 400, 61 Fed. 573; *Chesapeake & O. R. Co. v. Steele*, 29 C. C. A. 81, 54 U. S. App. 550, 84 Fed. 93; *Baltimore & O. R. Co. v. Burris*, 50 C. C. A. 48, 111 Fed. 882; *Watertown v. Greaves*, 56 L.R.A. 865, 50 C. C. A. 172, 112 Fed. 183; *Texas & P. R. Co. v. Reagan*, 55 C. C. A. 427, 118 Fed. 815; *Northern P. R. Co. v. Tynan*, 56 C. C. A. 192, 119 Fed. 288; *Jefferson Hotel Co. v. Warren*, 63 C. C. A. 193, 128 Fed. 565; *Armour & Co. v. Carlas*, 74 C. C. A. 53, 142 Fed. 721; *Illinois C. R. Co. v. O'Neill*, 100 C. C. A. 658, 177 Fed. 328; *Holmes v. Oregon & C. R. Co.* 6 Sawy. 275, 5 Fed. 523; *Crew v. St. Louis, K. & N. W. R. Co.* 20 Fed. 87; *Osborne v. Detroit*, 32 Fed. 36; *Clark v. Canadian P. R. Co.* 69 Fed. 544; *Gadonnex v. New Orleans R. Co.* 128 Fed. 805; *Clark v. Kansas City, Ft. S. & M. R. Co.* 64 C. C. A. 19, 129 Fed. 341; *Ward v. Dampskibsel* 33 L.R.A. (N.S.)

try. The leading Supreme Court case is that of *Washington & G. R. Co. v. Gladmon*, in which the rule that the burden is on the defendant is adopted. The court said that, while it is true that the absence of reasonable care and caution on the part of one seeking to recover for an injury so received will prevent a recovery, it is not correct to say that it is incumbent upon him to prove such care and caution. The want of such care, or contributory negligence as it is termed, is a defense to be proved by the other side; the plaintiff may establish the negligence of the defendant, his injury in consequence thereof, and his case is made out.⁴⁴ This is the well-settled rule of the Federal courts,⁴⁵ and governs there irrespective of the decisions in courts of the states where the Federal courts are

skabet Kjoebenhaven, 136 Fed. 502; *Baker v. Philadelphia & R. R. Co.* 149 Fed. 882, affirmed in 84 C. C. A. 86, 155 Fed. 407; *Ellsworth v. Hunt*, 93 C. C. A. 662, 168 Fed. 506; *Winona v. Botzet*, 23 L.R.A. (N.S.) 204, 94 C. C. A. 563, 169 Fed. 321; *Baltimore & O. R. Co. v. Taylor*, 186 Fed. 828; *Morgan v. Illinois & St. L. Bridge Co.* 5 Dill. 102, Fed. Cas. No. 9,802; *Evans v. Lake Erie & W. R. Co.* 78 Fed. 782; *Baltimore & O. R. Co. v. Burris*, 50 C. C. A. 48, 111 Fed. 882; *Texas & P. R. Co. v. Barrett*, 166 U. S. 617, 41 L. ed. 1136, 17 Sup. Ct. Rep. 707.

On all of the evidence, the rule of the Federal courts is that the burden of proof is on the defendant to sustain, by a preponderance of evidence, its defensive plea of contributory negligence. *Hemingway v. Illinois C. R. Co.* 52 C. C. A. 477, 114 Fed. 843.

The burden of proof of showing contributory negligence of an engineer in continuing to use a engine which he knew to be defective was held to be on the defendant. *Hough v. Texas & P. R. Co.* 100 U. S. 225, 25 L. ed. 617.

The burden of proof is not upon the plaintiff in an action for causing death, to show in the first instance that the person killed was in the exercise of due care at the time of the accident. *Union P. R. Co. v. O'Brien*, 161 U. S. 451, 40 L. ed. 766, 16 Sup. Ct. Rep. 618.

Where the plaintiff was injured while sitting in a car before the train was made up, by reason of the fact that another car was kicked against it, and it was assumed that the burden was on the defendant of proving a defense to the effect that the plaintiff was in the car in violation of the reasonable and known directions of the company, the court, on appeal, refused to consider the question whether the plaintiff had the burden of affirmatively maintaining that there were no prohibitions against her entering the car. *Root v. Catskill Mountain R. Co.* 33 Fed. 858.

held.⁴⁶ It is also the rule in Alabama,⁴⁷ Arizona,⁴⁸ Arkansas,⁴⁹ California,⁵⁰ and

⁴⁶ *Hemingway v. Illinois C. B. Co.* 52 C. C. A. 477, 114 Fed. 843.

⁴⁷ *Alabama G. S. R. Co. v. Frazier*, 93 Ala. 45, 30 Am. St. Rep. 28, 9 So. 303; *McDonald v. Montgomery Street R. Co.* 110 Ala. 161, 20 So. 317; *Alabama Steel & Wire Co. v. Wrenn*, 136 Ala. 475, 34 So. 970; *Mobile, J. & K. C. R. Co. v. Bromberg*, 141 Ala. 258, 37 So. 395; *Montgomery v. Wyche*, — Ala. —, 53 So. 786.

Contributory negligence is in its nature defensive, and the burden of proof to show it is on the party who relies on it. *Kansas City, M. & B. R. Co. v. Crocker*, 95 Ala. 412, 11 So. 262.

So, a charge that the burden of proof is not upon the defendant, to show that plaintiff was guilty of contributory negligence, was held properly refused. *West v. Thomas*, 97 Ala. 622, 11 So. 768.

So, a charge in substance that before the plaintiff can recover the jury must be satisfied that the plaintiff has been injured, and that his damage has been without the lack of any reasonable care on his part, etc., was held erroneous, in that it misplaced the burden of proof. *Thompson v. Duncan*, 76 Ala. 334. The court said it was not the plaintiff's duty to prove that the damage had been done through no want of reasonable care on his part, nor was it necessary that the jury should affirm that plaintiff had not contributed to the injury. That contributory negligence is in its nature defensive, the disproof of which does not rest on the plaintiff, unless in rebuttal of defensive testimony tending to establish it.

The effect of a charge that if the jury are unable to say that the injury was caused by want of ordinary care on the part of the defendant, without a want of ordinary care on the part of the plaintiff directly contributing thereto, they must find for the defendant, was held to place the onus on the plaintiff to prove that the injury was caused without negligence on his part, thus misplacing the burden of proof. *O'Brien v. Tatum*, 84 Ala. 186, 4 So. 158.

A charge that if any individual juror is not reasonably satisfied that the plaintiff did not contribute proximately to his injury, the plaintiff cannot recover, was held to misplace the burden of proof. *Alabama Steel & Wire Co. v. Wrenn*, 136 Ala. 475, 34 So. 970.

⁴⁸ *Maricopa & P. & S. R. Valley R. Co. v. Dean*, 7 Ariz. 104, 60 Pac. 871; *De Amado v. Friedman*, 11 Ariz. 56, 89 Pac. 588; *Hobson v. New Mexico & A. R. Co.* 2 Ariz. 171, 11 Pac. 545.

A verdict cannot be directed for the defendant in an action to recover for the negligent killing of a person, on the theory that the plaintiff has failed to show due care on the part of the deceased. *Southern P. Co. v. Tomlinson*, 4 Ariz. 126, 33 Pac. 710, reversed on another point in 163 U. S. 369, 41 L. ed. 193, 16 Sup. Ct. Rep. 1171. The 33 L.R.A. (N.S.)

court said that the rule in this territory is that in actions for personal injuries where contributory negligence is relied upon as a defense, due care and caution on the part of the plaintiff, in the absence of affirmative proof to the contrary, will be presumed, and the burden of proving such contributory negligence rests upon the defendant.

In an action to recover damages for the killing of a miner by negligently permitting rock to fall upon him, it is not necessary for the plaintiff to allege and prove that the accident occurred without fault of the deceased. *Lopez v. Central Arizona Min. Co.* 1 Ariz. 464, 2 Pac. 748.

⁴⁹ *Jones v. Malvern Lumber Co.* 58 Ark. 125, 23 S. W. 679; *Choctaw, O. & G. R. Co. v. Doughty*, 77 Ark. 1, 91 S. W. 768; *Wallis v. St. Louis, I. M. & S. R. Co.* 77 Ark. 556, 95 S. W. 446; *St. Louis, I. M. & S. R. Co. v. Stacks*, — Ark. —, 134 S. W. 315; *Aluminum Co. v. Ramsey*, 89 Ark. 522, 117 S. W. 568.

Contributory negligence is a defense, and the proof of it devolves upon the defendant who alleges it, and who therefore holds the affirmative of this issue. *Little Rock & Ft. S. R. Co. v. Atkins*, 46 Ark. 423. The court said that the courts of last resort in Massachusetts and several other states have indeed adopted the contrary principle, but this, it is believed, is inconsistent with the rule of evidence adjusting the burden of proof according to the state of pleadings, and it is certainly opposed to the weight of authority as settled in England, in the Supreme Court of the United States, and a majority of the states of the Union.

An instruction that if defects in a road-bed where the plaintiff's intestate was thrown down, and mortally injured by the cars of the defendant, were easily and readily seen, and he had been accustomed to working there, and, in attempting to uncouple cars while in motion, received the injuries which caused his death, he was not entitled to recover, was held properly refused, on the ground that contributory negligence was a matter of defense. *Little Rock, M. R. & T. R. Co. v. Leverett*, 48 Ark. 334, 3 Am. St. Rep. 230, 3 S. W. 50.

When negligence on the part of a carrier is established by evidence, the burden is upon the carrier to prove contributory negligence of an injured passenger. *St. Louis, I. M. & S. R. Co. v. Gilbreath*, 87 Ark. 572, 113 S. W. 200.

An instruction that, in order to find for the plaintiff, the jury must be satisfied by a preponderance of evidence of the negligence of the defendant, and that the plaintiff was free from contributory negligence, was held wrongfully to place the burden upon the plaintiff, and require him to prove by a preponderance of the evidence, not only the negligence charged in the complaint, but also, as a further fact essential to his recovery, the absence of negligence

Colorado.⁵¹ The same rule was adopted in Dakota.⁵² It prevails in the District of

on his part contributing to the injury. *Jones v. Malvern Lumber Co.* 58 Ark. 125, 23 S. W. 679.

Where it did not appear that a person killed at a railroad crossing looked both ways before as well as after he went upon the track, it was held that, since he might have done so, the burden was on the defendant to show that he did not. *Choctaw, O. & G. R. Co. v. Baskins*, 78 Ark. 355, 93 S. W. 757.

The burden of showing that one who goes upon a railroad track, and is struck by a passing train, is guilty of contributory negligence, is on the defendant. *St. Louis, I. M. & S. R. Co. v. Martin*, 61 Ark. 549, 33 S. W. 1070.

In an action for the negligent killing of a child, even if the mother's contributory negligence is a defense to an action by the administrator, the burden of proving such negligence is on the defendant. *Miles v. St. Louis, I. M. & S. R. Co.* 90 Ark. 485, 119 S. W. 837.

A charge that unless the jury find from the weight of evidence, first, that the defendant was guilty of negligence which contributed to the plaintiff's injury, and, second, that the plaintiff was free from fault or negligence, the verdict must be for the defendant, was held to misplace the burden of proof. *Little Rock & Ft. S. R. Co. v. Atkins*, 46 Ark. 423.

In *Choctaw, O. & G. R. Co. v. Doughty*, 77 Ark. 1, 91 S. W. 768, an action to recover for the death of a fireman, caused by a collision of defendant's trains, a requested instruction that if the jury should find from the evidence that, by reason of a curve in the track, it was impossible for the engineer to keep an efficient lookout, it devolved upon the fireman to keep such lookout, and that, if he failed to perform that duty and such failure contributed to his death, the verdict must be for the defendant, was held wrongfully to cast the burden upon the plaintiff, to exonerate the deceased fireman from the charge of contributory negligence.

⁵⁰ *McQuilken v. Central P. R. Co.* 50 Cal. 7; *Fujise v. Los Angeles R. Co.* 12 Cal. App. 207, 107 Pac. 317; *Foley v. Northern California Power Co.*—Cal. App. —, 112 Pac. 467; *Zibbell v. Southern P. Co.*—Cal. —, 116 Pac. 513; *Smith v. Occidental & O. S. S. Co.* 99 Cal. 462, 34 Pac. 84.

In *May v. Hanson*, 5 Cal. 360, 63 Am. Dec. 135, an action for damages sustained by plaintiff in crossing defendant's ferry, it was held unnecessary for the plaintiff to show that he had no agency in, and did not in any manner contribute to, the accident, the court saying that the proof of want of ordinary care on the part of plaintiff lies on the defendant, and that he who avers a fact in excuse of his own misfeasance must prove it.

And where the plaintiff was injured by stepping off of a car, the car being started

while she was in the act of alighting, it was held that a charge that she must show that the injury resulted from the negligence of the defendant, without any contributory negligence upon her part, was erroneous. *MacDougall v. Central R. Co.* 63 Cal. 431.

Where there was no question but that the evidence tended to prove negligence on the part of the defendant in running over a child in the street, it was held that the burden of proving contributory negligence of the parents of the child devolved upon the defendant, unless it had been made to appear by the evidence of the plaintiff. *Daly v. Hinz*, 113 Cal. 366, 45 Pac. 693.

So, in order to prevent recovery for injuries received by a servant working at a defective machine, where the plaintiff had been ordered by the master to work more rapidly, on the promise that the latter would repair, it was held that the burden was on the master not only to show that the plaintiff had knowledge of the defect, but also that, in obeying the order to operate the machine more rapidly, the plaintiff appreciated and understood that he was incurring obvious peril which no prudent man would hazard. *Anderson v. Seropian*, 147 Cal. 201, 81 Pac. 521.

In *Quill v. Southern P. Co.* 140 Cal. 268, 73 Pac. 991, an instruction that, in order to hold the defendants liable and entitle the plaintiff to recover, it must appear to the satisfaction of the jury that the person killed was without fault, was held not to misplace the burden of proof, since it amounted to nothing more than a declaration that even if they found the defendant negligent, still the plaintiff could not recover if the deceased had been guilty of contributory negligence.

⁵¹ *Western U. Teleg. Co. v. Eyser*, 2 Colo. 141; *Kansas P. R. Co. v. Twombly*, 3 Colo. 125; *Big Five Tunnel Ore Reduction & Transp. Co. v. Johnson*, 44 Colo. 236, 99 Pac. 63.

In an action for damages received through a fall caused by the plaintiff's slipping on ice in a street, and the only evidence of the plaintiff's conduct was that while crossing the ice he proceeded very carefully, it was held that a charge that the burden of proving contributory negligence was on the defendant was correct as applied to the facts. *Colorado Springs v. Floyd*, 19 Colo. App. 167, 73 Pac. 1092.

The burden of showing lack of knowledge or information on the part of a mine employee killed by the flooding of the mine, of conditions in an adjoining mine which were likely to result in such flooding, does not rest upon one seeking to recover for his death, but the mine owner has the burden of showing such knowledge, and therefore the court cannot direct a verdict in favor of defendant merely because the evidence tending to show absence of knowledge is not conclusive. *Williams v. Sleepy Hol-*

Columbia,⁵³ and in Florida,⁵⁴ although the question in that state is to some extent governed by statute.⁵⁵ It is the same in Georgia,⁵⁶ a statute of the latter state covering certain injuries having been

copied in Florida.⁵⁷ The rule that the burden is on the defendant has also been adopted in Indian territory,⁵⁸ Kansas,⁵⁹ Kentucky,⁶⁰ Minnesota.⁶¹

The rule was established in Missouri in

low Min. Co. 37 Colo. 62, 7 L.R.A.(N.S.) 1170, 86 Pac. 337, 11 A. & E. Ann. Cas. 111.

⁵² Sanders v. Reister, 1 Dak. 151, 46 N. W. 680.

⁵³ Harmon v. Washington & G. R. Co. 7 Mackey, 255.

In Atchison v. Wills, 21 App. D. C. 548, the court said: "The rule that prevails in this jurisdiction is that the onus of proof is upon the plaintiff to establish his case by proof of the negligence of the defendant, the injuries resulting therefrom, and his case is made out. If there be circumstances which convict him of contributory negligence, the defendant must prove them, and thus defeat the action. Irrespective of statute law on the subject, the burden of proof upon that subject does not rest upon the plaintiff to show himself free from blame, that is to say, the want of care on the part of plaintiff is matter of defense, to be proved by the defendant."

So, in Mackey v. Baltimore & P. R. Co. 8 Mackey, 282, it was held that a prayer for an instruction that the burden of proof is upon the plaintiff to show that he was not guilty of contributory negligence should be refused.

In an action to recover damages for injuries received by reason of a defect in a highway, the onus of proving contributory negligence is on the defendant. Muller v. District of Columbus, 5 Mackey, 286.

In Tolson v. Inland & Seaboard Coast-ing Co. 6 Mackey, 39, an action to recover damages for the crushing of a person's foot at a wharf caused by the negligent landing of a steamer, a prayer that the burden of proof was on the plaintiff to establish affirmatively his care and prudence was held properly rejected, the court saying that after the plaintiff has proved negligence on the defendant's part, he is entitled to rest, and the burden then falls on the defendant to prove want of ordinary care and prudence in the plaintiff, if he relies upon that as his defense.

⁵⁴ Louisville & N. R. Co. v. Yniestra, 21 Fla. 700.

In an action against a railroad company to recover damages for the value of cattle alleged to have been run over and killed, the burden of establishing contributory negligence by a preponderance of evidence is upon the railroad company. Atlantic Coast Line R. Co. v. Peeples, 56 Fla. 145, 7 So. 392.

An instruction in substance that there could be no recovery unless a person run over by the cars, for whose death the action was brought, was in the exercise of due care at the time of the accident, was held proper, the court saying that the instruction did not ask that the plaintiff

should be required to prove that, at the time of the accident, the deceased was in exercise of due care, as an independent and unconnected proposition of law, but relatively to the supposed facts that preceded it. Those facts were such as to warrant the presumption of want of due care and caution by the deceased in the protection of his person, and made it incumbent on the plaintiff to remove that presumption. Louisville & N. R. Co. v. Yniestra, 21 Fla. 700.

⁵⁵ See infra, VIII. d.

⁵⁶ Augusta v. Hudson, 88 Ga. 599, 15 S. E. 678.

The general rule in Georgia is that one who seeks to recover for the negligence of another is not bound to establish freedom from contributory negligence. Fisher Motor Car Co. v. Seymour, — Ga. App. —, 71 S. E. 764.

⁵⁷ See infra, VIII. d.

⁵⁸ Chicago, R. I. & P. R. Co. v. Pounds, 1 Ind. Terr. 51, 35 S. W. 249.

In an action to recover for injuries received by plaintiff by stepping off of a high railroad platform in the nighttime, an instruction that if, from the evidence in the case, it appeared that the night was dark and that the platform was not properly lighted, because of the darkness and a lack of light, it was incumbent upon the plaintiff, before recovery, to show that she took greater care than she would have taken had the night been light and the platform well lighted, was held erroneous, because the effect of it was to impose upon the plaintiff the burden of showing that she was not guilty of contributory negligence. Missouri, K. & T. R. Co. v. Turley, 1 Ind. Terr. 283, 37 S. W. 52.

⁵⁹ Kansas P. R. Co. v. Pointer, 14 Kan. 37; St. Louis & S. F. R. Co. v. Weaver, 35 Kan. 412, 57 Am. Rep. 176, 11 Pac. 408; Reading Twp. v. Telfer, 57 Kan. 798, 57 Am. St. Rep. 355, 48 Pac. 134.

If the evidence does not affirmatively show contributory negligence, the case should go to the jury. Eidson v. Chicago, R. I. & P. R. Co. — Kan. —, 116 Pac. 485.

In an action by a passenger against a common carrier, to recover for personal injuries received while traveling in a conveyance of the latter, proof of the accident and plaintiff's injury casts the burden upon the carrier to free itself from the presumption of negligence. St. Louis & S. F. R. Co. v. Burrows, 62 Kan. 89, 61 Pac. 439.

But it was held that the plaintiff was in no position to complain of an instruction that the plaintiff could recover only if the jury should find from a preponderance of the evidence that the plaintiff, in

Thompson v. North Missouri R. Co.,⁶² and has been followed ever since.⁶³

So, in an action to recover for injuries received while attempting to board a train, an instruction that the attempt of plaintiff to get upon a moving train was in itself negligence, and that the burden is upon the plaintiff to relieve himself of such imputa-

the performance of his duty as brakeman, exercised ordinary care on his part to prevent the injury complained of, on the theory that it shifted the burden of proof to the plaintiff, where, at his request, an instruction was given that if the jury believed from the evidence that the plaintiff was in the exercise of ordinary care in the performance of his duty, and that he was injured because of the want of ordinary care on the part of employees of the defendant, the jury should find for the plaintiff. *Carrier v. Union P. R. Co.* 61 Kan. 447, 59 Pac. 1075.

⁶⁰ *Paducah & M. R. Co. v. Hoehl*, 12 Bush, 41; *Bogenschutz v. Smith*, 84 Ky. 330, 1 S. W. 578; *Lexington R. Co. v. Cropper*, — Ky. —, 133 S. W. 968.

Where there was a plea of contributory negligence, but there was not evidence to support it, it was held that the court, in instructing the jury that before the plaintiff was entitled to a verdict, the jury should believe from the evidence that she was herself in the exercise of ordinary care for her own safety, in addition to believing the establishment of the various ingredients of actionable negligence on the part of the defendant, was in error, because imposing upon her the burden of proving freedom from contributory negligence. *Bevis v. Vanceburg Teleph. Co.* 132 Ky. 385, 113 S. W. 811.

The court properly refused to instruct the jury that the burden was on the plaintiff to show that he was free from any negligence which contributed to the injury complained of, since the burden is upon the defendant to show contributory negligence. *Louisville & N. R. Co. v. Hofgesang*, 13 Ky. L. Rep. 829.

In this case it was held not proper in any civil case to tell the jury in terms that the burden is on the one party or the other; and that while the giving of such an instruction might not be cause for reversal, it is the better practice simply to tell the jury to decide as they believe from the evidence the fact to be, without telling them upon which party the burden is. *Ibid.*

Except where wilful negligence is charged, the burden is on the defendant to establish plaintiff's contributory negligence. *Louisville & N. R. Co. v. Ritter*, 85 Ky. 368, 3 S. W. 591.

⁶¹ *St. Anthony Falls Water Power Co. v. Eastman*, 20 Minn. 277, Gil. 249; *Wilson v. Northern P. R. Co.* 26 Minn. 278, 37 Am. Rep. 410, 3 N. W. 333; *Hjelm v. Western Granite Contracting Co.* 98 Minn. 222, 108 N. W. 803; *Schutt v. Adair*, 99 Minn. 7, 108 N. W. 811.
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tion of negligence by showing that he had permission or was directed to do so from the employees of defendant in charge of the train, was held erroneous, for one reason because it placed the burden of proof upon the plaintiff to show that he was not guilty of contributory negligence.⁶⁴ The court in one case⁶⁵ refused to review the

The better and the more logical rule regards matter of this character as strictly defensive, the onus of proving which rests upon the defendant. *Hocum v. Weitherick*, 22 Minn. 152.

Where a servant, while under a threshing machine, was injured by a carrier falling upon him, the burden is upon the defendant to show that the plaintiff was under the machine when he ought not to have been. *Engel v. Breitzkreitz*, 39 Minn. 423, 49 N. W. 519.

⁶² 51 Mo. 191, 11 Am. Rep. 443; *Crane v. Missouri P. R. Co.* 87 Mo. 588.

⁶³ *Petty v. Hannibal & St. J. R. Co.* 83 Mo. 306; *Parsons v. Missouri P. R. Co.* 94 Mo. 286, 6 S. W. 464; *Bluedorn v. Missouri P. R. Co.* 108 Mo. 439, 32 Am. St. Rep. 615, 18 S. W. 1103; *Fulks v. St. Louis & S. F. R. Co.* 111 Mo. 335, 19 S. W. 818; *Baker v. Kansas City, Ft. S. & M. R. Co.* 122 Mo. 533, 26 S. W. 20; *Cambron v. Omaha & St. L. R. Co.* 165 Mo. 543, 65 S. W. 745; *Eckhard v. St. Louis Transit Co.* 190 Mo. 593, 89 S. W. 602; *Stotler v. Chicago & A. R. Co.* 200 Mo. 107, 98 S. W. 509; *Charlton v. St. Louis & S. F. R. Co.* 200 Mo. 413, 98 S. W. 529; *Schuerman v. Missouri R. Co.* 3 Mo. App. 565; *Fairgrieve v. Moberly*, 29 Mo. App. 142; *Groom v. Kavanagh*, 97 Mo. App. 362, 71 S. W. 362; *Card v. Eddy*, — Mo. —, 24 S. W. 746, 28 S. W. 753; *Jewell v. Kansas City Bolt & Nut Co.* 231 Mo. 176, 132 S. W. 703; *Buesching v. St. Louis Gaslight Co.* 73 Mo. 219, 39 Am. Rep. 503, affirming 6 Mo. App. 85.

An instruction is not open to criticism upon the ground that, upon the plea of contributory negligence, it places the burden of proof upon the defendant. *Underwood v. Metropolitan Street R. Co.* 125 Mo. App. 490, 102 S. W. 1045.

So, a defendant cannot complain of an instruction that, although the plaintiff cannot recover if, at the time of the injury, he was guilty of any negligence directly contributing to the injury, yet the plaintiff is not required to show that he was free from such negligence, but the defendant must show that the plaintiff was guilty of negligence directly contributing to the injury. *Churchman v. Kansas City*, 49 Mo. App. 366.

⁶⁴ *Fulks v. St. Louis & S. F. R. Co.* 111 Mo. 335, 19 S. W. 818.

In *Forrester v. Metropolitan Street R. Co.* 116 Mo. App. 37, 91 S. W. 401, an instruction that the defendant must show by a preponderance of the evidence that plaintiff failed to exercise ordinary care, etc., was upheld.

An instruction that unless plaintiff has

authorities on the ground that the rule was so well settled in that state.⁶⁶

The rule adopted by the Federal courts

is also followed in Nebraska⁶⁷ and in New Jersey.⁶⁸ This is the rule of North Carolina,⁶⁹ and is, in fact, made so by statute.⁷⁰

shown by a preponderance of the evidence in his favor that he was injured by defendant's train by reason of the negligence and want of care of the defendant's employees in charge of said train, and that plaintiff was guilty of no negligence which contributed directly to said injury, the verdict of the jury must be for the defendant, was held erroneous, as improperly placing upon the plaintiff the onus of showing not only that he had been injured by the negligence of the defendant, but also that he himself had not been guilty of contributory negligence. *Swigert v. Hannibal & St. J. R. Co.* 75 Mo. 475.

The burden of proof is not upon the plaintiff to show, by the greater weight of the evidence, that his injury was caused wholly by the negligence of the defendant, and without negligence on his part. *Latimore v. Union Electric Light & P. Co.* 28 Mo. App. 37, 106 S. W. 543.

In an action to recover for injuries received by falling into an excavation across a sidewalk, the plaintiff need not show that he fell without negligence. *Stephens v. Macon*, 83 Mo. 345.

In an action to recover for the death of a lineman killed by coming in contact with electric wires while at work on a telephone pole, evidence that, when the deceased came in contact with the wires, there was a flash of light, and at the same instant he was seen to fall headlong to the ground, and was in an unconscious condition, and died from his injuries shortly after, was held to make out a prima facie case for the plaintiff. *Von Trebra v. Laclede Gaslight Co.* 209 Mo. 648, 108 S. W. 559.

In an action to recover for the death of a child run over by a street car, it was held that an instruction that if the jury should find that the defendant was guilty of the negligence charged, and that the negligence caused the injury in question, they should find for the plaintiff, provided they also should find that the plaintiff was exercising the degree of care incumbent on him, was held wrong, because putting the burden of proof on the plaintiff not only of establishing the guilt of the defendant, but also of establishing his own exculpation. It was held that the instruction should be, in effect, that if the jury should find that the defendant was negligent as charged, and that the negligence caused the injury, they should find for the plaintiff, unless they should also find that the plaintiff was negligent in the particular charged in the plea, and that such negligence contributed to the injury. The court said that the difference in the form of expression is the difference in the location of the burden of proof. *Schmidt v. St. Louis R. Co.* 149 Mo. 269, 73 Am. St. Rep. 80, 50 S. W. 921.

⁶⁵ *Prosser v. Montana C. R. Co.* 17 Mont. 72, 30 L.R.A. 814, 43 Pac. 81.
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⁶⁶ *Nord v. Boston & M. Consol. Copper & S. Min. Co.* 30 Mont. 48, 75 Pac. 681; *Badovinac v. Northern P. R. Co.* 39 Mont. 454, 104 Pac. 543; *Meehan v. Great Northern R. Co.* — Mont. —, 114 Pac. 781; *Nelson v. Helena*, 16 Mont. 21, 39 Pac. 905; *Cummings v. Helena & L. Smelting & Reduction Co.* 26 Mont. 434, 68 Pac. 852.

⁶⁷ *Vertrees v. Gage County*, 81 Neb. 213, 115 N. W. 863.

In *Omaha v. Ayer*, 32 Neb. 375, 49 N. W. 445, an instruction that the burden was on the plaintiff to prove freedom from contributory negligence was held properly refused.

An instruction that the burden of proof is upon the plaintiff to establish that one killed while making a coupling was himself not guilty of carelessness or negligence which caused or contributed to the accident and death was held erroneous. *Anderson v. Chicago, B. & Q. R. Co.* 35 Neb. 95, 52 N. W. 840.

In an action to recover for injuries received by reason of a defective bridge, the plaintiff, who was riding horseback along the highway, was found injured and unconscious upon the bridge in question, and the horse which he had been riding had its hind feet in a hole caused by a broken plank. Under these circumstances, there being no evidence from which want of care might be inferred, it was held that the plaintiff was entitled to an instruction submitting the question whether the injury was caused by the negligence of the defendant, without an instruction in any manner calling the attention of the jury to the principle of law requiring him to use ordinary care to prevent an injury. *Clingan v. Dixon County*, 82 Neb. 808, 118 N. W. 1082.

⁶⁸ It is not the law of New Jersey, whatever may have been held elsewhere, that the plaintiff is bound in all cases to show positively that he himself was not to blame. *New Jersey Exp. Co. v. Nichols*, 32 N. J. L. 166.

The plaintiff is not, as a condition precedent to his right to maintain his action, bound to prove affirmatively that the injury was not contributed to by his own negligence, under the penalty of being nonsuited. *New Jersey Exp. Co. v. Nichols*, 33 N. J. L. 434, 97 Am. Dec. 722.

A request to charge that the plaintiff must affirmatively establish that she was guilty of no negligence that contributed to the injury was held properly refused. *Consolidated Traction Co. v. Behr*, 59 N. J. L. 477, 37 Atl. 142.

In an action to recover for the death of a person killed at a railroad crossing, contributory negligence of the decedent is a matter of defense, and the plaintiff is not required to prove its absence as a part of his case. *Danskin v. Pennsylvania R. Co.* 79 N. J. L. 526, 76 Atl. 975.

And the same doctrine obtains in North Dakota,⁷¹ and Ohio.⁷² There is a statute on the subject in Oklahoma.⁷³

Pennsylvania was among the number of older states adopting the rule that contributory negligence is a matter of defense.⁷⁴

⁶⁹ Russell v. Monroe, 116 N. C. 720, 47 Am. St. Rep. 823, 21 S. E. 550; Wilkie v. Raleigh & C. F. R. Co. 127 N. C. 203, 37 S. E. 204; Haltom v. Southern R. Co. 127 N. C. 255, 37 S. E. 262; Thomas v. Raleigh & A. Air-Line R. Co. 129 N. C. 392, 40 S. E. 201; House v. Seaboard Air Line R. Co. 131 N. C. 103, 42 S. E. 553; Hemphill v. Buck Creek Lumber Co. 141 N. C. 487, 54 S. E. 420; Goforth v. Southern R. Co. 144 N. C. 569, 57 S. E. 209; Ives v. Giving, 150 N. C. 137, 63 S. E. 609.

A charge which seeks to throw upon the plaintiff the burden of proving that the person for whose death the action was brought was not guilty of contributory negligence is erroneous. Peoples v. North Carolina R. Co. 137 N. C. 96, 49 S. E. 87.

In an action to recover for the death of a person run over by a railroad train, an instruction that the plaintiff must satisfy the jury that there was a failure to sound the whistle, and that such failure caused the killing, and that if the defendant did give the warning whistle, or if at the time the intestate was down upon the track drunk or unconscious, so that no signal given at the usual safe and ordinary distance would have aroused the intestate in time to enable him to avoid the result, there was no negligent killing, was held erroneous, for one reason because it put the burden on the plaintiff of proving that the intestate was not guilty of contributory negligence, although the court had also charged that the burden of proving the intestate's negligence was on the defendant. Fulp v. Roanoke & S. R. Co. 120 N. C. 525, 27 S. E. 74.

⁷⁰ See infra, VIII. a, 2.

⁷¹ Ouwerson v. Grafton, 5 N. D. 281, 65 N. W. 676.

⁷² Street R. Co. v. Nolthenius, 40 Ohio St. 376; Toledo R. & Light Co. v. Rippon, 8 Ohio C. C. N. S. 334, 28 Ohio C. C. 561; Strong v. Pickering Hardware Co. 9 Ohio C. C. 249, 6 Ohio C. D. 212; Pittsburgh, C. & St. L. R. Co. v. Hart, 10 Ohio C. C. 411, 6 Ohio C. D. 731.

To entitle the plaintiff to recover, he must show that he was free from negligence which proximately caused the injury, and that defendant was guilty of the negligence which caused the injury. Restler v. Railway Co. Dayt. (Ohio) 300, cited in 6 Ohio Cyc. Dig. 12,032.

A charge that, to entitle the plaintiff to a verdict, the jury must find from a preponderance of the evidence that the plaintiff herself was without fault, does not cast the burden on the plaintiff of showing by a preponderance of evidence that she was not negligent, where there was evidence on this issue offered by both parties, and the court, in another part of its charge, properly instructed the jury upon the question of the burden of proof. Peat v. Norwalk, 5 Ohio C. C. N. S. 614.

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⁷³ See infra, VIII. a, 3.

Where the plaintiff sues a carrier of passengers for injury alleged to have been received by him by the negligence of the carrier, while riding on a baggage car, the carrier must plead its rules and regulations relating to passengers and where they may ride, and allege the violation thereof by the plaintiff, if it desires to avail itself of such a defense. Lane v. Choctaw, O. & G. R. Co. 19 Okla. 324, 91 Pac. 885.

⁷⁴ Bush v. Johnston, 23 Pa. 209; Erie v. Schwingle, 22 Pa. 384, 60 Am. Dec. 87; Baker v. Westmoreland & C. Natural Gas Co. — Pa. —, 27 Atl. 792; Brown v. White, 206 Pa. 106, 55 Atl. 848.

In proving the negligence of the defendant, the plaintiff is not required to go further and establish freedom from contributory negligence. Coolbroth v. Pennsylvania R. Co. 209 Pa. 433, 58 Atl. 808.

So, a charge that if plaintiffs have not shown affirmatively that their own negligence did not contribute in any degree to the injury, they cannot recover, was held erroneous, since contributory negligence is a matter of defense. Mallory v. Gridley. 85 Pa. 275.

Manifestly, a charge that the jury must be "thoroughly satisfied" that the accident did not occur through the carelessness of the plaintiff, because the burden was on the plaintiff to prove freedom from contributory negligence, is erroneous, both as misplacing the burden of proof and as to the degree of proof required. Bradwell v. Pittsburgh & W. E. Pass. R. Co. 139 Pa. 404, 20 Atl. 1046.

Where the defendant requested an instruction that the burden was on the plaintiff to prove that "he was not guilty of any negligence contributing in any degree to the injury he suffered," the court said that an unqualified affirmance of the point would have constituted plain error. Supherstein v. Bertels, 178 Pa. 401, 35 Atl. 1000.

In an action to recover for the death of a person killed at a railroad crossing, plaintiff is not required to prove affirmatively, as part of her case, that there was no contributory negligence. The testimony offered by the plaintiff must not show that there was such negligence, and if it does not, and such negligence is alleged by the defendant, it is a part of the defense, and the burden of proof is on the defendant. Pennsylvania Teleph. Co. v. Varnau, 2 Monaghan (Pa.) 645, 15 Atl. 624.

In the case of a collision on water, an act done for the purpose of preventing injury, which is not shown to have caused any damage, does not impose upon the plaintiffs a necessity of proving that it did not contribute to the loss. Brown v. Gilmore, 92 Pa. 40.

Other states in which the doctrine prevails are South Carolina,⁷⁵ South Dakota,⁷⁶ Tennessee,⁷⁷ Utah,⁷⁸ Virginia,⁷⁹ Washington,⁸⁰ West Virginia.⁸¹ This doctrine of the

larger number of jurisdictions in the United States is also the law of England⁸² and of Canada.⁸³

In several states, the courts were first

⁷⁵ *Kaminitsky v. Northeastern R. Co.* 25 S. C. 53; *Joyner v. South Carolina R. Co.* 26 S. C. 49, 1 S. E. 52; *Whaley v. Bartlett*, 42 S. C. 454, 20 S. E. 745.

Contributory negligence is a matter of defense which must be proved to the satisfaction of the jury, and cannot therefore constitute a ground for a nonsuit. *Petrie v. Columbia & G. R. Co.* 29 S. C. 303, 7 S. E. 515; *Bouknight v. Charlotte, C. & A. R. Co.* 41 S. C. 415, 19 S. E. 915.

In *Carter v. Columbia & G. R. Co.* 19 S. C. 20, 45 Am. Rep. 754, it is said that it is a general rule that the burden of proof is upon the party who maintains the affirmative of the issue. In other words, he who asserts a fact necessary to sustain an action must prove it; and he who asserts one which is a bar to the action must also prove it. Generally, contributory negligence on the part of the plaintiff will bar a recovery, and it would seem, therefore, to be a matter of defense, and that it would devolve upon the defendant to prove it.

Consequently, in an action brought to recover for injuries received by a common laborer, for negligently allowing a section of a heavy iron standard to fall upon him, it is unnecessary for the plaintiff's evidence to show that the plaintiff used reasonable efforts to avoid the result of defendant's negligence. *Whaley v. Bartlett*, 42 S. C. 454, 20 S. E. 745.

⁷⁶ *Whaley v. Vidal*, — S. D. —, 132 N. W. 248.

⁷⁷ *Burke v. Citizens' Street R. Co.* 102 Tenn. 409, 52 S. W. 170.

The declaration having alleged that the defendant negligently ran its cars against the plaintiff's intestate, thereby causing his death, it was unnecessary to go further and allege that the injury was sustained by intestate without fault or negligence on his part, since contributory negligence is a matter of defense. *Illinois C. R. Co. v. Davis*, 104 Tenn. 442, 58 S. W. 296.

⁷⁸ *Holland v. Oregon Short Line R. Co.* 26 Utah, 209, 72 Pac. 940.

Where plaintiff's duties called him to the place where he was hurt, if he was negligent in staying, or getting away, the burden of showing it was held to be on the defendant. *Cunningham v. Union P. R. Co.* 4 Utah, 206, 7 Pac. 795.

⁷⁹ *Baltimore & O. R. Co. v. McKenzie*, 81 Va. 71; *Norfolk & W. R. Co. v. Burge*, 84 Va. 63, 4 S. E. 21; *Norfolk & W. R. Co. v. Gilman*, 88 Va. 242, 13 S. E. 475; *Lane Bros. v. Bott*, 104 Va. 615, 52 S. E. 258.

But the fact that the defendant was negligent in running its engine at an unlawful rate of speed, and collided with the deceased at a public crossing, does not impose upon the defendant the burden of proving that the deceased did not perform his duty, in that he failed to do a par-

ticular thing that he might have done, or did that which, under the circumstances, would not have been done by a reasonably prudent person. *Southern R. Co. v. Hansbrough*, 107 Va. 733, 60 S. E. 58. The court said it would be a most unreasonable requirement of the defendant in such a case, that it show that the injured party omitted to do what the facts and circumstances proved he might have done, and avoided the injury. This would be, in effect, to require proof of a negative, and take from the consideration of the jury the right to infer from the facts and circumstances surrounding the injury, that it was a result of the negligence of the party injured or the concurrent negligence of both parties.

⁸⁰ *Northern P. R. Co. v. O'Brien*, 1 Wash. 599, 21 Pac. 32; *Spurrier v. Front Street Cable R. Co.* 3 Wash. 659, 29 Pac. 346; *Norman v. Bellingham*, 46 Wash. 205, 89 Pac. 559.

⁸¹ *Riley v. West Virginia C. & P. R. Co.* 27 W. Va. 146; *Comer v. Consolidated Coal & Min. Co.* 34 W. Va. 533, 12 S. E. 476; *Parfitt v. Sterling Veneer & Basket Co.* — W. Va. —, 69 S. E. 985.

In an action for tort for negligence, while the burden of proof of the negligence pleaded as the cause of the injury rests on the plaintiff, the burden of proof of contributory negligence of the plaintiff rests on the defendant. *Flannegan v. Chesapeake & O. R. Co.* 40 W. Va. 436, 52 Am. St. Rep. 896, 21 S. E. 1028.

All that can be required of the plaintiff, either by law or reason, is that he shall prove he has been actually damaged, and, in addition thereto, facts and circumstances from which the jury may fairly conclude such damage was caused by the negligence of the defendant, leaving out of consideration any question of contributory negligence, the burden of proving this being on the defendant. *Johnson v. Baltimore & O. R. Co.* 25 W. Va. 571.

⁸² In *Wakelin v. London & S. W. R. Co.* 56 L. J. Q. B. N. S. 229, L. R. 12 App. Cas. 41, 55 L. T. N. S. 709, 35 Week. Rep. 141, 51 J. P. 404, a crossing accident case, Lord Watson said: "I am of opinion that the onus of proving affirmatively that there was contributory negligence on the part of the person injured rests, in the first instance, upon the defendants, and that, in the absence of evidence tending to that conclusion, the plaintiff is not bound to prove the negative in order to entitle her to a verdict in her favor."

⁸³ It is not for the plaintiff to prove affirmatively, as part of his case, that he was not guilty of contributory negligence. *Morrow v. Canadian P. R. Co.* 21 Ont. App. Rep. 149; *Shannahan v. Ryan*, 20 N. S. 142.

In an action for injuries to a servant

inclined to adopt the rule that the burden of proving absence of contributory negligence is on the plaintiff, but finally swung around to the opposite doctrine. It was first held in Delaware that the burden is upon the plaintiff to show by a preponderance of evidence that he was free from contributory negligence.⁸⁴ But this is not now the rule of that state.⁸⁵ The early deci-

sions of Idaho were against the plaintiff on this issue.⁸⁶ But in *Crawford v. Banners Ferry Lumber Co.*,⁸⁷ without referring to the earlier decisions, the rule that the burden of proving contributory negligence is on the defendant was approved. A like reversal of opinion appears in *Louisiana*,⁸⁸ *Maryland*,⁸⁹ and in *Mississippi*.⁹⁰

In an early Oregon case, it was said that

caused by a pile driver on which he was working falling upon him, it was said, in *McMillan v. Western Dredging Co.* 4 B. C. 122, that from the moment the plaintiff makes out a prima facie case that the injury was caused by the negligence of the defendant, the onus is cast on the defendant, if he sets it up, to show contributory negligence.

⁸⁴ *Huber v. Jackson & S. Co.* 1 Marv. (Del.) 374, 41 Atl. 92.

⁸⁵ *Philadelphia, B. & W. R. Co. v. Buchanan*, — Del. —, 78 Atl. 776.

In *Valente v. American Bridge Co.* — Del. —, 73 Atl. 395, reversed in 73 Atl. 400, the court said, in charging, that the plaintiff in an action to recover damages for personal injuries must satisfy the jury that the injuries resulted from the negligence of the defendant, and that at the time of the accident the plaintiff was without fault or negligence which proximately entered into and contributed to his injury; that the burden of proving negligence on the part of the defendant rested upon the plaintiff, and that the burden of proving negligence on the part of the plaintiff rested on the defendant.

In an action by an employee to recover damages received by reason of a defective elevator, the court charged the jury that where contributory negligence is relied upon as a defense, the burden of proving such negligence is upon the defendant. *Boyd v. Blumenthal*, 3 Penn. (Del.) 564, 52 Atl. 330.

⁸⁶ In *Holt v. Spokane & P. R. Co.* 4 Idaho, 443, 40 Pac. 56, an action to recover damages for the death of a child drowned in a well on private premises, it was held that, in order for the plaintiff to recover, it must affirmatively appear that the accident resulted from the negligence and carelessness of the defendant, and that the imprudence or negligence of the plaintiff did not contribute to the result.

This rule was followed in *Haner v. Northern P. R. Co.* 7 Idaho, 305, 62 Pac. 1028, in which it was held that an instruction to the jury that the burden of proof was upon the defendant to establish contributory negligence upon the part of the plaintiff was erroneous.

But where the evidence showed that a part of machinery belonging to the defendant was in a damaged condition, and that, by reason thereof, an employee in the discharge of his duty could become entangled in such machinery and lose his life, or suffer great bodily injury, through no fault of his, this was held a prima facie case, 83 L.R.A. (N.S.)

so that it was error to sustain a motion for nonsuit. *Adams v. Bunker Hill & S. Min. Co.* 12 Idaho, 637, 11 L.R.A. (N.S.) 844, 89 Pac. 624.

⁸⁷ 12 Idaho, 678, 87 Pac. 998, 10 A. & E. Ann. Cas. 1.

And in an action to recover damages for the death of a person run over by a street car, it was held that the burden of proving contributory negligence was on the defendant. *Pilmer v. Boise Traction Co.* 14 Idaho, 327, 15 L.R.A. (N.S.) 254, 125 Am. St. Rep. 161, 94 Pac. 432.

⁸⁸ In *Moore v. Shreveport*, 3 La. Ann. 645, the rule that in personal injury cases the burden of proof is on the plaintiff to show that he was free from negligence seems to be approved.

In *Buechner v. New Orleans*, 112 La. 596, 66 L.R.A. 334, 104 Am. St. Rep. 455, 30 So. 603, it was held that the burden of establishing contributory negligence is on the defendant, that contributory negligence must be pleaded by the defendant, and that, in the absence of such pleading, evidence is not admissible to show that the plaintiff was guilty of negligence. The court said that the doctrine that the defendant may prove, without alleging, contributory negligence, rests on the premise that plaintiff must allege and prove, either affirmatively or by inference, that he was without fault. From this point of view, evidence that the injury was occasioned by the concurring fault of the plaintiff is admissible in rebuttal of the evidence adduced on his behalf to show that he exercised due care and caution. "Several of our own state decisions," said the court, "enunciate this doctrine in a general way, but the clear-cut question is for the first time presented to this court by objections as to the admissibility of testimony to prove contributory negligence. Where the evidence is all in without objection, it is unnecessary to pass on the question of the burden of proof. . . . But in all cases the preponderance of the evidence as to contributory negligence must be on the side of the defendant. The law presumes, in the absence of evidence to the contrary, that plaintiff was free from negligence."

⁸⁹ In an action against a city for injuries sustained by reason of the negligence of the defendant in not preventing or removing an accumulation of ice on a footway, the court said that plaintiff must show that he used reasonable care and diligence to prevent injury. *Baltimore v. Marriott*, 9 Md. 160, 66 Am. Dec. 326.

But it was afterwards held that the burden is on the defendant. *Jones v. Unit-*

in actions for negligence, the burden of proof always rests upon the party charging it; that he must prove that the accident was caused by the wrongful act, omission, or neglect of the defendant, and that the injury of which he complained was not the result of his own negligence and the want of ordinary care and caution.⁹¹ This statements was said in a later case⁹² to have been a *lapsus linguæ*, and it was declared that all that was intended there-

by was that the plaintiff must be prepared to meet this issue when presented as a defense. The language used in the early Oregon decision, the court afterwards said, was intended to apply only to the state of facts mentioned in that case, and it was not intended to lay down any general rule that would be applicable to any state of facts that might occur in that character of cases. It was said that contributory negligence had always been understood by the court

ed R. & Electric Co. 99 Md. 64, 57 Atl. 320.

Contributory negligence being a matter of defense, the onus of proof in respect to it is properly on the defendant. State use of Bacon v. Baltimore & P. R. Co. 58 Md. 182.

The want of ordinary care on the part of the party injured is a matter of defense, and the onus of proof of the fact is upon the defendant. Baltimore & O. R. Co. v. State, 60 Md. 449; State use of Steever v. Union R. Co. 70 Md. 69, 18 Atl. 1032.

The rule that the burden of showing contributory negligence is on the defendant applies to accidents occasioned by defective country roads and ditches, as well as to railroad accidents. Prince George's County v. Burgess, 61 Md. 29, 48 Am. Rep. 38.

But in Baltimore Traction Co. v. Helms, 34 Md. 515, 36 L.R.A. 215, 36 Atl. 119, an action by a passenger to recover for injuries received just after alighting from a car, while he was attempting to cross another track, by being struck by a car coming in the opposite direction, Fowler, J., said: "By the well-settled law applicable to the class of cases to which this belongs, it is not enough for the plaintiff to prove the negligence of the defendant and the injury which followed, but he is bound also to establish by satisfactory proof, before he can recover, that he was himself free from negligence, and exercised ordinary care to avoid the consequences of the defendant's negligence. The right to recover depends upon two distinct propositions of facts, first, the negligence of the defendant, and, second, the exercise of due and ordinary care by the plaintiff; and if he failed to prove negligence on the part of the defendant, or, if it appeared from his own evidence that he was guilty of negligence directly contributing to the injury, he cannot recover." The first sentence of the above quotation was relied on in Baltimore & O. R. Co. v. Stumpf, 97 Md. 78, 4 Atl. 978, in support of the contention that the burden is on the plaintiff to establish freedom from contributory negligence, but the court said: "However that language might have been regarded, if it stood apart from any qualifying language, and if that case had been the first in this court dealing with this rule, it is impossible to suppose that the

learned and careful judge who delivered that opinion intended to overrule, without even mentioning, the various cases in which it had been held that the burden of proof in this regard is on the defendant, and it is perfectly apparent from the very next sentence in that opinion that the defendant's counsel in this case has misconceived the meaning of the language cited."

In Baltimore & O. R. Co. v. Stumpf, supra, a crossing accident case, it was urged by the defendant that it is the duty of the plaintiff to show how the accident happened as proof that it was caused by the negligence of the defendant; that, in doing this, he must necessarily negative the other possible explanations, that the theory of pure accident or the theory of the plaintiff's negligence, original or contributory, are open as possible causes; that he must show negligence of the defendant as the direct cause, and, in doing so, must negative negligence of the plaintiff; but the court adhered to the rule that the burden is on the defendant of showing contributory negligence.

⁹⁰ The burden is on the plaintiff to show that he, at least, exercised ordinary care and prudence. Vicksburg v. Hennessy, 54 Miss. 391, 28 Am. Rep. 354.

But in Hickman v. Kansas City, M. & B. R. Co. 66 Miss. 154, 5 So. 225, it was pointed out that in the Hennessy Case, 54 Miss. 391, 28 Am. Rep. 354, the plaintiff's own testimony showed that the injury of which he complained was occasioned by his own fault, and that neither the question of pleading nor the burden of proof was before the court; and it was declared that the question whether it was necessary in an action to recover for the death of a person, caused by the alleged negligence of a railroad company, to allege that the deceased was free from fault or in the exercise of reasonable care at the time of the accident, was an open one in Mississippi. It was held that such an allegation was unnecessary, the allegation that the injury was produced by the negligence of the defendant implying that there was no negligence on the part of the deceased contributing to it.

⁹¹ Walsh v. Oregon R. & Nav. Co. 10 Or. 250.

⁹² Johnston v. Oregon Short Line R. Co. 23 Or. 94, 31 Pac. 283.

to be a defense, and that it must be averred as such.⁹³ The rule is now settled that it is unnecessary for a plaintiff in a complaint in an action to recover damages for a personal injury, to allege or affirmatively show at the trial that he was free from negligence.⁹⁴

⁹³ Grant v. Baker, 12 Or. 329, 7 Pac. 318.

In Coughtry v. Willamette Street R. Co. 21 Or. 245, 27 Pac. 1031, Strahan, Ch. J., said: "The gist of this action is negligence; and, in order to enable the plaintiff to recover, he must prove by a preponderance of the evidence that the defendant violated some duty which it owed to the plaintiff; that is, that it did some act without due care which it ought not to have done, or that it omitted to do some act which it ought to have performed, and that such act or omission contributed to the injury of which the plaintiff complains; and in addition to this, that the plaintiff was guilty of no act which contributed to the injury."

The latter clause was said by the court, in Johnston v. Oregon Short Line R. Co. 23 Or. 94, 31 Pac. 283, to have probably been an oversight, unintentionally written, as the only questions presented by the record were "that the defendant had not been guilty of any negligence, and that plaintiff's evidence showed that he was guilty of negligence contributing to the injury." And for these reasons alone the case was reversed.

⁹⁴ Tucker v. Northern P. Terminal Co. 41 Or. 82, 68 Pac. 426; Grant v. Baker, 12 Or. 329, 7 Pac. 318; Dubiver v. City & Suburban R. Co. 44 Or. 227, 74 Pac. 915, 75 Pac. 693, 1 A. & E. Ann. Cas. 889; Gentzkow v. Portland R. Co. 54 Or. 114, 135 Am. St. Rep. 821, 102 Pac. 614; Jackson v. Sumpter Valley R. Co. 50 Or. 455, 93 Pac. 356; Doyle v. Southern P. Co. — Or. —, 108 Pac. 201; Scott v. Oregon R. & Nav. Co. 14 Or. 211, 13 Pac. 98; Palmer v. Portland R. & Light & P. Co. — Or. —, 108 Pac. 211.

⁹⁵ In Walker v. Herron, 22 Tex. 55, it is said in an action to recover for loss of horses in consequence of a contagious disease taken by plaintiff's horses from those of defendant, that, to entitle the plaintiff to maintain the action, he must satisfy the jury that he had used ordinary care. "Otherwise," said the court, "it cannot be certain that he was not himself the cause of his own injury. If he was negligent, it cannot be known whether the injury was wholly imputable to the defendant, or to the fault of the plaintiff himself. If both were negligent, and thereby injury ensued to the plaintiff, though it could not certainly be known whether the injury was caused at one time or another, or in what particular manner it was occasioned, the plaintiff was not entitled to maintain the action. To entitle the plaintiff to recover, he must have satisfied the jury that he had used ordinary care, or that the injury was

The Texas courts took a very strong position at first, in favor of the doctrine that the burden of proving absence of contributory negligence is on the plaintiff, but, after considerable wavering, receded therefrom,⁹⁵ adopting the rule that the burden is on the defendant.⁹⁶

wholly attributable to the defendant's fault."

In Texas & N. O. R. Co. v. Crowder, 63 Tex. 502, it was apparently held that the burden was on the plaintiff.

But, referring to the last mentioned case, it was said in Murray v. Gulf, C. & S. F. R. Co. 73 Tex. 2, 11 S. W. 125: "We do not understand the court to hold that the plaintiff must do more than to develop his own case, and, in so doing, show negligence of defendant causing the injury, and at the same time, while showing his own relations to the occurrence, relieve himself of responsibility for it. Negligence might exist on his part outside of his own necessary proof."

In International & G. N. R. Co. v. Hester, 72 Tex. 40, 11 S. W. 1041, however, it was said that, to enable the plaintiff to recover damages for injuries arising out of the culpable fault or negligence of the defendant, the burden of proof is upon the former to show that the company was negligent, and that he, at the same time, must have used ordinary care, such as a prudent person, similarly situated, would have used, to avoid the injury complained of.

And in Texas & N. O. R. Co. v. Crowder, 76 Tex. 499, 13 S. W. 381, it was said that the true rule in this class of cases is that the servant seeking to recover for an injury takes the burden upon himself of establishing negligence upon the part of the master, and due care on his own part. For former appeal, see 63 Tex. 503.

But in Murray v. Gulf, C. & S. F. R. Co. supra, it was held that after proof of plaintiff's case establishing the negligence of the defendant, and his own acts immediately connected therewith as free from fault, there may yet be such negligence on his part independent of his prima facie case, as will discharge the defendant of liability, and which, to become available as a defense, must be shown by the defendant. Such defense must be alleged and proved by the defendant.

And in Gulf, C. & S. F. R. Co. v. Shieder, 88 Tex. 152, 28 L.R.A. 538, 30 S. W. 902, affirming — Tex. Civ. App. —, 26 S. W. 509, it was said that the great weight of authority, as well as the reason of the law, is in favor of the rule which imposes the burden of proof on defendant to establish plaintiff's negligence, and the court said it might be considered as the settled law of Texas.

In Gulf, C. & S. F. R. Co. v. Shieder, supra, it is said that it cannot be denied that the opinions of the court in the earlier cases contain language showing that the learned judges delivering the same favored

So, in an action to recover for the killing of a dog by a street car, an instruction that if the plaintiff could have prevented the accident by the exercise of due care, and failed to do so, he could not recover, and that the burden of establishing his case

by a preponderance of the evidence was on the plaintiff, was held to cast too great a burden upon him, the burden not being on the plaintiff to show that he could not have prevented the injury.⁹⁷

The rule that the burden is on the defend-

the reasoning of the Massachusetts and Connecticut courts, and, from an examination of the opinions and briefs of counsel, it appears that cases from those courts were relied upon. It does not clearly appear that the question of burden of proof was before the court in the case of Walker v. Herron, supra, and in the Crowder Cases, supra. The court held that the facts were not sufficient to show defendant's negligence; and since the case must have been disposed of upon that ground, it is probable that the question of burden of proof on the issue of contributory negligence did not receive a very careful examination.

⁹⁶ Hogan v. Missouri, K. & T. R. Co. 38 Tex. 679, 32 S. W. 1035; Houston & T. C. R. Co. v. White, 23 Tex. Civ. App. 280, 56 S. W. 204; San Antonio & A. P. R. Co. v. Lindsey, 27 Tex. Civ. App. 316, 65 S. W. 568; Kroeger v. Texas & P. R. Co. 30 Tex. Civ. App. 87, 69 S. W. 809; Galveston, H. & S. A. R. Co. v. Jackson, 31 Tex. Civ. App. 342, 71 S. W. 991; Gulf, C. & S. F. R. Co. v. Hall, 34 Tex. Civ. App. 535, 80 S. W. 133; Consumer's Cotton Oil Co. v. Jonte, 36 Tex. Civ. App. 18, 80 S. W. 847; Galveston, H. & S. A. R. Co. v. Dehnisch, — Tex. Civ. App. —, 57 S. W. 64; Dallas v. Myers, — Tex. Civ. App. —, 64 S. W. 683; Bonn v. Galveston, H. & S. A. R. Co. — Tex. Civ. App. —, 82 S. W. 808; Texas & P. R. Co. v. Huber, — Tex. Civ. App. —, 95 S. W. 568; Houston & T. C. R. Co. v. Anglin, 45 Tex. Civ. App. 41, 99 S. W. 397; Industrial Lumber Co. v. Bivens, 47 Tex. Civ. App. 396, 105 S. W. 831; Missouri, K. & T. R. Co. v. Morgan, 49 Tex. Civ. App. 212, 108 S. W. 724; Boyd v. St. Louis South Western R. Co. 101 Tex. 111, 108 S. W. 813; Herring v. Galveston, H. & S. A. R. Co. — Tex. Civ. App. —, 108 S. W. 977; San Antonio Traction Co. v. Levyson, 52 Tex. Civ. App. 122, 113 S. W. 569; Galveston, H. & S. A. R. Co. v. Worth, — Tex. Civ. App. —, 116 S. W. 365; Missouri, K. & T. R. Co. v. Sharp, — Tex. Civ. App. —, 120 S. W. 263; El Paso & S. W. R. Co. v. Welter, — Tex. Civ. App. —, 125 S. W. 45; Buchanan & Gilder v. Blanchard, — Tex. Civ. App. —, 127 S. W. 153; Texas & N. O. R. Co. v. McLeod, — Tex. Civ. App. —, 131 S. W. 311; El Paso Electric R. Co. v. Shaklee, — Tex. Civ. App. —, 138 S. W. 188.

⁹⁷ Marshall v. Dallas Consol. Electric Street R. Co. — Tex. Civ. App. —, 73 S. W. 63.

The granting of a requested instruction that the burden of proof is upon the defendant company on their plea of contributory negligence, and "you are charged that the defendant should establish this fact by a preponderance of the evidence, in order to defeat a recovery by the plaintiff," given

with the addition that the charge is to be construed with the main charge that the plaintiff must show that the person for whose death the action was brought was injured without any fault or negligence on his part, in order to make out his case, was held good. Dallas Consol. Traction R. Co. v. Hurley, 10 Tex. Civ. App. 250, 31 S. W. 73.

In Gulf, C. & S. F. R. Co. v. Finley, 11 Tex. Civ. App. 64, 32 S. W. 51, a charge that the plaintiff must show that the death of a person alleged to have been negligently killed was not the result of his own contributory negligence, but that the burden of showing that his death was the result of his own contributory negligence rests upon the defendant pleading the same, was upheld, the court saying that the charge, while not as clear as it might have been, conveyed the idea that the duty rested upon the plaintiff to show that the deceased was in the exercise of due care, and that this being shown, the burden then rested upon the defendant to show contributory negligence.

Where the plaintiff is entitled to a charge that the burden of proving contributory negligence is on the defendant, if the court fails to give an instruction upon that issue, the defendant has no reason for complaint. International & G. N. R. Co. v. Tisdale, 39 Tex. Civ. App. 372, 87 S. W. 1063.

An instruction that if the jury should find, among other things, that the injured person was not guilty of contributory negligence, the verdict should be for the plaintiff, was held wrongfully to place the burden of proving absence of contributory negligence on the plaintiff. Selman v. Gulf, C. & S. F. R. Co. — Tex. Civ. App. —, 101 S. W. 1030.

A charge in effect that if the jury should find facts establishing the negligence of the defendant, and if they should further find that the plaintiff was not guilty of contributory negligence, the verdict should be for the plaintiff, was held erroneous, in placing the burden of proving such negligence on the plaintiff. Herring v. Galveston, H. & S. A. R. Co. — Tex. Civ. App. —, 108 S. W. 977.

A charge that the burden as to negligence is upon the plaintiff, and that the plaintiff is entitled to recover provided one or more of the acts of negligence are proved, etc., unless the jury should find that the injured person was guilty of contributory negligence, does not place the burden of proving freedom from such negligence on the plaintiff. International & G. N. R. Co. v. Jackson, 41 Tex. Civ. App. 51, 90 S. W. 918.

In an action to recover for injuries to a

ant has also been applied in Wisconsin,⁹⁸ but these cases have not been followed,⁹⁹ and the rule is not firmly established in that state that the burden is on the defendant.¹⁰⁰

In these jurisdictions, contributory negligence is considered to be a defense in the nature of a confession and avoidance. Standing alone, it necessarily admits that

passenger in a horse car, resulting from a collision between the car and a train at a crossing, the burden was held to be upon the defendant to establish its defense of contributory negligence on the part of the passenger, and it was held that the mere fact that the plaintiff had not shown that, while she was a passenger, she had exercised any care to discover the approaching train, would not justify the jury in finding her guilty of contributory negligence. *Gulf, C. & S. F. R. Co. v. Pendry*, 87 Tex. 553, 47 Am. St. Rep. 125, 29 S. W. 1038.

The burden is not on the person who is injured in attempting to board a moving train, of proving freedom from contributory negligence. *Missouri P. R. Co. v. Foreman*, — Tex. Civ. App. —, 46 S. W. 834.

In an action to recover for injuries received by a passenger while attempting to board a train, by the sudden starting of the cars, where the facts alleged in the petition, and the evidence adduced at the trial, did not establish prima facie, as a matter of law, negligence on the part of the plaintiff contributing to his injury, it was held that if the plaintiff attempted to board the train at a time and under circumstances which contributed to his injury, the burden of proof as to these facts rested upon the defendant. *St. John v. Gulf, C. & S. F. R. Co.* — Tex. Civ. App. —, 80 S. W. 235.

Where steam was turned through an exhaust pipe without the exercise of due care, so that a boy was scalded, it was held not error for the court in its charge to give the general rule as to the burden of proving contributory negligence resting on the defendant. *Houston & T. C. R. Co. v. Bulger*, 35 Tex. Civ. App. 478, 80 S. W. 557.

If a person killed while walking along a railroad track, by being struck by the pilot of an engine, was guilty of contributory negligence in failing to look and listen, the burden of proving that he did fail to look and listen is on the defendant. *Missouri, K. & T. R. Co. v. Wall*. — Tex. Civ. App. —, 110 S. W. 453.

⁹⁸ Plaintiff must show that his own negligence did not in any way contribute to produce the injury. *Chamberlain v. Milwaukee & M. R. Co.* 7 Wis. 425.

A charge that, if the plaintiff was injured by the carelessness or negligence of the defendant, it was not necessary for him in the first instance to negative carelessness or negligence on his own part; but the burden of proof was on the plaintiff; but that proof of injury by or through the

the plaintiff was injured by the negligence of the defendant.¹ It must be made out by showing affirmatively not only that the plaintiff was guilty of negligence, but that such negligence co-operated with the negligence of the defendant to produce the injury.² It is said to be an affirmative defense.³ Like any other defense of an affirmative character, the burden is upon the

carelessness of the defendants would make out a prima facie case,—was held erroneous. *Dressler v. Davis*, 7 Wis. 527.

⁹⁹ The above cases, in so far as they hold that a plaintiff in an action for an injury to the person must not only show negligence on the part of the defendant, but that, before he makes a prima facie case, he must also affirmatively establish by competent evidence that he was free from contributory negligence, have not been subsequently followed, and must, said court, in *Pfeiffer v. Radke*, 142 Wis. 52, 125 N. W. 934, to the extent indicated, be considered as overruled.

¹⁰⁰ *Bessex v. Chicago & N. W. R. Co.* 45 Wis. 477; *Valin v. Milwaukee & N. R. Co.* 82 Wis. 6, 33 Am. St. Rep. 17, 51 N. W. 1084; *Conrad v. Ellington*, 104 Wis. 37, 80 N. W. 456; *Blankavag v. Badger Bay & Lumber Co.* 136 Wis. 380, 117 N. W. 852; *Randall v. Northwestern Teleg. Co.* 54 Wis. 140, 41 Am. Rep. 17, 11 N. W. 419; *Holmes v. Peters*, 55 Wis. 405, 13 N. W. 219.

It is not necessary that the evidence should establish affirmatively that a person killed through the negligence of the defendant was free from contributory negligence. *Gill v. Homrighausen*, 79 Wis. 624, 48 N. W. 862.

¹ *Buechner v. New Orleans*, 112 La. 56, 66 L.R.A. 334, 104 Am. St. Rep. 455, 30 So. 603.

If plaintiff's case develops his own want of care, defendant can take advantage of it. If defendant relies upon contributory negligence not developed by the plaintiff's case, he must allege it. It is a defense in the nature of avoidance. *Murray v. Gulf, C. & S. F. R. Co.* 73 Tex. 2, 11 S. W. 125.

² *Kentucky C. R. Co. v. Thomas*, 79 Ky. 160, 42 Am. Rep. 208.

³ *O'Hara v. Central R. Co.* 183 Fed. 750; *Mississippi C. R. Co. v. Hardy*, 88 Mo. 732, 41 So. 505; *Hudson v. Wabash Western R. Co.* 101 Mo. 13, 14 S. W. 15; *Crumpley v. Hannibal & St. J. R. Co.* 111 Mo. 152, 19 S. W. 820; *Coffey v. Carthage*, 2 Mo. 616, 98 S. W. 562; *Kile v. Union Electric Light & P. Co.* 140 Mo. App. 354, 11 S. W. 89; *Reddon v. Union P. R. Co.* Utah, 344, 15 Pac. 262; *Currans v. Seattle & S. F. R. Co.* 34 Wash. 512, 76 Pac. 87; *Lind v. Uniform Stave & Package Co.* 141 Wis. 183, 120 N. W. 839; *Deisen v. Chicago, St. P. M. & O. R. Co.* 43 Minn. 454, 45 N. W. 864.

It is an affirmative issue, and cannot be found by the court. It must be determined by the jury. *Wood v. Bartholomew*, 122 N. C. 177, 29 S. E. 959.

defendant to establish it to the reasonable satisfaction of the jury.⁴ Though it may, of course, be inferred from circumstances,⁵ as will appear in a subsequent subdivision of the note.⁶ It has been held that it can-

not be considered on a motion for a nonsuit.⁷ All that the plaintiff has to do in the first instance is to make out a prima facie case of negligence against the defendant.⁸ If the defense is relied on, the onus

Plaintiff is entitled to go to the jury on the question of contributory negligence where his evidence does not show such negligence as a matter of law, since contributory negligence is an affirmative defense. *Matthews v. Missouri P. R. Co.* 26 Mo. App. 75.

Contributory negligence being a matter of defense, the burden is upon the defendant to establish it by affirmative evidence, unless it is shown by plaintiff's evidence. *West v. Bayfield Mill Co.* 144 Wis. 106, — L.R.A.(N.S.) —, 128 N. W. 992.

Since contributory negligence is a matter of defense, to be proved affirmatively by the defendant, upon whom the burden of proof rests, to justify the appellate court in disturbing the verdict, it must affirmatively appear as a matter of law from the undisputed facts, judged in the light of common knowledge and experience, of which the courts are bound to take judicial notice, that the plaintiff has not exercised such care as men of common prudence, usually exercise in positions of like exposure and danger. It must also appear affirmatively in the same conclusive way, that the negligence of the plaintiff was, in whole or in part, the proximate cause of the injury. In general, these questions are for the jury, whose verdict in favor of the plaintiff must be regarded as conclusive, unless the validity of the defense, both as to the existence of the negligence and its effect, as contributing proximately to the injury, follows necessarily from the undisputed facts. *Schneider v. Market Street R. Co.* 134 Cal. 482, 66 Pac. 734.

⁴ *Edington v. St. Louis & S. F. R. Co.* 204 Mo. 61, 102 S. W. 491.

The defense of contributory negligence is an affirmative one, and the burden is always upon the defendant to prove it. *Strickland v. F. W. Woolworth & Co.* 143 Mo. App. 528, 127 S. W. 628.

The defense of contributory negligence is an affirmative one, and the burden is always upon the defendant to establish it; and when there is evidence tending to show that the injury was caused by the negligence of the defendant, that is all the plaintiff is required to prove. The burden is then cast upon the defendant to show that it occurred without any negligence upon its part; or, if it asserts that the injury was caused by the negligence of the injured party, it must offer proof of that act. *Liston v. St. Louis Transfer R. Co.* 49 Mo. App. 231, 130 S. W. 381.

Contributory negligence is an affirmative defense the burden of proving which is upon the party pleading it; and it must be established, if at all, by a preponderance of the evidence pertinent to that issue, contained in the whole record. Ver-

trees v. Gage County, 81 Neb. 213, 115 N. W. 863.

By force of statute as well as a settled rule of decision, the plea of contributory negligence is an affirmative defense in which the burden both of allegation and proof rests upon the defendant. *Bolden v. Southern R. Co.* 123 N. C. 614, 31 S. E. 851.

⁵ Negligence on the part of the plaintiff is a mere matter of defense, to be proved affirmatively by the defendant, though it might, of course, be inferred from the circumstances proved by the plaintiff. *South-west Improvement Co. v. Andrew*, 86 Va. 272, 9 S. E. 1015.

Contributory negligence is an affirmative defense, and must be proven by the defendant, either by direct evidence or by proof of circumstances from which only the inference of contributory negligence can be drawn. *Whaley v. Vidal*, — S. D. —, 132 N. W. 248.

⁶ See *infra*, VI. b.

⁷ Contributory negligence, being an affirmative defense, cannot be considered on a motion for a nonsuit. *Powell v. Southern R. Co.* 125 N. C. 370, 34 S. E. 530.

⁸ Contributory negligence need not be disproved by the plaintiff to make out a prima facie case. *Whittier v. Chicago, M. & St. P. R. Co.* 24 Minn. 394.

The averment or proof of the absence of negligence on plaintiff's part is not an essential part of plaintiff's case. *Gram v. Northern P. R. Co.* 1 N. D. 252, 46 N. W. 972.

The plaintiff is not, in making out his case, required to show a want of concurring negligence on his part. *Knaresborough v. Belcher Silver Min. Co.* 3 Sawy. 446, Fed. Cas. No. 7,874.

Where the plaintiff makes out a case of negligence, the burden of showing contributory negligence is on the defendant. *Kings-ton Twp. v. Gibbons*, 3 Sadler (Pa.) 399, 18 W. N. C. 344, 6 Atl. 115; *Oliver v. Columbia, N. & L. R. Co.* 65 S. C. 1, 43 S. E. 307.

If the plaintiff makes out a prima facie case, the burden is on the defendants to disprove care, and thus establish negligence on the part of the plaintiff. *Pennsylvania Canal Co. v. Bentley*, 66 Pa. 30.

It is enough if the proof introduced and the circumstances attending the injury establish prima facie that the injury was occasioned by the negligence of the defendant. *Achtenhagen v. Watertown*, 18 Wis. 331, 84 Am. Dec. 769.

Where a prima facie case of negligence is made out against the defendant, the burden of proof is then cast upon the defendant to explain the cause of the accident, and to show, if that be the defense, that

is on the defendant to establish it.⁹ In the absence of all evidence as to contributory negligence, it is no fault or defect of plaintiff's case that he fails to plead or prove that the defense of contributory negligence

does not exist.¹⁰ The plaintiff need not call witnesses to declare the absence of contributory negligence, or to prove acts negating negligence, before the defendant is bound to answer;¹¹ and it has been held that it

the plaintiff was negligent, and that such negligence caused or contributed to the production of the injury. *Washington, A. & M. T. V. R. Co. v. Chapman*, 26 App. D. C. 472, 6 A. & E. Ann. Cas. 721; *Kehan v. Washington R. & Electric R. Co.* 28 App. D. C. 108.

Where the plaintiff makes out a prima facie case of negligence on the part of the defendant, and injuries resulting from such negligence, without any negligence on his part directly contributing thereto, the burden is on the defendant to show contributory negligence; and in the absence of any evidence tending to show it, it would be error to grant instructions to the effect that if the jury find that the plaintiff was guilty of contributory negligence, he cannot recover. *Anne Arundel County v. Carr*, 111 Md. 141, 73 Atl. 668.

Where there is evidence of negligence by the defendant, and the right to maintain the action is resisted upon the theory that the plaintiff has, by his own negligence, so far contributed to the production of the injury as to disentitle him to recover, there the *onus probandi* of such defense is upon the defendant. *Frech v. Philadelphia, W. & B. R. Co.* 39 Md. 574.

In *Augusta v. Hudson*, 88 Ga. 599, 15 S. E. 678, it was held that when the plaintiff in an action against the owner of a toll bridge proves his injury and the owner's negligence, as alleged, he is not bound to go further and prove his own diligence; want of care on his part being matter of defense.

Evidence that plaintiff was injured while a passenger in defendant's car, by reason of a collision with another car, makes out a prima facie case. *Green v. Pacific Lumber Co.* 130 Cal. 435, 62 Pac. 747.

If the plaintiff makes out a case of negligence against a railroad company, it then devolves upon the company to show that plaintiff's negligence contributed to the injury. *Hicks v. Pacific R. Co.* 65 Mo. 34.

⁹ *Western R. Co. v. Williamson*, 114 Ala. 131, 21 So. 827; *Gordon v. Richmond*, 83 Va. 436, 2 S. E. 727; *Interstate R. Co. v. Tyree*, 110 Va. 38, 65 S. E. 500; *Punkowski v. New Castle Leather Co.* 4 Penn. (Del.) 544, 57 Atl. 559; *Mac Feat v. Philadelphia, W. & B. R. Co.* 5 Penn. (Del.) 52, 62 Atl. 898.

The burden is on the defendant of proving acts of contributory negligence alleged in the answer. *Texas & P. R. Co. v. Mayfield*, 23 Tex. Civ. App. 415, 56 S. W. 942.

When the plaintiff's declaration is that defendant was guilty of negligence, and that negligence caused the injury in question, and the defendant's plea is that the plaintiff was himself guilty of negligence contributing to cause the injury, the bur-

den of proving the defendant's negligence and its consequence is on the plaintiff, and the burden of proving plaintiff's negligence and its contribution to the injury is on the defendant. *Schmidt v. St. Louis R. Co.* 149 Mo. 269, 73 Am. St. Rep. 380, 50 S. W. 921.

In an action for negligence when contributory negligence is relied upon as a defense, the burden of proof is upon the defendant to establish such defense unless contributory negligence is disclosed by the petition or by the evidence introduced by the plaintiff in making his case. *New Omaha Thompson-Houston Electric Light Co. v. Dent*, 68 Neb. 668, 94 N. W. 812, 103 N. W. 1091.

If the defendant pleads that the plaintiff was guilty of contributory negligence, or that the accident resulted solely from his negligence, the burden is upon the defendant to prove those defenses, and does not shift during the trial of the case. *McGahey v. Citizens' R. Co.* 88 Neb. 215, 129 N. W. 293.

The plaintiff in an action founded on the alleged negligence of another does not assume the burden of disproving any contributory negligence. Ordinarily the burden of establishing the facts upon which such negligence may be predicated is cast upon the party who makes defense on that ground. *Swanwick v. Monongahela City*, 36 Pa. Super. Ct. 628.

In an action for damages occasioned by the negligence or misconduct of the defendant, it is not necessary for the plaintiff to allege and prove the existence of due care and caution on his part, to entitle him to recover. If the defendant relies upon contributory negligence of the plaintiff to defeat the action, he must prove it, unless the fact is disclosed by the evidence of the plaintiff, or may be fairly inferred from all the circumstances. *Baltimore & O. R. Co. v. Whittington*, 30 Gratt. 805.

¹⁰ *Chicago G. W. R. Co. v. Price*, 38 C. A. 239, 97 Fed. 423; *Chicago, R. I. & G. R. Co. v. Clay*, — Tex. Civ. App. —, 119 S. W. 730.

The burden of proving contributory negligence on the part of the plaintiff rests upon the defendant unless the plaintiff, in making out his case, proves, or gives evidence tending to prove, that he was guilty of such contributory negligence; and when there is no evidence upon the subject, it is the duty of the court to assume that the plaintiff was not guilty of such contributory negligence, and so instruct the jury. *Smith v. Chicago, M. & St. P. R. Co.* 4 S. D. 71, 55 N. W. 717.

¹¹ *Cleveland & P. R. Co. v. Rowan*, 66 Pa. 393.

is not error to exclude evidence offered on behalf of the plaintiff to show freedom from contributory negligence.¹² But the unnecessary admission of evidence on behalf of the plaintiff, showing due care, will not entitle defendant to a reversal.¹³

It is sometimes said that the burden of proving contributory negligence is on the party pleading it;¹⁴ but these cases must be understood with the qualification that it is the duty of the defendant to plead it, for, as will be seen later,¹⁵ the fact that the plaintiff unnecessarily alleges that the injured party was free from contributory negligence does not cast upon him the burden of proving it.¹⁶

The rule is often stated in Pennsylvania to be that it is the duty of a plaintiff seek-

ing to recover where the gravamen of the action is the alleged negligence of the defendant, to show a case clear of contributory negligence on his own part. In other words, he must establish a *prima facie* cause of action resulting exclusively from the negligence and wrong of the defendant before the latter need answer at all.¹⁷ But this does not mean that the plaintiff has the burden of proving absence of fault on the part of the person injured, but simply means that the plaintiff must make out a *prima facie* case of negligence against the defendant; and that if his own evidence does not disclose contributory negligence, then the burden is on the defendant to establish that issue.¹⁸ This is the way the rule is stated in other jurisdictions where

¹² *Owen v. Portage Teleph. Co.* 126 Wis. 112, 105 N. W. 924. The court said that evidence in support of contributory negligence is defensive merely, and that such affirmative evidence cannot regularly be introduced until plaintiff's case is closed; nor, in the proper order of trial, should evidence in denial thereof be received until defendant rests his case. "Of course," said the court, "in practice it often happens that plaintiff and his witnesses, in narrating the transaction surrounding an injury, cannot avoid, either on direct or cross-examination, describing his conduct, and thus furnishing proof of the defense, of which defendant can avail himself; and it might then be proper to permit plaintiff to introduce explanatory evidence to avert the result of motion for nonsuit. Even in that case the evidence would be strictly out of order, and admissible only in discretion. We surely could not hold it abuse of discretion to refuse to receive evidence to rebut contributory negligence before any had appeared in support of that issue."

¹³ Although it is not technically necessary for plaintiff either to allege or prove the absence of contributory negligence in order to make out a *prima facie* case, nevertheless, the admission of testimony showing the absence of negligence on the part of the plaintiff cannot prejudice the defendant's case, and will not entitle the defendant to a reversal. *Gram v. Northern P. R. Co.* 1 N. D. 252, 46 N. W. 972.

¹⁴ *Chicago, R. I. & P. R. Co. v. Buie*, 31 Tex. Civ. App. 654, 73 S. W. 853.

The burden of proving negligence, whether on the part of the defendant or the plaintiff, rests upon the party by whom such negligence is alleged. *Elliott v. Wilmington City R. Co.* 6 Penn. (Del.) 570, 3 Atl. 1040.

Negligence and contributory negligence are matters to be proved; and the burden is on the one alleging injury from negligence to establish it, and upon the other, alleging immunity because of contributory negligence, to establish it, unless it is shown by plaintiff's testimony. *Millsaps v.* 3 L.R.A. (N.S.)

Brogdon, — Ark. —, 32 L.R.A. (N.S.) 1177, 134 S. W. 632.

In *Harrington v. Eureka Hill Min. Co.* 17 Utah, 300, 53 Pac. 737, the court said that the rule of evidence undoubtedly is that the burden of proof lies on the party who substantially asserts the affirmative of the issue; and the rule, as applied to proof of contributory negligence in Utah, is, that the defendant is required to allege contributory negligence, and to prove it by a preponderance of the evidence; and the burden is not upon the plaintiff to disprove it.

Contributory negligence is a matter of defense, and the burden of proving it rests on him who alleges it. *Eidson v. Chicago, R. I. & P. R. Co.* — Kan. —, 116 Pac. 485.

The burden of proving negligence, whether of the defendant or the plaintiff, rests upon the party by whom such negligence is alleged. *Coyle v. People's R. Co.* — Del. —, 80 Atl. 638.

¹⁵ See *infra*, VI. f, 4.

¹⁶ This would be true, no matter in which sense the term "burden of proof" were used.

¹⁷ *Waters v. Wing*, 59 Pa. 211.

It is the duty of the plaintiff seeking to recover where the gravamen of the action is the alleged negligence of the defendant, to show a case clear of contributory negligence on his own part. *Lancaster v. Kissinger*, 11 W. N. C. 151.

¹⁸ In *Pennsylvania Canal Co. v. Bentley*, 66 Pa. 30, it is said that the *Waters Case*, *supra*, note 17, is not authority for the proposition that it is incumbent on the plaintiff to show affirmatively freedom from contributory negligence.

In the light of subsequent explanations, all that was probably meant by the decision in the *Waters Case*, *supra*, is, that if the plaintiff's own evidence discloses facts which prove negligence, it is not necessary that the defendant should prove it. This is intimated in *Hays v. Gallagher*, 72 Pa. 136.

It was never intended to mean by the expression that the plaintiff must present a case clear of contributory negligence, that the plaintiff, after first proving affirmative-

the burden is considered to be upon the defendant; that is, if the plaintiff in any case of personal injury can show negligence on the part of the defendant, without at the same time disclosing the inherent weakness of his own case by reason of contributory negligence, then such contributory negligence is a matter of defense (in confession and avoidance), affirmative in its nature,

ly that defendant's negligence caused the injury, must also prove negatively that he himself was not guilty of any negligence that contributed to the result. *Bradwell v. Pittsburgh & W. E. Pass. R. Co.* 139 Pa. 404, 20 Atl. 1046.

The plaintiff is not required to disprove contributory negligence, but only to make out a case clear of it. *Raulston v. Philadelphia Traction Co.* 13 Pa. Super. 412.

Where the plaintiff is not required to disprove contributory negligence, but only to make out a case clear of it, unless his negligence appears affirmatively, he is entitled to go to the jury on the general presumption against him; and likewise, this is the case where the evidence is conflicting upon that question. *Ely v. Pittsburgh, C. C. & St. L. R. Co.* 158 Pa. 233, 27 Atl. 970.

The plaintiff is not called upon to disprove negligence on his part by negative testimony in the first instance. If he establishes a case against the defendant without disclosing negligence on his own part, he is entitled to go to the jury. *Phillips v. Duquesne Traction Co.* 8 Pa. Super. Ct. 210, 42 W. N. C. 528; *Pennsylvania R. Co. v. Weber*, 76 Pa. 157, 18 Am. Rep. 407; *Fitzpatrick v. Union Traction Co.* 206 Pa. 335, 55 Atl. 1050.

A plaintiff in an action for personal injuries caused by the negligence of the defendant is bound to show a case clear of contributory negligence; that is, his own evidence must not contain anything which would show contributory negligence on his part; but he is not bound to prove the negative, and show that he was not guilty of contributory negligence. *Lewin v. Pauli*, 19 Pa. Super. Ct. 447.

Where the gravamen of the action is the alleged negligence of the defendant, it is incumbent on the plaintiff to show a case clear of contributory negligence. It is enough that he makes out a case against the defendant without showing that his own want of due care under the circumstances also contributed to the injury. The burden of proving want of ordinary care rests upon the party alleging it; and ordinarily the burden of showing contributory negligence is on the defendant. *Kingston Twp. v. Gibbons*, 3 Sadler (Pa.) 399, 18 W. N. C. 334, 6 Atl. 115.

In an action to recover damages from a city for personal injuries sustained at an uncovered gutter crossing, it was held that the use of the word "burden" in an instruction that "a burden rests upon the

and the burden is upon the defendant to establish the defense by a preponderance of testimony, as in all other affirmative defenses of like nature.¹⁹ In a decision of the Illinois appellate court it is said that while the burden is on the plaintiff to show due care, yet if the facts and circumstances attending the injury show negligence in the defendant, and do not show any contributory

plaintiff, even though the city was negligent. . . . He must make out a case of negligence on the part of the city, free from contributory negligence on his part,"—though perhaps not happily chosen, was not inaccurate. *Heiss v. Lancaster*, 203 Pa. 260, 52 Atl. 201. The court said that the plaintiff was bound to make out a case clear of contributory negligence, and that this may be properly described as a burden, though a negative one.

¹⁹ *Texas & St. L. R. Co. v. Orr*, 46 Ark. 182.

If the plaintiff can prove his case without disclosing his own contributory negligence, such negligence is purely a matter of defense, to be established by the defendant. *Mares v. Northern P. R. Co.* 3 Dak. 336, 21 N. W. 5. To the same effect, *Stepp v. Chicago, R. I. & P. R. Co.* 85 Mo. 229; *Lincoln v. Walker*, 18 Neb. 244, 20 N. W. 113; *Union Stock Yards Co. v. Conoyer*, 41 Neb. 617, 59 N. W. 950, rehearing of case in 38 Neb. 488, 41 Am. St. Rep. 738, 56 N. W. 1081; *Omaha Street R. Co. v. Martin*, 48 Neb. 65, 66 N. W. 1007; *Baltimore & O. R. Co. v. Whitacre*, 35 Ohio St. 627; *Central Texas & N. W. R. Co. v. Bush*, 12 Tex. Civ. App. 291, 34 S. W. 133; *McNamara v. Clintonville*, 62 Wis. 207, 51 Am. Rep. 722, 22 N. W. 472; *Gibson v. Wyandotte*, 20 Kan. 156.

In *Stewart v. Nashville*, 96 Tenn. 50, 33 S. W. 613, the statement of Judge Dillon in the second volume of his work on *Municipal Corporations*, § 1026, "That where the plaintiff's contributory fault does not appear from his own testimony, the burden of proof to establish it rests upon the defendant. In other words, the plaintiff is not bound to prove affirmatively that he was himself free from negligence. When the plaintiff's fault is relied upon as a defense to defeat a recovery, the burden to establish such defense rests with the defendant,"—was regarded as an accurate statement of the correct rule.

It is often stated that the plaintiff must show that the injury was caused by the negligence of the defendant, without any fault or negligence on his part. It would be more correct, it is thought, to say that the plaintiff must show that the injury of which he complains was produced by the negligent acts of the defendant, under such circumstances as did not develop any negligence on his part contributing to his injury. *Texas & P. R. Co. v. Murphy*, 46 Tex. 356, 26 Am. Rep. 272.

tory negligence in the plaintiff, a prima facie case will be regarded as made out.²⁰ This is a view hardly to be expected from an Illinois court, where the burden of proving absence of contributory negligence has always been held to be on the plaintiff. The court cites as authority a case in the supreme court of Illinois.²¹ There is some language in the opinion of the supreme court, taken from a Michigan case, which might point to the view that it entertained the opinion stated by the appellate court; but this does not seem probable, and if it were, indeed, the fact, it would be *obiter*, as the court, at the conclusion of its opinion, states: "We entertain no doubt that, under the repeated decisions of this court, as well as upon other authorities, there was competent evidence in this case tending to support the allegation of due care on the part of the deceased, and that the court very properly refused to take it from the jury." To hold that all it is necessary

for the plaintiff to do in the first instance is to make out a case free from contributory negligence is to take from the defendant all the practical value of the rule placing the burden upon the plaintiff.

But to return to jurisdictions holding the burden to be upon the defendant. It is there held that the plaintiff, being able to prove the injury and loss by reason of the negligence of defendant, without disclosing any contributory negligence on the part of the deceased, may leave the whole question of contributory negligence to the pleadings and proofs of the defendant, and need not enter upon the negative task of disproving any possible negligence on the part of the deceased; and where there are neither pleadings nor proofs as to the contributory negligence of the deceased, the question is not presented for further consideration.²² If the defendant relies upon the defense, he must become the actor, and introduce his evidence to sustain it.²³ He has the bur-

²⁰ North Chicago Street R. Co. v. Conway, 76 Ill. App. 621.

²¹ Illinois C. R. Co. v. Nowicki, 148 Ill. 29, 35 N. E. 358, cited in the opinion of the court as 146 Ill. 29.

²² Oberfelder v. Doran, 26 Neb. 118, 18 Am. St. Rep. 771, 41 N. W. 1094.

Under the rule that if the plaintiff makes out a case without disclosing contributory negligence, the burden of proving such negligence is upon the defendant, it was held that in an action to recover for injuries received by falling through a trapdoor in plaintiff's own home, left open by plumbers, a verdict should not have been directed for the defendants because of plaintiff's contributory negligence in walking into the opening, where there was no evidence to show that she had any knowledge that there was any probability that the defendants would leave the trapdoor open. *L. W. Pomerene Co. v. White*, 70 Neb. 171, 97 N. W. 232, 98 N. W. 1040.

In *Owens v. Richmond & D. R. Co.* 88 N. C. 502, after a review of many of the leading cases, it is said: "While we do not undertake to reconcile the divergent decisions in reference to the burden of proof, we think a clear deduction from them, and, as well, supported by sound reasoning, is that if, in disclosing the facts which constitute the defendant's negligence, it does not appear whether the plaintiff exhibited the necessary watchfulness and care to avoid the consequent harm or injury, it will be assumed there was no such want of it on his part; and if the plaintiff in any legal sense were the cause, or the concurring cause, of his own injury, the duty of so showing in self-exculpation devolves upon the defendant."

A charge in effect that it rests with defendant to excuse its negligent act by showing contributory negligence by a preponderance of the evidence, unless plaintiff's evi-

dence tends to show in some degree that he was negligent, and that if there is anything in the evidence offered by plaintiff tending to show that he was negligent, he cannot recover unless the whole evidence, taken together, shows that he was not negligent, was upheld. *Houston & T. C. R. Co. v. O'Neal*, — Tex. Civ. App. —, 45 S. W. 921.

Unless the petition alleges a state of facts such as can be said, as a matter of law, to show contributory negligence, or there is such a state of uncontroverted evidence on that issue as will justify the court in deciding, as a matter of law, that contributory negligence has been shown, the issue should be submitted to the jury, and the burden of proof should be on the defendant,—the party asserting such contributory negligence. *Missouri, K. & T. R. Co. v. Lyons*, — Tex. Civ. App. —, 53 S. W. 96.

In *Wakelin v. London & S. W. R. Co.* L. R. 12 App. Cas. 41, Lord Fitzgerald said: "But if the plaintiff can establish his case in proof without disclosing any matters amounting to contributory negligence, or from which it can be reasonably inferred, then the defendant is left to give such evidence as he can to sustain that issue."

²³ If the plaintiff can make out his case without disclosing contributory negligence, and the defendant relies on such negligence, either to defeat or mitigate recovery, as to this defense, he becomes the actor, and his duty is to make it good by evidence, occupying with regard to it the same attitude as does the party who relies on a release or payment when sued on a contract. *Stewart v. Nashville*, 96 Tenn. 50, 33 S. W. 613.

Where it appeared that the person for whose death the action was brought was driving towards a railroad crossing, and

den of the issue; that is, he must establish it by a preponderance of the evidence.²⁴

that at the first point where looking would do any good, she looked towards a coming train, raised up in the buggy, and pulled back the lines, trying to stop her horse, which became unmanageable, and plunged across the track directly in the path of the approaching train, which struck and killed her, it was held that the plaintiff, in developing his case, had introduced no evidence tending to show that the deceased was not in the exercise of due care at the time of the accident, and that therefore the burden of proof on the question of contributory negligence was on the defendant. *Gulf, C. & S. F. R. Co. v. Shieder*, — Tex. Civ. App. —, 26 S. W. 509.

Where plaintiff's injuries resulted from slipping on a board on a derrick, and the evidence negatived any contributory negligence, it was held that the burden of proving such negligence was on the defendant. *Producers' Oil Co. v. Barnes*, — Tex. Civ. App. —, 120 S. W. 1023.

²⁴ *Washington & G. R. Co. v. Harmon* (*Washington & G. R. Co. v. Tobriner*) 147 U. S. 571, 37 L. ed. 284, 13 Sup. Ct. Rep. 557; *Clark v. Tulare Lake Dredging Co.* 14 Cal. App. 414, 112 Pac. 564; *Hitritz v. Brown*, 180 Fed. 1019; *The Nellie*, 130 Fed. 215; *Louth v. Thompson*, 1 Penn. (Del.) 149, 39 Atl. 1100; *Wilkins v. Wilmington*, 2 Marv. (Del.) 132, 42 Atl. 418; *Jones v. Baltimore & O. R. Co.* 21 D. C. 346; *Hoff v. Japanese-American Fertilizer & Fisheries Co.* 48 Wash. 581, 94 Pac. 109; *Gauthier v. Wood & Iverson*, 49 Wash. 8, 94 Pac. 654; *Tecker v. Seattle, R. & S. R. Co.* 60 Wash. 570, 111 Pac. 791; *Heckle v. Southern P. Co.* 123 Cal. 441, 56 Pac. 56.

If, after the plaintiff has rested, the case is in such condition as to require submission to the jury, and to put the defendant upon proof of his defense of contributory negligence, then the burden rests on him to prove it by a preponderance of the evidence. *Beatrice v. Forbes*, 74 Neb. 125, 103 N. W. 1069.

In Nebraska the rule has always prevailed that if the plaintiff can prove the allegations of his petition, showing his injury and the negligence of the defendant as the proximate cause producing it, then the defendant, in order to defeat a recovery on the ground of contributory negligence of the plaintiff, must establish such negligence by a preponderance of the evidence produced on the trial. *Ibid.*

In an action against the proprietors of a skating rink for damages for personal injuries, the defendants, after a general denial, having pleaded that the plaintiff's injuries, if any, were caused by her own negligence, it was held not error for the court to instruct the jury that the plaintiff having made out a prima facie case, "the burden is on the defendants to establish by a preponderance of the testimony that the plaintiff is guilty of any negligence which caused her injuries." 33 L.R.A. (N.S.)

If the evidence is in equipoise, the defendant fails.²⁵ But requiring the defendant

Stewart v. Mynatt, 135 Ga. 637, 70 S. E. 325.

But the defendant is not required to "satisfy" the jury that a person killed at a railroad crossing was not in the exercise of due care. *Cleveland, C. C. & St. L. R. Co. v. Sivey*, 6 Ohio C. C. N. S. 221, 27 Ohio C. C. 248.

Under an instruction that the burden of proof of contributory negligence rests upon the defendant, and "unless it proves the same to your satisfaction by a preponderance of evidence," etc., it was held that it would have been better to have left out the words "to your satisfaction," since they might tend to confuse the jury, and lead it to believe that something more than weight of evidence or preponderance of probability was required. *Hutson v. Southern California R. Co.* 150 Cal. 701, 89 Pac. 1093.

The defendant is not obliged to establish contributory negligence by clear and convincing evidence, but, like any other defense, by a preponderance of the evidence. It is only where a nonsuit is asked for that the proof of contributory negligence must be clear and convincing. *Sanders v. Aiken Mfg. Co.* 71 S. C. 58, 50 S. E. 679.

²⁵ *Kansas City, L. & S. R. Co. v. Philibert*, 25 Kan. 586.

In an action to recover damages for personal injuries the plaintiff cannot be required to show that he was not guilty of contributory negligence, such burden being cast upon the defendant; and if the evidence is equally balanced, the fact of contributory negligence is not established, and upon that issue the verdict should be for the plaintiff. *Hainlin v. Budge*, 56 Fla. 342, 47 So. 825.

In *Georgia P. R. Co. v. Davis*, 92 Ala. 300, 25 Am. St. Rep. 47, 9 So. 252, the plaintiff was injured by reason of the fact that a rock projected too far in one of the cuts of the defendant's right of way. A charge requested by the defendant, that the burden of proof was on the plaintiff to establish by a preponderance of evidence that he was at his post of duty when he was injured, and that if the testimony was equally balanced, or preponderated in favor of defendant, the verdict must be for the defendant, was held to misplace the burden of proof as to contributory negligence, which was on the defendant.

A requested instruction that the burden was on the plaintiff to show that he was free from contributory negligence, and that if the evidence balanced, and the jury could not say that it preponderated either way, to find for the defendant, was held properly refused. *Houston & T. C. R. Co. v. O'Neal*, — Tex. Civ. App. —, 45 S. W. 921.

An instruction that the burden of proof rests upon the plaintiff to establish his case by a preponderance of evidence, and that if, on any issue material to plaintiff's recovery, the evidence is of equal weight,

to show not only that the plaintiff was guilty of contributory negligence, but that the contributory negligence was the proximate cause of the injury, places a heavier burden upon him than the law requires.²⁶

In cases of injuries to servants, as in other negligence actions, the burden of showing contributory negligence is on the defendant, or master.²⁷

It has been said in Texas, that, under certain circumstances, where the case goes to the jury, the propriety of giving an instruction as to the burden of proof is questionable.²⁸

b. May be sustained by circumstantial evidence.

In making out a case of contributory negligence on the part of the plaintiff, the defendant has the same right to rely upon circumstantial evidence and upon legitimate deductions from the facts directly proven that he would in establishing any other ultimate fact; and the jury have a

the issue must be determined in favor of the defendant, was held erroneous and misleading, in that it was calculated to lead the jury to believe that the burden of proof upon the question of contributory negligence was on the plaintiff. *Lambert v. Western U. Teleg. Co.* — Tex. Civ. App. —, 45 S. W. 1034.

It would be incorrect to instruct the jury that if the weight of evidence is in favor of the defendant, or if it is equally balanced, then the plaintiff cannot recover where there is an affirmative plea of contributory negligence which is an issuable fact, since this language is open to the construction that the plaintiff could recover only by having every point or issue found in his favor by the greater weight of evidence; in other words, if the evidence on the issue of contributory negligence was equally balanced, plaintiff could not recover. *Hickey v. Rio Grande Western R. Co.* 29 Utah, 392, 82 Pac. 29.

²⁶ *Hillsboro Cotton Mills v. King*, 50 Tex. Civ. App. 50, 109 S. W. 484.

²⁷ The same rule applies in cases in which servants sue, as governs suits by other persons; and in neither is the plaintiff required to anticipate and negative a charge of contributory negligence if facts which he states do not suggest that he may have been guilty of it. *Galveston Rope & Twine Co. v. Burkett*, 2 Tex. Civ. App. 308, 21 S. W. 958.

²⁸ In *Texas & P. R. Co. v. Geiger*, 79 Tex. 13, 15 S. W. 214, it is said that in cases of this kind, where all the facts bringing about or attending an accident, tending to show negligence on the part of both parties, are in evidence, the propriety of giving any charge upon the burden of proof may be questioned.

In an action to recover for a dog killed 33 L.R.A. (N.S.)

right to find such deductions as facts when the facts directly proven tend, according to the evidence of common observation and experience, to prove the deduction.²⁹ So, in an action to recover for the death of an employee of a railroad company, run over and killed while walking on the defendant's track, where the evidence showed that no one saw the deceased on the track, nor saw him at the time he was struck, nor knew the situation he was in, but tended to show that the deceased could have seen and heard the engine which struck him if he had looked or listened, it was held that no such contributory negligence was shown as would defeat the action.³⁰

And where a person for whose death the action was brought was killed at a railroad crossing, and no one saw him until the instant he was struck, and there was no evidence whether he looked or listened for an approaching train, it was held that the burden of proving fault on the part of the deceased being on the defendant, it was not sustained.³¹ In a Pennsylvania

by a street car, where the plaintiff's testimony was that he stopped to avoid an approaching car, and the dog started to cross the track, whereupon the plaintiff called him back, and the dog stopped on the track, 75 yards from the approaching car, which was not sounding a gong, and that the motorman was looking ahead in the direction of the dog; and the motorman's testimony was that he first saw the dog on the track under an electric light for a second or two, when the dog left the track and disappeared in the darkness, and then returned, and attempted to cross within a few feet of the car, when it was too late to prevent the accident,—it was held that the court should not have instructed as to the burden of proof on the issue of contributory negligence, but should have left it for the jury to determine whether, under all the facts, the plaintiff was guilty of negligence in permitting his dog to be exposed to the danger of being run over by the car. *Marshall v. Dallas Consol. Electric Street R. Co.* — Tex. Civ. App. —, 73 S. W. 63.

²⁹ *Allis v. Columbian University*, 8 Mackey, 276.

Direct evidence is not required to prove that a person run over and killed failed to look and listen as he approached a railroad crossing, since the surrounding circumstances are often as convincing proof as direct evidence. *Stepp v. Chicago, R. I. & P. R. Co.* 85 Mo. 229.

For other cases holding that defense may be inferred from circumstances, see *supra*, VI., note 5.

³⁰ *Schlereth v. Missouri P. R. Co.* 96 Mo. 509, 10 S. W. 66.

³¹ *Crumpley v. Hannibal & St. J. R. Co.* 111 Mo. 152, 19 S. W. 820.

case it appeared that the plaintiff, late at night, was found beneath a highway bridge over a railroad, badly injured. He said he had fallen from the bridge, and it appeared that the railing had been torn or worn away at the time of the accident. There was no other evidence as to the manner in which the accident occurred, and the plaintiff, although present at the trial, was not called as a witness, either for himself or for the defendant. He was held entitled to recover.³²

It would seem that the mere happening of the accident would not be sufficient evidence of absence of care on the part of the person injured; and in a Virginia case, it has been held that it cannot be inferred, as a matter of law, that a person killed at a railroad crossing drove upon the track without stopping, and that he did not listen.³³

c. Burden in criminal cases.

It has been held that in criminal prosecutions for negligently causing the death of a person, the rule, as in the case of civil prosecutions, is that the burden of establishing freedom from contributory negligence is on the plaintiff.³⁴ So in a case in which there was an indictment for causing the death of a person at a railroad crossing, the court said that it is now the established law not only of this court, but of the highest courts of this country, that in order to entitle a recovery in this class of action, whether in form civil or crimi-

nal, it must affirmatively be shown that the defendants were guilty of negligence, that their negligence was the cause of the accident, and that the injured party was in the exercise of due care and diligence at the time of the injury; or, at least, that the want of such care on his part in no way contributed to produce it. It is not enough to show that the defendants were negligent.³⁵

d. Misleading instructions where burden is on the defendant.

In jurisdictions where the burden of proving contributory negligence is on the defendant, care is required of the courts in instructing the jury to avoid leaving the impression that this burden can be discharged only by evidence offered on behalf of the defendant. An instruction in such form that the jury may imply therefrom that the defense of contributory negligence on the part of the plaintiff can be established only by testimony of the defendant's witnesses is, of course, materially erroneous.³⁶ A charge that the burden of proof is upon the defendant to establish contributory negligence is not rendered incorrect by reason of the fact that contributory negligence may be established by plaintiff's own evidence.³⁷ And a charge that the defendant must establish the defense of contributory negligence by a preponderance of evidence has been held not misleading.³⁸ That it might mislead the jury has been held

³² Hays v. Gallagher, 72 Pa. 136.

In such a case, it was said, if the plaintiff makes out a prima facie case without his own testimony, he is not bound to offer himself as a witness. Ibid.

³³ Southern R. Co. v. Bryant, 95 Va. 212, 28 S. E. 183.

³⁴ State v. Maine C. R. Co. 76 Me. 357, 49 Am. Rep. 622.

³⁵ State v. Maine C. R. Co. 77 Me. 538, 1 Atl. 673.

³⁶ Pittsburgh, C. C. & St. L. R. Co. v. Reed, 36 Ind. App. 67, 75 N. E. 50.

³⁷ Hardt v. Chicago, M. & St. P. R. Co. 130 Wis. 512, 110 N. W. 429.

In Cleveland, C. C. & St. L. R. Co. v. Schneider, 40 Ind. App. 38, 80 N. E. 985, an instruction that "it is the law at this time that where a person is injured on a railroad crossing of a public highway, the presumption is that the plaintiff used the degree of care and caution that the law requires. This presumption, however, may be removed by the evidence, and the burden is upon the defendant to remove that presumption,"—was held not open to the objection that it necessarily gave the jury the impression that evidence of contributory negligence could come only from the defendant's witnesses.

Where the court informed the jury that

the burden was upon the plaintiff of proving negligence on the part of the defendant, and the burden was upon the defendant of proving contributory negligence on the part of the plaintiff, it was held that, as reasonable men, they must have understood from the entire charge that they were to decide those issues from all the evidence bearing upon them; and that in so doing, they were not limited to the consideration of the evidence offered by either side. Harrington v. Eureka Hill Min. Co. 17 Utah, 300, 53 Pac. 737.

³⁸ In Indianapolis & St. L. R. Co. v. Horst, 93 U. S. 291, 23 L. ed. 898, a charge that the burden of proving contributory negligence rests on the defendant, and that it will not avail the defendant unless it has been established by a preponderance of evidence, was upheld. It was declared that the trial court did not by this say that if such negligence were established by the plaintiff's evidence, the defendant could have no benefit from it, nor that the fact could only be made effectual by a preponderance of evidence coming exclusively from the party on whom rested the burden of proof.

An instruction that contributory negligence is an affirmative defense, to be established by the defendant, and such contribu-

not to make it erroneous.³⁹ It has been said that while such a charge is not a model of clearness, it contains no erroneous principle of law.⁴⁰ Other charges that have been upheld are that the burden is on the defendant to establish contributory negli-

tory negligence must be shown by the defendant, by a preponderance of the evidence, to have been the proximate cause of the plaintiff's injury, is not open to the objection that it indicated that contributory negligence could be established only by the defendant's own testimony. *Wistrom v. Redlick Bros.* 6 Cal. App. 671, 92 Pac. 1048.

An instruction that the burden is cast upon the defendant to prove by a fair preponderance of the evidence is not erroneous, on the theory that in effect it tells the jury that the defendant must prove the fact by its own evidence. *New Castle Bridge Co. v. Doty*, 168 Ind. 259, 79 N. E. 485. The court said that the party having the burden of proof in any issue in any case, and who must secure a preponderance on penalty of failure, has a right to have the jury explore the entire field of the evidence, and make available in his behalf not only the evidence produced by the party himself, but also all the evidence in his favor that may have been produced by the opposite party, directly or otherwise, either express or that may arise by implication from facts proved by the opponent, or from facts and circumstances otherwise appearing in the case. In other words, in determining any issue or fact in a judicial proceeding, all items of evidence for or against, whether brought into the case by this party or that, should be properly credited by the jury, and when so credited, if the whole evidence preponderates in weight in favor of the party having the burden of proof, he wins; but if it appears evenly balanced, or preponderates against him, he loses; and any instruction that conveys a different conception will be either erroneous or misleading.

An instruction that the burden of proving contributory negligence rests on the defendant, and that unless the defendant has proven such contributory negligence by a preponderance of evidence, he cannot recover, does not deprive the defendant of the benefit of the plaintiff's own evidence upon that subject. *Maguire v. St. Louis Transit Co.* 103 Mo. App. 459, 78 S. W. 838.

A charge in effect that if plaintiff has established by a preponderance of evidence the defendant's negligence, the burden shifts to the defendant, and it must show by a preponderance of the evidence that the alleged accident, if any, was caused by reason of the contributory negligence of the injured person, was held not open to the objection that it required the defendant to show by a preponderance of evidence, that the accident was not caused by its negligence, and also, that it was caused by the contribu-

gence, and that this must be determined, the same as all other questions at issue, from the facts and circumstances proven in the case; ⁴¹ that the burden of proving that the plaintiff contributed to the injury is upon the defendant, where the court also

tory negligence of the injured person, the meaning of the instruction being that the burden was on the defendant to show that the accident was caused by contributory negligence instead of defendant's own negligence. *El Paso Electric R. Co. v. Kitt*, — Tex. Civ. App. —, 99 S. W. 587.

³⁹ A charge that the burden of proving contributory negligence is on the defendant, and must be proved by defendant by a preponderance of the evidence, is not open to the objection that it might mislead the jury into believing that such negligence must be established by the evidence of defendant's witnesses only. *Prior v. Eggert*, 39 Wash. 481, 81 Pac. 929.

And in *Gulf, C. & S. F. R. Co. v. Elmore*, 35 Tex. Civ. App. 56, 79 S. W. 891, it was held that the jury would not infer that they could look only to the evidence of the defendant upon the issue of contributory negligence under a charge that where the defendant relies upon such negligence to defeat the action, it devolves upon him to establish the same by a preponderance of the evidence.

⁴⁰ And in upholding an instruction that the burden of proof is on the plaintiff to establish his right to a recovery by a preponderance of evidence, except that the burden of proof of establishing contributory negligence on the part of the plaintiff, and that, by a preponderance of evidence, is upon the defendant, the court said that contributory negligence is an affirmative defense; that it may appear from the evidence of the plaintiff; and that if so, such proof is all-sufficient. If it does not, the burden rests upon the defendant to establish its existence by a preponderance of his evidence. While the instruction was not to be commended as a model of clearness in expression, no error in principle of law was declared. *Chicago, R. I. & P. R. Co. v. Lee*, 66 Kan. 806, 72 Pac. 266.

⁴¹ In an action to recover for injuries received by reason of a defective sidewalk, an instruction that if the jury should find that plaintiff would be entitled to recover but for her own contributory negligence, the burden would be on the defendant to establish such negligence, and this must be determined the same as all other questions at issue from the facts and circumstances proven in the case,—was held not open to the objection that it left the impression that contributory negligence must be established by the defendant's evidence alone, and that the defendant could not avail itself of evidence offered by the plaintiff, showing such negligence. *Topeka v. Myers*, 10 Kan. App. 576, 63 Pac. 273.

makes it plain that the defendant is entitled to any evidence offered by the plaintiff tending to sustain this issue.⁴²

On the other hand, an instruction that "the burden of proof is upon the defendants to prove by a preponderance of the evidence that the plaintiff was careless and negligent, and that his carelessness and negligence directly contributed to the injury which he received, and if the evidence upon such matters, if any there be, is even-

ly balanced, or if it preponderates in favor of the plaintiff, then the defendant, failing to prove by a preponderance of the evidence that the plaintiff was guilty of contributory negligence, cannot defeat the claim of the plaintiff upon that ground,"—was held to be erroneous because it would leave upon the jury the impression that unless the defendants by their evidence established contributory negligence, the defense as to such negligence would fail.⁴³

⁴² The mere fact that the court instructs the jury that the burden of proving that the plaintiff proximately contributed to the injury is upon the defendant does not prevent the defendant from having the benefit of the evidence of the plaintiff on the question of contributory negligence, and is therefore not erroneous, especially where, in response to a request of the defendant, the court instructs the jury that although, upon the question of contributory negligence, the burden of proof is upon the defendant, yet that contributory negligence may be inferred from the evidence of the plaintiff. *Winamac v. Stout*, 165 Ind. 365, 75 N. E. 158, 651.

A charge that the burden is on the defendant is not likely to mislead the jury into believing that such proof must come from the defendant alone, where the court also instructed the jury that the plaintiff could not recover if it appeared by a preponderance of the evidence that the person for whose death the action was brought failed to use ordinary care in going upon the track upon which he was killed, or if they believed from the evidence that he failed to exercise ordinary care at the time he was killed. *Gulf, C. & S. F. R. Co. v. Howard*, 96 Tex. 585, 75 S. W. 805.

Even where the plaintiff's testimony raises an issue of contributory negligence, a charge that the burden of proof upon that issue is upon the defendant is not misleading, where the jury is expressly told that, in determining that issue, they are to look to all of the testimony, by whomsoever introduced. *General Electric Co. v. Murray*, 32 Tex. Civ. App. 226, 74 S. W. 50.

The defendant has no ground for complaining of an instruction that the burden of proof is on the defendant to show contributory negligence of the plaintiff by a preponderance of evidence, where they are told in the same connection that the plaintiff's own evidence may be considered in determining this question, and if contributory negligence appears from it, or from it and other evidence, it will be sufficient to establish such negligence. *Waterman v. Chicago & A. R. Co.* 82 Wis. 613, 52 N. W. 247, 1136.

An instruction that the burden of proving contributory negligence is on the defendant is not erroneous because of the fact that it fails to contain the qualification, "unless such contributory negligence appears from plaintiff's testimony." *Little Rock R. & Electric Co. v. Doyle*, 79 Ark. 378, 96 S. W. 353.

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An instruction that the defendant has the burden of proving contributory negligence, and is required to establish it by a preponderance of the evidence, is not open to the objection that it is calculated to make the jury believe that, in passing upon the truth of the plea, it can look only to the evidence produced by the defendant (*Missouri, K. & T. R. Co. v. Wilhoit*, 87 C. C. A. 401, 160 Fed. 440), where the court also charges that the defendant may establish such negligence either by the evidence it introduces, or by the plaintiff's evidence.

In *St. Louis, I. M. & S. R. Co. v. Wiggam*, — Ark. —, 135 S. W. 889, it was held not erroneous to tell the jury that the burden of showing contributory negligence is upon the defendant, where the defendant pleaded that defense, and introduced evidence to establish it, and where it was evident that the court meant that the jury should consider all the evidence in the case upon that subject.

⁴³ *Missouri, K. & T. R. Co. v. Merrill*, 61 Kan. 671, 60 Pac. 819.

And an instruction that the burden of proof is on the defendant to prove that the plaintiff was negligent, and that his negligence directly contributed to the injury complained of, and it must establish such facts by a preponderance of the evidence, was held to be misleading, in that it tended to leave out of consideration any negligent act of the plaintiff appearing in the evidence introduced to support his side of the case, and in that it tended to minimize the effect of any negligent conduct of his which might have defeated the action had the defendant introduced no evidence. *Burns v. Metropolitan Street R. Co.* 66 Kan. 188, 71 Pac. 244.

In an action to recover for injuries to a passenger by the sudden starting of a train while she was attempting to alight, an instruction that the jury were not entitled to presume that the plaintiff was guilty of negligence, but that if that fact is relied upon by the defendant, it must be proved by the defendant by preponderating testimony, and if the jury should find that their minds were in a state of equipoise as to whether she was guilty of negligence or not, they could not find that she was guilty of negligence, was held erroneous, as depriving the defendant of the benefit of evidence of the plaintiff showing contributory negligence. *Philadelphia, B. & W. R. Co. v. Hand*, 101 Md. 233, 61 Atl. 285. The court said that it can make no possible difference whether that negligence is proved by the plaintiff

And under a statute placing the burden of proving contributory negligence on the defendant, an instruction that "if it affirmatively appears from the evidence that the plaintiff did not use due care to discover the approach of cars upon defendant's track before he attempted to cross the

same, he cannot recover for any alleged negligence of the defendant," was improperly modified by adding the words: "But the burden of proving contributory negligence on the part of the plaintiff rests on the defendant." 44

All that it is necessary for the court to

or the defendant. It is its existence, and not the party by whom its existence is proved, that is material. It is the thing itself that defeats the action, and not the mere accident that it happened to be proved by the one or the other of the opposite parties. It is just as complete a bar to the action when its presence is revealed in the evidence introduced by the plaintiff as it is when disclosed in the testimony adduced by the defendant. Inasmuch, then, as the negligence of the plaintiff directly contributing to the happening of the injury sustained bars a recovery, it would seem *a priori* that it is absolutely of no consequence by which party to the suit that negligence is proved.

An instruction placing the burden of proof of contributory negligence on the defendant, without qualification, is erroneous, since it is susceptible of misleading the jury into believing that the burden can be discharged only by evidence offered by the defendant. *Suderman v. Kriger*, 50 Tex. Civ. App. 29, 109 S. W. 373.

An instruction that if the plaintiff shall have established his case by a preponderance of the evidence, then the burden rests upon the defendant to establish by a preponderance of evidence the defense of contributory negligence pleaded by it, followed by a refusal to instruct that the burden of proof is on the defendant to show contributory negligence unless it appears from the plaintiff's own evidence, was held erroneous, on the ground that the jury might have understood it to mean that the defendant, in order to prevail upon the issue, must have adduced some evidence, or, in other words, that there must have been some evidence coming from its own side, tending to show contributory negligence, although the plaintiff's evidence may have made that fact apparent. *Texas & P. R. Co. v. Reed*, 88 Tex. 39, 31 S. W. 1058.

If the plaintiff's evidence makes it necessary that he explain the conduct of the deceased, in order to exculpate him from the charge of contributory negligence, it is improper for the court to charge the jury that the burden of proof is upon the defendant to establish the defense of contributory negligence, because such a charge is calculated to lead the jury to believe that they shall consider alone the evidence offered by the defendant on that issue. *Gulf, C. & S. F. R. Co. v. Hill*, 95 Tex. 629, 69 S. W. 136.

44 *Indianapolis Street R. Co. v. Taylor*, 58 Ind. 274, 63 N. E. 456.

An instruction that the burden of proof is upon the defendants to show that the plaintiff was guilty of contributory negligence, and that the defendants must prove that fact by a fair preponderance of the evidence, 3 L.R.A. (N.S.)

dence, was held erroneous, for the reason that it was equivalent to telling the jury that it must not charge the plaintiff with fault unless the defendants have proved the fact by a preponderance of the evidence, thus depriving the defendants of the benefit of any evidence that may have been disclosed by the plaintiff and his witnesses. *Indianapolis v. Cauley*, 164 Ind. 304, 73 N. E. 691.

But an instruction that it is not necessary for the plaintiff to allege and prove the want of contributory negligence, but that the burden of establishing such contributory negligence on the part of the plaintiff rests on the defendant, and that the same must be established by the defendant by a fair preponderance of evidence, was held (one judge dissenting) not so phrased as to lead the jury to conclude that the defendant could not avail itself of all the facts and circumstances which appeared as part of the plaintiff's case. *M. S. Huey Co. v. Johnston*, 164 Ind. 489, 73 N. E. 996. While there was a division in the court as to whether the giving of the instruction was reversible error, all of the judges agreed that its form was not to be commended.

And in an action to recover for injuries received by the upsetting of a wagon by a horse frightened by a banner displayed on a car driven at high speed, an instruction that the burden was upon the defendant to prove contributory negligence, if any, was held harmless error, where there was no evidence offered on behalf of the plaintiff from which contributory negligence could be inferred. *Indianapolis & G. Rapid Transit Co. v. Haines*, 33 Ind. App. 63, 69 N. E. 187.

An instruction that the burden of proof is upon the defendant to show negligence on the part of the deceased which contributed to his death, although erroneous, because leaving the impression upon the jury that the defense of contributory negligence must fail unless established by the defendant's testimony, was held not prejudicial in an action brought to recover for the death of a track repairer, run over by an engine, where there was no sharp conflict between the evidence of the plaintiff and the defendant as to plaintiff's negligence, and no person saw the deceased immediately before the accident, and neither the evidence of plaintiff nor that offered by defendant told the jury what his conduct was. *Missouri P. R. Co. v. Bentley*, 78 Kan. 221, 93 Pac. 150, 90 Pac. 800.

An instruction which states that the burden of proof is upon the defendant to establish the defense of contributory negligence is not open to the objection that the jury might have been misled, when none of

do after instructing the jury that the burden is on the defendant is to make it clear that the defendant is entitled to the favorable testimony of the plaintiff on this issue, and that, in determining whether the issue has been established, they may look to all of the evidence in the case.⁴⁵ So, an

instruction that contributory negligence is a defense, and if it is shown by the evidence to exist, the plaintiff cannot recover; that the burden of proving contributory negligence is on the defendant, but it may arise in the whole evidence,—was held correct.⁴⁶ The better practice in such cases

the evidence of plaintiff tends to prove contributory negligence. *St. Louis & S. F. R. Co. v. Johnson*, 74 Kan. 83, 86 Pac. 156.

⁴⁵ An instruction that the defendant in his answer having alleged contributory negligence, the burden of proof is upon him to establish this allegation by a preponderance of the evidence, is bad in ignoring the fact that contributory negligence may be established by the plaintiff's own evidence; and the court should have added this qualification: "Unless you find from the plaintiff's own testimony that he was guilty of contributory negligence." *Durrell v. Johnson*, 31 Neb. 796, 48 N. W. 890.

In holding that a charge that the burden was on the defendant to prove the material allegations of its defense of contributory negligence was misleading and erroneous where the testimony of the plaintiff tended to show contributory negligence, since it was calculated to cause the jury to believe that, in considering the question of such negligence, they were not to consider evidence submitted by the plaintiff, it was declared that the court should have charged that the burden was on the defendant, but that the jury might take into consideration all the evidence bearing on that question, whether offered by the plaintiff or the defendant. *Gulf, C. & S. F. R. Co. v. Howard*, — Tex. Civ. App. —, 75 S. W. 803.

Under a statute placing the burden of proving contributory negligence on the defendant, an instruction that the burden of proving that a boy killed at a railroad crossing was guilty of contributory negligence was upon the defendant, and that the defendant must prove that fact by a fair preponderance of the evidence, although erroneous, was held cured by another instruction to the effect that such negligence need not be established by the evidence introduced by the defendant, but that it would be sufficient if it was made to appear by a preponderance of the evidence given in the case, whether by the defendant or by the plaintiff. *Cleveland, C. C. & St. L. R. Co. v. Miles*, 162 Ind. 646, 70 N. E. 985.

An instruction that while the burden of proof is on the defendant to show that a person killed at a railroad crossing was guilty of contributory negligence, it is not required to be done by its own evidence; if the evidence introduced by the plaintiff shows that the deceased might, by the use of ordinary care and diligence, have avoided the injury, then in such case he was guilty of contributory negligence which prevents a recovery,—was held proper. *Pittsburgh, C. C. & St. L. R. Co. v. Rogers*, — Ind. App. —, 87 N. E. 28.

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In cases in which plaintiff's evidence raises an issue of contributory negligence, an instruction that the burden of proving such negligence is on the defendant is misleading, unless the jury are also instructed that, in determining such issue, they may look to all the evidence in the case, whether introduced by the plaintiff or defendant. *Gulf, C. & S. F. R. Co. v. Melville*, — Tex. Civ. App. —, 87 S. W. 863.

⁴⁶ *Sellersburg v. Ford*, 39 Ind. App. 94, 79 N. E. 220.

And in an action to recover for injuries received by driving a wagon into a dangerous hole in a street, instructions that the burden of proof is upon the city on this point to satisfy the jury that the plaintiff was not exercising due care for his own safety, and that such conduct on his part contributed towards the happening of the accident, and that the burden of proof is on the defendant to establish, by a fair preponderance of all the evidence in the case, that the plaintiff was guilty of negligence contributing to his injury, were upheld. *Indianapolis v. Mullally*, 38 Ind. App. 125, 77 N. E. 1132.

And in an action to recover for the death of a woman who, while driving with her husband, was killed at a railroad crossing, an instruction that whether there was negligence on the part of the deceased that contributed towards producing her death, or negligence on the part of the husband, which was imputable to her, and which contributed toward her death, were matters as to which the burden of proof was upon the defendant, but they were matters to be determined upon the whole evidence, was held proper. *New York, C. & St. L. R. Co. v. Robbins*, 38 Ind. App. 172, 76 N. E. 804.

In an action by a passenger to recover for injuries received while alighting from a car, an instruction that if the whole evidence in the case showed contributory negligence on the plaintiff's part, whether such evidence were produced either by plaintiff or defendant, or by both combined, then such defense was made out, was held not open to the objection that it effectually deprived defendant of the defense of contributory negligence, on the theory that unless all plaintiff's as well as defendant's evidence proved it, the defendant had failed to come up to the measure of the amount of proof prescribed by the court. The court declared that the fair meaning of the instruction was that, if the evidence as a whole, whether produced by the plaintiff or defendant, established such contributory negligence, it would be a defense to the ac-

would be to guard against such a possible construction, and so frame the charge upon that issue as to permit the jury to take into consideration all the testimony admitted, both of the plaintiff and of the defendant, in determining whether or not contributory negligence has been shown.⁴⁷

It has been suggested that an instruction that the burden is upon the defendant unless contributory negligence appears from the evidence of the plaintiff himself is misleading, in that it might incline the jury to the belief that evidence of contributory negligence given for the plaintiff other than by himself might not be taken into consideration.⁴⁸

tion and prevent a recovery. *Indianapolis Traction & Terminal Co. v. Miller*, 43 Ind. App. 717, 88 N. E. 526.

But an instruction that the defendant must prove the defense of contributory negligence by a fair preponderance of all of the evidence, and an instruction that if the plaintiff had proved the material allegations of his complaint by a fair preponderance of all the evidence he would be entitled to recover, "unless you further find that the defendant has proved by a fair preponderance of all the evidence that the plaintiff's negligence contributed to his injury," were held erroneous, because implying that the contributory negligence must be shown by the defendant's negligence alone. *Indianapolis & E. R. Co. v. Barnes*, 35 Ind. App. 485, 74 N. E. 583. The court said that this was by no means equivalent to a charge that if the material allegations of the complaint be proved by a fair preponderance of the evidence, the plaintiff will be entitled to recover unless contributory negligence has been proved by a fair preponderance of the evidence.

⁴⁷ *Suderman v. Kriger*, 50 Tex. Civ. App. 29, 109 S. W. 373.

⁴⁸ In *Colorado Midland R. Co. v. Robins*, 30 Colo. 449, 71 Pac. 371, an instruction that, to entitle the defendant to a verdict upon the ground that the plaintiff's own negligent act contributed to his injury, it was incumbent upon the defendant affirmatively to establish that fact from the evidence, unless such negligence appeared from the testimony of plaintiff himself, was not held erroneous on the theory that if such contributory negligence appeared from the testimony of any of plaintiff's witnesses, or from any evidence produced by him, he was not entitled to recover, where the only evidence in the case from which contributory negligence could be inferred was that of the plaintiff himself.

An instruction that the burden of proof of contributory negligence is on the defendant unless it appear from "plaintiff's own testimony" was held not open to the objection that it referred only to the testimony given by plaintiff himself. It was held to refer to all the testimony produced on plaintiff's behalf. *New Omaha Thomson*-
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e. Effect of appearance of contributory negligence in plaintiff's own evidence.

1. In general.

The rule as to proving contributory negligence is often stated to be that the burden is on the defendant unless the plaintiff's own evidence establishes it.⁴⁹ It is said that the reason of the rule ceases, and it can have no application, when the plaintiff, by his own evidence, shows negligence on his part, and such negligence aided or contributed to the injury received. By such evidence he establishes a defense to his own action as much as if the same facts were

Houston Electric Light Co. v. Baldwin, 62 Neb. 180, 87 N. W. 27.

But a modification of an instruction that the burden is upon the defendant to prove contributory negligence by the preponderance of evidence "unless the jury believe from the evidence of the plaintiff himself that he was guilty of contributory negligence" was held misleading, since the jury might consider that only the evidence of the plaintiff himself was to be considered on this point, and not the evidence of all the witnesses introduced by the plaintiff. *Washington, A. & Mt. V. R. Co. v. Vaughan*, 111 Va. 785, 69 S. E. 1035.

⁴⁹ *Pullman Palace Car Co. v. Adams*, 120 Ala. 581, 45 L.R.A. 767, 74 Am. St. Rep. 53, 24 So. 921; *Nash v. Southern R. Co.* 136 Ala. 177, 96 Am. St. Rep. 19, 33 So. 932; *Hot Springs Street R. Co. v. Hildreth*, 72 Ark. 572, 82 S. W. 245; *Mammoth Vein Coal Co. v. Johnson*, — Ark. —, 127 S. W. 971; *Robinson v. Western P. R. Co.* 48 Cal. 409; *Cahill v. Stone*, 153 Cal. 571, 19 L.R.A. (N.S.) 1094, 96 Pac. 84; *Kenny v. Kennedy*, 9 Cal. App. 350, 99 Pac. 384; *Denver v. Dunsmore*, 7 Colo. 340, 3 Pac. 705; *Brady v. Fresno City R. Co.* 9 Cal. App. 417, 99 Pac. 400; *Queen Anne's R. Co. v. Reed*, 5 Penn. (Del.) 226, 119 Am. St. Rep. 301, 59 Atl. 860; *Baltimore & P. R. Co. v. Webster*, 6 App. D. C. 182; *Baker v. Kansas City, Ft. S. & M. R. Co.* 147 Mo. 140, 48 S. W. 838; *Ford v. Umatilla County*, 15 Or. 313, 10 Pac. 33; *Baker v. Westmoreland & C. Natural Gas Co.* 157 Pa. 593, 27 Atl. 789; *Teleph. Co. v. Varnan*, 5 Lanc. 401, affirming 5 Lanc. 97, cited in *Brightley's Digest*, 1877-1889, p. 4424; *Dallas & W. R. Co. v. Spicker*, 61 Tex. 427, 48 Am. Rep. 297; *Born v. Texas & P. R. Co.* — Tex. Civ. App. —, 39 S. W. 170; *Ft. Worth & R. G. R. Co. v. Morris*, 45 Tex. Civ. App. 596, 101 S. W. 1038; *Smith v. Ogden & N. W. R. Co.* 33 Utah, 129, 93 Pac. 185; *Kimball v. Friend*, 95 Va. 125, 27 S. E. 901; *Thoresen v. La-Crosse City R. Co.* 94 Wis. 129, 68 N. W. 548; *Corbett v. Oregon Short Line R. Co.* 25 Utah, 449, 71 Pac. 1065.

In *Savannah & M. R. Co. v. Shearer*, 59 Ala. 672, an action to recover damages for killing a person on the tracks of a railroad, it was said that contributory negligence,

proved by the defendant.⁵⁰ The rule does not mean that the burden must be discharged by defendant's own evidence.⁵¹ Very generally the proof offered to show the negligence of the defendant discloses the conduct of all the parties concerned, and

enables the court or the jury to determine which of the parties was, or were, really in fault.⁵² Contributory negligence may in fact be established by plaintiff's evidence alone.⁵³

Under the Indiana statute making the

when it exists, must generally spring out of the facts and circumstances which prove the injury. Hence, the court cannot say, as a matter of law, that the onus of proving it rests on the defendant. It evidently rests on the defendant unless the testimony which seeks to fix the blame on the defendant also inculcates the plaintiff.

Negligence on the part of the plaintiff is a mere matter of defense, to be proved affirmatively by the defendant, and which must be established by a preponderance of evidence, but which may be inferred from the circumstances proved by the plaintiff. *Sanders v. Reister*, 1 Dak. 151, 46 N. W. 680.

An instruction that the burden of proof is on the defendant to prove by a preponderance of the evidence that the plaintiff was guilty of contributory negligence, unless the evidence of the plaintiff or his own witnesses shows him guilty of contributory negligence, does not leave to the jury the question of determining where the burden rests. *Texas & N. O. R. Co. v. Conway*, 44 Tex. Civ. App. 68, 98 S. W. 1070.

⁵⁰ *Little Rock & Ft. S. R. Co. v. Cavenesse*, 48 Ark. 106, 2 S. W. 505; to the same effect, *Hill v. New Haven*, 37 Vt. 501, 88 Am. Dec. 613.

The reason that recovery is defeated when evidence of contributory negligence is offered by the plaintiff is that it negatives the affirmative fact which plaintiff must establish to make out his case, that the sole proximate cause of the alleged injury is the culpable negligence of the defendant. *Hocum v. Weitherick*, 22 Minn. 152.

⁵¹ Where the burden of proving contributory negligence is on the defendant, it does not follow that it must be established by the defendant's evidence alone. *Grand Trunk Western R. Co. v. Reynolds*, — Ind. App. —, 90 N. E. 94.

The rule that the defendant has the burden of proof does not mean that the defendant must introduce evidence of contributory negligence, even though such negligence is shown by the evidence of the plaintiff. *St. Louis, I. M. & S. R. Co. v. Sparks*, 81 Ark. 187, 99 S. W. 73.

The rule that the burden of proving contributory negligence is on the defendant does not require the defendant to establish this with his own testimony, but he may rely on that offered by the plaintiff. *O'Hara v. Central R. Co.* 183 Fed. 739.

If the plaintiff's evidence shows contributory negligence, it is unnecessary for defendant to introduce evidence to establish his plea of contributory negligence. *Bridges v. Jackson Electric R. Light & P. Co.* 86 Miss. 584, 38 So. 788, 4 A. & E. Ann. Cas. 662.

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The rule that contributory negligence is a defense, which must be affirmatively proved by the defendant, upon whom the burden rests to show such negligence, and that it must be established by a preponderance of testimony, was held not to prevent the defendant from taking advantage of the proof of contributory negligence when introduced by the plaintiff, it being said that in such case the defendant is relieved from the necessity of introducing additional evidence on the point. *St. Louis, I. M. & S. R. Co. v. Baker*, 67 Ark. 531, 55 S. W. 941.

The burden of proof is upon the defendant to establish contributory negligence, but in reaching the conclusion upon such issue, the jury may take into consideration all the evidence of the case. *Galveston, H. & S. A. R. Co. v. Worcester*, 45 Tex. Civ. App. 501, 100 S. W. 990.

When the case goes to the jury, the proof of contributory negligence must be submitted to them not alone upon the proof offered by the defendant in that behalf, but they must consider also any proof coming from the plaintiff or his witnesses, tending to establish that defense. *Beatrice v. Forbes*, 74 Neb. 125, 103 N. W. 1069.

⁵² *Frech v. Philadelphia, W. & B. R. Co.* 39 Md. 574.

In State use of *Bacon v. Baltimore & P. R. Co.* 58 Md. 482, it is said that it is not unfrequently the case that material defensive facts are disclosed by the testimony adduced on the part of the plaintiff, and where such is the case, and the evidence thus adduced by the plaintiff clearly establishes the fact of contributory negligence on the part of the party killed or injured, there is really nothing to be left to the jury to find. For while it is perfectly clear that where the plaintiff adduces evidence which, if uncontradicted, would justify and sustain a verdict, no amount of contradictory evidence, however strong, will justify the court in withdrawing the case from the jury; yet if it be proved as part of the plaintiff's case, or if it be otherwise proved, and not controverted or denied by the plaintiff, that the party injured or killed was clearly guilty of negligence in the occurrence of the accident, and that such accident would not have occurred but for the negligence of the party injured, directly contributing thereto, in such case the defendant is entitled to have the jury instructed that their verdict must be for the defendant.

⁵³ *Horn v. Baltimore & O. R. Co.* 4 C. C. A. 346, 6 U. S. App. 381, 54 Fed. 301; *Chicago G. W. R. Co. v. Price*, 38 C. C. A. 239, 97 Fed. 423; *Hemingway v. Illinois C. R. Co.* 52 C. C. A. 477, 114 Fed. 843; *Philadelphia, B. & W. R. Co. v. Buchanan*, — Del. —, 78 Atl. 776; *Jones v. Baltimore &*

burden of proving contributory negligence rest upon the defendant, it is held that the defendant may nevertheless be entitled to the advantage of the plaintiff's evidence upon this question.⁵⁴

The rule that when plaintiff's own case discloses contributory negligence, he cannot recover, is not peculiar to negligence actions, says the court in a Pennsylvania case; if, in an action on a book account,

the plaintiff's own evidence shows that it has been paid, he must fail. But that does not establish that the onus of proving affirmatively that the account has not been paid is on him.⁵⁵ It is, indeed, immaterial whether the burden of proving contributory negligence is on the defendant, or on the plaintiff, if the plaintiff's evidence in fact establishes it.⁵⁶ Where it affirmatively appears from plaintiff's evidence that the

O. R. Co. 21 D. C. 346; *Allis v. Columbian University*, 8 Mackey, 276; *Gleason v. Susan*, 110 Md. 137, 72 Atl. 1034; *McGahay v. Citizens' R. Co.* — Neb. —, 129 N. W. 293; *Morrow v. Canadian P. R. Co.* 21 Ont. App. Rep. 149.

The defendant may rest upon proof of contributory negligence in plaintiff's own testimony as securely as if he had proved it himself. *Cleveland & P. R. Co. v. Rowan*, 36 Pa. 393.

If the plaintiff's own evidence shows contributory negligence, he cannot recover. *Grant v. Baker*, 12 Or. 329, 7 Pac. 318; *Gerity v. Haley*, 29 W. Va. 98, 11 S. E. 101.

Although plaintiff is not required to show want of negligence, yet if negligence on his part is disclosed by his case, it will defeat his right of recovery. *Pereira v. Star Sand Co.* 51 Or. 477, 94 Pac. 835; *Scott v. Oregon R. & Nav. Co.* 14 Or. 211, 13 Pac. 98; *Pennsylvania R. Co. v. Weber*, 76 Pa. 157, 18 Am. Rep. 407; *Winchester v. Carroll*, 99 Va. 727, 10 S. E. 37.

Although contributory negligence is a matter of defense, yet if it appears by plaintiff's case that he is chargeable with such negligence, it is sufficient to defeat his right of recovery. *Brennan v. Front Street Cable R. Co.* 8 Wash. 363, 36 Pac. 272.

If it should appear from plaintiff's own proof, offered for the purpose of establishing defendant's negligence, that he was also guilty of negligence without which the injury complained of would not have occurred, such proof will defeat a recovery. *Tucker v. Northern P. Terminal Co.* 41 Or. 82, 68 Pac. 26; *Gentzkow v. Portland R. Co.* 54 Or. 14, 135 Am. St. Rep. 821, 102 Pac. 614.

Where negligence is the ground of the action, it rests upon the plaintiff to trace the fault for his injury to the defendant; and for this purpose he must show the circumstances under which the injury occurred; and from these circumstances, so proven by the plaintiff, it appears that the fault was mutual, or in other words, that contributory negligence is fairly imputable to him, he has, by proving the circumstances disproved his right to recover, and on the plaintiff's evidence alone the jury should find for the defendant. *Butcher v. West Virginia & P. R. Co.* 37 W. Va. 180, 8 L.R.A. 519, 16 S. E. 457; *Overby v. Chesapeake & O. R. Co.* 37 W. Va. 524, 16 S. E. 813.

⁵⁴ *Howard v. Indianapolis Street R. Co.* 9 Ind. App. 514, 64 N. E. 890; *Indianapolis E. R. Co. v. Barnes*, 35 Ind. App. 485, 3 L.R.A. (N.S.)

74 N. E. 583; *Roberts v. Terre Haute Electric Co.* 37 Ind. App. 664, 76 N. E. 323, 895; *Evansville v. Christy*, 29 Ind. App. 44, 63 N. E. 867; *Van Winkle v. New York, C. & St. L. R. Co.* 34 Ind. App. 476, 73 N. E. 157.

⁵⁵ *Pennsylvania Canal Co. v. Bentley*, 66 Pa. 30.

⁵⁶ If plaintiff's declaration or evidence establishes his own contributory negligence, it bars his recovery, no matter where the burden rests. *Jackson v. Sumpter Valley R. Co.* 50 Or. 455, 93 Pac. 356.

In *Ryan v. Louisville, N. O. & T. R. Co.* 44 La. Ann. 806, 11 So. 30, it was said that courts and text writers are divided as to where lies the burden of proof on the question of contributory negligence, but that all agree that if the plaintiff's own evidence establishes or strongly suggests his own contributory negligence, that bars recovery, no matter where the burden rests, unless he shall remove or explain away the adverse presumption thus created.

Practically all the courts agree that the fact of contributory negligence is fatal to the plaintiff's case (unless changed by statute), no matter how it appears, whether by affirmative evidence on the part of the defendant or by inference from the evidence on the part of the plaintiff. It is quite immaterial who proves the fact, so long as it is proved. *Shearm. & Redf. Neg.* § 106.

Although the defense of contributory negligence must be established by the defendant, it is not important whether the evidence showing it comes from the plaintiff or from the defendant. *Schutt v. Adair*, 99 Minn. 7, 108 N. W. 811. To the same effect, *Robostelli v. New York, N. H. & H. R. Co.* 33 Fed. 800; *Pittsburgh, C. C. & St. L. R. Co. v. Reed*, 36 Ind. App. 67, 75 N. E. 50; *Indianapolis v. Mullally*, 38 Ind. App. 125, 77 N. E. 1132; *Stephens v. American Car & Foundry Co.* 39 Ind. App. 414, 78 N. E. 335; *Lind v. Uniform Stave & Package Co.* 140 Wis. 183, 120 N. W. 839.

A charge that, in determining whether the defendant has "discharged" the burden of proving contributory negligence, the jury may look to all the facts and circumstances introduced in the evidence of either the plaintiff or defendant, or both, is not, in legal effect, materially different from one in which the jury is directed to examine the evidence to determine "whether the plaintiff had been guilty of contributory negligence." *Beaumont Traction Co. v. Happ*, — Tex. Civ. App. —, 122 S. W. 610.

An instruction that the burden of proving

want of due prudence on his part was the proximate cause of the injury complained

of, he cannot recover,⁵⁷ but may be nonsuited.⁵⁸ In North and South Carolina,

contributory negligence was upon the railroad company, but that if the negligence of a person killed at a crossing affirmatively appeared from the evidence, it was immaterial upon whom the burden of proof rested; since in that event the plaintiff could not recover, was held not open to objection by the railroad company. *Evansville & T. H. R. Co. v. Berndt*, 172 Ind. 697, 88 N. E. 612.

The inference of this co-operating agency may be drawn from the plaintiff's proof of the defendant's neglect or misconduct, as well as by substantive and independent testimony produced by the defendant. *Owens v. Richmond & D. R. Co.* 88 N. C. 502.

⁵⁷ *Dufour v. Central P. R. Co.* 67 Cal. 319, 7 Pac. 769.

If it appears from the testimony of the plaintiff that the person sustaining the injury was guilty of negligence without which the injury complained of would not have happened, such proof, as a matter of law, will defeat a recovery. *Carroll v. Grande Ronde Electric Co.* 47 Or. 424, 6 L.R.A. (N.S.) 290, 84 Pac. 389.

While contributory negligence on the part of the plaintiff is a matter of defense, still, if the plaintiff's evidence shows that the injury was a proximate result of contributory negligence, a prima facie case has not been made out, and notwithstanding the negligence of the defendant, a demurrer to the evidence should be sustained. *Union P. R. Co. v. Adams*, 33 Kan. 427, 6 Pac. 529.

⁵⁸ *Denver v. Dunsmore*, 7 Colo. 328, 3 Pac. 705; *Atchison, T. & S. F. R. Co. v. Baker*, — Ind. Terr. —, 104 S. W. 1182.

If contributory negligence appears from the plaintiff's evidence, that is ground for dismissing his complaint. *Wilson v. Northern P. R. Co.* 26 Minn. 278, 37 Am. Rep. 410, 3 N. W. 333.

The rule that the burden of proving contributory negligence is on the defendant does not preclude a court from directing judgment by way of nonsuit whenever the evidence of the plaintiff conclusively establishes a defense which would lead the court to grant a new trial in case of a verdict in favor of plaintiff upon like evidence. *McQuilken v. Central P. R. Co.* 50 Cal. 7; *Nagle v. California Southern R. Co.* 88 Cal. 86, 25 Pac. 1106.

While the burden of proving contributory negligence is on the defendant, yet, when it appears from the undisputed facts shown by the plaintiff's own evidence that the person killed had not exercised such care as men of prudence usually exercise in positions of like exposure to danger, the question was held to be one of law for the court, it being declared that such negligence will prevent recovery. *McGraw v. Friend & T. Lumber Co.* 120 Cal. 574, 52 Pac. 1004.

If it appears without any conflict of evidence, from plaintiff's own case, or from the cross-examination of his witnesses, that he was guilty of negligence proximately contributing to produce the injury, it 33 L.R.A. (N.S.)

will be the duty of the court to take the case from the jury by declaring, as a matter of law, that the plaintiff cannot recover. *Buesching v. St. Louis Gaslight Co.* 73 Mo. 219, 39 Am. Rep. 503.

In an action for a nuisance in causing to be made and continued, without sufficient cover or railing, an open area adjacent to a building of the defendant, into which the plaintiff, in the nighttime, fell and was injured, it was held that if want of care appeared by the plaintiff's own case, he must be nonsuited; for then he supplied his adversary with what is usually a matter of defense. *Durant v. Palmer*, 29 N. J. L. 544.

It is not the rule that if there is evidence of any negligence on the part of the defendant, that whatever may be the evidence of contributory negligence on the part of the plaintiff, the issue must go to the jury, but if contributory negligence appears from the plaintiff's testimony, he may be nonsuited. *Smith v. Richmond & D. R. Co.* 99 N. C. 241, 5 S. E. 896.

In an action against a municipal corporation for injuries caused by an obstruction of a street or sidewalk, when the evidence of the plaintiff proves such facts and circumstances as shows that he was guilty of contributory negligence in causing the injuries, the court should, on the motion of the defendant, exclude all the plaintiff's evidence from the jury. *Hesser v. Grafton*, 33 W. Va. 548, 11 S. E. 211.

In *New Jersey Exp. Co. v. Nichols*, 33 N. J. L. 434, 97 Am. Dec. 722, it is said that it is undoubtedly the law of New Jersey that if it appears by the plaintiff's evidence that his own negligence contributed to the injury, it is the duty of the court to nonsuit.

Another rule from which there seems to be no dissent except in North Carolina is, that if the evidence in plaintiff's behalf establishes beyond question that his own omission to use ordinary care contributed immediately to or itself caused the injury, the court should on motion direct a verdict or grant a nonsuit. *Cummings v. Helena & L. Smelting & Reduction Co.* 26 Mont. 434, 68 Pac. 852.

In *Hoyt v. Hudson*, 41 Wis. 105, 22 Am. Rep. 714, it was held that the burden is on the defendant, where plaintiff's evidence does not tend to show contributory negligence; that if it tends to show contributory negligence, the case is for the jury; but that if it conclusively shows such negligence, a nonsuit should be granted.

In *Prideaux v. Mineral Point*, 43 Wis. 513, 28 Am. Rep. 558, it is said that the *Hoyt* Case, supra, does not put the *onus probandi* in all cases upon the defendant. "The rule intended in that case," said the court, "is, that a plaintiff giving evidence of the negligence of the defendant and the resulting injury to himself, without showing any contributory negligence, is bound

however, the rule as to nonsuit is otherwise.⁵⁹

It is also said that where the plaintiff's testimony discloses contributory negligence, a demurrer to the evidence should be sustained.⁶⁰ It has been held that it is competent for the trial court, on a motion for peremptory instruction, and also for the appellate court, in reviewing the judgment, to determine whether the defense of contributory negligence has been so fully developed by the plaintiff's own evidence as to justify sustaining the motion.⁶¹ But it has been declared that the court can only

direct a nonsuit on the ground that plaintiff's evidence shows contributory negligence, where the plaintiff's evidence discloses facts which in law amount to such evidence. It is not enough that plaintiff's evidence may simply tend to establish such a state of facts.⁶²

The negligence must, it is said, be established by a preponderance of the evidence, without regard to its source.⁶³ The testimony must be such as to raise an unavoidable inference of negligence on the part of the person injured.⁶⁴ Even when contributory negligence is sufficiently dis-

to go no further; he is not required to negate his own negligence. If, however, the plaintiff, in proving the injury, shows contributory negligence sufficient to defeat the action, he disproves his own case of injury by the negligence of the defendant alone. If the plaintiff's evidence leave no doubt of the fact, his contributory negligence is taken, as matter of law, to warrant a nonsuit. If the plaintiff's evidence leave the fact in doubt, the evidence of contributory negligence on both sides should go to the jury. This was perhaps not as clearly stated as it might have been, and has been criticized. Properly understood, the rule in Hoyt v. Hudson makes no confusion between the burden of proof and the weight of evidence; is sounder in principle and easier in practice than the rule in Massachusetts, which, with great deference for that court, this court then declined to adopt. The true ground of reversal in Hoyt v. Hudson was, that the charge of the court submitted the question of contributory negligence to the jury when there was no evidence of contributory negligence on either side; giving the jury to believe that the plaintiff was bound affirmatively to disprove it."

⁵⁹ In North Carolina, contributory negligence, being in the nature of a plea in confession and avoidance, is held to be an affirmative defense which cannot be considered on a motion for a nonsuit. Cogdell v. Wilmington & W. R. Co. 124 N. C. 302, 32 S. E. 706; Powell v. Southern R. Co. 125 N. C. 370, 34 S. E. 530.

It is true that contributory negligence may be shown by the evidence of the plaintiff, but whether the weight of that evidence is sufficient to overcome the presumption in his favor arising from the burden of proof is a question for the jury. Bolden v. Southern R. Co. 123 N. C. 614, 31 S. E. 851.

In South Carolina a nonsuit cannot be granted upon the ground that the evidence shows contributory negligence on the part of the plaintiff, for the very obvious reason that it involves the decision of a question of fact of which, under the South Carolina Constitution, the jury alone has cognizance in a law case. Whaley v. Bartlett, 42 S. C. 454, 20 S. E. 745.

⁶⁰ Where an action is brought to recover for personal injuries, and the plaintiff's

testimony shows that his own negligence contributed directly to the injury, he has failed to make out a prima facie right of recovery, and a demurrer interposed to the evidence should be sustained. Dewald v. Kansas City, Ft. S. & G. R. Co. 44 Kan. 586, 24 Pac. 1101.

⁶¹ Cahill v. Cincinnati, N. O. & P. R. Co. 92 Ky. 345, 18 S. W. 2.

⁶² Baker v. Kansas City, Ft. S. & M. R. Co. 122 Mo. 533, 26 S. W. 20.

If plaintiff's evidence conclusively shows contributory negligence, no burden in that direction rests upon the defendant, and in that situation, the court should take the case from the jury. Ouverson v. Grafton, 5 N. D. 281, 65 N. W. 676.

If, in the trial of an action to recover damages for personal injuries, the plaintiff's own evidence shows that he was guilty of negligence that contributed to his injury, the court should take the case from the jury. In that case the court does not weigh the plaintiff's evidence of defendant's negligence and pronounce it insufficient, but it takes the plaintiff's evidence of his own negligence at its face value, and passes judgment of nonsuit upon it. Schmidt v. St. Louis R. Co. 149 Mo. 269, 73 Am. St. Rep. 380, 50 S. W. 921.

⁶³ Pittsburgh, C. C. & St. L. R. Co. v. Collins, 168 Ind. 467, 80 N. E. 415.

⁶⁴ Contributory negligence being an affirmative defense, before the plaintiff can be debarred from recovery on that ground, testimony adduced by him must be such that the facts raise an unavoidable inference of negligence on his part. Florida v. Pullman Palace Car Co. 37 Mo. App. 598. In this case, a passenger on a sleeping car left his trousers containing money and other articles, in an upper berth, and they were stolen. This was held not contributory negligence as a matter of law.

In Harrington v. Eureka Hill Min. Co. 17 Utah, 300, 53 Pac. 737, it is said that if the evidence introduced by the plaintiff furnishes sufficient proof of contributory negligence, it is not necessary for the defendant to prove it also. In determining the question of contributory negligence, it is the duty of the jurors to consider the whole evidence bearing on the issue. If the plaintiff offers any evidence tending to prove or disprove negligence on his part, the jurors should consider that, with the

closed by plaintiff's own evidence, unless the facts on which the alleged negligence rests are admitted or established by evidence which is undisputed, the court cannot declare, as a matter of law, that such negligence exists, but must submit the question under proper instructions to the jury.⁶⁵

Where, however, the plaintiff has made out a case for himself, he cannot be nonsuited, although another of his own witnesses shows his negligence.⁶⁶

2. *Shifting of the burden.*

(a) *Where burden is held to shift.*

In considering the cases collected under this subdivision of the note, the importance of keeping in mind the distinction between the two senses in which the term "burden of proof" is used will be apparent. There are many cases in which it is said that the burden of proof as to contributory negligence, under certain conditions, shifts from the defendant, where it originally rests, to the plaintiff. In most instances, it is apparent that the courts are using the term "burden of proof" in its secondary sense, that is, as meaning the burden of introducing testimony to rebut that already introduced on the issue. In some cases, it is impossible to tell in which sense the court has used the term; while in others, the courts have evidently been misled into believing that the burden of proof in its primary sense, that is, the burden of proving the issue by a preponderance of evidence, shifts. As already pointed out, the burden of proof in its primary sense never shifts, according to the best considered opinions. If it is on the plaintiff in the first instance, it remains with him to the end. If it is on the defendant, as it is held to be in jurisdictions the decisions of which are collected in this subdivision of the note, it is never transferred to the plaintiff. If the plaintiff's evidence tends to show contributory negligence, or is such as to make out a prima facie case of such negligence, of course, the burden is upon him to introduce testimony upon that issue. But that does not mean that when the evidence is all in, the plaintiff's testimony on the subject of freedom from contributory negligence must preponderate. The

burden of proving the issue being upon the defendant, the evidence as to contributory negligence must preponderate that as to freedom from contributory negligence, or the plaintiff will prevail,—provided, of course, that he has established the defendant's negligence by a preponderance of the evidence.

In a leading case in Texas it is said that "to the general rule imposing upon the defendant the burden of proof on the issue of contributory negligence, there appears to be, in the very nature of things, two well defined exceptions:

"First. Where the legal effect of the facts stated in the petition is such as to establish prima facie negligence on the part of plaintiff as a matter of law, then he must plead and prove such other facts as will rebut such legal presumption. The plain reason is that by pleading facts which, as a matter of law, establish his contributory negligence, he has made a prima facie defense to his cause of action, which will be accepted as true against him both on demurrer and as evidence on the trial, unless he pleads and proves such other facts and circumstances that the court cannot, as a matter of law, hold him guilty of contributory negligence. When he has done this, he has made a case which must be submitted to the jury. For instance, if plaintiff's petition shows that he was injured by defendant's car while on the track under circumstances which, in law, would make him a trespasser prima facie, then the law would raise a presumption of contributory negligence against him, for which his petition would be bad on demurrer, and it would be necessary for him to plead some fact or circumstance rebutting such presumption, such as, that he was, after going upon the track, stricken down by some providential cause, in order to save his petition, and on the trial, the burden would be upon him to establish such cause. . . .

"Second. When the undisputed evidence adduced on the trial establishes prima facie, as a matter of law, contributory negligence on the part of plaintiff, then the burden of proof is upon him to show facts from which the jury, upon the whole case, may find him free from negligence; otherwise the court may instruct a verdict for defendant.

evidence offered by the defendant, if any, tending to prove or disprove it, and it is the duty of the court so to inform the jury.

⁶⁵ *Swanwick v. Monongahela City*, 36 Pa. Super. Ct. 628.

⁶⁶ *Ely v. Pittsburgh, C. C. & St. L. R. Co.* 158 Pa. 233, 27 Atl. 970.

But if the plaintiff's own testimony shows that he was negligent, he cannot
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complain if the court takes his case as he makes it, although another witness has done better for him than he has done for himself; but where his own testimony makes out a clear case, the contradictory testimony of another witness will not destroy it, as a matter of law, even though such witness has been called by himself.
Kohler v. Pennsylvania R. Co. 135 Pa. 346, 19 Atl. 1049.

there being no issue of fact for the jury.'⁶⁷ The situation, however, created by the appearance of contributory negligence in plaintiff's case, does not constitute an exception to the rule that the burden of proving contributory negligence is on the defendant. It is, as before stated, only the burden of introducing testimony on the issue that is shifted. The burden of maintaining the issue is still on the defendant.

In an action to recover for the death of a track hand run over and killed while working on the track, an instruction that if the evidence offered by the plaintiff did not disclose any want of care on his part, the burden was on the defendant to show that he contributed directly to his death, which must be shown by a preponderance

of the evidence; but that if the plaintiff's evidence raised the presumption of contributory negligence, the burden rested upon him to remove that presumption by a like preponderance of the evidence, was held to mean that if, in the exercise of ordinary care, by looking the decedent would have seen the approach of the train, or by listening would have heard it, a presumption of negligence would arise on his part, which it was his duty to rebut; and the instruction was upheld.⁶⁸ Here it will be observed that the expression that the burden rested upon the plaintiff to remove the presumption of contributory negligence created by his own evidence, by a like preponderance of evidence, is incorrect, since it is a

⁶⁷ *Gulf, C. & S. F. R. Co. v. Shieder*, 88 Tex. 152, 28 L.R.A. 538, 30 S. W. 902, affirming — Tex. Civ. App. —, 26 S. W. 609.

To the general rule there are two well-defined exceptions, one being when the legal effect of plaintiff's pleading is such as to create a prima facie case of negligence on his part as a matter of law, when he must plead and prove such other facts as will rebut such legal presumption; the other exception being when the undisputed evidence establishes a prima facie case of contributory negligence against the plaintiff as a matter of law, then the burden is on him to show facts that will prove that he was not negligent. *El Paso Electric R. Co. v. Shaklee*, — Tex. Civ. App. —, 138 S. W. 188.

It is the general rule in Texas that the burden of proof rests upon the party charging contributory negligence, to establish that fact, to which there are but two exceptions. *Galveston, H. & S. A. R. Co. v. Parrish*, — Tex. Civ. App. —, 43 S. W. 536.

In *Gulf, C. & S. F. R. Co. v. Redeker*, 67 Tex. 181, 2 S. W. 513, it was held that a railroad company had no reason to complain of an instruction that the burden of proof was on the plaintiff to show that he was injured substantially as alleged in his petition, and that the injury was not caused by contributory negligence, and that if this had been shown, the burden of proof shifted to the defendant to show contributory negligence.

In *Missouri, K. & T. R. Co. v. Scarborough*, 29 Tex. Civ. App. 194, 68 S. W. 96, it appeared that a boy was standing on a skidway adjacent to a side track of a railroad company, and while standing there, a sufficient distance from the track to avoid cars properly loaded from coming in contact with him, intently watching an engine switching cars, was struck by a piece of timber projecting from the side of a passing car. It was held that the fact that the boy was standing on the skidway under such circumstances did not bring the case within either of the exceptions that

where the legal effect of plaintiff's allegations prima facie establishes negligence on his part, or where the undisputed evidence prima facie establishes contributory negligence on the part of the plaintiff as a matter of law, so as to relieve the defendant of the burden of establishing such negligence.

In *Chicago, R. I. & T. R. Co. v. Long*, 32 Tex. Civ. App. 40, 74 S. W. 59, writ of error refused in 97 Tex. 69, 75 S. W. 483, part of the members of a steel gang started for a tool house across a railroad bridge on foot, and part on a hand car. When the plaintiff had just entered upon the bridge, he looked back and saw the hand car motionless 360 yards away. When he and his companions were midway on the bridge, the car overtook them, and while his companions stepped aside and were unhurt, he was run over and injured. It was held that these facts did not bring the case within any of the exceptions to the general rule that the burden of proof is upon the defendant to show contributory negligence.

In an action to recover for injuries received by being struck by a switch engine, where the evidence showed that the track was a general thoroughfare for pedestrians, and that it was not obviously an imprudent act for the injured person to go thereon, a charge shifting the burden of proving contributory negligence would have been erroneous. *International & G. N. R. Co. v. Brooks*, — Tex. Civ. App. —, 54 S. W. 1056.

The mere fact that the plaintiff failed to accompany a race horse which was properly put into a car to be shipped for about a hundred and twenty-five miles, there being no necessity for feeding and watering it in that distance, does not impose upon the plaintiff, in an action to recover for the loss of the horse, the burden of proving freedom from contributory negligence. *Houston & T. C. R. Co. v. Parker*, — Tex. Civ. App. —, 138 S. W. 437.

⁶⁸ *Green v. New York, C. & St. L. R. Co.* 26 Ohio C. C. 609, 5 Ohio C. C. N. S. 497.

confusion of the two senses in which the term "burden of proof" is used.

It has been said that the act of getting on or off a moving train is evidence of contributory negligence, and imposes upon one who is injured in doing so, the burden of proving that the peculiar circumstances of the case justified him in such a course.⁶⁹ It is evident that the court here used the term "burden of proof" in its secondary sense, that is, as imposing upon the plaintiff the burden of introducing further testimony upon the issue.

In an action to recover damages resulting from fire communicated to plaintiff's wood pile, it was held that the fact that the plaintiff had failed to clear the brush and combustible material out of an open draw through which the fire was communicated to the wood pile did not shift to the plaintiff the burden of proving absence from contributory negligence.⁷⁰ This might mean that the burden of proof in the

primary sense—that is, the burden of proving the issue—does not shift, but it probably means that the fact mentioned was sufficient to shift the burden upon the plaintiff in the secondary sense, so as to require him to introduce further evidence on the issue of contributory negligence. But in most of the cases in which it is said that the burden of proof as to contributory negligence shifts, while it is not certain that the courts had in mind the distinct senses in which the term is used, it may be taken to have been employed in its secondary sense, and, if so, these decisions are not in conflict with those holding that the burden does not shift where the term "burden of proof" is used in its primary sense.

The rule is often stated to be that if plaintiff's evidence raises a presumption of contributory negligence, the burden of proving due care is at once cast upon him.⁷¹ The burden is upon him to remove the pre-

⁶⁹ *Holyman v. Kanawha & M. R. Co.* 65 W. Va. 264, 22 L.R.A.(N.S.) 741, 65 S. E. 536, 17 A. & E. Ann. Cas. 1149.

Likewise, where a person falls and is injured by the reason of a defect in the sidewalk caused by misplaced bricks, in an open and exposed place, the burden rests upon him to show conditions outside of himself which prevented him from seeing the defect, or which would excuse his failure to observe it. *Lerner v. Philadelphia*, 221 Pa. 294, 21 L.R.A.(N.S.) 614, 70 Atl. 755.

In an action brought to recover for the death of a person killed while lying on a railroad track, it appeared that the deceased was subject to epileptic fits, and that a short time previous to the accident he had been seen in an intoxicated condition. Under these circumstances, it was held that a charge placing the burden of showing contributory negligence on the defendant was erroneous. *Louisiana Western Extension R. Co. v. McDonald*, — Tex. Civ. App. —, 52 S. W. 649.

A charge in substance that if, in the testimony of the plaintiff, contributory negligence is disclosed, then it would defeat his recovery unless he by his own testimony relieved himself of the burden so cast upon him, was held proper. *Weiser v. Broadway & N. Street R. Co.* 6 Ohio C. D. 215.

⁷⁰ *Northern P. R. Co. v. Lewis*, 2 C. C. A. 446, 7 U. S. App. 254, 51 Fed. 658.

Likewise, where the complaint alleges that the plaintiff, without fault on his part, ran into a dangerous cut in a street while riding on his bicycle, it does not show that the proximate cause of the injury was due to any act on his part, so as to bring the case within the rule of throwing the burden upon him to prove that he was in the exercise of due care. *Snook v. Anaconda*, 26 Mont. 128, 66 Pac. 756. 33 L.R.A.(N.S.)

That the plaintiff, at the time he drove upon a bridge which broke down, was intoxicated, does not shift the burden of proof upon him to show that he was in the exercise of due care. *Ford v. Umatilla County*, 15 Or. 313, 16 Pac. 33.

In an action to recover for personal injuries, if the evidence is such as to establish intoxication on the part of the plaintiff, this does not cast the burden of proof upon him to show that he was in the exercise of ordinary care, intoxication being merely a circumstance to go to the jury upon the question of negligence. *Seymour v. Lake*, 66 Wis. 651, 29 N. W. 554. The court said that the burden of proof is on the defendant to prove contributory negligence, and the fact that the plaintiff makes proof on the trial from which the jury may or may not infer that there was negligence on his part does not cast the burden on him to make affirmative proof of his want of negligence.

⁷¹ Even in jurisdictions where contributory negligence is held to be a matter of defense, it is also held that whenever the plaintiff's own case raises a presumption of contributory negligence, the burden of proof is then upon him. In such a case it devolves upon him to clear himself of the suspicion of negligence that he himself has created. *Southern R. Co. v. Bruce* 97 Va. 92, 33 S. E. 548.

The court cannot say that refusal to charge that the burden of proving contributory negligence is on the defendant is erroneous, where it has not all the testimony in the case before it, since there may have been testimony offered by the plaintiff raising a presumption of contributory negligence which would throw the burden upon him to introduce testimony disproving it. *Root v. Monroeville*, 4 Ohio C. D. 53, reversed on another point in 54 Ohio St. 523, 44 N. E. 237.

umption by further proof.⁷² The rule that if the testimony of the plaintiff raises a presumption of contributory negligence, the burden is upon him to remove that presumption, is merely stating a rule of law

that the plaintiff is bound to show by his evidence that he was in the exercise of ordinary care, and that his want of such ordinary care did not contribute to his injury.⁷³

That the burden of proving absence of contributory negligence is on the plaintiff is manifestly against a settled law of the state, since it is only where the plaintiff's own evidence raises a presumption of contributory negligence on his part that the law imposes upon him the burden of removing that presumption. *Strong v. Pickering Hardware Co.* 9 Ohio C. C. 249, 6 Ohio C. D. 212.

The burden of proof to show contributory negligence, if contributory negligence is relied upon as a defense, is upon the defendant, unless the evidence offered by the plaintiff raises a presumption that the deceased was guilty of contributory negligence, in which case, the plaintiff is bound to overcome this presumption by a preponderance of the evidence. *McKeown v. Cincinnati Street R. Co.* 2 Ohio Leg. News, 88.

The exception to the general rule that the duty to plead, and the burden to prove, contributory negligence, is upon the defendant, does not apply to an action against the master by a servant ordered to perform new work with which he was unacquainted, and in company with an inexperienced servant. *Cleveland, C. C. & St. L. R. Co. v. Tehan*, 26 Ohio C. C. 457.

Where the facts stated in the petition do not raise a legal presumption that the injured person was guilty of contributory negligence, or the undisputed evidence does not establish a prima facie case of contributory negligence, the burden of showing such negligence is on the defendant. *Gulf, C. & S. F. R. Co. v. Booth*, — Tex. Civ. App. —, 97 S. W. 128.

The burden rests on plaintiff to disprove a presumption of contributory negligence arising from his own evidence in an action for personal injuries caused by defendant's negligence. *Blair v. Pittsburg & L. E. R. Co.* 37 Ohio L. J. 59.

There is a corollary to the rule, to the effect that whenever the plaintiff's own case raises a presumption of contributory negligence, the burden of proof is immediately upon him. In such a case, it devolves upon the plaintiff as of course, to clear himself of the suspicion of negligence that he has himself created. He must make out his case in full, and where the circumstances attending the injury were such as to raise a presumption against him in respect to the exercise of due care, the law requires him to establish affirmatively his freedom from contributory fault. *Nelson v. Helena*, 6 Mont. 21, 39 Pac. 905.

The rule announced in the last mentioned case was approved in *Hunter v. Montana L. R. Co.* 22 Mont. 525, 57 Pac. 140.

As to the corollary to the rule, the court in *Harrington v. Butte, A. & P. R. Co.* 37 L.R.A. (N.S.)

Mont. 169, 16 L.R.A. (N.S.) 395, 95 Pac. 8, said: "We think it would be more accurate to say that whenever the plaintiff's own case presents evidence which, if unexplained, would make out prima facie contributory negligence on his part, there must be further evidence exculpating him, or he cannot recover. However, this is evidently what the court meant, and this doctrine has the support of practically all the authorities."

⁷² *Pittsburgh, C. & St. L. R. Co. v. Zepperlein*, 1 Ohio C. D. 22, 1 Ohio C. C. 38.

While it is true that the burden of proving contributory negligence is ordinarily on the defendant, this is not so when the plaintiff's own testimony raises a presumption of contributory negligence. *Cincinnati, H. & D. R. Co. v. Levy*, 8 Ohio C. C. N. S. 353, 28 Ohio C. C. 23.

Where the circumstances disclose or give rise to a presumption of contributory negligence, the matter of excuse must be shown by the injured person, and the rule is the same where the injured person is dead. *Pennsylvania Co. v. Mahoney*, 22 Ohio C. C. 469, 12 Ohio C. D. 366.

Where the evidence shows that the person for whose death the action was brought used a dangerous, instead of a safe, method of performing a certain piece of work, a presumption of negligence on his part arises, and before the plaintiff can recover, the burden rests upon the latter to remove such presumption, and show that the deceased was exercising ordinary care by a preponderance of the evidence. *Lake Shore & M. S. R. Co. v. Whidden*, 13—23 Ohio C. C. 85.

The law will not presume that a plaintiff has been negligent in the absence of some evidence tending to show it; but when his evidence tends to create the presumption, then he must rebut the presumption by sufficient proof to produce a belief in the minds of the jury that negligence on his part did not in fact exist. *Missouri P. R. Co. v. Foreman*, 73 Tex. 311, 15 Am. St. Rep. 785, 11 S. W. 326.

⁷³ *Cincinnati v. Frazer*, 9 Ohio C. D. 487.

If the plaintiff's evidence raises a presumption of contributory negligence, it then becomes his duty to remove such presumption, and if he fails to do so, this will be fatal to his case. *Baltimore & O. R. Co. v. Whitacre*, 35 Ohio St. 627.

It has been frequently held that where the evidence of the plaintiff raises a presumption of his negligence contributing to the injury, the burden is upon him to remove the presumption before he can recover. *Street R. Co. v. Nolthenius*, 40 Ohio St. 376.

In *Pittsburgh & W. R. Co. v. Ackworth*,

In applying this rule, it has been held that riding on the platform of a street car creates such a presumption of contributory negligence as it requires the plaintiff to remove.⁷⁴ So, the presumption has been held created, within the rule, where a conductor attempted unnecessarily to descend from a

moving car; ⁷⁵ where the injured person jumped from a moving train; ⁷⁶ where an injured child was unattended in known place of danger; ⁷⁷ where a person run over and killed on a railroad track could, by the exercise of ordinary care, have seen the approach of the train; ⁷⁸ where an aged man

10 Ohio C. C. 583, 6 Ohio C. D. 622, it is said that this is a peculiar rule, and one which ought not to be extended, but strictly confined within the actual limit of its true application.

It is not correct to say that where a presumption of contributory negligence is raised by the plaintiff's evidence, the burden still rests upon the defendant to prove contributory negligence, if, after considering all of the evidence in the case, the presumption of negligence is removed. Where plaintiff is seeking to recover for injuries received through the negligence of the defendant, the legal effect of certain facts in the plaintiff's case, if they appear in his evidence, is to create a presumption that he was guilty of contributory negligence, and therefore he cannot recover until the legal effect of those facts is removed and overcome by showing the existence of other facts sufficient to that end; and that means that the burden of proof to remove and overcome the legal effect of those facts, that is, that the plaintiff was guilty of contributory negligence, rests upon the plaintiff; it does not thereafter shift to the defendant. New York, C. & St. L. R. Co. v. Woods, 9 Ohio C. C. 322, 6 Ohio C. D. 350.

"But in all those jurisdictions where contributory negligence is held a matter of defense, whenever the plaintiff's own case raises a presumption of contributory negligence, the burden of proof is immediately upon him. In such a case it devolves upon the plaintiff as of course, to clear himself of the suspicion of negligence that he has himself created. He must make out his case in full, and where the circumstances attending the injury were such as to raise a presumption against him in respect of the exercise of due care, the law requires him to establish affirmatively his freedom from contributory fault. And when the plaintiff's case on the face of it shows contributory negligence, there should be a nonsuit; but if there be any real question as to the plaintiff's negligence, he should not be nonsuited, but the question is for the jury." Beach, Contrib. Neg. § 427. Atchison, T. & S. F. R. Co. v. Baker, — Ind. Terr. —, 104 S. W. 1182.

⁷⁴ Alabama City, G. & A. R. Co. v. Ventress, — Ala. —, 54 So. 652.

⁷⁵ Where a conductor was injured in getting off of a train in the nighttime, because the stirrup or step of the car was loose and gave way when he put his weight upon it, it was held that the fact that he attempted to descend from the car while the train was moving at the rate of 4 or 5 miles an hour, while the rules of the company required him to bring it to a

standstill for the purpose of permitting him to alight, raised, as a matter of law, a presumption of negligence against the plaintiff, within the rule casting upon him the burden of disproving contributory negligence. Pittsburgh & L. E. R. Co. v. Blair, 11 Ohio C. C. 579, 5 Ohio C. D. 366.

⁷⁶ Where plaintiff's injuries were received by jumping from a moving train in the nighttime, it was held that he thereupon assumed the burden of alleging facts sufficient to show that, in so doing, he was not guilty of contributory negligence. Radovinac v. Northern P. R. Co. 39 Mont. 454, 104 Pac. 543.

Stepping off of a moving car is negligence *per se*, and where one is injured thereby, the burden is upon him clearly to demonstrate to the court why his case should go to the jury as a rare exception to the rule. Hunterson v. Union Traction Co. 205 Pa. 568, 55 Atl. 543.

⁷⁷ And the presence of a child five years and eight months old, unattended, in a known place of danger, was held to be prima facie evidence of contributory negligence, and where a satisfactory explanation could not be found in the evidence, the plaintiff could not recover upon the theory that the burden was upon the defendant to make an explanation which would show negligence, if any, upon the part of the plaintiff. Harrington v. Butte, A. & P. R. Co. 37 Mont. 169, 16 L.R.A. (N.S.) 395, 95 Pac. 8.

Where a child is struck by a street car while in a dangerous and exposed situation, the plaintiff in an action for its death has the burden of proving a want of negligence on the part of the child or its custodian. Bamberger v. Citizens' Street R. Co. 95 Tenn. 18, 28 L.R.A. 486, 49 Am. St. Rep. 909, 31 S. W. 163. The court said: "Looking to the facts in this case, we find that the street car was legitimately upon its own track, running its usual ordinary line, where it had a right to be, and the child, when the injury occurred, was upon the track, where it ought not to have been, and was, in consequence, killed. Under these circumstances, no matter what the rule may be as an abstract proposition, it would be incumbent on the father to show that the presence of the child upon the track, or in a dangerous and exposed situation, was without negligence or want of proper care on his part, or the part of the child's custodian, if the negligence of either can be held to bar the right of recovery in this case."

⁷⁸ In an action brought to recover for the death of a servant who, while at work on a railroad track, was run over and

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approached a railroad crossing without looking out for a train;⁷⁹ and where a person injured by reason of a defective sidewalk went upon it when it was plainly out of repair.⁸⁰

In an action to recover for injuries received by falling into an open drain in a street, a charge that the burden was on the plaintiff to prove, by a preponderance of the evidence, that he was not guilty of contributory negligence, was held not reversible error, where the record showed that the plaintiff was blind, and was on the street unattended when he received the injury, and had full knowledge of the existence and character of the drain when the accident occurred.⁸¹ This is another illustration showing how the court has fallen into error by failing to distinguish between the two senses in which burden of proof is used. While, under the circumstances mentioned, it would be necessary for the plain-

tiff to introduce testimony on the issue, it does not follow that he would be obliged to establish freedom from contributory negligence by a preponderance of the evidence, since this would be requiring him to maintain the burden of that issue, which is on the defendant in Tennessee.

The fact that the person for whose death the action was brought was on or near a railroad bridge track at the time he was killed, when not a trespasser, was held not to raise a presumption that he was negligent, so as to cast the burden upon the plaintiff of proving that he was free from fault.⁸²

In some of the cases, it is said that if plaintiff's own evidence raises an issue of contributory negligence, the burden of proving such negligence does not rest upon the defendant.⁸³ Other courts say that the burden is cast upon the plaintiff if, by his own evidence, he makes out a prima facie

killed, it was held that if the deceased, in the exercise of ordinary care, by looking, would have seen the approach of the train, or by listening, would have heard it, a presumption of negligence would arise on his part, which it was his duty to rebut. *Green v. New York, C. & St. L. R. Co.* 5 Ohio C. C. N. S. 497, 26 Ohio C. C. 609.

Likewise, where an employee of a railroad company using the tracks as a pathway to a place at which he was directed to work, in the proper exercise of his faculties of hearing and vision, would have been notified of an approaching train which struck him, the presumption arises when he does not discover that danger, that he did not exercise those faculties, and the burden is upon him to remove this presumption when it so arises. *Byrket v. Lake Shore & M. S. R. Co.* 29 Ohio C. C. 614.

⁷⁹ Where the plaintiff's evidence shows that the person for whose death the action was brought,—an old man, with the heads of two hogs slung upon his shoulder, probably interfering with his vision and hearing and his ability to escape from danger,—went upon a dangerous railroad crossing, where he must have known that trains frequently ran over the track, without having once looked to see whether a train was approaching, though he could have seen the track for perhaps 400 feet if he had looked a charge that the burden of proving contributory negligence rested upon the defendant was held erroneous, since the plaintiff's own evidence clearly raised a presumption of negligence on decedent's part contributing to the accident. *Cincinnati, H. & D. R. Co. v. Murphy*, 9 Ohio C. C. D. 703.

⁸⁰ In an action to recover damages for injuries received by reason of a defective sidewalk, if it appears that the plaintiff went upon the walk, and that it was plainly out of repair and dangerous, and appeared so to persons of ordinary intelligence, then the burden is upon her to show

that she exercised ordinary care, not only while she was walking upon such a sidewalk, where she had put herself, but that she exercised ordinary care in going upon such walk in the first place. *Peat v. Norwalk*, 5 Ohio C. C. N. S. 614, 26 Ohio C. C. 161.

⁸¹ *Stewart v. Nashville*, 96 Tenn. 50, 33 S. W. 613.

⁸² *Toledo, P. & W. R. Co. v. Chisholm*, 27 C. C. A. 663, 49 U. S. App. 700, 83 Fed. 652.

⁸³ The burden does not rest upon the defendant where the plaintiff's own evidence raises an issue of contributory negligence. *Missouri, K. & T. R. Co. v. Jolly*, 31 Tex. Civ. App. 512, 72 S. W. 871.

But, if the issue of contributory negligence is not raised by the plaintiff, but is put in issue by the pleadings of the defendant, no exception is presented to the general rule that the burden of proving such negligence is on the defendant. *Houston & T. C. R. Co. v. Davenport*, — Tex. Civ. App. —, 110 S. W. 150.

The burden is on the defendant if plaintiff's case does not raise an issue of contributory negligence. *Galveston, H. & S. A. R. Co. v. Parish*, — Tex. Civ. App. —, 93 S. W. 682.

Where, standing alone, plaintiff's testimony did not even raise the issue of contributory negligence, it was held that the burden of proving contributory negligence was on the defendant. *Missouri, K. & T. R. Co. v. White*, 22 Tex. Civ. App. 424, 55 S. W. 593.

In an action to recover for injuries received by a switchman while engaged in uncoupling cars, due to a premature signal, it was held that where the plaintiff, in the development of the case, presented the issue of contributory negligence, and, in addition to this, some of plaintiff's witnesses testified to facts which, if standing alone, would have authorized the submission to the jury of the issue of contributory negli-

case of contributory negligence.⁸⁴ So, where the deceased was found a few feet from a railroad trestle, and it was evident that he had been struck by a train just as he stepped upon the trestle, or else that he had gone there before and remained standing or lying on the track, there being enough light so that he could have seen the approach of the train had he looked, it was held that these facts made such a prima facie case of contributory negligence as to cast upon the plaintiff, suing for his death, the burden of proving his freedom therefrom.⁸⁵ But it was held that it could not be said that because a passenger on

a vessel went from the port door of the saloon alone, and, in doing so, put her left foot on the doorsill and then put her right foot forward, stepped on the deck, slipped and fell by reason of encountering a slippery substance, she was prima facie guilty of contributory negligence as a matter of law, so as to cast upon her the burden of rebutting such prima facie evidence before a recovery could be had.⁸⁶

It is also said that if the plaintiff's own evidence raises an inference of negligence against himself, then he is undoubtedly required to go further, and, in order to establish a prima facie case, to show that he

the court should have given no charge on the burden of proof as to that issue, or else should have given a charge so modified as to permit the jury to look to the whole evidence in determining whether the defense had been established. A charge, therefore, that the burden of proof was on the defendant to show by a preponderance of the evidence that the deceased was chargeable with contributory negligence was held erroneous. *Gulf, C. & S. F. R. Co. v. Hill*, 29 Tex. Civ. App. 12, 70 S. W. 103. Here, also, the court evidently fails to distinguish between the two senses in which burden of proof is used.

⁸⁴ The burden is on the defendant except where the petition or the evidence shows a prima facie case of contributory negligence. *Huber v. Texas & P. R. Co.* — Tex. Civ. App. —, 113 S. W. 984.

The rule is that the burden of establishing the defense of contributory negligence is upon the defendant, except where the plaintiff's evidence convicts him prima facie of contributory negligence. *Texas & N. O. R. Co. v. Conway*, 44 Tex. Civ. App. 68, 98 S. W. 1070.

The burden of proof is upon the defendant, except in those cases where the declaration alleges facts which prima facie show contributory negligence, but coupled with matter in avoidance, and except where plaintiff's evidence discloses contributory negligence. *Simms v. Forbes*, 86 Miss. 412, 38 So. 546.

Where the accident results from the direct act or omission of the defendant which prima facie is negligence in itself, and the plaintiff receives an injury in consequence thereof, while pursuing his ordinary course of affairs, he will not be compelled, in order to recover his damages, to prove that he was free from fault. *Grant v. Baker*, 12 Or. 329, 7 Pac. 318.

In order to place upon the plaintiff the burden of exonerating himself from contributory negligence, either by allegation or proof, the evidence or plaintiff's allegation, as the case may be, must present his act as one showing prima facie negligence on his part; in other words, his allegation or proof must be such, standing alone, as would warrant an instruction that he had

been negligent. *Hillsboro v. Jackson*, 18 Tex. Civ. App. 325, 44 S. W. 1010.

It is only in cases in which plaintiff's allegations or his evidence show prima facie negligence on his part, that it devolves upon him to show facts from which the jury, upon the whole case, may find him free from negligence. *Galveston, H. & S. A. R. Co. v. Conuteson*, 51 Tex. Civ. App. 1, 111 S. W. 187.

Where the testimony offered by the plaintiff did not make out a prima facie case of contributory negligence, and the defendant relied on such negligence, the burden of proof was held to be on it to establish such defense. *Houston & T. C. R. Co. v. Kelley*, 13 Tex. Civ. App. 1, 34 S. W. 809, 46 S. W. 863.

It is only when the averments of the petition show a prima facie case of negligence on the part of the injured party, that it becomes necessary that the plaintiff should negative by an averment and proof the existence of such negligence. When the case stated by plaintiff shows prima facie negligence of deceased, the defendant can avail himself of the defense of contributory negligence under the averments of the petition; otherwise, such defense must be pleaded. *San Antonio & A. P. R. Co. v. Bennett*, 76 Tex. 151, 13 S. W. 319.

⁸⁵ *International & G. N. R. Co. v. De Ollos*, — Tex. Civ. App. —, 76 S. W. 222.

⁸⁶ *Gillum v. New York & T. S. S. Co.* — Tex. Civ. App. —, 76 S. W. 232.

In an action for injury to a wife under such circumstances, brought by the husband and the wife, there being no evidence whatever of any negligence on the part of the husband, a charge casting upon the plaintiffs the burden of showing freedom from contributory negligence is erroneous as to the husband. *Ibid.*

Where the pleadings and proof show that plaintiff was a passenger on defendant's train, and that as the train approached a small station which was his destination, and the conductor announced it, the plaintiff, knowing of the custom to stop only momentarily at such place, followed the conductor to the front platform and steps, so that he could alight with promptness, and that, after reaching the steps, he caught hold of the hand rails with each of

was guilty of no negligence,⁸⁷ and that where the testimony of the plaintiff tends to show contributory negligence, it is error to charge the jury that the burden of

proving such negligence is on the defendant.⁸⁸

The rule was stated by Dr. Wharton to be that, if the plaintiff's own case exposes

his hands, and was exercising due care and caution for his own safety; that the conductor knew of his position, but, without warning, the speed of the train was suddenly slackened, so that the plaintiff was jerked and thrown off and injured, it was held that this evidence did not make out such a prima facie case of contributory negligence as to cast upon the plaintiff the burden of disproving it. *Houston & T. C. R. Co. v. Harris*, — Tex. Civ. App. —, 120 S. W. 500.

In *Beaumont Traction Co. v. Happ*, — Tex. Civ. App. —, 122 S. W. 610, a passenger who, on account of the crowded condition of a street car, was unable to get inside of it, took his position on the bumper or buffer in the rear of the car, and leaned his body through an open window in the rear vestibule of the car. While in this position, the car was backed up, and the passenger was injured by a collision between the car on which he was riding and another car. It was held that this did not establish a prima facie case of contributory negligence, so as to place the burden of disproving such negligence on the plaintiff. The court said that at most the evidence only raised the issue of contributory negligence, and, defendant having pleaded this issue as a defense, the burden was upon it to prove it.

And where the plaintiff, an inexperienced minor, after nine days' work as a section hand, was ordered with other employees, to place hand cars on the track in order to go to some work, and the cars were thereafter run in dangerous proximity to each other at a dangerous speed, in order to reach a switch before an approaching train, and one of the cars was for that reason derailed, and the car on which plaintiff was riding collided with it, causing the injuries complained of, it was held that a prima facie case of contributory negligence was not made out, so as to bring the case within any of the exceptions to the general rule placing the burden of establishing contributory negligence upon the defendant. *International & G. N. R. Co. v. Pina*, 33 Tex. Civ. App. 680, 77 S. W. 979.

Where the plaintiff was injured while attempting to board a slowly moving train, with the assistance of the conductor, it was held that this did not show a prima facie case of guilt of contributory negligence, so as to make a charge that the burden of proving such negligence was on the defendant erroneous. *Missouri, K. & T. R. Co. v. Gist*, 31 Tex. Civ. App. 662, 73 S. W. 857.

The mere admission of the plaintiff, a passenger in a caboose, that he was standing up at the time of a collision by which he was injured, does not make a case of negligence *per se*, or create a prima facie case of negligence, so as to cast upon him

the burden of proving the circumstances and clearing himself of the charge. *St. Louis, I. M. & S. R. Co. v. Gilbreath*, 87 Ark. 572, 113 S. W. 200.

⁸⁷ *Achtenhagen v. Watertown*, 18 Wis. 331, 84 Am. Dec. 769.

If, in proving plaintiff's case, there is anything in the evidence from which concurring negligence may be inferred, then the burden is on him to rebut or explain this. *Stewart v. Nashville*, 96 Tenn. 50, 33 S. W. 613.

There is no just inference of a want of ordinary care in a boy in falling through a large hole in a bridge, of which his father and others had for a long time had notice, and of which he is presumed to have had notice, so as to make it necessary for the plaintiff to prove affirmatively that the boy was not guilty of contributory negligence. *Strong v. Stevens Point*, 62 Wis. 255, 22 N. W. 425.

⁸⁸ *Texas Portland Cement Co. v. Ross*, 35 Tex. Civ. App. 597, 81 S. W. 94.

If it appears from the plaintiff's evidence that he was guilty of contributory negligence, or if the plaintiff introduces evidence tending to show that he was guilty of such negligence, the burden rests upon him to explain and remove this apparent negligence. *Gulf, C. & S. F. R. Co. v. Scott*, — Tex. Civ. App. —, 27 S. W. 827.

Where there is some evidence which arises from the development of the plaintiff's case, tending to show that he was guilty of contributory negligence, the burden is not upon the defendant to establish such negligence. *Gulf, C. & S. F. R. Co. v. Robinson*, — Tex. Civ. App. —, 72 S. W. 70.

Where all the evidence on the issue of contributory negligence is introduced by the plaintiff, and tends in some degree to show that he was not in the exercise of due care, a charge that the burden of proving such negligence is on the defendant is erroneous. *Missouri, K. & T. R. Co. v. Plunkett*, — Tex. Civ. App. —, 103 S. W. 663.

The rule as to the shifting of the burden has no application where the evidence on the part of the plaintiff does not show, or tend to show, that his negligence contributed to the injury. *Stephens v. Elliott*, 36 Mont. 92, 92 Pac. 45.

Where the evidence tending to show contributory negligence springs out of and forms part of the case relied upon by the plaintiff, the burden is on the plaintiff not only to show negligence on the part of the defendant, but also to show that he was not guilty of contributory negligence. *Chicago, R. I. & G. R. Co. v. Clay*, — Tex. Civ. App. —, 119 S. W. 730.

Where the defendant alleged contributory negligence, but the only evidence of such negligence appeared in the testimony of the

him to a suspicion of negligence, then he must clear off such suspicion.⁸⁹ This rule was followed in a few cases.⁹⁰ In applying the rule where the plaintiff alleged that while he was a passenger on a railroad train, the condition of the car was so crowded that he was forced to seek a place in another car, and that while on the platform he paused a moment, and was, by the sudden jerking of the train, thrown off and

injured, it was held that this did not raise a suspicion of negligence on his part, so as to cast the burden upon him of acquitting himself of the imputation, but that the burden was rightfully on the defendant.⁹¹ But it was said in an Ohio case that the rule that the burden shifts should not be extended upon mere suspicion,⁹² and the rule suggested by Dr. Wharton has now been repudiated in Texas.⁹³

plaintiff, it was held that a charge which in effect instructed the jury that the burden of proving contributory negligence, by the greater weight of the evidence, was on the defendant, was erroneous, because it contained nothing whatever about the burden removing the suggestion of contributory negligence arising from the plaintiff's own testimony. *Cincinnati Interurban Co. v. Haines*, 8 Ohio C. C. N. S. 77, 28 Ohio C. C. 443.

⁸⁹ No doubt where, in an action for injuries caused by failure of duty on the part of the defendant, the failure of duty and the injury are shown by the plaintiff, and there is nothing that implies that he brought on the injury by his own negligence, then the burden is on the defendant to prove that the plaintiff was guilty of such negligence. On the other hand, when the plaintiff's own case exposes him to suspicion of negligence, then he must clear off such suspicion. *Wharton, Neg. § 426*.

⁹⁰ *Ball v. El Paso*, 5 Tex. Civ. App. 221, 23 S. W. 835.

Unless the plaintiff's case discloses want of care on the part of the injured party, or exposes him to suspicion of negligence, and the defendant relies upon the defense of contributory negligence, it must be pleaded and proved. *San Antonio & A. P. R. Co. v. Bennett*, 76 Tex. 151, 13 S. W. 319.

But in *Texas & P. R. Co. v. Mayfield*, 23 Tex. Civ. App. 415, 56 S. W. 942, an objection was made to a charge that the burden of proving contributory negligence is on the defendant, on the ground that when plaintiff's own case shows a suspicion of negligence, then he must clear off that suspicion; but the court said: "We understand from this proposition, that complaint is made only on placing the burden of proof on defendant, to prove the acts of contributory negligence alleged in its answer, and we think it is now well settled that the burden is on defendant in such cases."

⁹¹ *Galveston, H. & S. A. R. Co. v. Morris*, — Tex. Civ. App. —, 60 S. W. 813, judgment affirmed in 94 Tex. 505, 61 S. W. 709.

But where the pleading and proof show that the person injured in getting off of a train was in a feeble condition, encumbered by her small children, and that she undertook to alight at a place dangerous on account of its height from the ground, these facts were held to raise more than a suspicion of negligence on her part, and to be sufficient to raise the issue of con-

tributory negligence in attempting to alight from the train under the circumstances, so as to make a charge that the burden was upon the defendant to establish contributory negligence erroneous. *St. Louis Southwestern R. Co. v. Martin*, 26 Tex. Civ. App. 231, 63 S. W. 1089.

In *International & G. N. R. Co. v. Lewis*, — Tex. Civ. App. —, 63 S. W. 1091, the plaintiff, seated on a load of hay, was driving faster than a walk, on a descending grade towards a culvert, and when he reached the culvert, one wheel of his wagon settled into a hole, which caused him to be thrown off and injured. The evidence showed that he was familiar with the dangerous condition of the culvert, had driven over it several times before, and had received jolts while so doing. A companion with him at the time said that he and the plaintiff were talking and joking when the accident happened. It was held that this evidence raised more than a suspicion of contributory negligence on the part of the plaintiff, requiring that issue to be submitted to the jury, and that, under such circumstances, an instruction that the burden of proof on that issue was on the defendant was erroneous. The court said that by such charge the jury might have understood that they were not to consider the presumption of negligence arising from plaintiff's evidence, and, unless the defendant's evidence showed contributory negligence on plaintiff's part, they might find for the plaintiff on this issue.

⁹² The exception to the rule that the burden of proving contributory negligence is upon the defendant should not be extended upon mere suspicion. *Cleveland, C. C. & St. L. R. Co. v. Tehan*, 4 Ohio C. C. N. S. 145, 26 Ohio C. C. 457.

⁹³ Where the case as made showed that the plaintiff, a nine-year-old boy, who was injured while alighting from a moving street car, had either jumped on the car to catch a ride, or had been invited to get on by an employee of the company, and had then been ordered off, a charge that the burden of showing contributory negligence was on the defendant was held erroneous, since a suspicion of contributory negligence could be inferred from the plaintiff's case, and it was his duty to clear away such suspicion. *Denison & S. R. Co. v. Carter*, — Tex. Civ. App. —, 70 S. W. 322.

Upon rehearing, however, in 71 S. W. 292, the court withdrew its reference to the doctrine of suspicion of contributory

In an Oregon case, Thayer, J., said that he did not believe that it would be any departure from the rule requiring contributory negligence to be pleaded as a defense, to say that where the plaintiff had been the actor in the affair in which the injury was received, and his acts *per se* would indicate negligence, he could not recover without proof that he exercised that ordinary care which a person ought to observe under the particular circumstances.⁹⁴

negligence, and then said: "As stated in the opinion under the case as made, the court's charge imposed too great a burden on the plaintiff. The court should have submitted the issue of contributory negligence without affirmatively placing the burden of proof on either."

But mere suspicion of contributory negligence is not enough to cast upon the plaintiff the burden of disproving it, since this would be practically the same as the rule which places the burden of proof upon the plaintiff in all cases upon the issue of contributory negligence, for an accident could rarely occur in which there would not be some slight evidence of negligence on the part of the plaintiff. *Gulf, C. & S. F. R. Co. v. Shieder*, 88 Tex. 152, 28 L.R.A. 38, 30 S. W. 902, affirming — Tex. Civ. App. —, 26 S. W. 509.

It is no longer the rule of Texas that where plaintiff's evidence exposes him to a suspicion of contributory negligence, the burden is upon him to disprove such negligence. *Houston & T. C. R. Co. v. Anglin*, 9 Tex. 340, 2 L.R.A. (N.S.) 386, 89 S. W. 66. The court said that it is now definitely settled that in every case in which the plaintiff seeks to recover of defendant on the ground of negligence of the defendant, and the defendant relies upon the defense of contributory negligence, in order to maintain that defense, it must appear by a preponderance of the evidence that the plaintiff was guilty of such negligence.

⁹⁴ *Grant v. Baker*, 12 Or. 329, 7 Pac. 18.

So, in *Pennsylvania R. Co. v. McTighe*, 6 Pa. 316, it was said by Thompson, J., *obiter*: "I have no doubt there may be cases in which the plaintiff's case would be incomplete without proof of care; such, for instance, as where a prescribed mode of doing an act was required, out of which the injury sprung; or where a party should leap from a train of cars to avoid a collision, on well-grounded apprehension of it; or such and in many other cases which might be imagined, it would doubtless be necessary to cover the whole ground in brief necessary to entitle the plaintiff *prima facie* to recover. But if a party admit this, where it is not necessary to aver it in the narr., and the other side do not choose to demur or go to the jury on the want of such an element, but assume the burden of proof, he could not nonsuit the plaintiff for want of it, or ask a court to do more than to submit the question to the jury whether, from all the evidence, the plaintiff himself had been guilty of negligence or not."

Another statement of the rule is that where the plaintiff's evidence was such that it would have been improper to instruct the jury to find against him on the issue of contributory negligence, a charge that the burden of proving such negligence was on the defendant was held proper;⁹⁵ that contributory negligence, as a matter of law, should be shown.⁹⁶ Again bearing in mind the distinction between the primary and secondary sense in which the term "bur-

den" is used, it is clear that the burden of proof is on the plaintiff to show the absence of such negligence. *Chicago, B. & Q. R. Co. v. Featherly*, 64 Neb. 323, 89 N. W. 792.

So, if the evidence in behalf of the plaintiff shows the injury to have been directly caused, either in whole or in part, by his act, the burden is immediately upon him to prove that he was exercising ordinary care at the time. *Cummings v. Helena & L. Smelting & Reduction Co.* 26 Mont. 434, 68 Pac. 852.

⁹⁵ *San Antonio v. Potter*, 31 Tex. Civ. App. 263, 71 S. W. 764.

In an action for damages resulting from the alleged negligence of the defendant, when the evidence on the part of the plaintiff is such as to justify a finding that his own negligence contributed to the injury complained of, the burden of proof is on the plaintiff to show the absence of such negligence. *Chicago, B. & Q. R. Co. v. Featherly*, 64 Neb. 323, 89 N. W. 792.

⁹⁶ A charge that the burden of proof is on plaintiff to relieve himself of the suspicion of contributory negligence is not proper if it is clear that contributory negligence was not shown as a matter of law. *Gulf, C. & S. F. R. Co. v. Cooper*, 33 Tex. Civ. App. 319, 77 S. W. 263.

It is only in cases in which the allegation of the petition or the evidence of the plaintiff shows negligence on his part, as a matter of law, that the burden is upon him to refute the charge of contributory negligence. *Lewis v. Houston Electric Co.* 39 Tex. Civ. App. 625, 88 S. W. 489.

If plaintiff's own case establishes a *prima facie* case, as a matter of law, of contributory negligence, the burden is upon him to overcome that fact by showing facts from which, upon the whole case, the jury can find him free from negligence. *International & G. N. R. Co. v. Brice*, — Tex. Civ. App. —, 111 S. W. 1094. To the same effect. *International & G. N. R. Co. v. De Ollos*, — Tex. Civ. App. —, 76 S. W. 222.

Unless the pleadings or evidence of the plaintiff establish contributory negligence as a matter of law, the burden is always upon the defendant to show that fact. *Gulf, C. & S. F. R. Co. v. Melville*, — Tex. Civ. App. —, 87 S. W. 863.

And where it appeared that cars of the defendant overran an embankment at the end of a spur track, struck a wagon from which plaintiff was unloading cotton seed, and injured him, it was held that contributory negligence was not shown, as a mat-

den of proof" is used, it would seem that this latter view is the correct one. If it is a case for the jury, it is not proper for the court to charge that the burden is upon the plaintiff at all, as that would be putting the burden of the issue upon him.

In Ohio, if the facts are such that it is doubtful whether or not the plaintiff's testimony raises a presumption of contributory negligence, the question of whether the burden is shifted to the plaintiff must go to the jury, the court not being permitted then to determine it; but if the presumption is not doubtful, if the facts are such that there can be no reasonable presumption but that of negligence, then the rule does not apply, and it is then a question of law only, to be determined by the court.⁹⁷

This is another curious illustration of the confusion which may arise from the inaccurate use of terminology. It being only the burden of proof in the secondary sense, that is, the burden of introducing evidence, that shifts, the question whether the bur-

den in this sense has shifted is never a question for the jury, but always a question for the court.⁹⁸ It is evident, however, that the Ohio courts in these cases understood the term "burden of proof" in its primary sense, that is, the burden of establishing the issue, which, as has been stated, never shifts.⁹⁹

(b) Where burden is held not to shift.

From what has already been said, it will be apparent that in those cases in which it is held that the burden of proof does not shift, the court has in mind the primary meaning of the term "burden of proof," that is, the burden of maintaining the issue. Even in these cases, however, it is not certain that the courts had the distinction between the meanings of burden of proof clearly defined. The importance of remembering that the burden of proof in its primary sense does not shift has been pointed out.¹⁰⁰

ter of law, so as to take the burden of proving this issue off of the defendant. *Missouri, K. & T. R. Co. v. Lyons*, — Tex. Civ. App. —, 53 S. W. 96.

In a case in which no testimony was offered except that on the part of the plaintiff, it was held that, since this did not authorize a peremptory instruction for the defendant on the issue of contributory negligence, the jury was properly instructed that the burden of proof on this issue was on the defendant. *Galveston, H. & S. A. R. Co. v. Gordon*; — Tex. Civ. App. —, 54 S. W. 635.

The rule that the burden is on the defendant to prove contributory negligence does not apply where the evidence showing such negligence comes wholly from the plaintiff; but where facts and circumstances, likewise appearing from plaintiff's evidence, excuse the same, the burden does not shift, but remains with the defendant. *Western U. Teleg. Co. v. Conder*, — Tex. Civ. App. —, 138 S. W. 447.

An instruction that the burden of proof is on the plaintiff to show freedom from contributory negligence would not be proper in a case in which it cannot be said that the plaintiff's evidence, as a matter of law, raises a presumption of want of care. *Monroeville v. Weihl*, 13 Ohio C. C. 689, 6 Ohio C. D. 188.

⁹⁷ *Pittsburgh & L. E. R. Co. v. Blair*, 11 Ohio C. C. 579, 5 Ohio C. D. 366.

But when it is clear that the evidence of the plaintiff raises the presumption of negligence, it is the duty of the court to declare that the burden of disproving such negligence is upon the plaintiff. It is only in doubtful cases that the question should be left for the jury. *Pittsburgh & W. R. Co. v. Ackworth*, 10 Ohio C. C. 583, 6 Ohio C. D. 622.

⁹⁸ See *supra*, II.

⁹⁹ The charge in the *Ackworth* Case was 33 L.R.A. (N.S.)

as follows: "Upon the question of contributory negligence, or violation of the rule by Ackworth [the plaintiff], the burden of proof is upon the defendant, and this makes it incumbent upon the defendant to produce a preponderance of the testimony that Ackworth did not act with ordinary care, or was acting in violation of the rules, upon that occasion, and that this failure to so act, or the violation of the rules, contributed to produce or cause his injuries, unless the testimony offered by the plaintiff in this case raises the presumption of contributory negligence or a violation of the rules on the part of Ackworth, in which event, the burden of proof would then rest upon the plaintiff to rebut and remove this presumption, and to produce a preponderance of the evidence that contributory negligence did not exist, and that the rules of the defendant were being observed by him at that time."

In the *Blair* Case, the court says that the burden of proof of contributory negligence was upon the defendant, unless the testimony on the part of the plaintiff raised a presumption of contributory negligence on his part, and if the jury found that it did, then the burden of proof would rest upon the plaintiff to rebut and remove this presumption, and produce a preponderance of evidence that contributory negligence on his part did not exist.

¹⁰⁰ In *Rapp v. Sarpy County*, 71 Neb. 382, 98 N. W. 1042, 102 N. W. 242, an action to recover for personal injuries due to a defective highway, in holding an instruction that if the plaintiff's own testimony tended to show that she was guilty of any carelessness which caused or aided in causing the injury complained of, then the burden of proof shifts, and it devolves upon the plaintiff to satisfy the jury by a preponderance of the evidence that she was not guilty of contributory negligence, was

As will be seen from a glance at the last subdivision of this note, it has been held in a number of the Texas cases that if the plaintiff's own case raises a presumption of contributory negligence, the burden is shifted from the defendant to the plaintiff to prove absence of fault. The language of these cases has been criticized in one Texas decision, in which it is said: "The law does not, at any stage of trial, impose upon a plaintiff the burden of showing that he has not committed negligence. The law does require that a plaintiff's evidence show a state of facts which entitles him to a judgment; and hence, when the evidence adduced by him shows that, because of his own fault, he is not so entitled, he loses his cause, because he has proved the fact, but

not because the law required him to prove the absence of it. The plaintiff's own evidence may conclusively show negligence on his part which contributed to his hurt, or may show facts which, though susceptible of explanation, are left unexplained, and so necessitate the conclusion of such negligence. In either of which cases, the court should decide or instruct against him as matter of law; or his evidence may merely raise a question to be solved by the opinion of the jury, and therefore to be submitted to the jury, as to whether or not his conduct was negligent and contributive,—a decision of which, by the jury against him, likewise results in his defeat. But these propositions are true because he has, in fact, furnished the evidence of his negli-

gerroneous, the doctrine that the burden of proof shifts in such a case from the defendant to the plaintiff was repudiated, the court saying: "It is a rule, as well of law as of logic, and one which, humanly speaking, is indispensable to the right decision of any controversy whatever, that the burden of proof, or of argument, rests upon him who maintains the affirmative of an issue. Not only so, but it abides with him continuously from the opening of the debate until its close. In certain instances, deficiencies of otherwise incomplete proofs are supplied by presumptions more or less conclusive in their nature; but, in such cases, their effect is upon the weight of the evidence required to maintain the issue, not upon the obligation of the party to produce a preponderance of the former. The distinction is of the uttermost practical importance, and courts and law writers ought scrupulously to abstain from the inaccurate and misleading expression that the burden of proof 'shifts' during the progress of a trial. Oftentimes, it is true, the use of the term, because of the peculiar circumstances of particular cases, may work no harm; but there is always danger of its doing so, as it may very probably have done in this case, in which the jury were told that, if there was anything in the plaintiff's testimony tending to prove that her conduct was negligent, she was burdened with the responsibility of establishing a negative 'by a preponderance of the evidence.' This could not have been so. If she had admitted that she was negligent, or if her evidence had disclosed conduct on her part from which the law conclusively presumes negligence, the litigation would, of course, have been at an end, not because she would have thus assumed the burden of proof, but because she would have furnished the evidence requisite to enable the defendant to meet the requirement in that regard, which the issue made of him. But the mere fact that her testimony tended to show that she was negligent, if it did so, went no further toward maintaining the issue tendered by the answer, than would have done evidence of equal weight and

credibility produced by the defendant. All that can justly be said about it is that the fact that the testimony was her own, it being in the nature of an admission against her own interest, added immensely to its weight and credibility; but, even so, there may have been other evidence in the case tending with equal or greater strength in the opposite direction, and unless, upon the whole record, there was a preponderance showing her negligence, she was not precluded, upon that issue, from recovery."

But in *Union P. R. Co. v. Connolly*, 77 Neb. 254, 109 N. W. 368, it was held that the defendant could not complain of an instruction that "the burden of proof of negligence on the part of the plaintiff is upon the defendants to establish by a preponderance of the evidence, unless you find that the evidence introduced by the plaintiff discloses negligence on his part which in any way caused or contributed to his injury; then it devolves upon the plaintiff, before he can recover, to prove by a preponderance of the evidence not only that the negligence of the defendants, or either of them, caused his injury, but also that he himself was free from any negligence on his part that contributed to his injury." This instruction reasonably admitting of the construction that if the plaintiff's testimony disclosed that the injury was in any way related to any negligent act or omission of the plaintiff, the burden of proof was upon him to show that such act or omission was not the proximate cause, or one of the proximate causes, operating to produce the injury, it was, at least, as favorable as the defendant had the right to ask.

And it was held that the defendant was in no position to complain that an instruction that the burden of proof of contributory negligence is on the defendant should not have been given, where the plaintiff's contributory negligence appeared from his own evidence, where the defendant not only alleged in its answer that plaintiff was guilty of contributory negligence, but adduced evidence in support of that defense. *Tinkle v. St. Louis & S. F. R. Co.* 212 Md. 445, 110 S. W. 1086

gence, and not because any rule of law ever exacted proof of its absence. Expressions in some of the opinions, which may seem to mean that the state of the evidence in particular cases may affect the application of the rule of law as to the burden of proof, are inaccurate. The rule of law, as it is established in this state, is that negligence, whether of the plaintiff or defendant, must be affirmatively shown, and this puts the burden on the party alleging it, to make it appear, either by evidence furnished by himself, or by availing himself

of that furnished by his adversary, or both." ¹

But these decisions are inaccurate only in so far as the courts may have used the term "burden of proof" in its primary sense, which is the sense in which the term is used in the quotation just referred to.

And in a Supreme Court case, a contention that the general rule that the burden of proving contributory negligence is upon the defendant is not applicable, where the presumption that the plaintiff was not in fault is overcome by plaintiff's own evi-

¹ *Houston & T. C. R. Co. v. Harris*, — Tex. —, 128 S. W. 897, affirming — Tex. Civ. App. —, 120 S. W. 500.

Likewise, in *Randall v. Northwestern Teleg. Co.* 54 Wis. 140, 41 Am. Rep. 17, 11 N. W. 419, it is said that the fact that the plaintiff, in making proofs on his part, introduces evidence tending to prove his own contributory negligence, does not change the nature of the issue. The affirmative of the issue and the question of the plaintiff's negligence is still with the defendant; and because he may use the evidence introduced by the plaintiff to support his side of that issue, that fact does not shift the burden of proof from the defendant to the plaintiff. If the defendant in an action upon contract pleads payment, and the plaintiff, in making out his case, offers some evidence which tends to prove payment, that fact does not relieve the defendant from the burden of proving the payment. He may make use of the plaintiff's evidence to prove his side of the case, but the burden of the proof is nevertheless on his shoulders. If, in making out his case, the plaintiff should admit his contributory negligence, or prove it by evidence which was conclusive of the fact, he would defeat himself, because he would prove the defendant's defense; but if he gave only testimony which might go to the jury, as evidence tending to prove such negligence, he would not be bound to give negative evidence to disprove such negligence, or be subject to an instruction that the burden of proof had been changed, so that, if it did not affirmatively appear that he had not been guilty of negligence, it would be presumed that he had been.

The burden of proving defendant's negligence rests upon the plaintiff, while the onus of showing contributory negligence rests upon the defendant. In both cases, this must be shown by a greater weight of the evidence, and of this relative weight the jury alone can determine. A negative presumption necessarily accompanies the burden, and remains until the burden is lifted or shifted by direct admissions or a preponderance of proof. Each issue bears its own burden, and it rarely happens that the burden of all the issues rests upon the same party. In cases of negligence like the present, it changes with each successive step, it being necessary for the plaintiff to prove the negligence of the defend-

ant, the defendant the contributory negligence of the plaintiff, and again for the plaintiff to show the last clear chance of the defendant, if that issue becomes material. Each of these issues depends upon the one preceding. The plaintiff must first prove that he was injured by the negligence of the defendant. If he fails to prove it, that is an end of the case, and the defendant is not then required to prove contributory negligence. Properly speaking, there can be no contributory negligence unless there is negligence on the part of the defendant. This distinction is important as affecting the burden of proof and the consequent direction of a verdict. If the negligence by which the plaintiff is injured is entirely his own, as in *Mesic's Case*, where, instead of the train running into the horse, the horse ran into the train, there is no evidence to go to the jury on the first issue, and the question of contributory negligence becomes immaterial. Where there is evidence tending to prove negligence on the part of both parties, the case must always be submitted to the jury, and it makes no difference if this evidence appears in the testimony of the plaintiff. The court may say to the jury that there is no evidence tending to prove a fact, but it can never say that a fact is proved. *Cox v. Norfolk & C. R. Co.* 123 N. C. 604, 31 S. E. 848.

In *North Birmingham Street R. Co. v. Calderwood*, 89 Ala. 247, 18 Am. St. Rep. 105, 7 So. 360, it is said that, although contributory negligence is defensive matter and the burden of establishing it is ordinarily on the defendant, it is not so if plaintiff's own testimony inculcates himself also.

This, of course, is so only when the term "burden of proof" is used in its secondary sense.

In *Georgia P. R. Co. v. Davis*, 92 Ala. 300, 25 Am. St. Rep. 47, 9 So. 252, it is held that the onus of proving contributory negligence is in all cases on the defendant, though the plaintiff's evidence sometimes relieves from the necessity of discharging it.

The fact that the plaintiff's evidence tends to show contributory negligence does not take the burden of proof as to such negligence from the defendant. *Birmingham Mineral R. Co. v. Wilmer*, 97 Ala. 165, 11 So. 886. The court said that the

dence, was not upheld, the court saying that the burden as to contributory negligence remained the same under the circumstances.²

f. Pleading.

1. Allegation of due care.

The rule that the burden of proving contributory negligence is on the defendant is

burden in all cases is on the defendant, although plaintiff's evidence sometimes obviates the necessity of proof by the defendant that the injury was due to contributory negligence, but that, even in such cases, it is inaccurate and misleading to say that the burden is on the plaintiff. The mere fact that there is evidence which tends to prove the affirmative of an issue, no matter from which side the evidence comes, does not, as a matter of law, discharge the onus resting on the party having the affirmative of that issue. The onus is not discharged by any tendency of the evidence which falls short of reasonably satisfying the jury of the facts involved in the tendency.

² *Washington & G. R. Co. v. Harmon* (*Washington & G. R. Co. v. Tobriner*) 147 U. S. 581, 37 L. ed. 284, 13 Sup. Ct. Rep. 557.

In *Denver & R. G. R. Co. v. Ryan*, 17 Colo. 98, 28 Pac. 79, the court said: "It sometimes happens that evidence tending to show contributory negligence on the part of plaintiff may be elicited from his own witnesses when giving their testimony in chief. In such case, unless such evidence be contradicted or rebutted by counter evidence tending to show plaintiff's diligence, or freedom from negligence, he should, of course, suffer defeat, either by nonsuit or by the verdict of the jury. But this does not affect the correctness of the rule that contributory negligence, the same as any other negligence, is a matter to be proved, and that, in the absence of evidence, it is not to be presumed. Hence, where a defendant relies upon the contributory negligence of the plaintiff as a defense, whether the averment in respect thereto appear negatively in the complaint or affirmatively in the answer, such contributory negligence must be shown by a preponderance of the evidence, or the defense will be unavailing. In general, from whatever source evidences of negligence or of contributory negligence may come, they are to be considered and weighed together, and the same quantum of proof will be required to establish one as the other."

The fact that the plaintiff, in making his proofs, introduced evidence tending to show contributory negligence, does not change the nature of the issue, the affirmative of the question being still with the defendant, and the introduction of evidence by the plaintiff supporting that side of the issue does not shift the burden of proof

a rule of pleading as well as of evidence.³ Contributory negligence is a defense which necessarily implies negligence on the part of the defendant, and is therefore a plea of confession and avoidance.⁴ Where the onus of proof is on the defendant as to contributory negligence, it is not necessary for the plaintiff to make the allegation of due care in his complaint, and thus anticipate the defense.⁵ This rule has been an-

from the defendant to the plaintiff. *Mares v. Northern P. R. Co.* 3 Dak. 336, 21 N. W. 5.

The defendant can avail himself of anything in plaintiff's evidence tending to prove contributory negligence, but this does not change the burden of proof as fixed by statute. *Wallace v. Western North Carolina R. Co.* 104 N. C. 442, 10 S. E. 552.

In an action to recover for injuries received by reason of a defective bridge, the mere fact that the evidence shows that the plaintiff knew of the condition of the bridge does not shift on him the burden of showing affirmatively that he used due care and prudence in driving upon it. *Prince George's County v. Burgess*, 61 Md. 29, 48 Am. Rep. 88. The court said that "it is wise for a plaintiff shown to know of a defect, to prove that he drove with caution; but we cannot accede to the view that the onus of showing want of care rests anywhere but on the defendant. If the bridge was wholly impassable and the plaintiff knew it, his knowledge would be conclusive, and the case might have been taken from the jury; but not for the reason assigned in the prayer. In this case it does not appear from the proof that the bridge was wholly impassable. It was unsafe and had a hole in it, into which the appellee's horse fell and was injured. The simple fact of its existence, with the knowledge of the plaintiff, was not sufficient to bar recovery. It should appear that the hole rendered the bridge practically impassable to effect a bar because of knowledge. The hole might possibly have been avoided with ordinary care in driving, and the knowledge of its existence ought to have prevented carelessness on the part of the plaintiff, and naturally would have induced care on his part; but the onus of showing that such care and prudence was not exercised still rested on the defendants."

For cases in which burden of proof is said never to shift, see I. note 5.

³ *Street R. Co. v. Nolthenius*, 40 Ohio St. 376.

⁴ *Watkins v. Southern P. R. Co.* 4 L.R.A. 239, 14 Sawy. 30, 38 Fed. 711.

It cannot be doubted that contributory negligence, while not a pure plea in confession and avoidance, is in the nature of such a plea. *Gadonnex v. New Orleans R. Co.* 128 Fed. 805.

⁵ *Crouch v. Charleston & S. R. Co.* 21 S. C. 495; *Baltimore & O. R. Co. v. Whittington*, 30 Gratt. 805; *Southwest Improv. Co.*

nounced in many cases.⁶ So, in an action to recover damages for injuries received by the breaking down of a bridge while plaintiff was crossing with his wagon and team, it was held not necessary that he should

aver that the bridge was broken without his fault.⁷ And a declaration charging a railroad company with carelessly and negligently killing the plaintiff's horse was held to set out a cause of action.⁸ The

v. Andrew, 86 Va. 272, 9 S. E. 1015; Carrico v. West Virginia C. & P. R. Co. 35 W. Va. 389, 14 S. E. 12; Southern R. Co. v. Bentley, — Ala. —, 56 So. 249.

The case of a party's own negligence concurring with that of the defendant in producing an injury is merely an exception to the general rule that he can recover for any injury inflicted on him by the negligent acts of the defendant. Though it would be the safer practice, the plaintiff is not bound to allege the nonexistence of an exception that may or may not exist as a defense to his action. Texas & P. R. Co. v. Murphy, 46 Tex. 356, 26 Am. Rep. 272.

⁶ Berry v. Lake Erie & W. R. Co. 70 Fed. 193; Texas & P. R. Co. v. Volk, 151 U. S. 73, 38 L. ed. 78, 14 Sup. Ct. Rep. 239; Government Street R. Co. v. Hanlon, 53 Ala. 79; Mobile & M. R. Co. v. Crenshaw, 65 Ala. 566; Mary Lee Coal & R. Co. v. Chambliss, 97 Ala. 171, 11 So. 897; Birmingham, R. Light & P. Co. v. Hinton, 141 Ala. 606, 37 So. 635; Yik Hon v. Spring Valley Waterworks, 65 Cal. 619, 4 Pac. 666; House v. Meyer, 100 Cal. 592, 35 Pac. 308; Morris v. Florida C. & P. R. Co. 43 Fla. 10, 29 So. 541; Fisher Motor Car Co. v. Seymour, — Ga. App. —, 71 S. E. 764; Cox v. Brackett, 41 Ill. 222; West Chicago Street R. Co. v. Dedloff, 92 Ill. App. 547; Carrier v. Union P. R. Co. 61 Kan. 447, 59 Pac. 1075; Owensboro & N. R. Co. v. Taylor, 9 Ky. L. Rep. 439; Depp v. Louisville & N. R. Co. 12 Ky. L. Rep. 366, 14 S. W. 363; Clark v. Chicago, M. & St. P. R. Co. 28 Minn. 69, 9 N. W. 75; Loyd v. Hannibal & St. J. R. Co. 53 Mo. 509; Mitchell v. Clinton, 99 Mo. 153, 12 S. W. 793; Young v. Shickle, H. & H. Iron Co. 103 Mo. 324, 15 S. W. 771; Taylor v. Missouri P. R. Co. 26 Mo. App. 336; Higley v. Gilmer, 3 Mont. 90, 35 Am. Rep. 450; Ball v. Gussenhoven, 29 Mont. 321, 74 Pac. 871; Meehan v. Great Northern R. Co. — Mont. —, 114 Pac. 781; Chicago, B. & Q. R. Co. v. Putnam, 45 Neb. 442, 63 N. W. 826; Warshawsky v. Raritan Traction Co. 68 N. J. L. 241, 52 Atl. 296; Purcell v. Bennett, 68 N. J. L. 519, 53 Atl. 235; Valley v. Concord & M. R. Co. 68 N. H. 546, 38 Atl. 383; Street R. Co. v. Nolthenius, 40 Ohio St. 376; Smith v. Ogden & N. W. R. Co. 33 Utah, 129, 93 Pac. 185; Southwest Improv. Co. v. Andrew, 86 Va. 270, 9 S. E. 1015; Norfolk & W. R. Co. v. Gilman, 88 Va. 239, 13 S. E. 475; Winchester v. Carroll, 99 Va. 727, 40 S. E. 37; Snyder v. Pittsburgh, C. & St. L. R. Co. 11 W. Va. 14; Sheff v. Huntington, 16 W. Va. 307; Fowler v. Baltimore & O. R. Co. 18 W. Va. 579; Berns v. Gaston Gas Coal Co. 27 W. Va. 285, 55 Am. Rep. 304.

A complaint is not demurrable on the ground that it fails to allege that the

plaintiff was in the exercise of due care. Smith v. Delaware River Amusement Co. 76 N. J. L. 461, 69 Atl. 970.

⁷ Smoot v. Wetumpka, 24 Ala. 112. The court said that the plaintiff deduced his right to damages from a tortious breach of the defendant's duty, which he avers has caused the injury of which he complains. If there be circumstances connected with the injury showing that it is to be attributed to some fault of the plaintiff, it is for the defendant to set them up in defense. It is not required that a plaintiff should, by his averments, negative every conceivable fact which might militate against his recovery. He is bound only to make out affirmatively a prima facie case for damages.

The plaintiff in an action for damages for being bitten by a dog does not fail to state a cause of action because of the fact that he does not negative contributory negligence. Boyd v. Oddous, 97 Cal. 510, 32 Pac. 569.

In Hines v. Georgetown Gas Co. 3 App. D. C. 369, it was held that in an action for damages to a laborer due to the escape of gas into a trench in which he was working, it is not necessary to allege that the plaintiff was ignorant of the noxious and dangerous quality of the gas, and of the danger of his employment in the trench, and that the plaintiff did not by his own negligence contribute to the injury complained of.

In an action for injuries received by reason of a defective sidewalk, it was held that failure of the plaintiff to allege that at the time of the accident he was exercising due and ordinary care was not a ground for demurrer. Orlando v. Heard, 29 Fla. 581, 11 So. 182. The court said that the plaintiff was not required to negative in his declaration a defense which the defendant must set up and maintain by proof in the absence of such a showing by the plaintiff.

In an action against a railroad company to recover damages for personal injuries to a brakeman, occasioned by the negligence of a coemployee, it is unnecessary for the plaintiff to aver that there was no fault or negligence on the part of the injured person. Missouri P. R. Co. v. McCally, 41 Kan. 639, 21 Pac. 574.

In an action to recover for the death of a boy who fell off of a private bridge into a canal and was drowned, it was held that the petition was not defective because of the fact that it failed to allege that there was no negligence on the part of the boy contributing to the accident. Louisville & P. Canal Co. v. Murphy, 9 Bush, 522.

⁸ Smith v. Eastern R. Co. 35 N. H. 356.

Where one person is killed by the negli-

rule being as stated, the defendant cannot object to the introduction of any evidence, on the ground that the petition does not allege that the person injured was without fault on his part.⁹

A declaration is fatally defective if it shows that the plaintiff was guilty of contributory negligence.¹⁰

It has been said that if the plaintiff in his petition suggests contributory negligence, the petition must be negatived by an allegation that he was without fault.¹¹ But it has been held that, to require him

to do this, the plaintiff's petition must make out a prima facie case of contributory negligence,¹² or raise an issue of contributory negligence,¹³ or show that plaintiff's negligence was the proximate cause of the injury.¹⁴

2. Allegation of knowledge of dangers and defects.

No attempt will be here made to collect all the cases bearing upon the question whether, in actions by servants to recover

from a negligent or wrongful act of another, the plaintiff is not required to allege that the deceased was exercising ordinary care for his own safety at the time of his death. *Johnson v. Westerfield*, 143 Ky. 10, 135 S. W. 125.

In an action to recover for injuries due to a defective sidewalk, it is not necessary that the plaintiff should allege freedom from any contributory negligence. *Pryor v. Walkerville*, 31 Mont. 618, 79 Pac. 240.

In an action by a brakeman for injuries received by being knocked down by a car on a parallel track, it is not necessary to allege that he was exercising due care for his safety, since the burden of alleging and proving contributory negligence is on the defendant. *Galveston, H. & S. A. R. Co. v. Collins*, 24 Tex. Civ. App. 143, 57 S. W. 384.

⁹ *O'Connor v. Missouri P. R. Co.* 94 Mo. 150, 4 Am. St. Rep. 364, 7 S. W. 106.

¹⁰ *Berns v. Gaston Gas Coal Co.* 27 W. Va. 285, 55 Am. Rep. 304.

Where the burden is on the defendant, the allegation that the defendant's negligence was the proximate cause of the injury is sufficient unless the complaint shows contributory negligence. *Cleveland, C. C. & St. L. R. Co. v. Goddard*, 33 Ind. App. 321, 71 N. E. 514.

It is not necessary to negative contributory negligence where it does not appear affirmatively in the allegations of the complaint. *Pittsburgh, C. C. & St. L. R. Co. v. Browning*, 34 Ind. App. 90, 71 N. E. 227.

¹¹ *Street R. Co. v. Nolthenius*, 40 Ohio St. 376.

¹² The plaintiff's petition not establishing a prima facie case of contributory negligence, it is not necessary for him to allege that, at the time of the injuries complained of, the injured person was in the exercise of due care. *Missouri, K. & T. R. Co. v. King*, — Tex. Civ. App. —, 123 S. W. 151.

Where the petition does not establish prima facie, at least, contributory negligence, it is not defective in failing to aver that the injury charged was inflicted upon the plaintiff without any fault on his part in the transaction. *Texas & P. R. Co. v. Murphy*, 46 Tex. 356, 26 Am. Rep. 272.

Where a passenger on a free emigrant train was injured by the falling of an upper berth upon her while she was away

from her seat, it was held that it was unnecessary for her to plead that she had left her seat from necessity, since this tended to prove contributory negligence, the burden of establishing which is on the defendant. *Northern P. R. Co. v. Hess*, 2 Wash. 383, 26 Pac. 866.

And the fact that a person is injured while crossing a street away from the regular crossing does not impose upon him the necessity of negating contributory negligence, in an action to recover for the injuries sustained. *Randall v. Hoquiam*, 30 Wash. 435, 70 Pac. 1111.

A complaint in an action to recover for the death of a switchman run over by reason of a misplaced switch does not disclose contributory negligence on the part of the deceased, where it not only alleges that the decedent was without fault, but that he had no notice, knowledge, or warning of the change of his switch, to which his injury is attributed, and that he could not have known thereof by the exercise of ordinary care and diligence. *Cleveland, C. C. & St. L. R. Co. v. Goddard*, 33 Ind. App. 321, 71 N. E. 514.

In a suit for damages against a railroad company on account of the alleged negligence of its agents, it is not necessary that the petition should negative, either by facts stated or by direct averment, the exercise of contributory negligence on the part of the plaintiff; and exception to this rule exists when the petition, from its averments, would establish, if unexplained, a prima facie case of negligence of the party injured. *Houston & T. C. R. Co. v. Cowser*, 57 Tex. 293.

A petition in an action to recover damages for injuries received by reason of a defective sidewalk does not raise the presumption that the plaintiff was guilty of contributory negligence, because of the fact that it alleges that she was walking upon the sidewalk and that it was out of repair. *Peat v. Norwalk*, 5 Ohio C. C. N. S. 614, 26 Ohio C. C. 161.

¹³ When the plaintiff raises an issue of negligence in the petition, he must establish the issue by proof, although the issue be properly a matter of defense. *Padgett v. Atchison, T. & S. F. R. Co.* 7 Kan. App. 736, 52 Pac. 578.

¹⁴ The existence of contributory negligence need not be negatived in the complaint, unless it appears from other allega-

damages from the master for personal injuries, the plaintiff must allege absence of knowledge of the danger or defect responsible for the injury, as this is a matter more properly belonging to the law of assumed risk.¹⁵ The subjects are so closely related, however, that a few cases may be taken for illustrative purpose. It has been held unnecessary for plaintiff to allege his ignorance of the danger to which he was exposed.¹⁶ And in an action to re-

tions therein that the proximate cause of the injury was the act of the plaintiff. *Orient Ins. Co. v. Northern P. R. Co.* 31 Mont. 502, 78 Pac. 1036.

Where the pleadings do not show that the injury was caused proximately by plaintiff's own act, and the facts shown by the proof are not before the court, the case falls within the rule that contributory negligence is an affirmative defense, and that the burden of establishing it by a preponderance of the evidence rests upon the defendant. *Nord v. Boston & M. Consol. Copper & S. Min. Co.* 33 Mont. 464, 84 Pac. 1116, 89 Pac. 647.

If the complaint shows the proximate or a proximate cause of the injury to have been the act of the plaintiff, the complaint must also state his freedom from negligence in doing the act; otherwise the pleading is bad. *Cummings v. Helena & L. Smelting & Reduction Co.* 26 Mont. 434, 68 Pac. 852.

In *Kennon v. Gilmer*, 4 Mont. 433, 2 Pac. 21, it was held that where the plaintiff alleges that his own act was the proximate cause of the injury, as where he jumps from a stagecoach because actuated by great fear of bodily injury if he should remain thereon, and, in jumping, is injured, it then becomes incumbent upon him to show that, in thus acting, he exercised that degree of care and prudence that a reasonable person would have exercised in like circumstances.

A complaint charging that plaintiff's hand was injured by being caught between the rollers of a mangle or ironing machine at which she was employed, due to the failure on the part of the defendant to provide plaintiff with reasonably safe machinery, and to maintain it in a reasonably safe condition, does not show that the proximate cause of the injury was an act of the plaintiff, within the rule that under such circumstances the complaint must also state plaintiff's freedom from negligence. *Ball v. Gussenhoven*, 29 Mont. 321, 74 Pac. 871.

The rule that if the complaint shows that the plaintiff's own act was the proximate cause of his injury, or proximately contributed thereto, it will be held insufficient unless it goes further and, by appropriate allegations, shows that the plaintiff was at the time exercising ordinary care and circumspection, is based upon the obviously just principle that one who has brought injury upon himself by his own act can-

cover for the death of a servant who, while on a car, was struck by a target pole while the car was passing it, and throws under the wheels, it was held that it was unnecessary for the plaintiff to allege that the deceased had no knowledge of the dangerous condition of the switch, and that he was free from contributory negligence.¹⁷ And where the plaintiff was injured by the explosion of a premature blast due to a defective fuse, it was held that it was un-

not lay responsibility for it upon another, unless he can allege and show that the act causing the injury was impelled by the apparent necessities of a perilous condition brought about by the negligence of such other person. *Montague v. Hanson*, 38 Mont. 376, 99 Pac. 1063.

The rule does not apply to cases where the plaintiff has been injured upon going into a place where he has a right to go, by some hidden or unknown cause, of the existence of which it is the duty of the person having control of the place to give him warning. *Ibid.*

¹⁵ See *supra*, V. c, 2.

¹⁶ A declaration in an action by a brakeman to recover for injuries received while attempting to couple defective cars is not fatally defective because it does not aver either that the plaintiff did not know, or could not have known by the exercise of ordinary care, the dangerous and defective construction complained of. *Crane v. Missouri P. R. Co.* 87 Mo. 588. The court said: "If the onus of proving contributory negligence, or of knowledge on the part of the plaintiff of defective machinery, rests on the defendant, it would be a singular rule of pleading to require a plaintiff to aver negatively that he was not guilty of contributory negligence, or did not have knowledge of defective machinery,—neither one of which he would be required to prove to make out his case, but which the defendant would be required to prove to make out his defense. The denial of a negative proposition is the affirmation of its opposite, and the general rule is that he who bases a right on an affirmative proposition must establish it."

¹⁷ *Johnston v. Oregon Short Line R. Co.* 23 Or. 94, 31 Pac. 283.

But where an employee of a railroad company was killed by being struck by a low viaduct under which a car, upon the top of which he was riding, was passing, it was held not incumbent upon plaintiff to prove his intestate's want of knowledge of the fact that there was insufficient space between the viaduct and the top of the car to permit a man to stand with safety. *Chicago Terminal Transfer R. Co. v. O'Donnell*, 114 Ill. App. 345.

In an action to recover for the death of a servant killed by a vicious horse, it is not necessary for the plaintiff to allege that the deceased did not have the means of knowing, equally with the defendant, the

necessary for him to allege that he did not have knowledge of such defect.¹⁸ So, it was held not necessary for a brakeman suing for injuries received by a collision due to the negligence of an incompetent and unfit engineer, to allege or prove his want of knowledge of such incompetency.¹⁹

According to some of the cases, whether the servant knew of the dangers or defects out of which the injury arose goes to the question of contributory negligence;²⁰

character of the animal. *Donahue v. Enterprise R. Co.* 32 S. C. 299, 17 Am. St. Rep. 854, 11 S. E. 95.

¹⁸ *Conroy v. Oregon Constr. Co.* 10 Sawy. 630, 23 Fed. 71.

The plaintiff need not allege want of knowledge of a defect in a platform, upon the condition of which he bases his right to recover. *Knarborough v. Belcher Silver Min. Co.* 3 Sawy. 446, Fed. Cas. No. 7,874.

Where a servant was injured by the derailling of a train by the striking of an animal on the track, and the negligence charged was that the road was not properly fenced and that the pilot was not in proper position, it was held unnecessary for the plaintiff to allege want of knowledge of such defect. *Magee v. North Pacific Coast R. Co.* 78 Cal. 430, 12 Am. St. Rep. 69, 21 Pac. 114.

¹⁹ *Williams v. Missouri P. R. Co.* 109 Mo. 475, 18 S. W. 1098.

In actions brought by servants against their masters, the burden of proof as to the master's knowledge, or culpability in lacking knowledge, of the defect which led to the injury, whether in the character of a fellow servant or in the quality of materials used, rests upon the plaintiff. But the plaintiff having proved the fault of the master in this respect, the burden of proving that the plaintiff also knew of such defect, and commenced or continued his service with such knowledge, rests upon the defendant. This fact being proved, it is then for the plaintiff to show, if he can, that defendant induced him to continue the work by promising to remedy the defect. *Shearm. & Redf. Neg.* § 99, p. 128, cited with approval in *Crane v. Missouri P. R. Co.* 87 Mo. 588.

The plaintiff need not allege lack of knowledge of the incompetency of defendant's employee. *Matthews v. Bull*, — Cal. —, 47 Pac. 773. The court said that in California the law seems to be settled that in this class of cases it is not necessary to allege in the complaint that the injury was one without fault or negligence on the part of the plaintiff.

In an action by an administrator against a stock-yard company for the death of a witchman, caused by defects in a railway track, it is not necessary to allege that he deceased had no knowledge of these defects, since that is a matter of defense which, to admit proof, must be pleaded. *Union Stock Yards Co. v. Conoyer*, 38 Neb. 3 L.R.A. (N.S.)

but it does not seem that the courts in the cases cited had in mind the proper distinction between the doctrine of assumed risk and contributory negligence.

3. Availability of defense under general denial.

It has been held in a number of cases, in jurisdictions where the burden of proving contributory negligence is on the de-

488, 41 Am. St. Rep. 738, 56 N. W. 1081.

In actions other than those between master and servant, the question of whether the person injured had knowledge of the danger or defect goes to the question of contributory negligence. In an action to recover damages for injuries received by reason of a defect in a highway, the burden of proving contributory negligence is not sustained by merely showing the knowledge by the complainant of the defect alleged. *Muller v. District of Columbia*, 5 Mackey, 286.

In an action to recover for injuries due to a defective sidewalk, it is not necessary for plaintiff to allege that he did not have knowledge of such defect. *Denison v. Sanford*, 2 Tex. Civ. App. 661, 21 S. W. 784.

In an action to recover for injuries due to obstructions in the street, it is unnecessary that the petition allege that the plaintiff was unaware of the obstruction, since the absence of contributory negligence need not be set out in the petition. *Lancaster v. Walter*, 25 Ky. L. Rep. 2189, 80 S. W. 189.

Where a passenger who was carried beyond her station was injured while attempting to walk back, it was held unnecessary in an action to recover for the injuries sustained, to negative the fact that there was an open, obvious, and safe way which the plaintiff could have traveled from the point where she was put off back to the station. *Alabama City, G. & A. R. Co. v. Cox*, — Ala. —, 55 So. 909.

²⁰ In *Richmond Granite Co. v. Bailey*, 92 Va. 554, 24 S. E. 232, the court said that to state that the master is exempt from liability where the danger is known to the servant is but another form of stating that the plaintiff cannot recover for the injury to which his own negligence has contributed. Contributory negligence, says the court, is a matter of defense, and need not be negatived by the plaintiff in his declaration.

Where the action was for an injury to a brakeman while attempting to couple two cars, and the negligence charged was due to the fact that the defendant had failed to employ a suitable number of servants to convey a stop signal, it was held unnecessary for the plaintiff to allege that he did not have knowledge of the condition complained of, or was not ignorant of it in consequence of a want of ordinary care on his part. *Thorpe v. Missouri P. R. Co.* 89 Mo. 650, 58 Am. Rep. 120, 2 S. W. 3. The court said: "The cases from which the

fendant, that if the defense is relied upon, it must be pleaded by the defendant; that it is not available under a general denial.²¹

rule for which defendant contends is taken are, we believe, from courts not in accord with this court as to the rule of pleading the contributory negligence of plaintiff, and which hold that the burden of proof is upon plaintiff to show both the negligence of defendant and his own care, which is not the rule in this state."

In an action by a miner to recover damages for injuries received by the fall of an overhanging rock in a place where he been ordered to work on the assurance that it was safe, it was held that whether the plaintiff was guilty of contributory negligence by knowing of the danger and failing to observe due care to avoid it, or otherwise, if susceptible of proof, was a matter of defense, which need not be negatived in the declaration. *Consolidated Coal Co. v. Wombacher*, 134 Ill. 57, 24 N. E. 627.

Failure of plaintiff, who was injured by reason of the breaking of a lumber truck through defective flooring, to allege that he could not have ascertained the condition of the flooring upon reasonable inquiry, does not render the pleading defective, since contributory negligence is a matter of defense, to be pleaded by the defendant, and not to be negatived by the complaint. *Johnson v. Bellingham Bay Improv. Co.* 13 Wash. 455, 43 Pac. 370.

A complaint is not insufficient because it fails to state that plaintiff was ignorant of the dangerous condition of a trench into which he was sent to work, since such an allegation, in an action to recover for injuries received in the trench, relates only to the defense of contributory negligence. *Hall v. St. Joseph Water Co.* 48 Mo. App. 356.

In an action to recover for injuries received by plaintiff while assisting in attempting to move a threshing machine engine over a country bridge, by the falling of the bridge, an instruction, "And if you believe from the evidence of the plaintiff himself, that the circumstances known and apparent to him, and immediately preceding and connected with the injury as disclosed by plaintiff's testimony, were such that a reasonably prudent and cautious man under like circumstances, in the exercise of reasonable prudence and caution, would have known, understood, and discovered the danger of going upon the bridge where he was injured, then the plaintiff cannot recover," was erroneous, for one reason, because, in effect, it was to tell the jury that plaintiff was bound to establish, by a preponderance of the evidence, that he was not guilty of contributory negligence. *Vertrees v. Gage County*, 81 Neb. 213, 115 N. W. 863.

²¹ In keeping with the proposition that the burden of proof is on the defendant, it has been repeatedly ruled in Missouri, that if contributory negligence is to be relied

upon, it must be pleaded by the defendant. *Taylor v. Missouri P. R. Co.* 26 Mo. App. 336.

Contributory negligence, if relied on as a defense, must be pleaded. *Louisville & N. R. Co. v. Schuster*, 10 Ky. L. Rep. 65, 7 S. W. 874; *Bevis v. Vanceburg Teleph. Co.* 132 Ky. 385, 113 S. W. 811; *Donovan v. Hannibal & St. J. R. Co.* 89 Mo. 147, 1 S. W. 232; *Parsons v. Missouri P. R. Co.* 94 Mo. 286, 6 S. W. 464; *Schultze v. Missouri P. R. Co.* 32 Mo. App. 438; *Orient Ins. Co. v. Northern P. R. Co.* 31 Mont. 502, 78 Pac. 1036; *Missouri, K. & T. R. Co. v. Foster*, — Tex. Civ. App. —, 87 S. W. 879; *Holland v. Oregon Short Line R. Co.* 26 Utah, 209, 72 Pac. 940.

The defendant cannot take advantage of the plaintiff's contributory negligence, not developed by plaintiff's case, unless the defendant pleads it. *St. Louis Southwestern R. Co. v. Gammage*, — Tex. Civ. App. —, 96 S. W. 645.

Being a matter of defense, it is incumbent upon the defendant by his answer to plead contributory negligence, that he may avail himself of such defense, for, there being no issue as to contributory negligence, no finding in relation thereto would be required. *Kenny v. Kennedy*, 9 Cal. App. 350, 99 Pac. 384.

So, where the defense of contributory negligence was not pleaded, it was held that an instruction that, before a recovery could be had, it must appear from the whole of the testimony that the injured party used, under all the circumstances, care to avoid the danger, was not proper, as contributory negligence was not an issue in the case. *White v. Trinidad*, 10 Colo. App. 327, 52 Pac. 214.

Where the petition states a good cause of action, and does not develop a case of contributory negligence, it rests upon the defendant to allege that the injury was so caused, if it desires to rely upon such a defense. *Missouri P. R. Co. v. Watson*, 72 Tex. 631, 10 S. W. 731.

The defense of contributory negligence must be set up in the answer where there are no facts stated in the complaint which, as a matter of law, constitute contributory negligence. *Duffy v. Atlantic & N. C. R. Co.* 144 N. C. 26, 56 S. E. 557.

²² *Montgomery v. Wyche*, — Ala. —, 53 So. 786.

²³ Contributory negligence is a special and affirmative defense, and, to be availed of, it must be pleaded with particularity. No other acts of negligence than those specially pleaded can be proved, and, if proved, they cannot be made the predicate for a verdict for the defendants. *Southern R. Co. v. Shelton*, 136 Ala. 191, 34 So. 194.

not by demurrer; ²⁴ that the defense is not available to the defendant unless he tenders an issue upon the question.²⁵

It is declared that a statement of a cause of action based upon the defendant's negligence does not involve the assertion that no negligence on the part of the plaintiff proximately contributed to the injury of which he complains, so that a mere denial of the allegations of the complaint casts the burden on the plaintiff to show that he was not guilty of contributory negligence.²⁶ And it has been held that an answer of general denial, even where the complaint alleges that the plaintiff was free from fault, does not raise the issue of contributory negligence.²⁷

²⁴ *Smith v. Southern R. Co.* 129 N. C. 374, 40 S. E. 86.

It is a sufficient answer to the contention that the plaintiff was guilty of contributory negligence, that no such defense was raised by the answer, or presented to the jury by instructions asked by the defendant. *Fell v. Rich Hill Coal Min. Co.* 23 Mo. App. 216.

A defense of contributory negligence cannot be made under the general issue, but must be specially pleaded. *Kansas City, M. & B. R. Co. v. Crocker*, 95 Ala. 412, 11 So. 262.

Under a general denial, the defendant is in no condition to invoke the defense of contributory negligence, unless the evidence offered in behalf of plaintiff shows such negligence. *Schlereth v. Missouri P. R. Co.* 96 Mo. 509, 10 S. W. 66.

In *Richmond & D. R. Co. v. Farmer*, 97 Ala. 141, 12 So. 86, the rule that the defense of contributory negligence is not available under the plea of not guilty was adhered to.

Where the case was tried solely upon the plea of not guilty, it was held that the want of care or diligence of the plaintiff was not an issue in the cause; that if the defendant had desired to raise the question of contributory negligence, it should have done so by a proper plea, and that it could not for the first time insist upon it in the appellate court. *Alabama Midland R. Co. v. Johnson*, 123 Ala. 197, 26 So. 160.

²⁵ *Womble v. Merchants' Grocery Co.* 135 N. C. 474, 47 S. E. 493.

²⁶ *Kansas City, M. & B. R. Co. v. Crocker*, 95 Ala. 412, 11 So. 262.

²⁷ *Hudson v. Wabash Western R. Co.* 101 Mo. 13, 14 S. W. 15.

Where the defense of contributory negligence is not pleaded by the defendant, and plaintiff's own case does not raise a presumption of contributory negligence, and the complaint specifically alleges that plaintiff was entirely without negligence, the question of contributory negligence cannot be considered. *Birsch v. Citizens' Electric Co.* 36 Mont. 574, 93 Pac. 940.

²⁸ *Glenville v. St. Louis R. Co.* 51 Mo. App. 629.

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But it has been decided in an action before a court of a justice of the peace, that the defendant may have the benefit of evidence showing contributory negligence, although such negligence was not pleaded, since before such court the defendant is not required to make any written plea.²⁸

Though contributory negligence is an affirmative defense which must be specially pleaded, it is declared that it may nevertheless be available to the defendant, although not specially pleaded, if it sufficiently appears from plaintiff's evidence that the plaintiff was guilty of negligence contributing to his injury.²⁹ It has been said that in a case in which plaintiff shows prima facie contributory negligence, the

²⁹ *McMurtry v. Louisville, N. O. & T. R. Co.* 67 Miss. 601, 7 So. 401. To the same effect, *Government Street R. Co. v. Hanlon*, 53 Ala. 70; *Florida East Coast R. Co. v. Smith*, — Fla. —, 55 So. 871; *Allen v. St. Louis Transit Co.* 183 Mo. 411, 81 S. W. 1142; *Evans & H. Fire Brick Co. v. St. Louis & S. F. R. Co.* 21 Mo. App. 648; *Pim v. St. Louis Transit Co.* 108 Mo. App. 713, 84 S. W. 155; *Kile v. Union Electric Light & P. Co.* 149 Mo. App. 354, 130 S. W. 89; *Silcock v. Rio Grande Western R. Co.* 22 Utah, 179, 61 Pac. 565.

Where it clearly appears from the plaintiff's own evidence that he was guilty of negligence that directly contributed to produce the injury, it is the duty of the court to take the case from the jury by an instruction in the nature of a demurrer to the evidence. *Chaney v. Louisiana & M. River R. Co.* 176 Mo. 598, 75 S. W. 595.

The defendant may interpose a motion for nonsuit on that ground. *Smith v. Ogden & N. W. R. Co.* 33 Utah, 129, 93 Pac. 185.

In *Taylor v. Missouri P. R. Co.* 26 Mo. App. 336, the question was left to the jury.

Where the plaintiff's own testimony points to contributory negligence, a charge on that subject is proper. *Nelson v. Boston & M. Consol. Copper & S. Min. Co.* 35 Mont. 223, 88 Pac. 785.

In an action to recover for the loss of stock killed at a crossing, in which plaintiff's contributory negligence was not pleaded, it was held that the plaintiff could not recover where his own evidence showed that he was guilty of negligence contributing to the accident. *Milburn v. Kansas City, St. J. & C. B. R. Co.* 86 Mo. 104.

In an action to recover for injuries received by coming in contact with an electric wire, evidence that plaintiff slipped while working on a scaffold, and, in endeavoring to save himself, threw out his arms and came in contact with the wire, does not show contributory negligence, so as to enable the defendant to take advantage of that defense in the absence of its being pleaded in the answer. *Birsch v. Citizens' Electric Co.* 36 Mont. 574, 93 Pac. 940.

defendant may take advantage of it without pleading such defense;³⁰ and that it should not be understood that in all cases where there may be evidence tending to show contributory negligence, such defense may be raised at the trial though not set up in the answer. To be thus utilized on the trial, the contributory negligence shown in plaintiff's evidence should be so clear and flagrant as to disprove the cause of action stated in the petition. If it falls short of this, and remains a question of fact which might be decided either way, then we have little doubt that it should be pleaded to be available as a defense;³¹ and that it is only where a conclusive inference of contributory negligence arises out of the plaintiff's own testimony, or that of his witnesses, either on their direct or their cross-examination, that contributory negligence will bar his recovery when it is not pleaded. In other cases, contributory negligence is an affirmative defense, to be pleaded and proved by the defendant in order to entitle him to have it submitted to the jury. If it is not so pleaded and proved, and is nevertheless submitted to

the jury, the case falls within the rule that it is error to submit to the jury an issue not made by the pleadings.³² And that unless plaintiff's petition makes him *prima facie* guilty of negligence as a matter of law, or unless the undisputed evidence shows contributory negligence as a matter of law, the defendant, to make out that defense, must allege and prove the act or acts relied on as constituting such negligence.³³ The fact that contributory negligence is not affirmatively pleaded in the answer is immaterial where plaintiff's own evidence shows that he was guilty of negligence which was the proximate cause of the injury.³⁴ The defense may be considered, however, where it is manifest from the record that both parties, without objection, have tried a case for personal injuries to its conclusion as if upon issue joined upon the plea of contributory negligence, although the record shows no other plea than the general issue.³⁵

It is not intended in this note to go into the question of what constitutes a sufficient plea of the defense of contributory negligence, but a few of the cases in which the

No issue of contributory negligence having been presented by the pleadings, the court upon appeal cannot, in determining that question, consider any evidence other than that presented by the plaintiff in establishing his case. *Kenny v. Kennedy*, 9 Cal. App. 350, 99 Pac. 384.

In *Brown v. Hannibal & St. J. R. Co.* 31 Mo. App. 661, where the defense of contributory negligence was not pleaded, it was urged that, although the evidence of the plaintiff did not so clearly show contributory negligence as to warrant the court in taking the case from the jury, if it nevertheless tended to show contributory negligence, it became an issue in the case, and should have been submitted to the jury; but the court did not pass upon the question, on the ground that, in the case before it, there was no evidence on the part of the plaintiff, either proving or tending to prove contributory negligence.

But in *Kansas City, M. & B. R. Co. v. Crocker*, 95 Ala. 412, 11 So. 262, the court said that the defendant need not introduce evidence in support of a special plea, if the evidence introduced by the plaintiff has already established the defense. But the source from which the evidence to support a defense comes does not determine that it was not purely defensive matter, and available only under a special plea, or that the burden to prove it was not on the defendant. The term "contributory negligence," instead of implying such a denial of the material allegations of the complaint as is made by pleading the general issue, implies just the contrary. The theory of this special defense is that the defendant was negligent, but that the negligence of the plaintiff conduced to the injury com-

plained of. The defense is in the nature of a confession and avoidance. It may be fully made out without denying a single allegation of the complaint. The pith of it is that, admitting that the defendant was negligent as charged, yet the plaintiff is not entitled to recover because his own negligence proximately contributed to the injury.

³⁰ *Louisiana Western Extension R. Co. v. McDonald*, — Tex. Civ. App. —, 52 S. W. 649.

³¹ *Schultze v. Missouri P. R. Co.* 32 Mo. App. 438.

³² *Keitel v. St. Louis Cable & W. R. Co.* 28 Mo. App. 657.

But where neither plaintiff's pleading nor evidence, except such as is drawn out on cross-examination, develops contributory negligence, such negligence is not available to the defense, where it is not pleaded. *Lewis v. Texas & P. R. Co.* — Tex. —, 122 S. W. 605.

³³ *San Antonio & A. P. R. Co. v. Belt*. — Tex. Civ. App. —, 46 S. W. 374.

³⁴ *Bunnell v. Rio Grande Western R. Co.* 13 Utah, 314, 44 Pac. 927.

Although as a general rule in an action for damages for injuries resulting from negligence, contributory negligence is a matter of defense, and must be alleged and proved by the defendant, yet where plaintiff's own testimony shows that his own negligence or want of ordinary care was the proximate cause of the injury, he will not be permitted to recover, even though the answer contains no averment of contributory negligence. *Clark v. Oregon Short Line R. Co.* 20 Utah, 401, 59 Pac. 92.

³⁵ *Richmond & D. R. Co. v. Farmer*, 97 Ala. 141, 12 So. 86.

plea has been held insufficient are appended by way of illustration.³⁶

The cases are not in harmony as to the necessity of specially pleading the defense of contributory negligence, as this defense

has been held available under the general issue or under a general denial.³⁷ In the United States courts there is a conflict on the question;³⁸ and in South Carolina the decisions are not in accord.³⁹ It would

³⁶ An answer denying any negligence on the part of the defendant, and alleging that the injury complained of resulted wholly from plaintiff's negligence, does not plead contributory negligence, so as to raise that issue. *Birsch v. Citizens' Electric Co.* 36 Mont. 574, 93 Pac. 940.

A statement in an answer purporting to be a defense of contributory negligence to an action for damages for injury to the person, which only denies that the injury was caused by the negligence of the defendant, and alleges that it was "wholly" caused by the negligence of the plaintiff, is not such a defense, but only a denial of the negligence of the defendant, and needs no reply. *Watkins v. Southern P. R. Co.* 4 L.R.A. 239, 4 Sawy. 30, 38 Fed. 711.

An allegation in an answer that an intestate's death was not caused by any negligence of the defendant, but by his own negligence, is not a sufficient statement of the defense of contributory negligence. *Cogwell v. Wilmington & W. R. Co.* 132 N. C. 52, 44 S. E. 618.

A plea by which the defendant denies each and every allegation in the complaint, and alleges that if the plaintiff's intestate was killed by a locomotive and cars of the defendant, as charged, he contributed thereto by his own carelessness and negligence, and that the defendant is not liable therefor, is not a good plea of contributory negligence, since the defendant must set out or admit its negligence, and seek to avoid its negligence by alleging negligence of the plaintiff as a proximate cause. *Scott v. Seaboard Air Line R. Co.* 7 S. C. 136, 45 S. E. 129.

³⁷ Evidence that plaintiff's negligence contributed to the injury sued for may be given in evidence under the general issue. *Western U. Teleg. Co. v. Eyser*, 2 Colo. 41; *Holden v. Liverpool New Gas & Coke Co.* 3 C. B. 1, 15 L. J. C. P. N. S. 301, 10 Jur. 883; *Hocum v. Weitherick*, 22 Minn. 52.

Under the Indiana statute placing the burden of proving contributory negligence on the defendant, it was held that such defense may be proved under the answer of general denial. *Indianapolis & E. R. Co.*

Barnes, 35 Ind. App. 485, 74 N. E. 583; *Roberts v. Terre Haute Electric Co.* 37 Ind. App. 664, 76 N. E. 323, 895; *New York, C. & St. L. R. Co. v. Robbins*, 38 Ind. App. 12, 76 N. E. 804; *Pittsburgh, C. C. & St. L. R. Co. v. Rogers*, — Ind. App. —, 87 N. E. 28.

In *Pittsburgh, C. C. & St. L. R. Co. v. Robbins*, 168 Ind. 467, 80 N. E. 415, an instruction that contributory negligence is now a matter of defense, and provable under the answer of general denial, was said to be not subject to criticism.

3 L.R.A. (N.S.)

³⁸ On principle, the pleading of this defense would seem to be requisite to raising it in the United States courts, especially in proceedings according to the course of the common law. *Clark v. Canadian P. R. Co.* 69 Fed. 544.

The defendant may prove contributory negligence, although it is not pleaded in his answer. *Canadian P. R. Co. v. Clark*, 20 C. C. A. 447, 38 U. S. App. 573, 74 Fed. 362. *Lacombe, J.*, in a concurring opinion in this case, said: "A system of procedure which denies to defendant the right to avail of plaintiff's contributory negligence, unless he has alleged it in his pleading, is inherently vicious. There are many cases where the fact that plaintiff's negligence was the real cause of the accident is wholly unknown until the trial. It is locked up in plaintiff's breast, and only made manifest under the stress of cross-examination. Under such circumstances, how could an honest defendant have alleged it in his answer? He had no knowledge or information whatsoever, warranting a belief sufficient to authorize his verifying an answer which alleges that plaintiff was negligent. And how unjust to deprive him of a meritorious defense merely because he did not and could not have learned of it until the trial. It may be suggested that the court has the power to allow an amendment on the trial; but that power rests in the court's discretion, and it does not seem to be a very sensible system which contemplates amendment as a necessary essential of its usefulness. The inevitable result of such an illogical and unscientific system of pleading and practice would be to imperil the rights of the conscientious defendant, while the defendant with an elastic conscience would invariably aver and swear to plaintiff's negligence, although he had not the slightest knowledge or information to warrant any such averment. Certainly, no such practice should be encouraged."

But in *Gadonnex v. New Orleans R. Co.* 128 Fed. 805, it is said that no such injustice as pointed out in the concurring opinion in the *Clark Case* could be inflicted, because it is well settled that the defendant, even if he has not pleaded contributory negligence, can avail himself—without the necessity of an amendment and without right on the plaintiff's part to a delay,—of the plaintiff's contributory negligence appearing from the plaintiff's own case.

The *Clark Case* was an action on the case under common-law pleadings, and the court admits the rule which it announces might be different under Code pleading. The general issue at common law and the general denial under Code pleadings are not equivalent. *Gadonnex v. New Orleans R. Co. supra.*

likewise seem that the question is not settled in Texas.⁴⁰

4. Effect of allegations in complaint showing contributory negligence.

The same rule applies to pleading as to proof, with respect to the effect of the de-

In *Gadonnex v. New Orleans R. Co.* supra, a motion that the defendant's answer be made more specific concerning the defense of contributory negligence was granted. The court said that, on the issue raised by such a special defense, the defendant holds the affirmative, and stands in the attitude of a plaintiff *quoad* the special defense. If it be but just and fair that the plaintiff be required distinctly to inform the defendant as to his demand, it is equally just and fair that the defendant, who introduces an issue into the cause as a matter of special defense, should inform the plaintiff of the act or acts upon which reliance is placed in support of that defense.

³⁹ In *Kennedy v. Southern R. Co.* 59 S. C. 535, 38 S. E. 169, it was held that under a general denial the defendant could prove that the injury was caused solely by the negligence of the plaintiff. It was said that, "if a person is charged with having caused an injury to another by reason of his negligence, surely it is both reasonable and logical for him to say 'I deny the charge, and support such denial by showing that the injury complained of was caused by the negligence of the party injured, or that of some other person, and therefore I am not the cause of the injury complained of.' If a person is charged with taking the life of another, it is certainly competent for him to deny the charge, and sustain such denial by showing that the party took his own life, or that his death resulted from some other agency for which the party charged was not responsible. Indeed, this seems to us to be the strongest form of denial, for, if it is shown that the act or omission complained of was the result of some other agency than the act of the party charged, then it is shown that he not only did not do the act, but that it was impossible that he could have done it."

Without referring, however, to the last mentioned decision, the court in *Scott v. Seaboard Air Line R. Co.* 67 S. C. 136, 45 S. E. 129, says that it is well settled in South Carolina that when contributory negligence is relied upon by the defendant, it must be pleaded.

⁴⁰ In *Gulf, C. & S. F. R. Co. v. Shieder*, 88 Tex. 152, 28 L.R.A. 538, 30 S. W. 902, the court said: We understand that two questions were decided in *Murray v. Gulf, C. & S. F. R. Co.* 73 Tex. 2, 11 S. W. 125. First, that the evidence was sufficient to sustain the verdict on the issue of contributory negligence, and, second, that the evidence on such issue was admissible under the general denial, the special plea of contributory negligence having been held de-

velopment of a case of contributory negligence by the plaintiff. If the declaration or complaint shows it, the pleading is demurrable.⁴¹ The rule, of course applies where a statute imposes the burden of proving contributory negligence on the defendant.⁴² So, in an action brought to recover for injuries received by the plaintiff

fective. It is not necessary for us to determine here in what class of cases a special plea of contributory negligence is required, but it seems generally to be admissible in many jurisdictions under the general denial, even where the burden of proof is on the defendant.

But the reason why the court in the *Murray* Case, referred to, let the defendant have the benefit of contributory negligence under the general issue, was that such negligence had been developed by the plaintiff in proving his case, which, as has been seen, is in harmony with other decisions on the point.

⁴¹ If the declaration develops a case of contributory negligence, it is demurrable. *Winchester v. Carroll*, 99 Va. 727, 40 S. E. 37.

If contributory negligence be shown by the complaint, it will render the pleading insufficient. *Indianapolis & E. R. Co. v. Barnes*, 35 Ind. App. 485, 74 N. E. 583.

It is doubtless true that if the complaint states facts showing affirmatively that plaintiff was guilty of negligence which contributed to his injury, the complaint would be demurrable. *Clark v. Chicago, M. & St. P. R. Co.* 28 Minn. 69, 9 N. W. 75.

Although contributory negligence is a defense which confesses and avoids the plaintiff's case, and must be affirmatively pleaded by the defendant, it may nevertheless be decided on demurrer to a petition, whether, according to the facts stated by the plaintiff, he was guilty of such contributory negligence as to defeat his recovery. *Farr v. Louisville & N. R. Co.* 91 Ky. 541, 16 S. W. 370.

⁴² And where a statute imposes the burden of proving contributory negligence on the defendant, nevertheless, if the facts pleaded in the complaint show that the plaintiff was in fault, he cannot recover. *Rich v. Evansville & T. H. R. Co.* 31 Ind. App. 10, 66 N. E. 1028.

Where a complaint shows that the plaintiff was guilty of contributory negligence, notwithstanding the fact that it also shows the defendant was guilty of the negligence which caused the injury, such a complaint is insufficient, and advantage may be taken of such defect by demurrer. *Lafayette v. Fitch*, 32 Ind. App. 134, 69 N. E. 414.

The statute putting the burden of proving contributory negligence on the defendant has not changed the common-law rule that where the facts specially alleged show that the plaintiff was guilty of negligence contributing to his injury, the complaint will not withstand the attack of a demurrer for want of facts. *Indianapolis Trac-*

due to the falling of a pile of lumber upon him, the complaint having in effect alleged that plaintiff assisted in piling the lumber, which was partly covered with snow and in a slippery condition, upon a car in such a manner that a slight jar would cause the lumber to fall down unless the same were properly braced or shored up, which was not done, and that he got into the car, and while stooping down between the piles and in the act of counting the lower tiers, the pile fell upon him, it was held that he should have gone further, and alleged, if he could, other facts showing that he was without fault at the time.⁴³

5. *Effect of allegation in complaint of freedom from fault.*

The mere fact that the plaintiff unneces-

sarily alleges that the injured person was, at the time of the accident, not guilty of contributory negligence, does not cast the burden of that issue upon him;⁴⁴ and this is the rule although the defendant traverses the allegation.⁴⁵ Such allegations may be eliminated,⁴⁶ as they add no force to the complaint.⁴⁷

VII. *Miscellaneous rules.*

a. *Exercise of due care by plaintiff after defendant's negligence.*

1. *In general.*

It has been held that the burden of proving negligence on the part of the person injured, after the accident, rests upon the

tion & Terminal Co. v. Pressell, 39 Ind. App. 172, 77 N. E. 357.

⁴³ Hoth v. Peters, 55 Wis. 405, 13 N. W. 119.

⁴⁴ Contributory negligence is a matter of defense, although freedom from fault is alleged in the complaint. Snook v. Ananda, 26 Mont. 128, 66 Pac. 756; Missouri P. R. Co. v. Preston, — Kan. —, 63 Pac. 44.

A case is not excepted from the general rule of the Federal court, that the burden of proving contributory negligence is on the defendant, because of the fact that the plaintiff alleges in his declaration that he was "in the exercise of due care." Fitchburg R. Co. v. Nichols, 29 C. C. A. 500, 10 U. S. App. 297, 85 Fed. 945.

In Montgomery & E. R. Co. v. Chambers, 9 Ala. 338, the court said that if the plaintiff averred that the injury he complains of was caused by the negligence of the defendant without any fault or neglect of duty on his part, this does not change the burden of proof as to such contributory negligence. The defendant must still make the proof, unless the plaintiff's testimony proves also that he, plaintiff, by his own negligence, has contributed proximately to the injury.

In Denver & R. G. R. Co. v. Ryan, 17 Colo. 98, 28 Pac. 79, the court said: "It is true, the complaint in an action for negligence usually contains the averment that the plaintiff, without any fault or negligence on his part, was injured by reason of the negligence of the defendant. In consequence of this negative averment, it has been supposed that the plaintiff must offer some affirmative evidence of the absence of negligence on his part in the first instance. But this does not follow. The negative averment, even if necessary,—a point we do not decide,—serves substantially as a plea of not guilty to any countercharge of contributory negligence which may be made by defendant. In the absence of evidence of defendant's negligence, the defendant is saved from defeat. So, in the absence of evidence of plaintiff's contributory negligence, the plaintiff is saved from defeat on that ground. Perhaps, the matter may be stated more clearly and logically thus: As the absence of evidence tending to show defendant's negligence leaves the charge of negligence unsustained against defendant, so the absence of evidence tending to show plaintiff's contributory negligence leaves the countercharge of contributory negligence unsustained against the plaintiff."

In Atchison v. Wills, 21 App. D. C. 548, the court said that the allegation is not a material one to be made in the declaration, but, being made, the natural instinct of self-preservation would stand in the place of positive evidence to support the allegation, until evidence by proof of contributory negligence furnished by the defendant,—or that may be gathered by the evidence introduced by the plaintiff in proving the cause of action alleged in the declaration,—overcomes this presumption in behalf of the plaintiff.

Where the plaintiff was injured by reason of a defective sidewalk, and the complaint alleged that the injury was without any fault or negligence on plaintiff's part, it was held that contributory negligence was a matter of defense. Pryor v. Walkerville, 31 Mont. 618, 79 Pac. 240.

The making of the unnecessary allegation in plaintiff's petition, that he was injured without fault on his part, does not change the rule as to the burden of proof, so as to cast upon him the burden of showing that he was without fault. Pares v. St. Louis Southwestern R. Co. — Tex. Civ. App. —, 57 S. W. 301.

⁴⁵ Bevis v. Vanceburg Teleph. Co. 132 Ky. 385, 113 S. W. 811.

⁴⁶ Allegations in the complaint that the plaintiff was exercising or using due care may be eliminated, since they do not change the burden of proof,—the defendant, setting up and relying on the defense of contributory negligence, being required to prove it, notwithstanding such averments. McDonald v. Montgomery Street R. Co. 110 Ala. 161, 20 So. 317.

⁴⁷ Where the statute casts upon the de-

defendant.⁴⁸ The burden, for example, of proving mismanagement in the care of cattle injured by a train, after the accident, by which greater loss resulted than was necessary, is on the defendant.⁴⁹

Although this is not contributory negligence in its technical sense, it is often treated as such. In an action to recover for damages caused by the spread of fire from defendant's right of way, it was said that where, as in Indiana, the burden rests upon the plaintiff to show his want of contributory negligence, it becomes necessary for him to prove whether or not he or his servants in charge of the property had knowledge of the existence of the fire during its progress, and, if it is not made to appear that such knowledge did not exist,

then it devolves upon the plaintiff to show what efforts were made to save him from loss, and it is incumbent upon him to prove the use of efforts reasonable under the circumstances.⁵⁰ And in an action by a passenger to recover for injuries received by reason of the fact that his train broke through a bridge, it was urged that the complaint was defective because it did not show that he might have conducted himself negligently after the bridge went down, in the endeavor to extricate himself from the wreck; but the court declined to hold that a passenger who, without fault, became involved in such a disaster, should be required to aver or prove that he acted with prudence and deliberation while so involved.⁵¹

defendant the burden of proving the plaintiff's contributory negligence, the fact that the plaintiff alleges freedom from fault in the complaint adds no force to the complaint, and does not put upon him the burden of this issue which by the statute is placed upon the defendant. *Southern R. Co. v. Davis*, 34 Ind. App. 377, 72 N. E. 1053.

Where the statute places the burden of showing contributory negligence on the defendant, the allegation of freedom from such negligence in the complaint does not change the burden of proof. *Pennsylvania Co. v. Fertig*, 34 Ind. App. 459, 70 N. E. 834.

⁴⁸ The burden of proof is on the carrier to establish that any increase in the amount of damages caused by its negligence, after the accident, was due to want of care on the part of the injured person. *Secord v. St. Paul, M. & M. R. Co.* 5 McCrary, 515, 18 Fed. 221.

⁴⁹ *Gulf, C. & S. F. R. Co. v. Hudson*, 77 Tex. 494, 14 S. W. 158.

In an action to recover damages to cattle due to the delay in the transportation of seed, the burden is on the defendant to show negligence on the part of the plaintiff in not procuring seed from other sources, by which the damages were enhanced. *Belcher v. Missouri, K. & T. R. Co.* 92 Tex. 593, 50 S. W. 559.

⁵⁰ *Wabash R. Co. v. Miller*, 18 Ind. App. 549, 48 N. E. 663.

An interrogatory, "Did not the plaintiff and the members of his family make all reasonable efforts to subdue and extinguish said fire? Answer. Yes," does not show plaintiff's freedom from contributory negligence. *Ibid.*

In *Wissler v. Atlantic*, 123 Iowa, 11, 98 N. W. 131, a sidewalk accident case, it was held unnecessary for the plaintiff to allege and prove, in order to authorize the recovery, that, following the accident, she was not guilty of any negligence contributing to the conditions complained of and made the basis of her demand for damages. It was for the defendant to bring forth facts to prove that the result of

the injury had been attenuated or aggravated by some intervening cause which was the fault of the injured party. The court said: "Failure to exercise that degree of proper care and caution necessary to keep results within natural and ordinary bounds may operate, as a matter of course, to defeat a recovery in whole or in part, but it is a misnomer to speak of such as contributory negligence. The negligence of a tortfeasor ends when the accident out of which the injury grows is complete. From that time on, the law holds him to a responsibility for consequences. If conditions arise which are not traceable to the accident as a proximate cause, but which, on the contrary, are due to some act or want of care on the part of the injured party, such can in no sense be said to be the result of contributory negligence. Contributory negligence presumes the presence of primary negligence on the part of some other party, and which is active and operating at the time. A failure to exercise proper care by an injured party following his injury is primary negligence in itself, and the rule that steps in here, and forbids his recovery, has its origin in the fundamental doctrine that one man may not pass upon another the responsibility for something which he himself has done or omitted to do, and in respect of which such other had no part."

⁵¹ *Bedford, S. O. & B. R. Co. v. Rainbolt*, 99 Ind. 551.

But under the rule that it is the duty of a party injured to use ordinary care and diligence in securing medical or surgical aid after receiving such an injury, and that he cannot recover for any suffering or ailment brought about by his failure to use such care and diligence, it was held that such aggravation was a matter of defense, and that after an injury by the defendant's negligence has been established, the burden is on the defendant to show the plaintiff's failure to use ordinary care, judgment, and diligence in having his injuries properly treated. *Citizens' Street R. Co. v. Hobbs*, 15 Ind. App. 610, 43 N. E. 479, 44 N. E. 377.

In an action to recover for the loss of

3. Actions for malpractice.

In an action for malpractice, it has been held that the burden is on the plaintiff to show freedom from negligence contributing to the injury complained of.⁵² And on the other hand, it has been held necessary for the plaintiff in such actions to allege his own freedom from negligence.⁵³ In other words, the rule as to the burden of proving negligence of this sort seems to follow the rule as to the burden of proof in respect to contributory negligence in its technical sense.

In an eye due to a cinder getting in it, it was held that the burden was on the plaintiff to show that delay in consulting a specialist had not contributed to the loss of the eye. *Morrison v. Long Island R. Co.* 3 App. Div. 205, 38 N. Y. Supp. 393.

In an action to recover for injuries received by plaintiff in attempting to board a train, where both the pleading of the defendant and the charge of the court treat of the failure of the plaintiff to obtain proper medical attendance after the injury as if it were contributory negligence, it was held that a charge in effect that if the plaintiff established the negligence of the defendant to the satisfaction of the jury, then the burden of proof shifted to the defendants, and they must show by the evidence, to the satisfaction of the jury, that the plaintiff was guilty of contributory negligence, was held reversible error. *Gulf, C. & S. F. R. Co. v. Condra*, 36 Tex. Civ. App. 556, 82 S. W. 528.

In an action to recover damages for the diversion of water, proof that plaintiff's inaction and culpable negligence aggravated his damages is a matter of defense. *Colrick v. Swinburne*, 105 N. Y. 503, 12 N. E. 427.

⁵² *Whitesell v. Hill*, — Iowa, —, 66 N. W. 894.

One who seeks to recover damages for malpractice must show that no negligence of his own contributed to the result complained of. *Baird v. Morford*, 29 Iowa, 531.

⁵³ *Decatur v. Simpson*, 115 Iowa, 348, 88 N. W. 839. In this case there was a contention that the action did not sound in tort, but was for breach of contract. The court hardly thought the counsel serious in this contention, stating that a bare reading of the petition showed that it was an action for negligence, in which the relation of the parties was material only as fixing the degree of care required.

A charge that the plaintiff could not recover if, by contributory negligence in disobeying his physician, he had contributed in any degree to the injury complained of, does not shift the burden of proving contributory negligence onto the defendant, where the jury was plainly told by another instruction that the plaintiff could not re-

b. Rule under special contracts.

Under an insurance contract providing that all loss of property insured, caused by a steam threshing machine, shall be paid, provided that due caution shall be exercised to prevent fire from its use, it has been held that the burden of proof would be on the insurance company in an action to recover for a loss, to establish that the insured had failed to exercise due caution.⁵⁴ And in an action on an accident insurance policy, the burden of proving contributory negligence on the part of the deceased is on the defendant.⁵⁵ Under the voluntary

cover if he was guilty of any fault or negligence. *Swanson v. French*, 92 Iowa, 695, 61 N. W. 407.

In *Lower v. Franks*, 115 Ind. 334, 17 N. E. 630, in holding that contributory negligence was a defense to an action for malpractice, the court said that an action against a railroad company for a negligent injury to a passenger while under its charge is, though sounding in tort, really an action founded upon and arising out of a contract. Yet in that class of actions, proof of contributory negligence is fatal to a recovery. So important is it considered in this state that contributory negligence shall not appear as an element in actions of that class, that the plaintiff is required to aver in his complaint and to show at the trial that he did not contribute to the injury complained of. In pleading, therefore, contributory negligence is not in this state generally treated as a matter of defense, technically speaking, but as a thing to be negatived both in the complaint and by the evidence as a prerequisite to the right to recover for negligence of the defendant.

But, in *Gramm v. Boener*, 56 Ind. 497, in an action to recover damages for malpractice, a charge that proof of the commission by the defendant of the injuries complained of very generally carries with it prima facie proof of negligence and unskillfulness; and it is for the defendant to show that the injuries were the result of inevitable accident, or that they were occasioned by the negligence of the plaintiff himself, was held proper.

⁵⁴ *Morris v. Farmers' Mut. F. Ins. Co.* 63 Minn. 420, 65 N. W. 655.

⁵⁵ *Mulville v. Pacific Mut. L. Ins. Co.* 19 Mont. 95, 47 Pac. 650.

Under a policy insuring a person against bodily injuries effected through external, violent, and accidental means, providing, however, that the insurer shall not be liable unless the insured uses "all due diligence for personal safety and protection," the burden in an action to recover on the policy is on the defendant, or insurer, to show that the insured failed to use such diligence. *Freeman v. Travelers' Ins. Co.* 144 Mass. 572, 12 N. E. 372.

exposure to unnecessary danger clause, the burden is on the company to show the carelessness of the insured.⁵⁶

Where a stipulation in a drover's pass provided that in case he should not ride in the caboose while the train was in motion, this should be deemed prima facie evidence of negligence on his part, it was held that this merely shifted the burden of proof of contributory negligence, and did not preclude recovery where the drover was injured while riding on the engine.⁵⁷

It is evident that the court, in this reference to the burden of proof, is speaking of it in its secondary sense; that is, the burden of introducing evidence on the issue. It would hardly seem reasonable to hold that, under such a stipulation, the burden of proving the issue of contributory negligence by a preponderance of the evidence would be cast upon the plaintiff.⁵⁸

c. Right to peremptory instructions.

Peremptory instructions in favor of the party having the burden of the issue when it depends upon oral testimony are not allowed.⁵⁹ And by this is meant, of course, the burden of proof as to contributory negligence in its primary sense. So, a statute having been passed placing the burden of proving contributory negligence upon the defendant, it was held necessarily to follow that a peremptory instruction

which, under the rule requiring plaintiff to establish his freedom from contributory negligence was permitted only in favor of the defendant, could, the burden of proof having been changed, only be given in favor of the plaintiff.⁶⁰

In North Carolina, while the court can hold that a party on whom rests the burden of proof has failed to offer evidence to sustain it, it cannot adjudge that he has proved his case, for when there is evidence the jury alone can pass upon its truth.⁶¹

And in South Carolina, prima facie proof of negligence on the part of the defendant is sufficient to compel the court to send the case to the jury; but prima facie proof of contributory negligence on the part of the plaintiff is not sufficient to draw it from the jury, because whether the plaintiff contributed to the negligence or not is a fact which the court should not determine on prima facie evidence.⁶²

VIII. Statutes.

a. Acts fixing burden of proof.

1. Indiana.

(a) Proof.

In Indiana, the burden of proving absence of contributory negligence was always held to be on the plaintiff; but in 1889, a statute⁶³ was passed, re-enacted in 1901,⁶⁴ abrogating this rule. Since the

⁵⁶ *Badenfield v. Massachusetts Mut. Acci. Asso.* 154 Mass. 77, 13 L.R.A. 263, 27 N. E. 769.

⁵⁷ *Missouri, K. & T. R. Co. v. Avis*, 100 Tex. 33, 93 S. W. 424.

⁵⁸ For discussion of the relation between presumptions of evidence and burden of proof, see *supra*, IV.

⁵⁹ *Cleveland, C. C. & St. L. R. Co. v. Henry*, — Ind. App. —, 80 N. E. 636.

⁶⁰ *Indianapolis Street R. Co. v. Coyner*, 39 Ind. App. 510, 80 N. E. 168.

A defendant is not entitled to an instruction stating the contributory negligence of a decedent as a matter of law, where the burden is on the defendant to establish contributory negligence. *Cleveland, C. C. & St. L. R. Co. v. Henry*, — Ind. App. —, 80 N. E. 636.

In an action to recover for the death of a person killed at a railroad crossing, where the statute places the burden upon the defendant to establish the plaintiff's contributory negligence, it was held that a peremptory instruction for the defendant was not justified where the evidence was meager and unsatisfactory on the question of the surroundings of the accident, where there was no evidence as to the movements of the deceased from the time she left a point 300 feet from the railroad until the instant she was struck and killed, and where, although there was some evidence

as to the freedom of the tracks from obstruction, there was nothing to show what the temporary condition in that respect was at the time the accident happened. and where, although there was some testimony as to the blowing of a whistle, it was not in itself sufficient to have justified the withdrawal of the case from the jury. It was said that the burden of showing conditions which would establish contributory negligence rested on the defendant. *Wamsley v. Cleveland, C. C. & St. L. R. Co.* 41 Ind. App. 147, 82 N. E. 490, rehearing denied in 41 Ind. App. 155, 83 N. E. 640.

⁶¹ *Sims v. Lindsay*, 122 N. C. 678, 30 S. E. 19.

If, upon plaintiff's evidence in an action to hold another liable for a personal injury, he shows negligence on his part, a matter of law, the question of his negligence should be submitted to the jury. *Wagner v. Atlantic Coast Line R. Co.* 147 N. C. 315, 19 L.R.A. (N.S.) 1028, 61 S. E. 171.

⁶² *Kaminitsky v. Northeastern R. Co.* 25 S. C. 53.

⁶³ Acts 1899, p. 58, § 1.

⁶⁴ The statute reads: "That hereafter, in all actions for damages, brought on account of the alleged negligence of any person, copartnership, or corporation, for causing personal injuries or the death of any person, it shall not be necessary for

passage of the statute, the burden has, of course, always been upon the defendant.⁶⁵ The statute in all things reversed the rule

which had theretofore obtained,⁶⁶ relieving the plaintiff of the burden,⁶⁷ and changing the rule of both pleading and proof.⁶⁸ The

the plaintiff in such action to allege or prove the want of contributory negligence on the part of the plaintiff, or on the part of the person for whose injury or death the action may be brought. Contributory negligence on the part of the plaintiff or such other person shall be a matter of defense; and such defense may be proved under the answer of general denial. Provided, that this act shall not affect pending litigation." § 359a, Burns's Anno. Stat. 1901. *Frank Bird Transfer Co. v. Krug*, 30 Ind. App. 602, 65 N. E. 309.

⁶⁵ *Pennsylvania Co. v. Fertig*, 34 Ind. App. 459, 70 N. E. 834; *Indianapolis v. Keeley*, 167 Ind. 516, 79 N. E. 499; *Howard v. Indianapolis Street R. Co.* 29 Ind. App. 514, 64 N. E. 890; *Southern R. Co. v. Davis*, 34 Ind. App. 377, 72 N. E. 1053; *Fletcher v. Kelly*, 37 Ind. App. 254, 76 N. E. 813; *Sellersburg v. Ford*, 39 Ind. App. 14, 79 N. E. 220; *Indianapolis Traction & Terminal Co. v. Pressell*, 39 Ind. App. 172, 77 N. E. 357; *Indianapolis Street R. Co. v. Coyner*, 39 Ind. App. 510, 80 N. E. 168; *Louisville & S. I. Traction Co. v. Short*, 41 Ind. App. 570, 83 N. E. 265; *Lowden v. Pennsylvania Co.* 41 Ind. App. 514, 82 N. E. 941; *Grass v. Ft. Wayne & N. Valley Traction Co.* 42 Ind. App. 395, 81 N. E. 514; *Indianapolis Traction & Terminal Co. v. Miller*, 43 Ind. App. 717, 88 N. E. 526; *Chicago, I. & L. R. Co. v. Vicker*, — Ind. App. —, 71 N. E. 223; *Diamond Block Coal Co. v. Cuthbertson*, — Ind. —, 73 N. E. 818; *Crawford & M. Co. v. Gose*, — Ind. App. —, 82 N. E. 984; *Grand Trunk Western R. Co. v. Reynolds*, — Ind. App. —, 90 N. E. 94; *Indiana Union Traction Co. v. Keiter*, — Ind. —, 92 N. E. 982; *Chicago & E. R. Co. v. Lawrence*, 169 Ind. 319, 79 N. E. 363, 82 N. E. 768.

⁶⁶ *Nichols v. Baltimore & O. S. W. R. Co.* 33 Ind. App. 229, 70 N. E. 183, 71 N. E. 170.

Since the passage of the statute, the plaintiff in a personal-injury case arising out of negligence is no longer required to show an absence of contributory negligence on his part, but the burden is placed upon the defendant to establish by a fair preponderance of all the evidence in the case applicable to such issue, that the plaintiff was guilty of such negligence. *Davis v. Mercer Lumber Co.* 164 Ind. 413, 73 N. E. 199.

In an action to recover damages for the killing of a switchman crushed between an engine and a car standing on a side track, it was held that the burden of proving contributory negligence was on the master. *Chicago & E. R. Co. v. Lawrence*, 169 Ind. 319, 79 N. E. 363, 82 N. E. 768.

But an instruction that "if the burden is upon either party to show any particular fact called for in any question, such fact should be established by a fair preponderance of the evidence to warrant you in so answering the question as to show the fact established. If there is no preponderance of evidence on any question,—that is to say, if the evidence tending to prove the fact in question is only balanced by the evidence to the contrary,—then such fact would not be proved, and your answer should be in the negative,"—although practically the same as that in *Citizens' Street R. Co. v. Reed*, 151 Ind. 396, 51 N. E. 477, was held good under the statute changing the burden of proving contributory negligence. *Indianapolis Street R. Co. v. Brown*, 32 Ind. App. 130, 69 N. E. 407.

⁶⁷ *Baltimore & O. R. Co. v. Ryan*, 31 Ind. App. 597, 68 N. E. 923.

In *New Castle Bridge Co. v. Doty*, 37 Ind. App. 84, 76 N. E. 557, in upholding an instruction that, under the statute relieving the plaintiff from the burden of establishing freedom from contributory negligence, the plaintiff is not bound to prove that he was free from fault in receiving his injuries; that the question of contributory negligence is now a matter of defense, and the burden is cast upon the defendant to prove, by a fair preponderance of the evidence, that the plaintiff was guilty of some act of negligence that contributed to his injuries, or that he did not use such care or caution as a reasonably prudent person would have done under the circumstances, before any action can be defeated for contributory negligence alone, if he has otherwise proved his case,—the court said that the instruction under consideration would be strictly accurate in a case where the defendant was relying upon payment, fraud, failure of consideration, duress, estoppel, illegality, release, tender, etc., as had been many times ruled and never denied by the Indiana supreme or appellate courts. If an exception to this well-defined principle was to be made where the affirmative defense relied upon consisted of a charge of negligence against the plaintiff, there must be some reason for such exception, and the court did not believe that any reason could be stated or found.

Under a statute imposing the burden of proving contributory negligence on the defendant, an instruction that "if you find that no facts have been adduced, either by the plaintiff or the defendant, from which you can reasonably infer what the conduct and actions of the decedent were at the time of his injury, then your verdict should be for the defendant," cannot be given. *Evansville & T. H. R. Co. v. Berndt*, 172 Ind. 697, 88 N. E. 612.

⁶⁸ The statute changed the rule of pleading and proof with respect to contributory negligence, and it imposed the burden of alleging and proving such negligence upon the defendant. *Ibid.*

The statute makes contributory negligence a matter of defense. *Evansville v.*

plaintiff makes his case under the statute when he proves negligence on the part of the defendant, and resulting damages to him.⁶⁹ The burden of proof as here used, meaning the burden of the issue, does not shift; that is to say, the burden is upon the defendant to establish this issue by a preponderance of evidence; and under no circumstances will it devolve upon the plaintiff to establish it by a preponderance

of evidence.⁷⁰ This has nothing to do with the measure of care required of the plaintiff.⁷¹

(b) Pleading.

Since the passage of the statute, it has not been necessary for the plaintiff to allege freedom from contributory negligence.⁷² So, it is not necessary for the

Christy, 29 Ind. App. 44, 63 N. E. 867; Union Traction Co. v. Sullivan, 38 Ind. App. 513, 76 N. E. 116; New York, C. & St. L. R. Co. v. Robbins, 38 Ind. App. 172, 76 N. E. 804; Indianapolis Street R. Co. v. Brown, 32 Ind. App. 130, 69 N. E. 407; Stephens v. American Car & Foundry Co. 38 Ind. App. 414, 78 N. E. 335.

And since the burden is upon the defendant in respect to contributory negligence by virtue of the statute, the inferences upon that subject which the complaint admits of must be in favor of the plaintiff. Cleveland, C. & St. L. R. Co. v. Lynn, 171 Ind. 589, 85 N. E. 999, 86 N. E. 1017.

⁶⁹ In other words, the proof being in that condition, the plaintiff will recover if no more evidence is given. New Castle Bridge Co. v. Doty, 37 Ind. App. 84, 76 N. E. 557.

Under the Indiana statute (§ 359a, Burns's Anno. Stat. 1901), an instruction that the burden of proving absence of contributory negligence is on the plaintiff was held erroneous. Wortman v. Minich, 28 Ind. App. 31, 62 N. E. 85.

It is unnecessary since the passage of the Indiana statute that the plaintiff in an action against a railroad company for injuries or for death sustained at a railroad crossing should go into the details of the surroundings of the scene of the accident to show what obstructions were or were not present that would or would not prevent a person injured from seeing or hearing approaching trains, unless such facts are necessary to prove the defendant's negligence charged in the complaint. The fact that there were no obstacles or obstructions in the way that would have prevented the plaintiff's intestate from seeing an engine that struck her is a fact essential to be shown to establish contributory negligence. And this must be shown by the defendant. Wamsley v. Cleveland, C. C. & St. L. R. Co. 41 Ind. App. 147, 82 N. E. 490, rehearing denied in 41 Ind. App. 155, 83 N. E. 640.

Proof that a railroad company ran a car along the streets of a city on a dark and stormy night, without a headlight, or without sounding gong or whistles at street crossings, casts upon the company the burden of proving that one who is struck thereby was in the exercise of due care. Nelson v. Chicago, L. S. & S. B. R. Co. 41 Ind. App. 397, 83 N. E. 1019.

⁷⁰ The burden of proving contributory negligence is, under the statute, on the de-

fendant; and this burden does not shift. Harris v. Pittsburgh, C. C. & St. L. R. Co. 32 Ind. App. 600, 70 N. E. 407.

⁷¹ By the statute, the burden of proving contributory negligence was thrown upon the defendant; but the measure of care to be used in nowise changed. Chicago, I & L. R. Co. v. Turner, 33 Ind. App. 264, 69 N. E. 484.

In Southern Indiana R. Co. v. Peyton, 157 Ind. 690, 61 N. E. 722, the court said that the statute did not in any manner excuse or relieve the plaintiff from the consequences of contributory negligence, long recognized by the law, nor make the presence of concurrent fault less effective to the defendant in escaping liability. Its obvious purpose was to restore to litigants in such cases the just and reasonable rule of the common law as interpreted by the English courts, and from which the Indiana courts had radically departed. Under the ancient rule alluded to, and which was said to be adhered to in most of the states of the Union, the plaintiff is required to allege and prove by a preponderance of evidence that the defendant's negligence was the proximate cause of his injuries; and if he has, by his own conduct, forfeited his right of recovery, this delinquency, when not voluntarily disclosed by the plaintiff, if made available to the defendant, must be established by him as a matter of defense by a like preponderance.

⁷² Frank Bird Transfer Co. v. Krug, 30 Ind. App. 602, 65 N. E. 309; Nichols v. Baltimore & O. S. W. R. Co. 33 Ind. App. 229, 70 N. E. 183, 71 N. E. 170; Southern Indiana R. Co. v. Corps, 37 Ind. App. 586, 76 N. E. 902; Parkhurst v. Swift, 31 Ind. App. 521, 68 N. E. 620; Indianapolis & E. R. Co. v. Barnes, 35 Ind. App. 485, 74 N. E. 583.

Under the statute it is only necessary to allege that the defendant's negligence was the proximate cause of the injury. Cleveland, C. C. & St. L. R. Co. v. Goddard, 33 Ind. App. 321, 71 N. E. 514.

Under the statute, a complaint is not defective, even in an action to recover for a death at a grade crossing, because no facts are therein disclosed to excuse the decedent from the exercise of that degree of care and caution which the law exacts of a traveler at such a place. Evansville & T. H. R. Co. v. Berndt, 172 Ind. 697, 88 N. E. 612.

In a crossing-accident case, where the plaintiff set out the conditions existing at the crossing at the time of the accident,

plaintiff to aver that a person killed or injured was not guilty of contributory negligence, or that he was without fault or without negligence, nor is it necessary to state any facts with a purpose thereby to negative contributory negligence;⁷³ and a complaint in an action by an engineer to recover for personal injuries received by being knocked down and run over by a mail car was held not insufficient because it failed to aver that the plaintiff was in the exercise of due care and diligence, as required by the provision of an earlier employers' liability act,⁷⁴ the act of 1899 purporting to cover all cases of personal injuries.⁷⁵

No adverse inference will arise against the plaintiff by reason of the absence of the averment that the person for whose death the action was brought was free from contributory negligence.⁷⁶ The burden of showing contributory negligence being on the defendant, the pleading will be good even as against a demurrer, unless it alleges facts which overthrow the presump-

tion of absence of contributory negligence.⁷⁷ In other words, if the complaint does show contributory negligence, the plaintiff has discharged the defendant's burden for him. From the language used by the court, it is evident that the court believes that the rule as to the burden of proof as to contributory negligence having by statute been imposed upon the defendant, it follows that a presumption as to the absence of contributory negligence arises.⁷⁸

The statute does not change the rule with reference to personal property, so that in actions to recover for injury to such property, the plaintiff should show that he was without fault.⁷⁹ The statute has, nevertheless, been held constitutional.⁸⁰

2. North Carolina.

A North Carolina statute places the burden of proving contributory negligence upon the defendant.⁸¹ The statute requires the defendant both to plead and to prove contributory negligence.⁸²

together with the conduct of the railroad company in operating the train which collided with decedent, and alleged that it was negligently run over him, and the averment of the pleading did not affirmatively show that the deceased was negligent, it was held that a demurrer was properly overruled. *Cleveland, C. C. & St. L. R. Co. v. Starks*, — Ind. App. —, 89 N. E. 602.

⁷³ *Chicago & E. R. Co. v. La Porte*, 33 Ind. App. 691, 71 N. E. 166.

The burden as to contributory negligence being by statute placed upon the defendant in a case for personal injury or death wrongfully inflicted, it is not necessary for the plaintiff affirmatively to show in the complaint that his intestate was free from fault. *Chicago & E. R. Co. v. Ginther*, — Ind. App. —, 90 N. E. 911.

⁷⁴ Acts 1893, p. 294, § 7083, Burns's Anno. Stat. 1901.

⁷⁵ *Pittsburgh, C. C. & St. L. R. Co. v. Lightheiser*, 163 Ind. 247, 71 N. E. 218, 360.

In following the last-mentioned case, the court in *Pittsburgh, C. C. & St. L. R. Co. v. Collins*, 163 Ind. 569, 71 N. E. 661, said: 'It is proper to say, however, that said act of 1899 did not repeal or modify that part of . . . [the statute providing that] 'the employee so injured being in the exercise of due care and diligence.' It only changed the rule of pleading and proof then in force, so that thereafter such fact need not be alleged or proved by the injured employee, but the same constituted a defense, and when shown to exist in a case by the complaint or the evidence, whether introduced by the plaintiff or the defendant or both, no recovery can be had.'

⁷⁶ *Southern Indiana R. Co. v. Peyton*, 157 Ind. 690, 61 N. E. 722.

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⁷⁷ *La Fayette v. West*, 43 Ind. App. 325, 87 N. E. 550.

⁷⁸ For a discussion of the relation between presumptions of evidence and burden of proof, see *supra*, IV.

⁷⁹ *Cincinnati, L. & A. Electric Street R. Co. v. Klump*, 37 Ind. App. 660, 77 N. E. 869; *Cleveland, C. C. & St. L. R. Co. v. Moore*, — Ind. App. —, 90 N. E. 93.

Where the injury complained of is to property, the complaint must negative contributory negligence. *Indiana Nitroglycerine & Torpedo Co. v. Lippincott Glass Co.* 165 Ind. 361, 75 N. E. 649.

⁸⁰ *Indianapolis Street R. Co. v. Robinson*, 157 Ind. 232, 61 N. E. 197; *Indianapolis Street R. Co. v. Robinson*, 157 Ind. 414, 61 N. E. 936.

In *Citizens' Street R. Co. v. Jolly*, 161 Ind. 80, 67 N. E. 925, a contention that the statute attempts to make a distinction in regard to contributory negligence between cases of personal injury and those for injury to property, where each arises out of negligence; and that it is special legislation, regulating the practice in courts of justice, and therefore unconstitutional, — was not upheld.

⁸¹ *Wallace v. Western North Carolina R. Co.* 104 N. C. 442, 10 S. E. 552.

The statute provides: "That in all actions to recover damages by reason of the negligence of the defendant, where contributory negligence is relied upon as a defense, it shall be set up in the answer and proved on the trial." North Carolina Session Laws 1887, chap. 33, § 1.

⁸² *Stewart v. Raleigh & Air Line R. Co.* 137 N. C. 667, 50 S. E. 312.

3. *Oklahoma.*

Under the Code of Civil Procedure contained in the statutes of 1890, and adopted from the state of Indiana, it was held that the settled rules of interpretation and construction applied to it by the supreme court of that state would be followed in Oklahoma; and that therefore the plaintiff in an action to recover damages resulting from the overflow of water, due to the alleged negligence of a city in interfering with the natural condition of the land, must show that he himself was guilty of no contributory negligence. The court, however, did not approve this rule, and did not consider that it would be applied under the Code in force at the time of the decision.⁸³

4. *Effect of statutes on presumption.*

The erroneous supposition that the burden of proof as to contributory negligence is dependent upon certain presumptions has led courts in jurisdictions where the rule has been changed by statute to hold that this involved a corresponding change in presumptions. It is said, for instance, that the Indiana statute which changed the burden of proof as to contributory negligence of necessity removed the presumption against the plaintiff,⁸⁴ and gave rise to the presumption that the injured person was in all respects free from contributory negligence.⁸⁵ The presumption that the deceased exercised due care for himself is now expressly incorporated in the statutes which expressly im-

pose the burden of proof upon the defendant who sets up contributory negligence as a defense.⁸⁶ So, in North Carolina it is said, as indicated in another subdivision of the note, that it does not follow from the fact that the rule as to the burden of proof has been changed by statute that rules as to presumptions of due care or contributory negligence theretofore existing are required to be changed. As was stated in one Indiana case, referring to the Indiana act, the statute does not attempt to create a presumption of law as to a contested issue, but only relieves a plaintiff of the burden of showing affirmatively the negative fact that he is without fault proximately contributing to his own injury.⁸⁷

So, a statute placing the burden of proving contributory negligence on the defendant does not change the rule that a traveler, approaching a railroad crossing of a highway, is presumed in law to have seen what he could have seen if he had looked attentively, and to have heard what he could have heard if he had listened attentively.⁸⁸

b. *Employers' liability acts.*

The Alabama "employees' act" of 1885, enlarging the liability of the master, but providing that he shall not be liable if the complaining employee knew of the defect or negligence which caused the injury, and not being aware that the fact was already known to the master or some person superior in authority, failed to communicate his knowledge to the employer or superior employee, does not require the

⁸³ Guthrie v. Nix, 3 Okla. 136, 41 Pac. 343.

⁸⁴ Nichols v. Baltimore & O. S. W. R. Co. 33 Ind. App. 229, 70 N. E. 183, 71 N. E. 170.

For presumption in a crossing case after passage of statute, see supra, IV., note 51.

⁸⁵ Pittsburgh, C. C. & St. L. R. Co. v. Reed, 36 Ind. App. 67, 75 N. E. 50.

The burden of proving contributory negligence being on the defendant, the mere fact that the evidence does not show that a person killed at a railroad crossing looked or listened, or, if he did so, where he was at the time of doing so, or when he became aware of the railroad track, will not defeat recovery, since the presumption, in the absence of evidence on the subject, is that he did exercise such care as the law requires. Grand Trunk Western R. Co. v. Reynolds, — Ind. App. —, 90 N. E. 94.

⁸⁶ Cogdell v. Wilmington & W. R. Co. 130 N. C. 313, 41 S. E. 541.

Under the statute, there is, of course, no presumption that the plaintiff contributed to the injury, and even where the defendant offers no testimony, it is not incumbent upon the plaintiff to show freedom

from contributory negligence. Jordan v. Asheville, 112 N. C. 743, 16 S. E. 760.

⁸⁷ Indianapolis v. Keeley, 167 Ind. 516, 79 N. E. 499.

In this case, in holding that, in an action to recover damages for injuries received by reason of a defect in the street, an instruction to the effect that the plaintiff was presumed to be without fault and in the exercise of ordinary care at the time of the accident, was erroneous, the court said that the statute makes contributory negligence a ground of defense affirmative in character, and its existence must be established by a preponderance of evidence to defeat a recovery by a plaintiff injured through negligence of another. The burden of showing contributory negligence is upon the defendant, but it may be established by a fair preponderance of the evidence upon that issue; and a defendant is not required to have a preponderance plus so much evidence as may be deemed necessary to outweigh and overthrow a presumption of law in favor of the plaintiff.

See also supra, IV.

⁸⁸ Chicago & E. R. Co. v. Gintber, — Ind. App. —, 90 N. E. 911.

pecies of contributory negligence to be negatived in the complaint.⁸⁹

To maintain an action under the Massachusetts employers' liability act,⁹⁰ for the death of an employee, it is necessary to prove that the employee was in the exercise of due care.⁹¹

The New York employers' liability act,⁹² providing that "the question whether the employee understood and assumed the risk of such injury, or was guilty of contributory negligence by his continuance in the same place and course of employment with knowledge of the risk of injury, shall be one of fact, subject to the usual powers of the court in a proper case to set aside a verdict rendered contrary to the evidence," does not relieve the plaintiff from showing freedom from contributory negligence, nor does it require the submission to the jury of this question where there is an utter absence of proof tending to establish the exercise of care by the person injured.⁹³

And a statute providing that "every railroad corporation doing business in this state shall be liable for damages sustained by any employee thereof within this state without contributing negligence on his part, etc.," does not, by reason of the provision "without contributory negligence on his part," place the burden of proving freedom from such negligence on the plaintiff.⁹⁴

c. Fellow-servant act.

The Arkansas fellow-servant act of March 8, 1907, which makes the master liable for the negligence of all his servants, does not take away his defense of contributory negligence, so that the rule in regard to the burden of proof is not changed, but remains with the defendant.⁹⁵

The Minnesota statute,⁹⁶ the object of which was to change, as applied to railroad operatives, the rule of the common law which exempted a common employer of several servants from liability to one for the negligence of his fellow servants, does not, by virtue of the qualifying words, "without contributory negligence on his part," change the Minnesota rule that the burden of proving contributory negligence is on the defendant.⁹⁷

The Wisconsin statute⁹⁸ providing that "every railroad company shall be liable for damages for all injuries . . . sustained by any of its employees . . . when such injury . . . shall have been sustained by any . . . employee of such company while engaged in the line of his duty as such, and which such injury shall have been caused in whole or in greater part by the . . . negligence of any other officer, agent, servant, or employee of such company . . . in the discharge of or . . . by reason of failure to discharge his duties as such,"—does not involve

⁸⁹ Code, §§ 2590-2592; *Columbus & W. R. Co. v. Bradford*, 86 Ala. 574, 6 So. 90.

See *supra*, VI. f, 2.

⁹⁰ Statutes 1887, chap. 270.

⁹¹ *Geyette v. Fitchburg R. Co.* 162 Mass. 49, 39 N. E. 188.

Under the Massachusetts employers' liability act (Statutes 1887, chap. 270), it is necessary, by virtue of the first section, for the plaintiff to prove that a servant killed on a railroad track was in the exercise of due care and diligence at the time of the accident. *Shea v. Boston & M. R. Co.* 54 Mass. 31, 27 N. E. 672.

Where the evidence introduced is as consistent with negligence as with due care, the plaintiff does not sustain his burden. *Id.*

⁹² Laws of 1902, chap. 600, § 3.

⁹³ *Wilson v. New York Mills*, 107 App. Div. 99, 94 N. Y. Supp. 1090.

⁹⁴ *Dugan v. Chicago, St. P. M. & O. R. Co.* 85 Wis. 609, 55 N. W. 894.

The court said: "It will be observed that such words were not so embodied for the purpose of giving to the plaintiff a right of action, but for the purpose of more certainly securing to the defendant a defense in case of such contributory negligence. The case is clearly distinguishable from that line of cases where the right to recover is based wholly upon an exception in the statute, as, for instance, where 33 L.R.A. (N.S.)

the statute expressly prohibits all right of recovery except upon one condition, and the plaintiff seeks to bring himself within such exception."

⁹⁵ *Aluminum Co. v. Ramsey*, 89 Ark. 522, 117 S. W. 568.

The act of March 8, 1907, known as the fellow-servant act (Acts 1907, p. 162), providing that the injured servant, in order to recover under the provisions of the act, must have been "in the exercise of due care," was intended merely to preserve to the employer the defense of contributory negligence, and does not change the rule as to the burden of proof, which is still on the employer in such cases. *Soard v. Western Anthracite Coal & Min. Co.* 92 Ark. 502, 123 S. W. 759.

⁹⁶ Laws of 1887, chap. 13.

⁹⁷ *Lorimer v. St. Paul City R. Co.* 48 Minn. 391, 51 N. W. 125.

The court said that obviously this was inserted from motives of caution, that it might not be supposed that the declared liability of the master was intended to be absolute, and without regard to any negligence of the complainant, contributing to the result. The court declared that the language recited simply preserves as an express limitation of declared liability the recognized principle of the common law as to the effect of contributory negligence.

⁹⁸ Laws 1907, chap. 254, p. 495.

a modification of the rule which casts the burden of proving plaintiff's contributory negligence on the defendant.⁹⁹ A provision of the Wisconsin act: ¹⁰⁰ "In all cases where the jury shall find that the negligence of the company . . . was greater than the negligence of the employee so injured, and contributing in a greater degree to such injury, then the plaintiff shall be entitled to recover . . ." does not change the rule casting the burden of proving contributory negligence on the defendant.¹

d. The Georgia and Florida acts.

The following interpretation has been given by the Georgia court of appeals of certain statutes² relating to presumptions and burden of proof. Where an employee sues a railroad company under the act of 1909 (Acts 1909, p. 160), now Civil Code 1910, §§ 2782 et seq., providing that if death does not result from the injury, the presumption of negligence shall be and remain as now provided by law in case of injury received by an employee in the service of the railroad company, the presumptions and methods of carrying the burden of proof are as follows:

"(a) If it does not appear that the

plaintiff was himself connected with the transaction from which the injury flowed, and if it appears that he was hurt through the running of the defendant's cars or machinery, or by the act of some fellow servant, the presumption authorized by the Civil Code 1910, § 2780, comes to his aid, and he makes a prima facie case merely by showing that he was damaged through one of the methods specified. If the damage did not ensue from one of the causes specified in the Code, . . . the plaintiff must prove the defendant's negligence without the aid of the presumption.

"(b) If the plaintiff himself was connected with the transaction through which his injury ensued, he cannot rely solely upon the statutory presumption to make out his case. If the transaction is not one as to which the statutory presumption applies, he must prove the negligence by some affirmative proof, but need not go further and negative his own contributory negligence.

"(c) If the transaction in which the plaintiff was damaged was one as to which Civil Code 1910, § 2780, applies, and the plaintiff was himself a party to the transaction, he may make a prima facie case by proving either of two additional things; (1) that he did not bring about the injury

⁹⁹ Zeratsky v. Chicago, M. & St. P. R. Co. 141 Wis. 423, 123 N. W. 904.

¹⁰⁰ Stat. § 1816; Laws of 1907, chap. 254.

¹ Zeratsky v. Chicago, M. & St. P. R. Co. 141 Wis. 423, 123 N. W. 904.

² The statutes are as follows: "Every common carrier by railroad shall be liable in damages to any person suffering injury while he is employed by such carrier, or, in case of death of such employee, to his or her personal representative for the benefit of the surviving widow or husband or child or children of such employee; and if none, then of such employee's parents; and if none, then of the next of kin dependent upon such employee for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defects or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment: Provided, nevertheless, no recovery shall be had hereunder if the person killed or injured brought about his death or injury by his own carelessness amounting to a failure to exercise ordinary care; or if he, by the exercise of ordinary care, could have avoided the consequences of the defendant's negligence. The measure of damage in case the injury results in death of the employee shall be that prescribed in §§ 4424 and 4425: Provided that the party or parties for whose benefit recovery may be had under this and the five succeeding

sections may sue and recover in their name or names in the manner prescribed by § 4424 in case no administrator or executor has been appointed at the time suit is filed. In case death results from injury to the employee, the employer shall be liable unless it make it appear that it, its agents and employees, have exercised all ordinary and reasonable care and diligence, the presumption being in all cases against the employer. If death does not result from the injury, the presumption of negligence shall be and remain as now provided by law in case of injury received by an employee in the service of a railroad company." Georgia Code 1911, § 2782.

"In all cases hereafter brought against any such common carrier by railroad now, or by virtue of any of the provisions of this, the preceding, or the four preceding sections, to recover damages for personal injuries to an employee, or where such injuries have resulted in death, the fact that the employee may have been guilty of contributory negligence not amounting to a failure to exercise ordinary care shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: Provided that no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation of such common carrier of any such statute enacted for the safety of employees contributed to the injury or death of such employee." Georgia Code 1911, § 2783.

by his own carelessness amounting to a failure to exercise ordinary care; or (2) that the defendant or its other servants were in fact negligent in one or more of the respects charged in the petition. The defendant taking, at this stage, the burden of reply, can successfully defend by disproving either of these propositions, or by proving that, notwithstanding it or its servants were guilty of negligence, the plaintiff, by the exercise of ordinary care, could have avoided the consequences.

"(d) If it appears either by affirmative proof or by presumption, that the defend-

ant was negligent, and it also appears that the plaintiff was somewhat at fault (but less at fault than the defendant), the plaintiff may, nevertheless, go to the jury, and may recover (unless it appears that his injury was brought about by his own carelessness, amounting to a failure to exercise ordinary care, or that, by the exercise of ordinary care, he could have avoided the consequences of the defendant's negligence); and in such cases, the jury may diminish the damages in proportion to the amount of negligence attributable to the plaintiff." 3

3 Wrightsville & T. R. Co. v. Tompkins, — Ga. App. —, 70 S. E. 955.

To make a prima facie case for recovery, a railroad employee suing the company for a physical injury resulting from an act in which he participated must prove either that he was not to blame, or that the company was. The burden of proof is as follows: after proving the fact and the degree of injury, if the plaintiff show himself not to blame, the law then presumes, until the contrary appears, that the company was to blame; or, if he shows, on the other hand, that the company was to blame, the law then presumes, until the contrary appears, that he was not to blame. So that, in order to make a prima facie case and change the onus, he need not go further than to show by evidence one or the other of these two propositions: either that he was not to blame, or that the company was. The company, taking at this stage the burden of reply, can defend successfully by disproving either proposition. The disproval of both is not necessary; but until one or the other shall be overcome, the defense is not complete. Central R. & Bkg. Co. v. Kenney, 58 Ga. 485.

Under this ruling, a charge that "it is incumbent on the plaintiff to show that her husband was killed, or his death caused, by the act of other employees of the company. If this is shown by evidence, then the presumption would be that the defendant's employees were at fault, etc., etc."—was held erroneous because the deceased was directly concerned in the act which resulted in his death; and the onus was upon him to show himself without fault before it could be presumed that the other employees were at fault; or to show the other employees at fault before the law would presume him to be without fault. Central R. & Bkg. Co. v. Sears, 59 Ga. 439. The idea of the court was that where an employee had nothing at all to do with the act which resulted in his injury, he would stand upon the footing of a passenger in regard to presumptions of negligence; but if he were concerned therein, then the presumption would be that he had as much to do with the accident as another also concerned; and that it would be a very violent presumption to take it for granted without proof that everybody else was to blame except him, when he had as much to do

with the cause of the disaster as anyone else.

An employee of a railroad, suing the company for injuries sustained by him from the negligent performance of any act in which he participated, does not make a prima facie case for recovery without proving either that he was free from fault himself or that there was negligence on the part of his fellow servants. Any presumption of negligence would apply as well to him as to others participating in the common act; and to be benefited by presumption against them, he must rebut it as to himself. Gassaway v. Georgia Southern R. Co. 69 Ga. 347.

Where a widow sues a railroad company to recover damages for the homicide of her husband (an employee of the company, who was killed in connection with his employment), she must show either that the deceased was free from fault contributing to his death, or that he was killed by the negligence of the company, as alleged in the declaration. Wallace v. Southern R. Co. 6 Ga. App. 526, 65 S. E. 299.

The burden of showing that the agents of the company have exercised all ordinary and reasonable care and diligence is not imposed upon the company in such a case until the plaintiff has prima facie established one or the other of the propositions above referred to. Western & A. R. Co. v. Jackson, 113 Ga. 355, 38 S. E. 820.

If he rests on a presumption of negligence without actual proof thereof, that presumption applies to him with the same force as to others who participated in the same act of common duty; and to get the benefit of the presumption as applied to others, he must rebut it so far as it applies to himself. Atlanta & R. Air Line R. Co. v. Campbell, 56 Ga. 586.

In Atlantic Coast Line R. Co. v. Jones, 132 Ga. 189, 63 S. E. 834, it was held that the court did not err in charging that "whenever it is shown you by evidence that the plaintiff's husband [the person for whose death the action was brought] was free from fault and was not guilty of any negligence . . . that . . . contributed to the causes which produced his death, then the burden would be shifted," and that in establishing one of the two defenses open to it, it would be required to do so by preponderance of the evidence.

In an action against a railroad company by one of its servants for injuries received through the alleged negligence of other servants in the performance of an act with which the plaintiff was connected at the time of the injury, it was held that the presumption of negligence was not against the company before the plaintiff proved he was without fault.⁴ So, in an action against a railroad company for the death of an employee through the alleged negligence of a fellow servant, an instruction that if the plaintiff proves that the death of the deceased employee was oc-

casioned by the railway company in the running of its cars, and nothing further appears, a prima facie case of liability is made out, is erroneous.⁵ Where the duty of coupling cars was on the injured employee, in union with the conductor in signaling and the engineer in backing the car, it was held that he must show affirmatively that he was himself without fault; and that then the presumption would be that the others were negligent, and this would entitle him to recover unless the company rebutted this presumption of their negligence by consistent proof.⁶ In an

⁴ *Western & A. R. Co. v. Vandiver*, 85 Ga. 470, 11 S. E. 781.

No presumption of negligence against the company arises until the plaintiff shows affirmatively that he was himself without fault. *Georgia R. & Bkg. Co. v. Hicks*, 95 Ga. 302, 22 S. E. 613.

In an action by an employee against a railroad company for injury inflicted by the negligence of a coemployee, the plaintiff must show that the injury was not the result of fault or negligence on his part. *Redding v. East Tennessee, V. & G. R. Co.* 74 Ga. 385.

In an action against a railroad company by an employee for personal injuries alleged to have been received through the negligence of a coemployee, no presumption of negligence arises against the company until the plaintiff has affirmatively shown that he himself was free from fault. *Florida C. & P. R. Co. v. Burney*, 98 Ga. 1, 26 S. E. 730.

Railroad companies are not liable to employees as they are to passengers, but, in an action by an employee against a railroad company for an injury to him, or by one who sues for his homicide, it must be shown either that such employee, at the time the injury was received, was free from fault, or that the company was at fault, before any presumption of negligence would arise against the defendant. If either one of these things were shown, the other could be presumed, and the onus would be upon the company to rebut that presumption; but the rule as to passengers is different. *East Tennessee, V. & G. R. Co. v. Maloy*, 77 Ga. 238, 2 S. E. 941.

A charge that, "the presumption in all cases like this is against the railroad, and that the burden is on it to show that ordinary and reasonable care and diligence were exercised by its agents, and to show fault in the deceased, and the presumption remains until removed by proof, but, if removed, the presumption ceases and the proof would prevail," is erroneous in this: that the court put upon the company the burden of showing not only that it was itself without fault, but that the deceased was in fault before the burden was shifted; the law being, under § 3033 of the Code, that when the company shows itself without fault by showing that its agents had exercised all reasonable care and diligence,

there can be no recovery against it. *Central R. Co. v. Moore*, 61 Ga. 151.

Proof that a railroad company's employee, killed by the cars, was without fault, raises a presumption that the company was negligent. Proof that the servants of the company who were operating the train were in fault puts upon the company the burden of showing that the deceased himself was negligent. *Augusta Southern R. Co. v. McDade*, 105 Ga. 134, 31 S. E. 420.

In an action to recover for the death of an engineer, the plaintiff having clearly shown negligence on the part of the company, it is incumbent on the company to show that the engineer was negligent. *Central R. Co. v. Vining*, 116 Ga. 284, 42 S. E. 492.

And where there was an affirmative showing of negligence on the part of the company, it was held that the presumption would arise that one who was killed by the operation of the defendant's cars was free from fault. *Roquemore v. Albany & N. R. Co.* 127 Ga. 330, 56 S. E. 424.

In the case of an injury to an employee of a railroad company, caused by the running of a train, while the burden is on the company to prove that it used proper care and diligence, it is necessary for the plaintiff to show that the injury was caused without fault or negligence on his part. *Campbell v. Atlanta & R. Air Line R. Co.* 53 Ga. 488.

⁵ *Atlanta & B. Air-Line R. Co. v. McManus*, 1 Ga. App. 302, 58 S. E. 258.

In such a case, in order to authorize a recovery, the plaintiff must cause it to appear both that the defendant was negligent and that the employee was free from fault; but when the death of the employee is caused in the running of the train, either one or both of these elements, according to the nature of the case, may be prima facie supplied by the proof of the injury being so received.

⁶ *Central R. & Bkg. Co. v. Kelly*, 58 Ga. 107.

In *Central R. & Bkg. Co. v. Kelly*, supra, in which the injured employee was engaged with other employees of the company about the coupling of cars, it was held that he could not invoke the presumption of negligence against the company and of faultlessness in himself as a passenger could

action by a locomotive engineer against a railroad company by which he was employed, for personal injuries received by him while running a locomotive, it was held error to charge that, in order to entitle the plaintiff to a recovery, it was necessary for him to show affirmatively both negligence on the part of the company

and the absence of negligence on his part. If he showed that he was not negligent, the presumption of negligence was raised by law against the company. If he showed that the company was negligent, it then became incumbent on the company, as a matter of defense, to show that the plaintiff was negligent.⁷

do; or as an employee could do who was hurt by other employees in matters with which he was wholly disconnected. "For instance," said the court, "an employee is engaged to sweep the cars, to wait on passengers, to keep the baggage, check it, etc., etc., and has nothing to do with the management of the running of the cars. By the negligence or fault of the conductor or engineer in running the cars, he is hurt; we hold that he is upon the footing of a passenger, and every presumption is against the company and that he is without fault, just as it would be in case of a passenger."

In an action to recover for injuries received by a switchman hit on the shoulder by a bar of iron negligently let fall by laborers in the employ of the defendant, it was held that the fact that the employee was without fault or negligence is not a condition precedent to his recovery. In this case as in others, it was held that the presumption is against the company, and that it is for it to show its agents to be without fault or negligence, and the injured employee either at fault or negligent. Code, §§ 3033, 3034, 3036; Thompson v. Central R. & Bkg. Co. 54 Ga. 509.

Where an employee of a railroad company sues for a personal injury sustained by him in consequence of a hand car leaving the track, upon which car he was riding, and the running of which he controlled, he must, in order to entitle himself to recover, show affirmatively that he was free from fault, or that there was negligence by the company sufficient to have caused the run-off. Central R. & Bkg. Co. v. Kennedy, 58 Ga. 485.

In Central R. Co. v. Sears, 61 Ga. 279, it was held that where an emergency is relied upon in justifying a conductor in going out of his sphere, and taking upon himself the duty and hazards of a subordinate, and it is alleged that the emergency was occasioned by the train being behind time, it is incumbent upon the conductor, or those claiming through him, to make it clearly appear by evidence that the delay of the train was not caused by his fault or negligence.

In an action by a wife for the death of her husband, killed on the railroad, it was held not error to charge that the burden was on the plaintiff to show that her husband was without fault, or that the defendant was in fault. Prather v. Richmond & D. R. Co. 80 Ga. 427, 12 Am. St. Rep. 263, S. E. 530.

In Central R. & Bkg. Co. v. Small, 80 Ga. 19, 5 S. E. 794, it was held that where the plaintiff, a track hand, was wholly unconnected with the running of the engine

which injured him, he had the right to prove the negligence of the company, and rest his case upon it; and that he had this right, even if he were connected with the engine, without going into the question of his own negligence; to which the company could reply by showing either that it was not negligent, or that the plaintiff was.

⁷ Johnston v. Richmond & D. R. Co. 95 Ga. 685, 22 S. E. 694.

It was held that the action being for the homicide of an employee of the company, and the evidence not showing affirmatively whether the employee was free from negligence or not, and no negligence on the part of the company adequate to have caused the homicide under the circumstances being shown, the most reasonable and probable cause of the disaster being an accident to the employee by which his life became suddenly exposed to a danger incident to his employment, there was no error in granting a nonsuit. Kendrick v. Central R. & Bkg. Co. 89 Ga. 782, 15 S. E. 685.

In Savannah, F. & W. R. Co. v. Day, 91 Ga. 676, 17 S. E. 959, there being evidence tending to show that the plaintiff's husband, a brakeman employed upon one of the defendant's freight trains, was killed by being knocked from the top of a car by a low bridge over defendant's road, and there also being evidence from which the jury might have inferred negligence on the part of the railroad company in failing to keep in suitable order warnings of approach of the trains to the bridge, and it not appearing from the testimony produced by the plaintiff that the deceased was himself guilty of any negligence, the motion for a nonsuit was properly overruled.

It was also held in this case that there was no error in refusing to charge the jury as follows: "In a suit against a railroad company by one of its servants for injuries sustained by alleged negligence of others of its servants in the performance of an act with which the servant was connected at the time of the injury, then the presumption of negligence was not against the company before the plaintiff proved that the servant was without fault," such a request being inapplicable to the case presented. Ibid.

So much of § 2321 of the Civil Code as is embraced in the phrase, "the presumption in all cases being against the company," is inapplicable to a case where a railroad company is sued for the killing of an employee, unless the plaintiff shows the deceased was free from fault; and consequently, on the trial of such a case, the law embodied in this section should not,

The burden of proving the exercise of due care on the part of the company, or the lack of care on the part of a person killed by the cars, rests by statute⁸ upon the defendant.⁹ In an action to recover damages for the death of a person run over by one of the defendant's trains, it was held that upon proof of the accident, there was immediately a presumption that the defendant was negligent in each and every respect alleged in plaintiff's petition; and

that the burden was upon the company to disprove all the proximate acts of negligence alleged, or to show contributory negligence, or some other defense sufficient to defeat the plaintiff's action.¹⁰ And where a cow was killed by a railroad train, this was held to impose on the company the duty of showing that the company was in the exercise of all ordinary and reasonable care and diligence, or that the damages were caused solely by the negli-

either literally or substantially, be given in a charge to the jury without plainly and distinctly stating the qualification indicated. *Augusta Southern R. Co. v. McDade*, 105 Ga. 134, 31 S. E. 420.

And in *Jones v. Central R. Co.* 116 Ga. 27, 42 S. E. 363, it was held that although there was evidence from which the jury could have found that the plaintiff's husband, an employee of the defendant company, for whose homicide the suit was brought, was killed by the running of the defendant's train, yet, as it neither affirmatively appeared that he was without negligence, nor that the defendant was negligent, there was no error in refusing a petition for certiorari, complaining of the grant of a nonsuit upon the trial of the case.

In *Central R. & Bkg. Co. v. Hubbard*, 86 Ga. 623, 12 S. E. 1020, a declaration alleging that the plaintiff's husband, an employee of a railroad company, was killed by an engine of the company, setting forth such a statement of the facts and circumstances connected with the killing as did not of themselves negative the existence of negligence on the part of the company, and distinctly averring that the deceased was without fault, and that the killing was caused by the negligence of the company's servants in running of such engine, was held not demurrable.

In *Smith v. Georgia R. & Bkg. Co.* 87 Ga. 764, 13 S. E. 904, a declaration filed by a track hand of a railroad company, alleging that plaintiff was injured by a fall of earth, was held to set out a cause of action, although it did not distinctly allege that plaintiff was ignorant of the danger to which he was subjected.

⁸ "The burden of proof generally lies upon the party asserting or affirming a fact, and to the existence of whose case or defense the proof of such fact is essential. If a negation or negative affirmation be so essential, the proof of such negative lies on the party so affirming it." *Georgia Code 1911*, § 5746 (5160).

⁹ *Williams v. Southern R. Co.* 126 Ga. 710, 55 S. E. 948.

When a person is killed by a railroad company by the running of its trains, the presumption of negligence attaches by law to the company, and the onus is on it to show all ordinary and reasonable care by its officers and agents; or that the deceased's own negligence was the cause of

the death; or that, by ordinary care, he could have avoided the consequences of the negligence of the company. *Brunswick & W. R. Co. v. Hoover*, 74 Ga. 426.

Under the Georgia Code, negligence of a railroad company being presumed when injury by the running of its trains is shown, it is not necessary for a father suing for loss of services of his minor son, not an employee of the company, who was killed at a public crossing, to allege in his declaration either that he or the son was in the exercise of due care, or was without fault. *Georgia Midland R. Co. v. Evans*, 87 Ga. 673, 13 S. E. 580.

¹⁰ *Ellenberg v. Southern R. Co.* 5 Ga. App. 389, 63 S. E. 240.

In the case of the homicide of plaintiff's husband by the servants of the defendant by the operation of a locomotive, cars, and other machinery, where the plaintiff proved her relation to the deceased, and his physical condition and earning capacity, and rested, this was held to make a *prima facie* case for the plaintiff, the burden then resting upon the defendant to overcome it by making it affirmatively appear that the injury was the result of the negligence of the plaintiff's husband. *Central R. Co. v. North*, 129 Ga. 106, 58 S. E. 647.

Where those in charge of a railway train neglected to comply with the statutory precautions in approaching a highway, and a person on the crossing was struck and injured, it was held that the only defenses open to the company were that the injury was done by the consent of the person injured; or that, by the observance of ordinary care, he could have avoided the injury; or, in mitigation of damages, that his negligence contributed to it; that when such an injury occurs, the onus is upon the company to prove such fault on the part of the injured person. *Bryson v. Southern R. Co.* 3 Ga. App. 407, 59 S. E. 1124.

And where one who was knocked down by a car of the defendant showed the injury, it was held that this shifted the burden of proof to the defendant, and that it became incumbent upon the defendant to show that the plaintiff consented to the injury, or could have avoided it by the use of due care; or that the employees of the defendant exercised all ordinary and reasonable care and diligence. *Augusta R. & Electric Co. v. Arthur*, 3 Ga. App. 513, 60 S. E. 213.

gence of the owner of the cow, or, to diminish damages, that both were at fault.¹¹

In an action by an employee under the provisions in the Florida act to recover damages from his employer for injuries alleged to have been inflicted by the negligence of another employee in performing some act in the defendant's service, in the performance of which, plaintiff, as a co-employee, was participating, the plaintiff must show either that he was free from fault himself, or that there was negligence on the part of his coemployee. Upon proof that the plaintiff was free from fault, the statutory presumption arises that the servants of the defendant were at fault, and it thereupon devolves upon the defendant to make it appear to the contrary.¹² Since the enactment of § 2, chap. 4071, of the Laws of 1891, making contributory negligence only a partial defense, the rule that the plaintiff need not negative contributory negligence in his declaration applies with even greater force than it did before the enactment of that statute.¹³

e. Statutory duty acts.

Statutes imposing special duties upon persons with a view of preventing injuries to others do not usually affect the rule with reference to the burden of proof as

to contributory negligence that may obtain in the jurisdiction where such statutes are in force. The mere fact that injury results from a violation of a master's statutory duty does not relieve the plaintiff from his obligation to show freedom from contributory negligence as a part of his affirmative case, where there is no specific provision as to what plaintiff shall be required to establish in order to make out a case for recovery.¹⁴

Under a statute¹⁵ providing that "it shall be unlawful for any such corporation to knowingly or negligently use or operate any car or locomotive that is defective, or any car or locomotive upon which the machinery or attachments thereto belonging are in any manner defective, if the employee of any such corporation shall receive any injury by reason of any defect in any car or locomotive, or the machinery or attachments thereto belonging, owned and operated or being run and operated by such corporation, such corporation shall be deemed to have had knowledge of such defect before and at the time such injury is so sustained; and when the fact of such defect shall be made to appear in the trial of any action in the courts of this state, brought by such employee or his legal representatives, against any railroad corporation for damages on account of such injuries so received, the same shall be

¹¹ Georgia R. Co. v. Bird, 76 Ga. 13.

"A railroad company shall be liable for any damage done to persons, stock, or other property by the running of the locomotives or cars or other machinery of such company, or for damage done by any person in the employment and service of such company, unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence, a presumption in all cases being against the company." Georgia Code 1911, § 2780 (2321).

¹² Florida C. & P. R. Co. v. Mooney, 40 Fla. 17, 24 So. 148.

The Florida act, copied from the Georgia statute, provides thus: "Section 1. A railroad company shall be liable for any damage done to persons, stock, or other property, by the running of the locomotives or cars or other machinery of such company, or for damage done by any person in the employment and service of such company, unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company.

"Sec. 2. No person shall recover damages from a railroad company for injury to himself or his property where the same is done by his consent, or is caused by his own negligence. If the complainant and the agents of the company are both at fault, the former may recover, but the damages shall be diminished or increased by the jury in proportion to the amount of default attributable to him.

fault, the former may recover, but the damages shall be diminished or increased by the jury in proportion to the amount of default attributable to him.

"Sec. 3. If any person is injured by a railroad company by the running of the locomotives or cars or other machinery of such company, he being, at the time of such injury, an employee of the company, and the damage was caused by negligence of another employee, and without fault or negligence on the part of the person injured, his employment by the company shall be no bar to a recovery. No contract which restricts such liability shall be legal or binding."

If the act resulting in injury to plaintiff, an employee, was one being performed by other employees in the defendant's business, but in the performance of which plaintiff was not participating, then the presumption of negligence on the part of the agents of the defendant, and that plaintiff was free from fault, arises under the statute to the same extent as if plaintiff were not an employee; and it devolves upon the defendant to relieve itself, either by showing that plaintiff was at fault, or that its servants were not negligent. Ibid.

¹³ Morris v. Florida C. & P. R. Co. 43 Fla. 10, 29 So. 541.

¹⁴ Sutton v. Des Moines Bakery Co. 135 Iowa, 390, 112 N. W. 836.

¹⁵ Bates's Anno. Stat. § 3365-21.

prima facie evidence of negligence on the part of such corporation,"—the burden of proof of want of knowledge of an existing defect, and of due diligence in ascertaining it, is cast upon the company.¹⁶ A statute requiring a railroad company to erect warning signs at crossings, and providing that the company "shall be liable in damages for all injuries occurring to persons or property by such neglect or refusal," does not relieve the plaintiff from the burden of proving freedom from contributory negligence.¹⁷

Before there can be a recovery on account of the negligence of a railroad company in

failing to give statutory signals, or for running at an excessively high rate of speed, it has been held that it must be shown that the person suffering injury from the negligence did not contribute to the injury by negligence on his part, and he cannot in all cases rely upon the railroad company to give the signals required by statute. The burden of showing this is on the plaintiff.¹⁸ The rule is otherwise, however, under such a statute in jurisdictions upholding the doctrine that the burden of proving contributory negligence, in the absence of statute, is on the defendant.¹⁹ Even in a jurisdiction where

¹⁶ *Baltimore & O. R. Co. v. Burris*, 50 C. C. A. 48, 111 Fed. 882.

¹⁷ *Payne v. Chicago, R. I. & P. R. Co.* 44 Iowa, 236.

In an action to recover for injuries alleged to have been due to the failure of a railroad company to have a signboard required by statute, at a railroad crossing, warning persons of the proximity of the railroad, it was said that it is just as incumbent upon plaintiff to show reasonable care upon his part when the negligence of the defendant consists in the failure to observe a statute, as when it arises from any other omission or neglect. *Dodge v. Burlington, C. R. & M. R. Co.* 34 Iowa, 276.

A statute rendering a railroad company liable for damages sustained by a person by reason of the refusal or neglect of the company to erect a sign of warning at or near a highway crossing does not relieve the plaintiff from the burden of proving freedom from contributory negligence. *Lang v. Holiday Creek R. & Coal Min. Co.* 49 Iowa, 469.

But to this provision the Code, § 1288, adds these words: "And in order for the injured party to recover, it shall only be necessary for him to prove such neglect and refusal;" so that, under the Code, failure or refusal of a railroad company to erect the sign renders it absolutely liable in a case wherein it is shown that a person was injured at a crossing. *Payne v. Chicago, R. I. & P. R. Co.* 44 Iowa, 236.

The burden of proof of contributory negligence is on the defendant under the Iowa Code, § 1288, providing that an injured party, in order to recover damages from a railroad company for neglect or refusal to comply with the statute requiring safe crossing and cattle guards, need only prove such neglect and refusal. *Ford v. Chicago, R. I. & P. R. Co.* 91 Iowa, 179, 24 L.R.A. 657, 59 N. W. 5.

¹⁸ *Crawford v. Chicago G. W. R. Co.* 109 Iowa, 433, 80 N. W. 519.

¹⁹ Where the negligence charged is failure of a railroad company to give statutory signals on approaching a crossing, the burden of proving contributory negligence is upon the defendant, as in other cases. 33 L.R.A. (N.S.)

Turner v. St. Louis & H. R. Co. 134 Mo. App. 397, 114 S. W. 1026.

Where, under a statute requiring a railroad company to ring a bell or blow a whistle within a prescribed distance of railway crossings, provided that, upon failure to do so, the companies "shall be liable for all damages which shall be sustained by any person by reason of such neglect," it was held that proof of failure to observe the requirement of the statute did not make out a prima facie case, and the statute was thereafter amended (Acts 1881, p. 79) so as to provide: "And said corporations shall also be liable for all damages which any person may hereafter sustain at such crossing when such bell shall not be rung, or such whistle sounded, as required by this section; provided, however, that nothing contained shall preclude the corporation sued from showing that the failure to ring such bell, or sound such whistle, was not the cause of such injury." The court declared that it was clear that it was intended by this amendment to establish the rule that when a person suing for damages sustained at the crossing by a railroad of a public road or street shows that neither the bell of the engine was rung nor whistle sounded, as required by the statute, he makes out a prima facie case, and that the burden of rebutting it is cast upon the corporation. *Huckshold v. St. Louis, L. M. & S. R. Co.* 90 Mo. 548, 2 S. W. 794.

The statute of 1881, p. 79, as to signals at railway crossings, shifts the burden of proof to the corporations as to the cause of the injury when it appears the statutory signals are not given, but in regard to the contributory negligence of the injured party, the rule remains the same in this class of cases as in all others. *Crumpley v. Hannibal & St. J. R. Co.* 111 Mo. 152, 19 S. W. 820.

Under a statute providing that if a person is injured at a railroad crossing by a collision with the engine or cars of a railroad corporation, and it appears that the corporation neglected to give the signals required by the statute, and that such neglect contributed to the injury, the corporation shall be liable for all damages caused by the collision, etc. (Rev. Stat. §§ 1685, 1692), it

the burden of proving absence of contributory negligence is on the plaintiff, it has been held that under a statute requiring railroad companies to maintain sufficient grade crossings, and making them absolutely liable for all damages for failure or neglect to construct and maintain the same, the burden is on the defendant or railroad company to establish contributory negligence on the part of a person injured or killed at such crossing, in order to defeat recovery in an action for damages resulting in such injury.²⁰

It has been held in Maine that to maintain an action against a town for injuries received by reason of a defective highway

which the town by statute was required to keep in repair, it is incumbent on the plaintiff, after proving the notices required by statute, to prove affirmatively that the highway was not safe and convenient for travelers at the point where the accident occurred, that no want of ordinary care on his part contributed to the accident, and that his injury was occasioned through the defect alone.²¹ In actions of this kind in Massachusetts, the plaintiff must allege the exercise of due care.²² The same rule prevails in Vermont,²³ but the opposite rule obtains in Kansas.²⁴

In a jurisdiction in which the general

is not necessary that the plaintiff should show, in order to prove that the failure to give signals contributed to the accident, that the person for whose death the action was brought was not aware of the train's approach in time to avoid the collision, since this would result in casting the burden upon the plaintiff. The burden should not be on the plaintiff for two reasons: First, because it would be requiring the plaintiff, in violation of the general rule, to prove a negative. Second, because the knowledge of the deceased of the approach of the train in time to avoid a collision is a matter of defense, to be proved by the defendant, and not to be disproved in advance by the plaintiff. *Nohrden v. Northeastern R. Co.* 50 S. C. 87, 82 Am. St. Rep. 826, 37 S. E. 228.

In *Peart v. Grand Trunk R. Co.* 10 Ont. App. Rep. 191, under a statute requiring a railroad company to give warning by bell or whistle on the approach to highway crossings, it was held that it was not necessary for plaintiff to negative contributory negligence in an action to recover for the death of a person killed at a crossing by reason of the negligence of the defendant by failure to perform such statutory duty.

²⁰ See *v. Wabash R. Co.* 123 Iowa, 443, 9 N. W. 106.

Likewise in *Illinois C. R. Co. v. Trowbridge*, 31 Ill. App. 190, it was said that the rule laid down in *Rockford, R. I. & St. R. Co. v. Lynch*, 67 Ill. 149, that in an action based on the negligence of the company for failure to fence its road, the plaintiff need only prove the injury by the trains of the company, and its neglect to fence, in order to establish a prima facie case of liability, applies in all cases of injuring animals by railroad trains where the agency or control of the owner or those in charge of them is not a factor in the case; but that when it appears that the actions of animals are controlled by the conduct of the owner, or others representing him, in such a way as will affect the right of recovery, then, it devolves upon such owner to show affirmatively upon his part the proper degree of care before he can recover.

3 L.R.A. (N.S.)

In the *Lynch Case* there was no question as to the burden of proving contributory negligence. The erroneous instruction in that case was that the plaintiff must prove failure to fence and "negligence in other respects." This was held to require too much; that proof of the breach of the statutory duty made out a prima facie case.

²¹ *Cunningham v. Frankfort*, 104 Me. 208, 70 Atl. 441.

²² *Hilton v. Boston*, 171 Mass. 478, 51 N. E. 114. The court said it was formerly considered that in an action against a town for a defect in a highway, it was unnecessary to allege that the plaintiff was in the exercise of due care. Negligence on the part of the town was the gist of the action, and this was the main thing to be proved. The plaintiff put in evidence proof of his own care to negative his own negligence. But since the practice act of 1851, the schedule of forms in an action against a town for a defect in the highway contains an allegation of due care on the part of the plaintiff. Stat. 1851, chap. 233; Stat. 1852, chap. 312; Gen. Stat. chap. 129; Pub. Stat. chap. 167. And the commissioners on the statutes of 1851, in their note to the form in such a case, refer to *May v. Princeton*, 11 Met. 442. While negligence on the part of a town is the gist of the action, the plaintiff must, since the statute of 1851, prove as an affirmative proposition, the exercise of due care on his part.

In order to maintain an action against a town upon the statute for damage occasioned by want of repair in a highway, two things must concur: first, that the highway was out of repair; secondly, that the party complaining was driving with ordinary care and skill. *Adams v. Carlisle*, 21 Pick. 146.

²³ Where a right of action is given for injuries received "by means of" the insufficiency of a highway, this requires that the insufficiency shall be the sole operative cause of the injury, and necessarily imposes upon the plaintiff the burden of proving freedom from contributory negligence. *Bovee v. Danville*, 53 Vt. 183.

²⁴ A statute (Sess. Laws of 1887. § 1, chap. 237; Gen. Stat. 1889, ¶ 7134) providing that "any person who shall, without

rule is that the burden of proving contributory negligence is on the defendant, under a statute giving a right of action for injuries due to defects in highways, provided that the injured person has not in any way brought about the injury or damage by his own act, or by having negligently contributed thereto, it is held that the plaintiff must allege as a point of his case, that the injuries complained of were not contributed to by his own fault.²⁵

Where the rule was that the burden of proving absence of contributory negligence is on the plaintiff, it was held in an action for negligence, growing out of the viola-

a contributing negligence on his part, sustain damage by reason of any defective bridge, culvert, or highway, may recover such damages from the county or township wherein such defective bridge, culvert, or highway is located," etc., does not change the rule of pleading, and shift the burden of proof to the plaintiff, as to cases falling within its terms, its object being not to declare a rule, either of pleading or of evidence, but to declare a rule of right. *Reading Twp. v. Telfer*, 57 Kan. 798, 57 Am. St. Rep. 355, 48 Pac. 134.

Under a statute (Laws of Kansas of 1887, chap. 237), providing that any person who shall, without contributory negligence on his part, sustain damage by reason of any defective bridge, culvert, or public highway, may recover damages from the county or township in which said defective bridge, culvert, or public highway is located, the plaintiff must allege and prove that the injuries were sustained without contributory negligence on his part, and if the defendant deny the allegations of the complaint, the burden of proof as to contributory negligence is on the plaintiff; but if the defendant pleads contributory negligence, and sets out certain particular acts of the plaintiff in support thereof, the burden of proving such facts is thrown upon the defendant. *Falls Twp. v. Stewart*, 3 Kan. App. 403, 42 Pac. 926. To the same effect, *Independent Twp. v. Guldner*, 7 Kan. App. 690, 51 Pac. 943.

²⁵ *Walker v. Chester County*, 40 S. C. 342, 18 S. E. 936.

In construing the statute (highway statute) in *McFail v. Barnwell County*, 57 S. C. 294, 35 S. E. 562, *McIver*, Ch. J., said: "To maintain this action, it was necessary for the plaintiff not only to allege and prove that the injuries of which he complains against the county were 'occasioned by its neglect and mismanagement,' but also that he 'has not in any way brought about such injury or damage by his own act, or negligently contributed thereto.' If, therefore, the injury complained of was in any way brought about by the negligence of the plaintiff, or if he negligently contributed thereto, then the plaintiff, under the express terms of the statute, could not recover. The legislature, by the use of the language above quoted, manifestly intend-

tion of a statute prescribing the duties of a mine boss, and making a violation of its provision negligence *per se*, that the plaintiff is required to allege that he was free from fault.²⁶

Under the Kentucky statutes²⁷ requiring each owner or lessee of a coal mine, under a penalty, to provide and maintain by appliances and means therein described a prescribed amount of ventilation throughout his mines, all that was necessary for plaintiff to do to make out his case *prima facie* was to show that the injury was caused by an explosion, and that the defendant had not complied with the stat-

ed to declare that in either one of two contingencies the plaintiff could not recover. First, if the injury was in any way brought about by his own act. Second, if he negligently contributed thereto. Now, if the statute had stopped after declaring the first one of these contingencies, then possibly the conclusion might have been that the negligence of the plaintiff, in order to bar a recovery, must be the efficient cause of the injury; or, to use the language of the circuit judge, must be the immediate, proximate cause of the injury, as the words 'brought about' would seem to imply. But the statute does not stop there, but goes on to declare another contingency upon which the plaintiff's right of recovery would be barred,—if he negligently contributed thereto. The use of the word 'contributed' necessarily implies that there was another cause to which the plaintiff's negligence might contribute; and although plaintiff's negligence might not alone be sufficient to cause the injury, yet if it contributed to some other cause,—for example, the defendant's negligence,—then the plaintiff could not, under the second contingency declared in the statute, recover." This case was overruled in *Duncan v. Greenville County*, 73 S. C. 254, 53 S. E. 367.

Under § 1347 of the Code of 1902, giving a right of action for injuries due to a defect in a highway, provided that the injured person did not in any way bring about the injury or damage by his own act "negligently contributing thereto," the plaintiff, in order to recover, must show that he was not guilty of any negligence which contributed to the injury as a proximate cause thereof. *Ibid*.

In an action brought to recover for injuries received by the alleged "mismanagement" of a steam roller in a highway, under a statute creating such a right, provided that the injured person "has not in any way brought about such injury or damage by his or her own negligent act, or negligently contributed thereto," it is necessary for the plaintiff, as a part of his case, to show that his own negligence did not contribute to the injury. *Barksdale v. Laurens*, 58 S. C. 413, 36 S. E. 661.

²⁶ *Linton Coal & Min. Co. v. Persons*, 11 Ind. App. 264, 39 N. E. 214.

²⁷ § 2731.

ute; thus shifting the burden upon the defendant to show that the injury was caused not by an explosion of accumulated gases of a noxious and inflammable character, but instead by the imprudent and negligent manner in which the blasting was done by plaintiff.²⁸

The rule that the burden is on the plaintiff was held not affected by a statute requiring the tumbling rods of threshing machines to be boxed, and providing that the owners shall be liable for damages to persons injured, upon failure to comply with the statute. The burden is still upon the plaintiff to show that the injury was not due to his own negligence contributing to the accident.²⁹ A Georgia statute³⁰ requires that it should affirmatively appear as a condition of recovery in an action for injuries received by reason of defective machinery, that the servant could not have known of the defect by the exercise of ordinary care.³¹

²⁸ Godfrey v. Beattyville Coal Co. 101 Ky. 339, 41 S. W. 10.

It was held, however, in this case, that an instruction putting the burden upon the plaintiff was not prejudicial, for the reason that the evidence clearly showed that the injury was caused by the negligent and reckless manner in which the plaintiff and his collaborators blasted the coal.

²⁹ Reynolds v. Hindman, 32 Iowa, 146.

³⁰ "The master is bound to exercise ordinary care in the selection of servants, and not to retain them after knowledge of incompetency; he must use like care in furnishing machinery equal in kind to that in general use, and reasonably safe for all persons who operate it with ordinary care and diligence. If there are latent defects in machinery, or dangers incident to an employment, unknown to the servant, of which the master knows, or ought to know, he must give the servant warning in respect thereto." Georgia Code 1911, § 3130 (2611).

"A servant assumes all ordinary risk of his employment, and is bound to exercise his own skill and diligence to protect himself. In suits for injuries arising from the negligence of a master in failing to comply with the duties imposed by the preceding section, it must appear that the master knew or ought to have known of the incompetency of the other servant, or of the defects or danger in the machinery supplied; and it must also appear that the servant injured did not know, and had not equal means of knowing, of such fact, and by the exercise of ordinary care could not have known thereof." Georgia Code 1911, § 3131 (2612).

³¹ Wysong v. Seaboard Air Line R. Co. 74 S. C. 1, 54 S. E. 214.

³² Pub. Stat. chap. 104, § 14.

³³ Taylor v. Carew Mfg. Co. 143 Mass. 470, 10 N. E. 308.

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Under a statute providing that any corporation owning a factory shall be liable for damages suffered by any employee by reason of its failing to guard or fence an elevator well,³² a person injured in this manner has the burden of establishing his freedom from contributory negligence. Where a statute does not otherwise provide, the rule requiring the plaintiff in an action for negligence to show that, at the time of the injury complained of, he was in the exercise of due care, is the same whether the action is brought under a statute or at common law. The doctrine of contributory negligence governs both classes of actions.³³

The Iowa Code,³⁴ providing that the owner of a dog "shall be liable to the party injured for all damages done by his dog, except when the party is doing an unlawful act," creates an absolute liability, so as to relieve the plaintiff from the necessity of alleging due care on his part.³⁵

Under a statute relating to the setting and spread of fire from railroads, providing that the use of adjacent property in the same manner in which it would have been used had no railroad been located there shall not be considered negligence, the evidence showing without dispute that the burned property had been used the same as before the coming of the railroad, it was held that the burden was not on the plaintiff to show freedom from contributory negligence in stacking straw in close proximity to defendant's tracks. American Strawboard Co. v. Chicago & A. R. Co. 177 Ill. 513, 53 N. E. 97.

³⁴ § 1485.

³⁵ Gregory v. Woodworth, 93 Iowa, 246, 61 N. W. 962.

In Stuber v. Gannon, 98 Iowa, 228, 67 N. W. 105, the rule announced in the Gregory Case was followed by the majority of the court. Deemer, J., however, expressed individual views to the contrary. He said: "The only theory on which it can be sustained is that the statute in question is remedial in its nature, and in effect does nothing more than dispense with proof of the *scienter* required in actions at common law; that the action is still predicated upon the negligence of the defendant; and that the ordinary rule denying recovery to one for injuries resulting from his own negligence applies. To sustain the opinion it must also be found that the purpose of the exception stated in the statute, to wit, 'except when the party is doing an unlawful act,' was to limit the right of recovery, and not to extend it. . . . There is a class of actions in tort not based on negligence in which the defendant's care, or the want of it, is not in issue, in which some direct and positive act of the defendant makes out the cause of action. In such cases plaintiff makes out a *prima facie* case by proving the defendant's act and consequent injury. He has no occasion to prove

And under a statute³⁶ providing that when a dog does damage, his owner or keeper forfeits to the person injured double the amount of the damage done, to be recovered by action of trespass, it is not necessary for the plaintiff to prove due care.³⁷

f. Statutory actions for death.

Under the Connecticut statute, it is incumbent upon the plaintiff to show that his intestate was in the exercise of due care at the time of the injury causing the death, the intent of the statute being merely to make a right of action survive, and not to change the general rule of law as to the burden of proof.³⁸

In an action to recover for the death of a brakeman, the administrator must, under the Maine statute,³⁹ affirmatively prove that the deceased was free from con-

tributory negligence, the same as in an action by the deceased himself, had he survived.⁴⁰

Under the Massachusetts statutes,⁴¹ in an action by the administrator of a switchman killed while in the performance of his duty, to recover for the conscious suffering of the intestate, and by the next of kin to recover for his death, it must be shown by the plaintiffs that the deceased was not guilty of contributory negligence.⁴²

In an action brought under the Kentucky statutes,⁴³ to recover for death, it is not necessary that the plaintiff should prove that the deceased exercised ordinary care for his own safety.⁴⁴

The Maryland Code requires an averment of freedom from contributory negligence in actions of this kind.⁴⁵ But this is not the rule in an action to recover for death resulting from a pistol shot fired in defense of defendant's servant.⁴⁶

defendant's negligence, nor his own care in the first instance. . . . It seems to me that this is an action belonging to that class, and that plaintiff was not required to show freedom from contributory negligence."

³⁶ Maine Rev. Stat. chap. 30, § 1.

³⁷ *Hussey v. King*, 83 Me. 568, 22 Atl. 476. The court, however, put this ruling on the ground that negligence did not constitute an element of the action, and that recovery would be had irrespective of the question whether the plaintiff was negligent.

But under a statute providing that when a dog does damage to a person or his property, his owner forfeits to the person injured the amount of the damage done, provided such damage was not occasioned through the fault of the person injured, the burden is on the plaintiff to prove freedom from contributory negligence. *Garland v. Hewes*, 101 Me. 549, 64 Atl. 914.

In an action under Pub. Stat. chap. 102, § 93, to recover double the amount of damages alleged to have been sustained by plaintiff in stopping a dog fight, it was held that the statute was not penal, so as to require a different rule from that which prevails in actions of tort; that is, that the burden is on the plaintiff to prove freedom from contributory negligence. *Raymond v. Hodgson*, 161 Mass. 184, 36 N. E. 791.

³⁸ *Chandler v. New York, N. H. & H. R. Co.* 159 Mass. 589, 35 N. E. 89.

The statutes provide (Conn. Gen. Stat. 1888, § 1008) that "all actions for injury to the person, whether the same do or do not instantaneously or otherwise result in death, . . . shall survive to his executor or administrator;" that "in all actions by an executor or administrator for injuries resulting in death from negligence, such executor or administrator may recover from the party legally in fault for such

injury just damages, not exceeding five thousand dollars." (§ 1009.)

³⁹ Acts of 1891, chap. 124.

⁴⁰ *McDonough v. Grand Trunk R. Co.* 93 Me. 304, 56 Atl. 913.

⁴¹ Stat. 1887, chap. 270, § 1, as amended by Stat. 1893, chap. 359.

⁴² *Dacey v. New York, N. H. & H. R. Co.* 168 Mass. 479, 47 N. E. 418.

In the statutory action to recover for the death of a boy killed by the alleged gross negligence of the defendant, it is necessary for the plaintiff to show that there was no contributory negligence on the part of the deceased, or on the part of those who had charge of him. *Manning v. Conway*, 192 Mass. 122, 78 N. E. 401.

In the statutory action to recover for the death of a person, due to the alleged negligence of another, the burden of proof of showing due care is on the plaintiff. *McCarty v. Clinton Gaslight Co.* 193 Mass. 76, 78 N. E. 739.

In an action for the conscious suffering of a person killed while crossing street car tracks, and in the statutory action for his death, the plaintiff is bound to show that the intestate was in the exercise of due care. *Haynes v. Boston Elev. R. Co.* 204 Mass. 249, 90 N. E. 419.

⁴³ Russell's Stat. § 11.

⁴⁴ *Warren v. Jeunesse*, — Ky. —, 122 S. W. 862.

⁴⁵ In *State ex rel. Dodson v. Baltimore & L. R. Co.* 77 Md. 489, 26 Atl. 865, in an action against a railroad company, to recover for the death of a servant, the court said that the forms set forth in the Code seemed to require an averment on the part of the plaintiff of freedom from contributory negligence (art. 75, § 23, form 36). A pleading failing to contain this averment was therefore held defective on demurrer.

⁴⁶ In *Tucker v. State*, 89 Md. 471, 46 L.R.A. 181, 43 Atl. 778, the court said:

It has been held in Ohio that a statute providing that the administrator may recover in a case in which the deceased might have recovered if living does not cast the burden of disproving contributory negligence on the plaintiff, on the theory that the deceased could not have recovered if living, in a case in which he was guilty of contributory negligence.⁴⁷

In an action under a Massachusetts stat-

It has been held over and over again in this state that if a suit is brought under this statute for the negligence of the defendant, the burden is on the plaintiff to prove the negligence; yet, if the plaintiff's testimony makes out a prima facie case of negligence, and does not disclose want of care on the part of the deceased, the burden is on the defendant to establish contributory negligence if that is relied on.

So, although, by the terms of the statute, the plaintiff in such cases can only recover by proving that the death of the person was caused by the negligence or default of the defendant, the defendant has the burden cast on him to prove that the proximate cause of the injury was the negligence of the deceased, and that, too, notwithstanding the plaintiff is required to prove as part of his case that the negligence of the deceased did not directly contribute to the injury. It is true that the latter may be satisfied by the presumption of due care and the known and ordinary disposition of men to guard themselves against danger, when the plaintiff's testimony as to the accident does not show affirmatively that the deceased did directly contribute to the injury."

⁴⁷ Jackson Knife & Shear Co. v. Hathaway, 27 Ohio C. C. 745.

⁴⁸ "If a person is injured in his person or property by collision with the engines or cars of a railroad corporation at a crossing such as is described in § 163, and it appears that the corporation neglected to give the signals required by said section, and that such neglect contributed to the injury, the corporation shall be liable for all damages caused by the collision, or to a fine recoverable by indictment, as provided in the preceding section; or, in case the life of a person so injured is lost, to damages recoverable in an action of tort, as provided in said section, unless it is shown that, in addition to a mere want of ordinary care, the person injured, or the person having charge of his person or property, was, at the time of the collision, guilty of gross or wilful negligence, or was acting in violation of the law, and that such gross or wilful negligence or unlawful act contributed to the injury." Mass. Pub. Stat. 1882-1887, chap. 112, § 213.

"By reason of the negligence or carelessness of a corporation operating a railroad or street railway, or of the unfitness or gross negligence or carelessness of its servants or agents while engaged in its business,

to recover damages for causing the death of a person by running him down at a crossing, it was held that to recover under § 212, it must be shown that the deceased was in the exercise of due diligence. To recover under § 213, it must be shown that the defendant neglected to sound its whistle or ring its bell, as required by § 163.⁴⁹

In an action against a railroad company

ness, the life of a passenger, or of a person being in the exercise of due diligence, and not a passenger or in the employment of such corporation, is lost, the corporation shall be punished by a fine of not less than 500 nor more than 5,000 dollars, to be recovered by indictment prosecuted within one year from the time of the injury causing the death, and paid to the executor or administrator, for the use of the widow and children of the deceased, in equal moieties; or, if there are no children, to the use of the widow; or, if no widow, to the use of the next of kin; but a corporation operating a railroad shall not be so liable for the loss of life by a person while walking or being upon its road contrary to law, or to the reasonable rules and regulations of the corporation. If the corporation is a railroad corporation, it shall also be liable in damages not exceeding 5,000 nor less than 500 dollars, to be assessed with reference to the degree of culpability of the corporation or of its servants or agents, and to be recovered in an action of tort commenced within one year from the injury causing the death, by the executor or administrator of the deceased person, for the use of the persons hereinbefore specified in the case of an indictment. But no executor or administrator shall, for the same cause, avail himself of more than one of the remedies given by this section." Mass. Pub. Stat. 1882-1887, chap. 112, § 212.

⁴⁹ "Section 163, of chap. 112, of the Public Statutes, is hereby amended by inserting after the word 'or' in the fourth line the words 'at least three separate and distinct blasts of,' so that said section shall read as follows:—§ 163. Every railroad corporation shall cause a bell of at least 35 pounds in weight and a steam whistle to be placed on each locomotive engine passing upon its road; and such bell shall be rung, or at least three separate and distinct blasts of such whistle sounded, at the distance of at least 80 rods from the place where the road crosses upon the same level any highway, townway, or traveled place over which a signboard is required to be maintained, as provided in the two following sections; and such bell shall be rung or such whistle sounded continuously or alternately until the engine has crossed such way or traveled place." § 1 of Mass. Acts and Resolves 1890, chap. 173.

"If a person is injured in his person or property by collision with the engines or cars of a railroad corporation at a crossing

in Massachusetts for causing the death of a passenger, it is not incumbent upon the plaintiff to prove that the deceased was in the exercise of due care.⁵⁰

Before the plaintiff can recover in Massachusetts for the death of a person suffo-

such as is described in § 147, and it appears that the corporation neglected to give the signals required by said section, and that such neglect contributed to the injury, the corporation shall be liable for all damages caused by the collision, or to a fine recoverable by indictment, as provided in § 63 of part 1; or, if the life of a person so injured is lost, to damages recoverable in an action of tort, as provided in said section, unless it is shown that, in addition to a mere want of ordinary care, the person injured, or the person who had charge of his person or property, was, at the time of the collision, guilty of gross or wilful negligence, or was acting in violation of the law, and that such gross or wilful negligence or unlawful act contributed to the injury." Mass. Acts and Resolves 1906, chap. 463, part 2, § 245.

Livermore v. Fitchburg R. Co. 163 Mass. 132, 39 N. E. 789.

Under the Massachusetts Statutes of 1881, chap. 199, § 2, in an action for causing the death of a person at a railroad crossing, the burden is upon the defendant of showing that the deceased was guilty of gross or wilful negligence. Copley v. New Haven & N. Co. 136 Mass. 6.

In an action to recover for the death of a person killed at a railroad crossing, based on the failure of the company to give the signals required by law, the company can relieve itself from liability only by showing that the deceased was guilty of gross or wilful negligence, and that such negligence contributed to the injury; and the burden of proof is on the defendant to show this. Pub. Stat. chap. 112, § 213. Walsh v. Boston & M. R. Co. 171 Mass. 52, 50 N. E. 453.

In an action under Pub. Stat. chap. 112, § 213 (Rev. Laws, chap. 111, § 268), for the death of a boy killed at a grade crossing, due to failure of defendant to give signals required by Pub. Stat. chap. 112, § 163; Stat. 1890, chap. 173 (Rev. Laws, chap. 111, § 188), the plaintiff need not show that the deceased was careful. If the defendant relies upon the gross negligence of the deceased, that defense must be established by evidence. McDonald v. New York C. & H. R. R. Co. 186 Mass. 474, 72 N. E. 55.

In an action under the statute (Rev. Laws, chap. 111, § 268) for the loss of the life of a person at a grade crossing, the burden is upon the defendant to prove that the plaintiff's intestate was grossly negligent. Brusseau v. New York, N. H. & H. R. Co. 187 Mass. 84, 72 N. E. 348.

In an action under the statute (Pub. Stat. chap. 112, § 213) for injuries re-

ceived at a railroad crossing, the burden is on the defendant to prove gross negligence on the part of the plaintiff. Kenny v. Boston & M. R. Co. 188 Mass. 127, 74 N. E. 309.

In speaking of the English act,⁵³ Lord FitzGerald said: "Before the passing of

ceived at a railroad crossing, the burden is on the defendant to prove gross negligence on the part of the plaintiff. Kenny v. Boston & M. R. Co. 188 Mass. 127, 74 N. E. 309.

In an action to recover for injuries received by being struck by a train at a railroad crossing, due to the alleged negligence of the defendant in failing to give statutory signals, as required under Rev. Laws, chap. 111, § 268, the burden of proving gross negligence on the part of the plaintiff is on the defendant. Kelsall v. New York, N. H. & H. R. Co. 196 Mass. 554, 82 N. E. 674.

An action under Statutes 1906, chap. 463, part 2, § 245, for the death of a person, due to the negligence of the defendant in failing to ring bell as train approached crossing, the burden is on defendant of proving gross negligence of plaintiff. Slatery v. New York, N. H. & H. R. Co. 203 Mass. 453, 133 Am. St. Rep. 311, 89 N. E. 622.

⁵⁰ Merrill v. Eastern R. Co. 139 Mass. 252, 29 N. E. 666.

For statute, see supra, VIII., note 48.

If a person killed by a railroad company was a passenger, and his life was lost through the negligence of the defendant, or the gross negligence of its servants or agents, it is unnecessary for the plaintiff to prove that the deceased was not negligent, under Pub. Stat. chap. 112, § 212. McKimble v. Boston & M. R. Co. 139 Mass. 542, 2 N. E. 97.

⁵¹ Rev. Laws, chap. 171, § 2.

⁵² Hamma v. Haverhill Gaslight Co. 203 Mass. 572, 89 N. E. 1043.

⁵³ "Whereas no action at law is now maintainable against a person who, by his wrongful act, neglect, or default, may have caused the death of another person, and it is oftentimes right and expedient that the wrongdoer in such case should be answerable in damages for the injury so caused by him, be it therefore enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and commons, in this present Parliament Assembly, and by the authority of the same. That whensoever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although

Lord Campbell's act . . . in a common-law action for an injury alleged to have been caused by the negligence of the defendant, and when that most convenient plea 'not guilty' was permitted, I always understood that if the defendant relied as a defense on contributory negligence, though he was permitted to establish it under 'not guilty,' yet the issue lay on him, and I am not aware that any different rule has been established since the passing of that statute, or since the practice has been adopted of putting in special defenses, whether the action was at common law, for a personal injury, or under the statute for a wrongful act causing the death."⁵⁴

g. Acts relating to pleading.

Under a statute providing that the answer "shall consist of a concise statement of facts constituting . . . the defend-

ant's ground of defense," it was held that the defense of contributory negligence must be specifically pleaded in order that it may be availed of. But the court said, *obiter*, that it was probable that if the matter were before the court, it would follow what appeared to be the weight of authority that if the plaintiff in his own case showed that his negligence contributed to the injury, he could not recover, although the defendant might not have pleaded contributory negligence as a defense.⁵⁵

It is especially true that the defendant must plead the defense of contributory negligence under the provisions of a Code providing that the answer of the defendant shall contain, first, a special denial of each material allegation of the petition controverted by the defendant; second, a statement of any new matter constituting a defense.⁵⁶

the death shall have been caused under such circumstances as amount in law to felony.

"II. And be it enacted, that every such action shall be for the benefit of the wife, husband, parent, and child of the person whose death shall have been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased; and in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought; and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst the before-mentioned parties in such shares as the jury by their verdict shall find and direct.

"III. Provided always, and be it enacted, that not more than one action shall lie for and in respect of the same subject-matter of complaint, and that every such action shall be commenced within twelve calendar months after the death of such deceased person.

"IV. And be it enacted that in every such action the plaintiff on the record shall be required, together with the declaration, to deliver to the defendant or his attorney a full particular of the person or persons for whom and on whose behalf such actions shall be brought, and of the nature of the claim in respect to which damages shall be sought to be recovered.

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"V. And be it enacted that the following words and expressions are intended to have the meaning hereby assigned to them respectively, so far as such meanings are not excluded by the context or by the nature of the subject-matter. That is to say, words denoting the singular number are to be understood to apply also to a plurality of persons or things; and words denoting the masculine gender are to be understood to apply also to persons of the feminine gender, and the word 'person' shall apply to bodies politic and corporate, and the word 'parent' shall include father and mother and grandfather and grandmother and stepfather and stepmother; and the word 'child' shall include son and daughter and grandson and granddaughter and stepson and stepdaughter.

"VI. And be it enacted that this act shall come into operation from and immediately after the passing thereof, and that nothing therein contained shall apply to that part of the United Kingdom called Scotland.

"VII. And be it enacted that this act may be amended or repealed by any act to be passed in this session of Parliament. 9 & 10 Vict. chap. 93."

⁵⁴ Wakelin v. London & S. W. R. Co. L. R. 12 App. Cas. 41.

⁵⁵ De Amada v. Friedman, 11 Ariz. 56, 89 Pac. 588.

⁵⁶ Hudson v. Wabash & W. R. Co. 32 Mo. App. 667.

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From purchase money for loss by superior adverse title to portion of land conveyed, see Vendor and Purchaser.

1. The failure of a trustee in bankruptcy to intervene in a suit brought by the bankrupt in a state court before his adjudication will not abate the suit. *Weaver Mercantile Co. v. Thurmond*, 33: 1061, 70 S. E. 126, 68 W. Va. 530.

2. Under a statute providing that an action shall stand revived in the absence of sufficient cause shown against revivor, after service of a conditional order therefor, the court has no discretion to refuse to permit a revival. *Boyes v. Masters*, 33: 576, 114 Pac. 710, — Okla. —.

3. The method of reviving an action sanctioned by a statute providing for a revivor by service of a conditional order therefor is not exclusive where the statutes also provide that, in case of death of a party, the court may allow the action to continue against his representative, and authorize the court to allow supplemental pleadings alleging facts occurring after the former pleadings. *Boyes v. Masters*, 33: 576, 114 Pac. 710, — Okla. —. (Annotated)

4. The mere fact that the time allowed by the revivor statute has elapsed will not, in the absence of laches, prevent the revivor of an action foreclosing a mortgage which, after the death of the mortgagor, had been revived against his widow, who was also one of his executors, and his heirs, and after the death of the widow had been reversed and remanded on appeal, and an attempt made to revive against the other executor and the widow's representatives, without any attempt to bring in the heirs until after a motion was dismissed because of failure to do so. *Boyes v. Masters*, 33: 576, 114 Pac. 710, — Okla. —.

ABUTTING OWNERS.

Requiring consent of to standing of hacks in street, see Constitutional Law, 7.

ACCEPTANCE.

Necessity of notice of acceptance of guaranty, see Guaranty.

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ACCORD AND SATISFACTION.

One who accepts in payment of overdue accounts upon which interest is due, which is not provided in the contract, checks containing a statement of the account, without interest, and bearing the announcement "in full payment of above account," waives his right subsequently to claim the interest, although he understands that the question of right to interest was left open, and as to the portion of the interest claimed so notified the one making the payment. *Bassick Gold Mine Co. v. Beardsley*, 33: 852, 112 Pac. 770, — Colo. —.

ACKNOWLEDGMENT.

To interrupt statute of limitations, see Limitation of Actions, 6.

ACTION OR SUIT.

Abatement of, see Abatement and Revival.

Dismissal and discontinuance, see Dismissal or Discontinuance.

Parties to actions, see Parties.

Premature; conditions precedent.

To enforce stockholder's liability, see Corporations, 2.

1. Dissolution of an injunction on motion does not mature a right of action on the injunction bond if the suit is still pending, although the statute provides that, in case of dissolution of an injunction, the complaint shall be dismissed of course unless sufficient cause be shown against its dismissal at the next succeeding term of court. *Vicksburg Waterworks Co. v. Vicksburg*, 33: 844, 54 So. 852, — Miss. —.

2. One is not bound to make a tender of any amount as a condition of instituting a suit to set aside an assessment for a public improvement, which is invalid *in toto*. *Denver v. State Invest. Co.* 33: 395, 112 Pac. 789, — Colo. —.

3. Tender of a portion of an assessment for a public improvement is not a prerequisite to the institution of a suit to set it aside for illegality, if no part of the assessment is due and payable when the suit is instituted. *Denver v. State Invest. Co.* 33: 395, 112 Pac. 789, — Colo. —.

Who may set up defense.

4. One seeking to set aside for fraud a contract by which he transferred corporate stock to his attorney, in consideration of the latter's securing money to relieve the business from financial difficulties, cannot set up usury in a transaction by which the attorney transferred a portion of the stock to persons who lent the money which he undertook to secure. *Winsor v. Commonwealth Coal Co.* 33: 63, 114 Pac. 908, — Wash. —.

Joinder.

5. A statutory action to quiet title and a common-law action to recover damages for trespass upon the property involved may be joined under a statute permitting the joinder of causes which arise out of transactions connected with the same subject of action. *McArthur v. Moffett*, 33: 264, 128 N. W. 445, 143 Wis. 564.

6. The physical presence of the injured person is not necessary to effect a transaction within the meaning of a statute permitting the joinder of causes of action arising out of the same transaction, or transactions connected with the same subject of action. *McArthur v. Moffett*, 33: 264, 128 N. W. 445, 143 Wis. 564.

7. In possessory and proprietary actions, whether involving real or personal property, the subject of action, causes arising out of transactions concerning which may, by statute, be joined in a single action, is composed of the plaintiff's primary right, together with the specific property itself. *McArthur v. Moffett*, 33: 264, 128 N. W. 445, 143 Wis. 564.

ADMINISTRATION.

Of decedent's estate, see *Executors and Administrators*.

ADMISSIONS.

Evidence of, see *Evidence*, 19.

ADOPTED STATUTE.

Construction of, see *Statutes*, 3.

ADOPTION.

Inheritance by adopted child, see *Descent and Distribution*.

ADVERSE POSSESSION.

Sufficiency of evidence to show adverse nature of possession, see *Evidence*, 39.

1. The intention determines the question whether or not the possession of one holding to a fence placed on a mistaken boundary is adverse to the true owner. *Edwards v. Fleming*, 33: 923, 112 Pac. 836, 83 Kan. 653. (Annotated)

2. Title acquired up to a division fence by adverse possession and acquiescence for the statutory period is not disturbed by a survey fixing the true boundary elsewhere, which was made under a statute providing that the boundary established by the survey shall be considered as permanently established and shall not thereafter be changed, since a statutory survey cannot change title 33 L.R.A. (N.S.)

to land. *Edwards v. Fleming*, 33: 923, 112 Pac. 836, 83 Kan. 653.

ADVERTISING.

Of prize contest, see *Prize*.

For divorce business as ground of disbarment, see *Attorneys*, 3.

AGGRAVATION.

Of damages, see *Damages*, 10.

ALIENS.

Discrimination in inheritance tax on property devised to, see *Taxes*, 10.

ALIMONY.

See *Divorce*.

AMENDMENT.

As affecting limitation of actions, see *Limitation of Actions*, 4.

Of pleading, generally, see *Pleading*, 4.

ANIMALS.

Jurisdiction of action against nonresident for permitting animal to run at large, see *Courts*, 2.

Injury to person on depot platform struck by animal thrown from track by engine, see *Carriers*, 14: Trial, 9, 15.

Permitting dog to run at large without muzzle as proximate cause of injury, see *Proximate Cause*, 3.

Fright of horse by electric railway, see *Street Railways*.

Pleading in action for injury by fright of horse on highway, see *Pleading*, 2, 5.

The personal liability of a nonresident owner of a cow for permitting it to run at large within the limits of a municipal corporation, contrary to the provisions of its ordinances, is not defeated by the fact that the ordinances also provide for proceeding against the animal *in rem* for collection of the penalty. *Tutt v. Greenville*, 33: 331, 134 S. W. 890, 142 Ky. 536.

ANNUITIES.

Right of trustee in bankruptcy to set aside annuity insurance, see *Bankruptcy*, 3.

Interest on fund bequeathed for purchase of annuity, see *Interest*.

Necessary parties to proceeding to determine whether legatee is entitled to principal sum devised for purchase of, see *Parties*, 3.

Validity of annuity insurance contract, see *Insurance*, 2.

The beneficiary is entitled to receive the principal of a fund in due course of administration, where the will directs the laying out by trustees of a certain sum in the purchase of an annuity for him. *Parker v. Cobe*, 33: 978, 94 N. E. 476, — Mass. —. (Annotated)

ANSWER.

Time for filing, see *Pleading*, 1.

APOLOGY.

As defense to action for battery, see Assault and Battery, 5.

APPEAL AND ERROR.

Finality of decision for purpose of appeal.

1. No appeal lies from an order refusing to dismiss an action brought by the state to determine which of two sets of trustees is entitled to administer a sectarian school, but the entry of appeal may be treated as an exception upon appeal from the final judgment. *State ex rel. Kerr v. Hicks*, 33: 529, 70 S. E. 468, 154 N. C. 265.

2. Permitting defendants in default to file pleadings after a reversal of a judgment on demurrer of part of the defendants, because the petition fails to state a cause of action, before any amendment of the petition, is not a final judgment from which a writ of error will lie. *Tate v. Goode*, 33: 310, 70 S. E. 571, 135 Ga. 738.

Right to appeal.

3. Compelling surrender of the parcel awarded plaintiff in an action of ejectment and payment of taxed costs, by threat of executing the writ of restitution which had been issued, prevents him from attempting to reverse the judgment on appeal, although he was denied relief as to a large parcel of land upon which he claimed that defendant had wrongfully encroached. *Clairview Park Improv. Co. v. Detroit & Lake St. C. R. Co.* 33: 250, 129 N. W. 353, 164 Mich. 74.

Parties; intervention.

4. A trustee in bankruptcy who fails to intervene in the trial court in a proceeding brought by the bankrupt before the proceedings were taken against him has no right to take such a proceeding for the first time on appeal. *Weaver Mercantile Co. v. Thurmond*, 33: 1061, 70 S. E. 126, 68 W. Va. 530.

Mode.

5. An appeal may be taken from a judgment which is void because of the unconstitutionality of the statute creating the court in which it was rendered, and a reversal had, where the case is preserved and presented by a case-made, that being one of the prescribed methods for the taking of an appeal. *Fleeman v. Chicago, R. I. & P. R. Co.* 33: 733, 109 Pac. 287, 82 Kan. 574. (Annotated)

Record on appeal.

6. Rulings on pleadings cannot be presented to the appellate court by bill of exceptions, if the pleadings appear only in such bill. *Diener v. Star-Chronicle Pub. Co.* 33: 216, 132 S. W. 1143, 230 Mo. 613.

Objections and exceptions; raising questions in lower court.

7. A reversal may be had to prevent injustice because of insufficient instructions to the jury, although the losing party did not except to those given, or request others. *Lepley v. Andersen*, 33: 836, 125 N. W. 433, 142 Wis. 668.
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Rules of decision.

8. Where there is conflicting testimony in the appellate court as to whether or not a case made was served before the expiration of the time allowed, the certificate of the trial judge that the service was made in due time will control. *Girard Trust Co. v. Owen*, 33: 262, 112 Pac. 619, 83 Kan. 692.

Presumptions.
9. No presumption that a woman will perform her invalid contract to give her attorney a share of the allowance secured in a divorce proceeding as alimony will prevent the appellate court from affirming a special allowance for counsel fees made by the trial court. *McConnell v. McConnell*, 33: 1074, 136 S. W. 931, — Ark. —.

Discretionary matters.

10. The exercise of the discretion of the trial court, in permitting an amended bill to be filed, will not be disturbed by an appellate court, except in cases of abuse of such discretion. *Floyd v. Duffy*, 33: 883, 69 S. E. 993, 68 W. Va. 339.

Questions not raised below.

11. Failure to prove presentment and notice, which the declaration in an action against the indorser of a promissory note alleges to have been made, is fatal, even in the appellate court. *Worley v. Johnson*, 33: 639, 53 So. 543, — Fla. —.

12. The objection that an answer of a witness was not responsive to the question propounded to him is not available on appeal, if not taken at the trial, where the answer was ruled out because inadmissible. *Britton v. Washington Water Power Co.* 33: 109, 110 Pac. 20, 59 Wash. 440.

Errors waived or cured below.

13. Failure to take from the jury the question of murder in the first degree on a trial for homicide is not subject to review in favor of the accused, if the verdict is murder in the second degree. *State v. Meyers*, 33: 143, 110 Pac. 407, — Or. —.

Review of facts.

14. Where there is a direct invasion of personal rights under circumstances showing malice, or a wilful and wanton disregard of another's right to personal security, the amount of compensatory damages is not susceptible of exact computation, and must usually be left to the sound discretion of the jury. *Kurpgewit v. Kirby*, 33: 98, 129 N. W. 177, 88 Neb. 72.

15. The allowance of \$50 per month as alimony to a wife having no property, against a man worth from \$15,000 to \$60,000, who causes the wife to leave the home because of his siding with his sister in her attempt to control the affairs of the house, will not be interfered with on appeal. *McConnell v. McConnell*, 33: 1074, 136 S. W. 931, — Ark. —.

Grounds for reversal.

16. Erroneous rulings of the trial court upon abstract propositions of law will not require a reversal if, upon the law and legal evidence, the result of the trial was right. *Gordon v. Conley*, 33: 336, 78 Atl. 365, — Me. —.

17. A judgment will not be reversed be-

cause new matter in a reply constitutes a departure from the petition, although timely objection has been made thereto in the trial court, where, notwithstanding the fault in the pleading, the contention of each party has been made clear, and each has had full opportunity to develop the facts. *Savage v. Modern Woodmen of America*, 33: 773, 113 Pac. 802, — Kan. —.

18. If, on appeal, it appears that the original bill is broad enough to admit the evidence and sustain the decree pronounced, the decree will not be reversed for failure to mature an amended bill unnecessarily filed. *Floyd v. Duffy*, 33: 883, 69 S. E. 993, 68 W. Va. 339.

19. The admission in an action by a servant of a street railroad company to hold the master liable for injury caused by the negligence of a fellow servant who was alleged to be incompetent, of incompetent evidence as to the making of complaints to an officer having no authority to discharge him, is reversible error, although the jury are instructed to consider it merely as to a subordinate fact, if they are permitted to consider it on the question of notice to the company of such incompetence, and the officer alleged to have received the notice is made a witness and obliged to meet the testimony, which might destroy his value as a witness. *Rosenstiel v. Pittsburgh Railways Co.* 33: 751, 79 Atl. 556, — Pa. —.

20. Error in admitting in evidence a written statement of those in charge of a street car which was in an accident, in an action to hold the street car company liable for injuries thereby, is not cured by a charge to the effect that it is admitted only to contradict such persons' testimony as witnesses in the case, where, as to one of the witnesses, it was not admissible for that purpose because he had never adopted it by signing it, and it contains matters prejudicial to the objecting party other than those which are merely contradictory while, in a portion of the charge, the jury are authorized to use it as substantive evidence. *Boyle v. Boston Elevated R. Co.* 33: 552, 94 N. E. 247, 208 Mass. 41.

21. It is not reversible error to refuse to permit a witness who has testified as to the condition of weather on a certain day, to state whether or not he would call it a fair day, since the jury are able, from his description, to determine that fact for themselves. *Pratt v. North German Lloyd S. S. Co.* 33: 532, 184 Fed. 303, 106 C. C. A. 445.

22. Where an action for personal injury occurring in one state is brought in another state, where plaintiff had a right to bring it, it is error for the court to instruct the jury that the fact that plaintiff brought the action away from his home and among strangers may be considered by them in so far as it may throw light, or tend to throw light, upon the transaction. *Mason v. Nashville, C. & St. L. R. Co.* 33: 280, 70 S. E. 225, 135 Ga. 741.

23. In a contest over the probate of a will, it is error to instruct the jury that 33 L.R.A. (N.S.)

their verdict will be that the instrument offered for probate is not the will of decedent, if they find that she did not sign it, where the evidence is insufficient to sustain such a finding. *Re Gray*, 33: 319, 130 N. W. 746, 88 Neb. 835.

24. The giving of an erroneous prejudicial instruction is not cured by a conflicting one which announces the correct rule, if the former is allowed to stand. *St. Louis, I. M. & S. R. Co. v. Woods*, 33: 855, 131 S. W. 869, — Ark. —.

25. An instruction in an action to recover damages for malicious prosecution, that the damages might include an allowance for suffering caused by cold and lack of bed and food during his imprisonment, cannot be regarded as prejudicial where the only evidence to which it is applicable is to the effect that the bed furnished was hard and that plaintiff ate nothing, which may have been due to his own volition. *Seidler v. Burns*, 33: 291, 79 Atl. 53, — Conn. —.

26. A verdict for \$3,200 for the negligent crushing of the hand of an employee, leaving it in a permanently crippled condition, is not indicative of passion or prejudice so as to require interference by the appellate court. *Poli v. Numa Block Coal Co.* 33: 646, 127 N. W. 1105, — Iowa, —.

Judgment.
27. The fact of the death of a party between the submission and decision of a cause in the appellate court does not impair the validity of a judgment thereafter rendered, but that court will, on proper showing, satisfy the judgment, recall the mandate, and direct the clerk to refile the opinion and enter judgment in the case *nunc pro tunc*, as of the date when the same was submitted. *Boyes v. Masters*, 33: 576, 114 Pac. 710, — Okla. —.

28. Although a case is of such a character that the question of measure of damages is primarily one for the jury, if, under all the circumstances, the amount of the verdict is such as to indicate passion or prejudice, the appellate court will require a remittitur or reverse. *Kurpgewelt v. Kirby*, 33: 98, 129 N. W. 177, 88 Neb. 72.

29. The effect of a judgment cannot be avoided on the second trial on the theory of a difference in evidence if it is clear that the court, in rendering the first judgment, acted upon the facts substantially as they appear in the newly offered evidence. *Thaler v. Wilhelm Greisser Constr. Co.* 33: 345, 79 Atl. 147, 229 Pa. 512.

APPLIANCES.

Master's duty as to, see Master and Servant.

ARCHITECT'S CERTIFICATE.

Certificate of performance of contract, see Contracts, 14; Evidence, 34.

ARGUMENT.

Of counsel, see Trial, 1, 2.

ARREST.

Unlawful arrest as justification for assault, see Assault and Battery, 3.
Killing in resisting, see Evidence, 2, 24; Homicide, 3.

An action cannot be maintained for false arrest if a fine has been imposed by a police court for the conduct which caused the arrest. *Louisville R. Co. v. Hutti*, 33: 867, 133 S. W. 200, 141 Ky. 511.

ARTIFICIAL TEETH.

As necessities, see Husband and Wife, 1.

ASSAULT AND BATTERY.

On passenger, see Carriers, 3-6.
Mental anguish as element of damages, see Damages, 8.
Liability of master for assault by servant, see Master and Servant, 17.

1. Making threatening gestures towards another with an ax does not constitute an assault if one is not within striking distance of him, or sufficiently near to put him in fear of being struck. *Grimes v. State*, 33: 982, 54 So. 839, — Miss. —.

(Annotated)

2. Placing one's hand on another's head and pushing his hat back for the purpose of seeing his face, in order to identify him, is an assault and battery. *Seigel v. Long*, 33: 1070, 53 So. 753, — Ala. —.

Justification; defenses.

In case of assault on passenger, see Carriers, 6.

Homicide in resisting unlawful arrest, see Homicide, 3.

3. If an attempted arrest be unlawful, the party sought to be arrested may use such reasonable force, proportioned to the injury attempted upon him, as is necessary to effect his escape, but no more; and he cannot do this by using or offering to use a deadly weapon, if he has no reason to apprehend a greater injury than a mere unlawful arrest. *State v. Gum*, 33: 150, 69 S. E. 463, 68 W. Va. 105.

(Annotated)

4. Mistake in identity of the person assaulted is no justification for assault and battery. *Seigel v. Long*, 33: 1070, 53 So. 753, — Ala. —.

(Annotated)

5. Offering to apologize to one upon whom a battery has been committed is no defense to an action to recover damages for the battery. *Seigel v. Long*, 33: 1070, 53 So. 753, — Ala. —.

ASSIGNMENT.

Of negotiable paper, see Bills and Notes.

Of insurance policy, see Insurance, 4.

Of corporate stock, see Parties, 1.

Effect of acknowledgment to assignor after assignment as collateral security, see Limitation of Actions, 6.

ASSUMPSIT.

Recovery of rent paid in advance where tenement is destroyed, see Landlord and Tenant, 2, 3.

Of amount paid on forged check, see Banks, 5.

Mistake as ground for recovery of payment by bank, see Banks, 2, 3.

Common counts are not applicable in an action against an indorser, as such, of negotiable promissory notes. *Worley v. Johnson*, 33: 639, 53 So. 543, — Fla. —.

ASSUMPTION OF RISK.

By servant, see Master and Servant.

ATTACHMENT.

As to garnishment, see Garnishment.

ATTORNEYS.

Agreement of woman to share alimony with, see Appeal and Error, 9; Contracts, 11.

Right of prosecutrix in bastardy proceeding to retain private counsel, see Bastardy.

Presence of, in grand jury room, see Indictment, etc., 6, 8.

Liability on injunction bond for expense of special attorney, see Injunction, 8.

Libel by, in giving advice to client, see Libel and Slander, 4.

Argument of, see Trial, 1, 2.

1. The court cannot by *ex parte* order require the publisher of a newspaper, although he is also an attorney at law, to justify in open court an article in which he raises a suspicion that the jury was bribed in an action tried before the court, where the information may necessitate the naming of persons in good standing before the community, and subject the publisher to libel suits. *Warren v. Connolly*, 33: 314, 130 N. W. 637, — Mich. —.

2. Publishing advertisements in other states, and sending pamphlets there, for the purpose of attracting their citizens to the state for the purpose of instituting divorce proceedings in its courts, and giving employment to the one doing the advertising, is misconduct on the part of an attorney within the meaning of a statute permitting his disbarment or suspension therefor. *Re Schnitzer*, 33: 941, 112 Pac. 848, — Nev. —.

(Annotated)

3. Ceasing advertising for divorce business among nonresidents upon complaint of the bar association may, in case of a first delinquency, be ground for leniency on the part of the court in fixing punishment therefor. *Re Schnitzer*, 33: 941, 112 Pac. 848, — Nev. —.

AUTOMOBILES.

Libel on chauffeur, see Libel and Slander, 1, 2.

Review by courts of reasonableness of act regulating, see Courts, 6.

Maturity; extension; renewal.

13. A conditional vendor of chattels who reserves title until payment of the purchase money waives it in favor of an intervening mortgage from the vendee, who had paid enough to give him an interest to mortgage, by taking a renewal note for the unpaid purchase money without reserving title at the time he does so. *Thornton v. Findley*, 33: 491, 134 S. W. 627, — Ark. —.

(Annotated)

Actions; defenses.

Complaining for first time on appeal of failure to prove presentment and notice, see *Appeal and Error*, 11.

Common counts in action against indorser, see *Assumpsit*.

Jurisdiction of equity of suit by payee against parties loaning money on, contrary to instructions, see *Equity*, 1.

Parol evidence that note was signed upon condition, see *Evidence*, 15.

Evidence of admissions of agent, see *Evidence*, 19.

Sufficiency of pleading in action on note, see *Pleading*, 6.

14. Delay in enforcing a note against one maker has no effect to release a co-maker, although he signed out of accommodation to the principal debtor. *Petty v. Gacking*, 33: 175, 133 S. W. 832, — Ark. —.

15. The maker of a promissory note may defeat an action thereon by the original payee by showing that it was executed as a premium for a life insurance policy, and that neither policy nor note was to be valid unless the payee secured for the maker a loan upon the policy, which was not done. *Smith v. Dotterweich*, 33: 892, 93 N. E. 985, 200 N. Y. 299.

BILLS OF LADING.

Garnishment of proceeds of draft attached to bill of lading for goods sold, see *Garnishment*.

Where the seller of goods ships them and makes a draft upon the purchaser, with the bill of lading attached, one who buys the draft and receives payment thereof from the drawee is not liable for the return of any portion of the proceeds on account of any defect in the quality of the goods; and it is immaterial that the draft was bought in reliance upon a written guaranty of its payment, in which the bill of lading was described as covering goods of a designated quality. *Central Mercantile Co. v. Oklahoma State Bank*, 33: 954, 112 Pac. 114, 83 Kan. 504.

BONA FIDE PURCHASER.

Of note, see *Bills and Notes*.

BONDS.

In injunction suit, see *Injunction*, 8.

Reasonableness of time for giving notice of breach of contract which bond is given to secure, see *Trial*, 5.

1. Delivery of an indemnity bond is 33 L.R.A. (N.S.)

shown by evidence that it was executed by the insurer and sent by him to the agent of the assured, and that shortly afterwards the premium was paid to and accepted by the insurer. *Title Guaranty & S. Co. v. Bank of Fulton*, 33: 676, 117 S. W. 537, 89 Ark. 471.

2. The bond of a corporation organized for the purpose of engaging for profit in the business of guarantying the fidelity of contracts of a third party, given to indemnify the owner of property against loss from the failure of a contractor to perform the conditions of a building contract, while in form resembling a contract of suretyship, is in effect a contract of insurance, to which the rules governing ordinary contracts of insurance are applicable. *George A. Hormel & Co. v. American Bonding Co.* 33: 513, 128 N. W. 12, 112 Minn. 288.

(Annotated)

3. Where the legislature has not prescribed a standard policy, a guaranty insurance bond which is fairly open to two constructions, or as to the terms of which an ambiguity exists, should be strictly construed against the insurer; but if the terms of the contract be clear, and not fairly susceptible of two constructions, an ambiguity cannot be assumed and the plain intention of the parties nullified by constructions. *George A. Hormel & Co. v. American Bonding Co.* 33: 513, 128 N. W. 12, 112 Minn. 288.

4. A guaranty insurance bond securing the performance of a building contract which reserves the right to have changes made and extra work done without limit on the written order of the owner or architect, is not released by the giving of oral orders for changes and extras, where the architect audits and allows the amount thereof before payment. *George A. Hormel & Co. v. American Bonding Co.* 33: 513, 128 N. W. 12, 112 Minn. 288.

5. The requirement of a bond insuring the performance of a contract to erect a building, that the owner should immediately after knowledge of the occurrence of any breach by the contractor, or of any act on his part which might involve a loss for which the surety would be liable, give written notice thereof to the surety company, does not require that notice be given instantly upon learning of a default, but that it should be given within a reasonable time under all the circumstances. *George A. Hormel & Co. v. American Bonding Co.* 33: 513, 128 N. W. 12, 112 Minn. 288.

For fidelity of employee.

6. A fidelity insurance bond issued by a corporation in consideration of a premium paid need not be signed by the principal to render it valid, in the absence of any stipulation in the instrument or elsewhere which requires such signature. *Title Guaranty & S. Co. v. Bank of Fulton*, 33: 676, 117 S. W. 537, 89 Ark. 471.

7. A clause in a fidelity insurance bond which requires a statement from the employer as to habits and accounts of the employee whose fidelity is to be insured,

and provides that said statement shall constitute part of the basis and consideration of the contract, does not make the statement a warranty so as to avoid the policy in case it is incorrect through mere mistake. *Title Guaranty & S. Co. v. Bank of Fulton*, 33: 676, 117 S. W. 537, 89 Ark. 471. (Annotated)

By public officers.

8. The sureties upon the official bond of a deputy sheriff, who undertake that he shall faithfully and impartially discharge the duties of his office, are liable for any unlawful or oppressive act done by such officer under color or by virtue of his office. *Lee v. Charmley*, 33: 275, 129 N. W. 448, — N. D. —.

9. A deputy sheriff who, falsely claiming to have a warrant for the arrest of a person not charged with crime of any kind, goes to his house in the nighttime, and, under guise of the authority of his office, arrests and takes such person into custody, has committed an unauthorized and unlawful act under color of his office, for which the sureties upon his official bond are liable in a proper action. *Lee v. Charmley*, 33: 275, 129 N. W. 448, — N. D. —. (Annotated)

BOUNDARIES.

Adverse possession beyond, see Adverse Possession.

BOYCOTT.

As conspiracy, see Conspiracy.

BREACH.

Of contract, see Contracts, 15, 16.

BREACH OF PROMISE.

Relevancy of evidence in suit for, see Evidence, 40.

BRIDGES.

Injury by electric wires on, see Electricity; Master and Servant, 18.

BROKERS.

Requiring contracts for procuring purchaser for real estate to be in writing, see Constitutional Law, 5, 6, 15; Eminent Domain, 2.

Recovery on *quantum meruit*, see Contracts, 2.

BUILDING CONTRACTS.

Bond to indemnify against loss for failure to perform, see Bonds, 2, 4, 5; Trial, 5.

BURDEN OF PROOF.

In general, see Evidence, 2-7.

BUSINESS.

Right of foreign corporation to engage in, see Corporations, 6-8.

BUSINESS COLLEGE.

Exemption of from taxation, see Taxes, 1, 2.

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CALL.

As condition to enforcement of stockholder's liability, see Corporations, 2.

CARRIERS.

Bills of lading, see Bills of Lading.

Who are passengers.

1. Where one intending to become a passenger, and while the work of preparing the train on which he intended to take passage is going on, necessitating dangerous switchings and coupling of the cars, of which he has notice, and at a point where the carrier is not accustomed to receive passengers, and without notice to, or invitation by, any officer or agent of the carrier with authority, enters one of the coaches, and, in attempting to go from one coach to another, is injured by a jolt or impact given to the coaches in making such switchings or couplings, the carrier is not liable to him in damages for his injuries thus sustained. *Raines v. Chesapeake & O. R. Co.* 33: 583, 70 S. E. 711, 68 W. Va. 694. (Annotated)

Abuse of passenger; insult.

Mental anguish as element of damages, see Damages, 9.

2. A carrier cannot escape liability for insults addressed by its conductor to a passenger, on the ground that it did not authorize or ratify them. *Bleecker v. Colorado & S. R. Co.* 33: 386, 114 Pac. 481, — Colo. —.

Assault.

Evidence in action for assault on passenger, see Evidence, 31.

3. Although the duty of enforcing statute requiring the separation of white and colored passengers is imposed upon conductors of trains, a railroad company may be held liable for injury inflicted upon a passenger of one race by a member of the other who is allowed to be in the wrong compartment without the knowledge of the conductor, if a subordinate employee, upon discovering his presence there, fails, as soon as practicable and within a reasonable time, to notify the conductor of that fact. *Louisville & N. R. Co. v. Renfro*, 33: 133, 135 S. W. 266, 142 Ky. 590.

4. A railroad whose conductor fails as soon as practicable, and within a reasonable time after discovering a white passenger in a negro compartment, to require him to leave it, is, where the statute provides a penalty for permitting passengers to occupy compartments set apart for the other race and charges the conductor with the enforcement of the law, liable in damages for the unprovoked shooting by him of a negro. *Louisville & N. R. Co. v. Renfro*, 33: 133, 135 S. W. 266, 142 Ky. 590. (Annotated)

5. A railroad company cannot be held liable for the killing of a negro passenger by a white person permitted to be in the negro compartment of a train, contrary to the provisions of the statute, if the shooting was done in necessary self-defense. *Louis-*

Maturity; extension; renewal.

13. A conditional vendor of chattels who reserves title until payment of the purchase money waives it in favor of an intervening mortgage from the vendee, who had paid enough to give him an interest to mortgage, by taking a renewal note for the unpaid purchase money without reserving title at the time he does so. *Thornton v. Findley*, 33: 491, 134 S. W. 627, — Ark. —.

(Annotated)

Actions; defenses.

Complaining for first time on appeal of failure to prove presentment and notice, see *Appeal and Error*, 11.

Common counts in action against indorser, see *Assumpsit*.

Jurisdiction of equity of suit by payee against parties loaning money on, contrary to instructions, see *Equity*, 1.

Parol evidence that note was signed upon condition, see *Evidence*, 15.

Evidence of admissions of agent, see *Evidence*, 19.

Sufficiency of pleading in action on note, see *Pleading*, 6.

14. Delay in enforcing a note against one maker has no effect to release a co-maker, although he signed out of accommodation to the principal debtor. *Petty v. Gacking*, 33: 175, 133 S. W. 832, — Ark. —.

15. The maker of a promissory note may defeat an action thereon by the original payee by showing that it was executed as a premium for a life insurance policy, and that neither policy nor note was to be valid unless the payee secured for the maker a loan upon the policy, which was not done. *Smith v. Dotterweich*, 33: 892, 93 N. E. 985, 200 N. Y. 299.

BILLS OF LADING.

Garnishment of proceeds of draft attached to bill of lading for goods sold, see *Garnishment*.

Where the seller of goods ships them and makes a draft upon the purchaser, with the bill of lading attached, one who buys the draft and receives payment thereof from the drawee is not liable for the return of any portion of the proceeds on account of any defect in the quality of the goods; and it is immaterial that the draft was bought in reliance upon a written guaranty of its payment, in which the bill of lading was described as covering goods of a designated quality. *Central Mercantile Co. v. Oklahoma State Bank*, 33: 954, 112 Pac. 114, 83 Kan. 504.

BONA FIDE PURCHASER.

Of note, see *Bills and Notes*.

BONDS.

In injunction suit, see *Injunction*, 8.

Reasonableness of time for giving notice of breach of contract which bond is given to secure, see *Trial*, 5.

1. Delivery of an indemnity bond is 33 L.R.A. (N.S.)

shown by evidence that it was executed by the insurer and sent by him to the agent of the assured, and that shortly afterwards the premium was paid to and accepted by the insurer. *Title Guaranty & S. Co. v. Bank of Fulton*, 33: 676, 117 S. W. 537, 89 Ark. 471.

2. The bond of a corporation organized for the purpose of engaging for profit in the business of guarantying the fidelity or contracts of a third party, given to indemnify the owner of property against loss from the failure of a contractor to perform the conditions of a building contract, while in form resembling a contract of suretyship, is in effect a contract of insurance, to which the rules governing ordinary contracts of insurance are applicable. *George A. Hormel & Co. v. American Bonding Co.* 33: 513, 128 N. W. 12, 112 Minn. 288.

(Annotated)

3. Where the legislature has not prescribed a standard policy, a guaranty insurance bond which is fairly open to two constructions, or as to the terms of which an ambiguity exists, should be strictly construed against the insurer; but if the terms of the contract be clear, and not fairly susceptible of two constructions, an ambiguity cannot be assumed and the plain intention of the parties nullified by constructions. *George A. Hormel & Co. v. American Bonding Co.* 33: 513, 128 N. W. 12, 112 Minn. 288.

4. A guaranty insurance bond securing the performance of a building contract which reserves the right to have changes made and extra work done without limit, on the written order of the owner or architect, is not released by the giving of oral orders for changes and extras, where the architect audits and allows the amount thereof before payment. *George A. Hormel & Co. v. American Bonding Co.* 33: 513, 128 N. W. 12, 112 Minn. 288.

5. The requirement of a bond insuring the performance of a contract to erect a building, that the owner should immediately after knowledge of the occurrence of any breach by the contractor, or of any act on his part which might involve a loss for which the surety would be liable, give written notice thereof to the surety company, does not require that notice be given instantly upon learning of a default, but that it should be given within a reasonable time under all the circumstances. *George A. Hormel & Co. v. American Bonding Co.* 33: 513, 128 N. W. 12, 112 Minn. 288.

For fidelity of employee.

6. A fidelity insurance bond issued by a corporation in consideration of a premium paid need not be signed by the principal to render it valid, in the absence of any stipulation in the instrument or elsewhere which requires such signature. *Title Guaranty & S. Co. v. Bank of Fulton*, 33: 676, 117 S. W. 537, 89 Ark. 471.

7. A clause in a fidelity insurance bond which requires a statement from the employer as to habits and accounts of the employee whose fidelity is to be insured,

and provides that said statement shall constitute part of the basis and consideration of the contract, does not make the statement a warranty so as to avoid the policy in case it is incorrect through mere mistake. *Title Guaranty & S. Co. v. Bank of Fulton*, 33: 676, 117 S. W. 537, 89 Ark. 471. (Annotated)

By public officers.

8. The sureties upon the official bond of a deputy sheriff, who undertake that he shall faithfully and impartially discharge the duties of his office, are liable for any unlawful or oppressive act done by such officer under color or by virtue of his office. *Lee v. Charmley*, 33: 275, 129 N. W. 448, — N. D. —.

9. A deputy sheriff who, falsely claiming to have a warrant for the arrest of a person not charged with crime of any kind, goes to his house in the nighttime, and, under guise of the authority of his office, arrests and takes such person into custody, has committed an unauthorized and unlawful act under color of his office, for which the sureties upon his official bond are liable in a proper action. *Lee v. Charmley*, 33: 275, 129 N. W. 448, — N. D. —.

(Annotated)

BOUNDARIES.

Adverse possession beyond, see Adverse Possession.

BOYCOTT.

As conspiracy, see Conspiracy.

BREACH.

Of contract, see Contracts, 15, 16.

BREACH OF PROMISE.

Relevancy of evidence in suit for, see Evidence, 40.

BRIDGES.

Injury by electric wires on, see Electricity; Master and Servant, 18.

BROKERS.

Requiring contracts for procuring purchaser for real estate to be in writing, see Constitutional Law, 5, 6, 15; Eminent Domain, 2.

Recovery on *quantum meruit*, see Contracts, 2.

BUILDING CONTRACTS.

Bond to indemnify against loss for failure to perform, see Bonds, 2, 4, 5; Trial, 5.

BURDEN OF PROOF.

In general, see Evidence, 2-7.

BUSINESS.

Right of foreign corporation to engage in, see Corporations, 6-8.

BUSINESS COLLEGE.

Exemption of from taxation, see Taxes, 1, 2.

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CALL.

As condition to enforcement of stockholder's liability, see Corporations, 2.

CARRIERS.

Bills of lading, see Bills of Lading.

Who are passengers.

1. Where one intending to become a passenger, and while the work of preparing the train on which he intended to take passage is going on, necessitating dangerous switchings and coupling of the cars, of which he has notice, and at a point where the carrier is not accustomed to receive passengers, and without notice to, or invitation by, any officer or agent of the carrier with authority, enters one of the coaches, and, in attempting to go from one coach to another, is injured by a jolt or impact given to the coaches in making such switchings or couplings, the carrier is not liable to him in damages for his injuries thus sustained. *Raines v. Chesapeake & O. R. Co.* 33: 583, 70 S. E. 711, 68 W. Va. 694.

(Annotated)

Abuse of passenger; insult.

Mental anguish as element of damages, see Damages, 9.

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4. A railroad whose conductor fails as soon as practicable, and within a reasonable time after discovering a white passenger in a negro compartment, to require him to leave it, is, where the statute provides a penalty for permitting passengers to occupy compartments set apart for the other race and charges the conductor with the enforcement of the law, liable in damages for the unprovoked shooting by him of a negro. *Louisville & N. R. Co. v. Renfro*, 33: 133, 135 S. W. 266, 142 Ky. 590.

(Annotated)

5. A railroad company cannot be held liable for the killing of a negro passenger by a white person permitted to be in the negro compartment of a train, contrary to the provisions of the statute, if the shooting was done in necessary self-defense. *Louis-*

ville & N. R. Co. v. Renfro, 33: 133, 135 S. W. 266; 142 Ky. 590.

8. The mere fact that a conductor is angered by words or conduct of a passenger does not absolve the carrier from liability for his assault upon him, if the words were not sufficient to justify the act, but, if the passenger's conduct is such as to justify the assault, the carrier is not liable; and, if it was sufficient to mitigate the conductor's act, the mitigation inures to the benefit of the carrier. *Mason v. Nashville, C. & St. L. R. Co.* 33: 280, 70 S. E. 225, 135 Ga. 741. (Annotated)

Measure of care required; negligence generally.

Evidence of declaration of bystander in action for injury to passenger, see Evidence, 25.

Relevancy of evidence to show negligence of carrier generally, see Evidence, 30.

Sufficiency of evidence to show negligence, see Evidence, 37.

Proximate cause of injury to passengers, see Proximate Cause, 2.

Negligence as question for jury, see Trial, 9.

Correctness of instruction as to carrier's duty, see Trial, 15.

7. The exercise of reasonable care with respect to the condition of its decks as to their slipperiness is the measure of duty which a steamship company owes a passenger, and the court cannot be required to instruct the jury that it must exercise the greatest care. *Pratt v. North German Lloyd S. S. Co.* 33: 532, 184 Fed. 303, 106 C. C. A. 445. (Annotated)

8. A union depot company which relied upon train employees to direct passengers to their trains is liable for injury caused to a passenger's attendant by following the direction of such employee, which takes him into an unsafe place, where the danger is not obvious, although the one giving it was not in its immediate employ. *Union Depot & R. Co. v. Londoner*, 33: 433, 114 Pac. 316, — Colo. —. (Annotated)

Contributory negligence of passenger.

9. One who is accompanying live stock in shipment, and has occasion to walk at night between his train and a depot, cannot be said, as a matter of law, to be guilty of negligence if, in attempting to walk in the safe space between two tracks, he inadvertently gets close to one of them, so that he is struck by an approaching train. *Losey v. Atchison, T. & S. F. R. Co.* 33: 414, 114 Pac. 198, — Kan. —.

10. Failure of a shipper of stock, walking between the train and station in a railroad yard, to carry a lantern, as required by his contract, will not prevent holding the carrier liable for killing him by a train running backward, without sufficient watch or signal. *Losey v. Atchison, T. & S. F. R. Co.* 33: 414, 114 Pac. 198, — Kan. —.

Ejection of passenger.

11. Train men have the right to remove from the train a person who has boarded it 33 L.R.A. (N.S.)

after the conductor has refused, because of his intoxicated condition, to receive him as a passenger, although he has a ticket entitling him to transportation. *Chesapeake & O. R. Co. v. Selsor*, 33: 165, 134 S. W. 143, 142 Ky. 163.

12. A passenger on a street car who is entitled to transfer on payment of fare cannot make the simultaneous issuance of the transfer a condition of paying the fare, and in case he attempts to do so, and refuses to pay his fare without receiving his transfer, he may be ejected from the car, although experience has shown that, if the transfer is not issued when the fare is paid but after the conductor has finished collecting all fares in the car, he will reach his transfer point before receiving the transfer. *Louisville R. Co. v. Hutti*, 33: 867, 133 S. W. 200, 141 Ky. 511.

Disabled or incompetent passengers.

13. The conductor of a passenger train may refuse to receive as a passenger a person so far intoxicated as to affect his conduct. *Chesapeake & O. R. Co. v. Selsor*, 33: 165, 134 S. W. 143, 142 Ky. 163.

Stations; approaches; platforms.

Sufficiency of evidence to show duty to give warning of approach of train, see Evidence, 37.

Negligence as question for jury, see Trial, 9.

Correctness of instructions as to carrier's duty, see Trial, 15.

14. A railroad company is not bound to use the utmost care and foresight to prevent injuring a person standing on its platform waiting to take a train, by striking an animal on the track with an engine and throwing it against him. *St. Louis, I. M. & S. R. Co. v. Woods*, 33: 855, 131 S. W. 869, — Ark. —. (Annotated)

15. A union depot company which undertakes to provide common terminal facilities for the passenger-carrying railroads entering a city owes to passengers and their attendants the duty of keeping the station and its facilities in a proper condition for their safety. *Union Depot & R. Co. v. Londoner*, 33: 433, 114 Pac. 316, — Colo. —.

Carriers of freight.

Measure of damages for breach of duty as to, see Damages, 3.

Passing of title on delivery to carrier, see Sale, 1.

16. A railroad company which is a common carrier of passengers and freight, and maintains within a city a freight line and spur tracks to industrial plants, cannot refuse to transport freight from one part of the system to another, on the theory that they are within its switching limits, and that, as to such limits, it does not assume the duty of a common carrier. *Higdon v. Louisville & N. R. Co.* 33: 442, 135 S. W. 768, 143 Ky. 73. (Annotated)

17. A railroad company cannot, by refusing to haul coal from a mine to industrial plants connected by belt lines, to spur tracks within the city, when it hauls other commodities to such points, establish the right to refuse to perform its duty as a common

carrier, when such service is demanded. *Higdon v. Louisville & N. R. Co.* 33: 442, 135 S. W. 768, 143 Ky. 73.

18. The fact that a railroad company will receive a transportation charge on a finished product, the raw material for which it hauls from a warehouse to a mill within the limits of a city, while it will not secure such charge in case of coal hauled from a mine within the city to the mill, does not justify its refusing to haul the coal, and performing the service with respect to the raw material. *Higdon v. Louisville & N. R. Co.* 33: 442, 135 S. W. 768, 143 Ky. 73.

19. One who has secured the sole right to sell the product of a mine in a certain city cannot hold a railroad company liable in damages for refusing to haul coal for him, where the mine was required to fill his orders only after other contracts were cared for, and it does not appear that the railroad company's refusal caused him any loss because of inability to fill orders taken under his contract with the mine, which it was ready to fill. *Higdon v. Louisville & N. R. Co.* 33: 442, 135 S. W. 768, 143 Ky. 73.

20. A consignee of a machine shipped in parts cannot refuse to accept a tender by the carrier of a portion of the parts, although the others are missing, so as to prevent the liability of the carrier from changing from that of insurer to that of warehouseman. *Louisville & N. R. Co. v. Gay*, 33: 303, 135 S. W. 400, 143 Ky. 56.

Governmental control; discrimination; rates.

Equal protection and privileges in regulation of rates, see Constitutional Law, 3.

21. A carrier which, through innocent mistake, quotes a rate on merchandise which is less than that on file with the Interstate Commerce Commission, in response to a request for a rate in order to fix a selling price at destination, is not liable for the loss occasioned by the shipper's being compelled to pay the correct rate to get possession of his goods. *Shenberger v. Union P. R. Co.* 33: 391, 113 Pac. 433, — Kan. —.

(Annotated)

22. That a railroad company, when publishing its rates for hauling cars from one point to another within the limits of a city, was under the mistaken impression that it was not bound to do a regular freight business between such points, does not entitle it to charge more than its published rates for handling such freight, and it cannot avoid this result by insisting that the rate was only for switching service, where it had done both switching and transportation service at such rate. *Higdon v. Louisville & N. R. Co.* 33: 442, 135 S. W. 768, 143 Ky. 73.

CASE MADE.

See Appeal and Error, 5, 8.

CAUSE.

Opinion as to, see Evidence, 17.
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CERTIFICATE.

Of performance of contract, see Contracts, 14.

CERTIFIED COPY.

As evidence, see Evidence, 8, 9.

CHAMPERTY AND MAINTENANCE.

A corporation which has undertaken to furnish steam to the public for heating purposes cannot defeat an action to enjoin it from discontinuing service to a consumer, on the ground that the expenses of the suit would be paid by a rival corporation for the purpose of inducing the consumer to start litigation in order to harass and annoy the defendant. *Seaton Mountain El. L. H. & P. Co. v. Idaho Springs Invest. Co.* 33: 1078, 111 Pac. 834, — Colo. —.

CHARITIES.

Succession tax on transmission of property to, see Taxes, 18.

1. A hospital supported mainly by charity does not lose its character as a charitable institution by the fact that it makes a charge for the use of rooms to those who are able to pay for them. *Jensen v. Maine Eye & Ear Infirmary*, 33: 141, 78 Atl. 898, — Me. —.

2. A corporation organized to conduct a hospital as a public charity is not liable for the negligence of its servant in failing to prevent a patient, in a private room engaged for his use, under the direction of his private physician, from falling from the window, although the use of the room includes necessary care and attention by employees of the hospital. *Jensen v. Maine Eye & Ear Infirmary*, 33: 141, 78 Atl. 898, — Me. —.

CHAUFFEUR.

Libel in report of killing by, see Libel and Slander, 1, 2.

CHECKS.

Accord and satisfaction by, see Accord and Satisfaction.

Payment by bank of forged check, see Banks, 5.

CHILDREN.

In general, see Infants.

CHIROPRACTIC PRACTITIONER.

Necessity of securing license, see Physicians and Surgeons, 2.

CHURCHES.

See Religious Societies.

CITIES.

See Municipal Corporations.

CLEARING HOUSE.

Effect on payee of bank's failure to comply with rules of, see Banks, 4.

CLOUD ON TITLE.

Joining statutory action to quiet title with common-law action to recover damages for trespass, see Action or Suit, 5.

COAL.

Refusal of carrier to haul, see Carriers, 17-19.

COLLATERAL ATTACK.

On appointment of administrator, see Executors and Administrators.

COLLATERAL-INHERITANCE TAX.

See Taxes, 3-18.

COMMERCE.

Applicability of local law to railroad company engaged in interstate commerce, see Corporations, 4.

Requiring foreign corporations to become domesticated before they shall be permitted to own or operate railroads in the state does not unconstitutionally interfere with interstate commerce. *Plummer v. Chesapeake & O. R. Co.* 33: 362, 136 S. W. 162, 143 Ky. 102.

COMMON CARRIERS.

See Carriers.

COMMON LAW.

Sufficiency of common-law indictment to support conviction for statutory crime, see Indictment etc., 5.

COMPENSATION.

For taking of property, see Eminent Domain, 2.

COMPETITION.

Contract to restrain, see Contracts, 12.

COMPLAINT.

Of plaintiff, see Pleadings, 5.

COMPOUND INTEREST.

Validity of, see Usury.

CONDEMNATION.

Of property, see Eminent Domain.

CONDITION.

Precedent to suit, see Action or Suit, 2, 3.

Defeating action on note by showing failure to comply with condition, see Bills and Notes, 15.

In contract, see Contracts, 14.

To enforcement of stockholder's liability, see Corporations, 2.

As to foreign corporation doing business in state, see Corporations, 6-8.

Relating to real property, see Covenants and Conditions.

To relief in equity, see Equity, 4.

Parol evidence to show condition to written contract, see Evidence, 15.

Of continuance in employment, see Master and Servant, 1.

Of sale, see Sale, 2.

To supplying water to tenant, see Waters, 5.

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CONDITIONAL SALES.

In general, see Sale, 2.

CONFLICT OF LAWS.

A provision in an insurance policy requiring suit to be brought within a year after death of insured, which is valid in both the state where the insurer resides and that where the insured resides, will be enforced by the courts of a third state in which the insured dies and where suit is brought, although it is contrary to the public policy of that state and void there. *Clarey v. Union Central L. Ins. Co.* 33: 881, 136 S. W. 1014, 143 Ky. 540.

CONSENT.

Of abutting owner to standing of hack in street, see Constitutional Law, 7.

CONSIDERATION.

For contract, see Contracts, 4, 5.

CONSPIRACY.

A hospital excluded from the list has no cause of action on the ground of illegal boycott, against several employers who, to serve their own interests, deduct from the wages of their employees a small amount for a hospital fund, in consideration of which the employees are entitled to ticket entitling them to care in case of injury, in any hospital on a list furnished by the employers; and it will be immaterial that the lists were selected with a view to injure the business of the excluded hospitals. *Union Labor Hospital Asso. v. Vance Redwood Lumber Co.* 33: 1034, 112 Pac. 886, 158 Cal. 551. (Annotated)

CONSTITUTIONAL LAW.

Forbidding taking of property without compensation, see Eminent Domain, 2.

As to search and seizure, see Search and Seizure.

Equal protection and privileges.

1. Where there is a substantial difference in the condition or situation of individuals or objects with reference to the subject embraced in a law, an appropriate limitation based on such difference, in the application of the law, does not make such legislation partial. *State v. Chicago, M. & St. P. R. Co.* 33: 494, 130 N. W. 545, — Minn. —.

2. The fact that a prohibition of the use of soft coal in locomotives does not apply to stationary engines does not make such prohibition partial legislation; there being obvious differences between the two classes of engines in respect to the tendency that burning soft coal has to cause a smoke nuisance, and other appropriate legislation having been enacted by the city to prevent the emission of dense smoke by stationary plants. *State v. Chicago, M. & St. P. R. Co.* 33: 494, 130 N. W. 545, — Minn. —.

3. A railroad company is denied the

qual protection of the laws by a state statute requiring it to transport militiamen when in the performance of military duty, at less than the reasonable rate of transportation which has been fixed by the state officials. *Re Gardner*, 33: 956, 113 Pac. 1054, — Kan. —. (Annotated)

4. An exemption from a collateral inheritance tax when the estate is less than a certain value is not an unconstitutional discrimination, which will invalidate the tax. *Godman v. Com. ex rel. Selligman*, 33: 592, 13 S. W. 61, 130 Ky. 88.

5. No unequal grant of privileges or immunities, contrary to the Constitution, is effected by a statute requiring contracts to make compensation for procuring a purchaser for real estate to be in writing. *Selva v. Talbott*, 33: 973, 95 N. E. 114, — Ind. —.

6. A state statute requiring contracts to make compensation for procuring purchasers for real estate to be in writing is not forbidden by the 14th Amendment to the Federal Constitution, since that Amendment was not intended to interfere with the police power of the states. *Selva v. Talbott*, 33: 973, 95 N. E. 114, — Ind. —.

7. A municipal ordinance is not invalid as unconstitutionally granting special privileges which allows the municipality to grant special permission to licensed hack drivers who can procure the consent of the butting property owners, to stand their vehicles in the street in front of such property, when the same privilege is not granted to those who do not obtain such consent. *McFall v. St. Louis*, 33: 471, 135 W. 51, 232 Mo. 716. (Annotated)

8. Making railroad companies liable for injury to employees through the negligence of fellow servants, and forbidding the avoidance of such liability by a relief or indemnity contract with the employee, does not deprive such companies of the equal protection of the laws. *McGuire v. Chicago, B. & Q. R. Co.* 33: 706, 108 N. W. 902, 131 Iowa, 340.

due process; right to life, liberty, and property.

9. The interest of those who will take under a will or deed upon failure of a donee of a power of appointment therein to exercise it is not so far vested that the imposition of a succession tax upon the passing of them of the estate, in case of such failure, can be considered as a taking of property without due process of law. *Minot v. Stevens*, 33: 236, 93 N. E. 973, 207 Mass. 38. (Annotated)

10. The constitutional right of acquiring and protecting property does not include the mere privilege, right, or expectancy of inheritance, so as to prevent the legislature from placing a tax upon such privilege. *Godman v. Com. ex rel. Selligman*, 33: 592, 13 S. W. 61, 130 Ky. 88. (Annotated)

11. Forbidding railroad companies which have been rendered liable for injuries to employees by the negligence of fellow servants, to avoid such liability by relief or indemnity contracts with their employees, 3 L.R.A. (N.S.)

is not an unconstitutional interference with their liberty of contract. *McGuire v. Chicago, B. & Q. R. Co.* 33: 706, 108 N. W. 902, 131 Iowa, 340.

12. The hearing required by the constitutional provision for due process of law is not afforded by a municipality to which is delegated power to assess the cost of public improvements on property benefited thereby, where the body charged with the duty of conducting the hearing receives written protests and hears oral arguments, but refuses to take testimony, on the theory that it has no power to afford relief. *Denver v. State Invest. Co.* 33: 395, 112 Pac. 789, — Colo. —.

13. A legislative attempt to confer upon the court the power in a criminal case to appoint experts in case they are needed, and acquaint the jury with the fact, who shall prepare themselves and give testimony in the case, is invalid, as tending to deprive the accused of due process of law. *People v. Dickerson*, 33: 917, 129 N. W. 199, 164 Mich. 148. (Annotated)

Police power.

See also *supra*, 6.

14. The emission of dense smoke by yard and switch engines, being caused by the use of soft coal therein, a prohibition of such use within a populous city is substantially related to, and directly tends to, the prevention of a nuisance,—the emission of dense smoke,—and is an exercise of the police power of the state, within constitutional limits. *State v. Chicago, M. & St. P. R. Co.* 33: 494, 130 N. W. 545, — Minn. —.

15. The police power extends to requiring contracts to compensate one for procuring a purchaser for real estate to be in writing. *Selva v. Talbott*, 33: 973, 95 N. E. 114, — Ind. —. (Annotated)

16. A statute requiring a license as a condition to treating the sick has sufficient relation to the protection of the public health to be within the public power of the legislature, which cannot be controlled by the courts, and is not so unreasonable or capricious that it can be declared not to be an honest exercise of such power, although it may interfere with the right of the patient to choose his own method of treatment, and of the practitioner to pursue a calling of his choice. *State v. Smith*, 33: 179, 135 S. W. 465, — Mo. —.

17. The police power of the state extends to forbidding railroad companies which have been made liable for injury to employees through the negligence of fellow servants, from contracting with them for a relief or indemnity plan which will relieve the railroad company from a portion of the burden cast upon it by the statute. *McGuire v. Chicago, B. & Q. R. Co.* 33: 706, 108 N. W. 902, 131 Iowa, 340. (Annotated)

Freedom of speech, press, and worship.

18. No unconstitutional interference with liberty or freedom of speech is effected by forbidding the placing of scurrilous matter on packages placed in the mail. *Warren v.*

United States, 33: 800, 193 Fed. 718, 106 C. C. A. 156.

Guaranty of republican form of government.

19. The legislature cannot confer upon the residents of a municipal corporation the power to enact ordinances by initiative and referendum, where the Constitution delegates to it the legislative power, and merely reserves to the people the right to assemble and apply to those invested with the powers of government for redress of grievances, while it forbids any change in the form of government. *Ex parte Farnsworth*, 33: 968, 135 S. W. 535, —Tex. Crim. Rep. —. (Annotated)

CONSTRUCTION.

Of insurance contract generally, see Insurance, 3.

Of treaties, see Treaties.

CONSTRUCTIVE TRUSTS.

See Trusts, 2.

CONTEMPT.

Being in a court room in an intoxicated condition does not constitute contempt of court if the fact is not brought to the attention of the judge and the business of the court is in no way interfered with. *Neely v. State*, 33: 138, 54 So. 315, — Miss. —. (Annotated)

CONTRACTS.

What questions may be raised by one seeking to set aside contract for fraud, see Action or Suit, 4.

Right of trustee in bankruptcy to set aside, see Bankruptcy, 3.

Estoppel by, see Estoppel, 1, 2.

Estoppel to set up defense, see Estoppel, 2.

Right of action on generally, see Parties, 1, 2.

Specific performance of, see Specific Performance.

Defense that contract was made on Sunday, see Sunday, 2.

Implied agreements.

See also *infra*, 17.

Implied trust, see Trust, 2.

1. No contract to compensate one for services can be implied where the statute requires an express contract to do so to be in writing. *Selvage v. Talbott*, 33: 973, 95 N. E. 114, — Ind. —.

2. No recovery can be had on *quantum meruit* for services rendered in procuring a purchaser for real estate, where there is no written contract to make compensation, as required by statute. *Selvage v. Talbott*, 33: 973, 95 N. E. 114, — Ind. —.

3. One who performs services for another, based upon a contract void under the statute of frauds, can recover from him only so much as he has been enriched by the transaction. *Henrikson v. Henrikson*, 33: 534, 127 N. W. 962, 143 Wis. 314.

Consideration.

4. The amount paid for a newspaper 33 L.R.A. (N.S.)

plant furnishes a consideration not only for the transfer of the physical property, but also for the business and good will, and for the agreement of the seller not to conduct another paper in the same county. *McAuliffe v. Vaughan*, 33: 255, 70 S. E. 322, 135 Ga. 852.

5. The moral obligation of a married woman to pay for supplies furnished for use in her family at a time when she had no legal power to contract for them is not sufficient to support her promise after her disability has been removed to make such payments. *Lyell v. Walbach*, 33: 741, 77 Atl. 1111, 113 Md. 574. (Annotated)

Statute of frauds.

Equal privileges and immunities, see Constitutional Law, 5, 6.

Police power as to, see Constitutional Law, 15.

Taking of property without compensation by statute as to, see Eminent Domain, 2.

Parol evidence to vary written contract, see Evidence, 13-15.

As to parol trusts, see Trusts, 1.

See also *supra*, 3.

6. Failure to mention the time for paying the balance of the purchase money in a receipt for a part payment towards the purchase price of real estate renders the receipt insufficient as a contract under the statute of frauds. *Ebert v. Cullen*, 33: 84, 139 N. W. 185, — Mich. —. (Annotated)

7. The right to the benefits of a parol antenuptial contract which has been fully executed by both parties cannot be defeated because of the statute of frauds. *Supreme Lodge K. of P. v. Ferrell*, 33: 777, 112 Pac. 155, 83 Kan. 491.

Validity; public policy.

Presumption that woman will perform invalid contract to share alimony with attorney, see Appeal and Error, 9.

Contracts of unauthorized foreign corporation, see Corporations, 9.

Validity of contract for voting stock, see Corporations, 3.

Validity of insurance contract, see Insurance, 2.

Validity of Sunday contracts, see Sunday.

8. The invalidity in a contract for the transfer and pooling of corporate stock in consideration of a loan of money to finance the institution, of a provision which retains the owner in the board of directors and gives him employment as the sales agent of the corporation, does not necessarily invalidate the pooling agreement. *Winsor v. Commonwealth Coal Co.* 33: 63, 114 Pac. 908, — Wash. —.

9. An agreement by which an uncle undertakes to pay the premiums on policies of insurance to be taken out by his nephew in his own name, and assigned to the uncle with the privilege of redeeming one of them, but the uncle to have one policy absolutely, and in case the nephew does not pay the premiums to have the proceeds of both upon the nephew's death, is void, and the uncle

cannot compel the nephew's administrator to account for the proceeds of the policy after he has collected them. *McRae v. Warmack*, 33:949, 135 S. W. 807, — Ark. —.

(Annotated)

10. A contract by one injured by another's negligence, to pay his physician a percentage of the amount recovered against the one responsible for the injury, for his services in treating the injury, is against public policy and void where the parties contemplate that the physician shall be a witness for his employer in case suit is necessary. *Sherman v. Burton*, 33: 87, 130 N. W. 667, — Mich. —.

(Annotated)

11. An agreement by a woman to pay her attorney a percentage of the alimony recovered in a suit for divorce against her husband is void as against public policy. *McConnell v. McConnell*, 33: 1074, 136 S. W. 931, — Ark. —.

(Annotated)

12. Where one who had been engaged in publishing a newspaper in a certain county sold the property connected therewith and the business and good will to another, and agreed not to conduct, either directly or indirectly, any other newspaper in that county without the consent of the other party, his heirs and assigns, such a contract was not void, as being in general restraint of trade, or unreasonable in its terms. *McAuliffe v. Vaughan*, 33: 255, 70 S. E. 322, 135 Ga. 852.

Performance; breach.

13. One who engages accommodations at a hotel for a party, promising that they will occupy and utilize them, is personally liable for the contract price in case the party upon arriving refuses to accept the accommodations and goes elsewhere. *Danenhower v. Hayes*, 33: 698, 35 App. D. C. 65.

(Annotated)

14. Where a building contractor, acting as owner, sublets a portion of the work, with the provision that the work is to be done to the satisfaction of its architects, upon whose certificate payments are to be made, recovery may be had in the absence of certificate upon proof that the certificate was not withheld in good faith. *Thaler v. Wilhelm Greisser Constr. Co.* 33: 345, 79 Atl. 147, 229 Pa. 512.

15. Merely paying monthly accounts for laborers furnished under a contract to furnish a certain number of hands per day does not waive a claim for damages for a shortage, where the full number of hands was at all times demanded. *State v. Arkansas Brick & Mfg. Co.* 33: 376, 135 S. W. 843, — Ark. —.

16. Mere failure to pay the instalments for the purchase price of a newspaper plant on the exact days when they are due under the contract will not, in case the seller receives them afterwards, permit him to claim such a breach on the part of the buyer as to authorize him to disregard his agreement in the contract not to conduct another paper in that county. *McAuliffe v. Vaughan*, 33: 255, 70 S. E. 322, 135 Ga. 852.

Change or extinguishment.

17. Where the parties to an overdue note

enter into a written agreement, founded upon a sufficient consideration, by the terms of which a part of the debt is forgiven and the time for paying the reduced amount is extended, a provision therein that a default in the payment of interest shall mature the new principal implies that the debtor is not to forfeit the benefit of the reduction by a failure to meet promptly the terms of the readjustment. *Girard Trust Co. v. Owen*, 33: 262, 112 Pac. 619, 83 Kan. 692.

CONTRADICTION.

Of witness, see Witnesses, 4-6.

CONTRIBUTION.

Between cotenants, see Cotenancy.

CONTRIBUTORY NEGLIGENCE.

In general, see Negligence, 3.

CONVICTS.

Contract by state to furnish contractor with convict labor, see Set-Off and Counterclaim, 1-3.

COPY.

As evidence, see Evidence, 8-10.

Probate of copy of foreign will, see Wills, 4.

CORONER.

Evidence of testimony at inquest, see Evidence, 18.

CORPORATIONS.

Action to set aside for fraud contract transferring stock, see Action or Suit, 4.

Jurisdiction of suit by trustee in bankruptcy to set aside dividends, see Courts, 3.

Right of corporation to enforce promise of assignee of stock to pay unpaid subscriptions, see Parties, 1.

Public service corporations, see Public Service Corporations.

Recovery by conditional vendor from corporation to whom property has been turned over in payment of stock, see Sale, 2.

Liability of stockholders.

Jurisdiction to enforce liability of members of mutual assessment company, see Courts, 1; Equity, 3.

1. A stockholder of an insolvent corporation cannot complain that suit to enforce his unpaid stock subscriptions was not brought in a court where he could bring in other stockholders and compel contribution by them if they were insolvent so that they could not have been made to contribute even if they were brought into the proceeding. *Edwards v. Schillinger*, 33: 895, 91 N. E. 1048, 245 Ill. 231.

2. No call for unpaid subscriptions need be made by the corporation or the bankruptcy court, to enable a trustee in bankruptcy to maintain a suit against stockholders for unpaid subscriptions which are necessary to satisfy the claims of creditors.

Edwards v. Schillinger, 33: 895, 91 N. E. 1048, 245 Ill. 231.

Pooling stock.

Partial invalidity of pooling agreement, see **Contracts**, 8.

3. A contract by which the owner of the majority of the stock of a corporation agrees with one to whom he transfers a portion of his stock in consideration of a loan of money to finance the corporation, that the stock might be pooled for a term of years in order to control the management, is not against public policy. **Winsor v. Commonwealth Coal Co.** 33: 63, 114 Pac. 908, — Wash. —.

Foreign corporations.

Interference with interstate commerce by conditions as to doing business, see **Commerce**.

Jurisdiction to enforce liability of members, see **Courts**, 3.

• Estoppel to set up mortgage as against corporation purchasing without authority, see **Estoppel**, 6.

Effect of sale by domestic railroad company to foreign corporation, see **Railroads**, 1.

4. That a railroad company is the creature of another state, and is engaged in interstate commerce, does not make inapplicable to it a statute of a state in which it is doing business forbidding such companies to make contracts with their employees for the establishment of a relief or indemnity plan which shall relieve them from a portion of the liability imposed upon them by law for injuries to employees. **McGuire v. Chicago, B. & Q. R. Co.** 33: 706, 108 N. W. 902, 131 Iowa, 340.

5. One seeking damages for personal injuries from a domestic railroad company, which denies liability on the ground that it had conveyed its property to a foreign corporation, may question the right of the latter to take the title, for the purpose of showing that defendant had not relieved itself from responsibility for the operation of the road. **Plummer v. Chesapeake & O. R. Co.** 33: 362, 136 S. W. 162, 143 Ky. 102.

6. A state has power to require foreign railroad companies to become domesticated as a condition to acquiring and operating railroads within the state. **Plummer v. Chesapeake & O. R. Co.** 33: 362, 136 S. W. 162, 143 Ky. 102.

7. A foreign railroad company wishing to purchase a railroad line within the state must comply with the statute applicable to such corporations which wish to purchase and hold lands for depot, tracks, and other purposes, and compliance with the statute applicable to those wishing to possess, control, maintain, or operate a railway within the state is not sufficient. **Plummer v. Chesapeake & O. R. Co.** 33: 362, 136 S. W. 162, 143 Ky. 102.

8. A constitutional provision that no foreign railroad company shall have power to acquire a right of way or real estate for a depot or other uses, until it shall have become a domestic corporation, applies to the purchase of existing lines as well as to 33 L.R.A. (N.S.)

the construction of new ones. **Plummer v. Chesapeake & O. R. Co.** 33: 362, 136 S. W. 162, 143 Ky. 102.

9. Title to real estate taken by a foreign corporation without complying with the provisions of the local statute necessary to entitle it to do business in the state is subject to an unrecorded mortgage lien for unpaid purchase money in favor of a prior vendor, where the statute provides that every contract in relation to real estate made by a corporation under such circumstances shall be wholly void. **Hanna v. Halsey Realty Co.** 33: 355, 129 N. W. 1080, 145 Wis. 276. (Annotated.)

COTENANCY.

Specific performance of oral contract to convey interest to, see **Specific Performance**, 2.

A tenant in common cannot compel incompetent cotenants to contribute to the cost of improvements which he has put upon the property. **Henrikson v. Henrikson**, 33: 534, 127 N. W. 962, 143 Wis. 314.

COUNTERCLAIM.

See **Set-off and Counterclaim**.

COURTS.

Discretion as to permitting revival, see **Abatement and Revival**, 2.

Conferring upon power in criminal case to appoint experts, see **Constitutional Law**, 13.

Contempt of, see **Contempt**.

Bringing suit to enforce stockholder's liability in court where other stockholders could not be brought in, see **Corporations**, 1.

Power to suspend sentence, see **Criminal Law**, 6.

Loss of jurisdiction to enforce criminal sentence by suspension, see **Criminal Law**, 5, 7.

Judicial notice by, see **Evidence**, 1.

Jurisdiction; territorial limitations.

1. A receiver cannot confer upon the court jurisdiction of members of a mutual insurance company who are nonresidents of the county, by joining them in a single equity suit to compel payment of assessments which were overdue at the time of his appointment, where no facts exist to give equity jurisdiction of the action, the liabilities of the respective members upon their assessments being several, and not joint. **Burke v. Scheer**, 33: 1057, 130 N. W. 962, — Neb. —.

2. A nonresident may be prosecuted in a police court of a city, the jurisdiction of which is limited to offenses occurring within its limits, for permitting his cow to be at large within the city, contrary to a municipal ordinance, although he was not personally within the city at the time, if process is subsequently served upon him within the jurisdiction. **Tutt v. Greenville**, 33: 331, 134 S. W. 890, 142 Ky. 536. (Annotated.)

3. Holders of unpaid stock in a foreign corporation cannot defeat an action by its

trustee in bankruptcy to set aside a fraudulent dividend applied in satisfaction of such subscriptions, and compel their payment, on the theory that it is an attempt to regulate the internal affairs of such corporation, which is not a party to the proceeding, where all solvent stockholders are parties, since the corporation and creditors are represented by the trustee, and all necessary parties are therefore before the court. *Edwards v. Schillinger*, 33: 895, 91 N. E. 1048, 245 Ill. 231. (Annotated)

Relation to other departments of government.

5. Courts are bound by the expressions of public policy found in constitutional statutes. *McGuire v. Chicago, B. & Q. R. Co.* 33: 706, 108 N. W. 902, 131 Iowa, 340.

6. Ordinarily the courts will not substitute their opinions for the judgment of the legislature as to the reasonableness of an act fixing the rate of speed at which motor vehicles may be lawfully driven. *Schultz v. State*, 33: 403, 130 N. W. 972, — Neb. —.

Probate courts.

7. A probate court may dissolve a partnership one member of which has died, notwithstanding a clause in his will providing that the business shall be continued by his executors, where the surviving partner is abusing his trust, misappropriating the funds, and a disagreement has arisen between him and the executors. *Parnell v. Thompson*, 33: 658, 105 Pac. 502, 81 Kan. 119.

COVENANTS AND CONDITIONS.

Implied reservation of easement in case of grant with covenant of warranty, see Easements.

Condition in will, see Wills, 3.

That the grantee in a general warranty deed had knowledge at the time of the conveyance of a superior claim to part of the land conveyed to him will not debar him from compensation for the particular land lost to him under such claim. *Smith v. Ward*, 33: 1030, 66 S. E. 234, 66 W. Va. 190.

CRIMINAL LAW.

As to arrest, see Arrest.

Presumptions and burden of proof, see Evidence, 2.

Documentary evidence, see Evidence, 12.

Evidence of privileged communications, see Evidence, 21.

Evidence as to declarations or acts of accused, see Evidence, 24.

Evidence of threats in criminal case, see Evidence, 24, 27.

Evidence as to intent, see Evidence, 28.

Evidence of other crimes, see Evidence, 32.

Relevancy of evidence generally, see Evidence, 33.

Evidence of testimony at coroner's inquest, see Evidence, 18.

Habeas corpus, see Habeas Corpus.

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As to requisites and sufficiency of indictment, information, and complaint, see Indictment, etc.

Enforcing rates prescribed by ordinance by criminal penalty, see Municipal Corporations, 4.

Injunction against crime, see Nuisance. Correctness of instructions, see Trial, 16.

Refusal to instruct as to former jeopardy, see Trial, 13.

Impeachment or discrediting of witness, see Witnesses, 4-6.

See also Assault; Bastardy, Gaming; Homicide; Incest; Intoxicating Liquors.

What law in point of time governs.

What law governs as to length of imprisonment, see *infra*, 3.

1. One cannot be punished for selling intoxicating liquor at a time when the prohibitory law is, by decision of the highest court of the state, unconstitutional, although that court subsequently changes its opinion and holds the law to be valid. *State v. O'Neil*, 33: 788, 126 N. W. 454, 147 Iowa, 513. (Annotated)

Pleadings; motions; demurrer.

2. The question whether an information states facts sufficient to constitute an offense, is duplicitous, or is defective in the description of the offense, cannot be raised by motion to set aside, but only by demurrer. *Childs v. State*, 33: 563, 113 Pac. 545, 4 Okla. Crim. Rep. 474.

Sentence and punishment.

3. The right to require a convict whose sentence was illegally suspended by the court, to serve his full term of imprisonment, is not affected by the fact that, since suspension took effect, the legislature shortened the term for which persons convicted of the offense involved could be imprisoned, to a period less than that imposed by the original sentence. *State v. Abbott*, 33: 112, 70 S. E. 6, — S. C. —.

4. There is no power to make the serving of sentence for crime depend upon the subsequent conduct of the convict. *Re Peterson*, 33: 1067, 113 Pac. 729, — Idaho, —.

5. Where, upon a plea of guilty, accused is sentenced to a term of imprisonment and payment of a fine, or alternative imprisonment for a further term in case of its nonpayment, with a proviso that in case it is paid, the sentence of imprisonment shall be suspended until further order, if the fine is paid and the accused released without bail, the court has no power to compel him afterwards to serve out his term. *Re Peterson*, 33: 1067, 113 Pac. 729, — Idaho, —.

6. A court has no power to suspend a sentence of imprisonment during the good behavior of the convict. *State v. Abbott*, 33: 112, 70 S. E. 6, — S. C. —.

(Annotated)

7. The invalidity of an attempt by a court to suspend a sentence of imprisonment during good behavior of the convict does not affect the validity of the sentence,

and it may be enforced even though the time covered by the sentence has expired. *State v. Abbott*, 33: 112, 70 S. E. 6, — S. C. —.

CRIMINAL LIBEL.

See Libel and Slander, 3.

CRIMINAL NUISANCE.

See Nuisance.

CROSS-EXAMINATION.

Of witness, see Witnesses, 3.

CUSTODY.

Of children, see Infants.

CUSTOM.

Sufficiency of evidence of, to show negligence, see Evidence, 37.

DAMAGES.

Review of on appeal, see Appeal and Error, 14.

Instructions as to, see Appeal and Error, 25.

Prejudicial error as to measure of, see Appeal and Error, 26.

Remittitur on appeal, see Appeal and Error, 28.

Mitigation of damages for assault on passenger, see Carriers, 6.

Right to damages on injunction bond, see Injunction, 8.

Nominal.

1. One is entitled to nominal damages at least for the pollution of a stream running through his property by the casting of chemicals into it, although he shows no special damage from the injury. *Hodges v. Pine Product Co.* 33: 74, 68 S. E. 1107, 135 Ga. 134.

Sales of personalty.

2. That plaintiff in an action for damages for breach of warranty of a machine purchased for resale alleges loss of a sale does not confine his right to recover to the question of his diligence with respect to such sale, if he also alleges that the machine was wholly unsalable, useless, and without value. *Loxterkamp v. Lininger Implement Co.* 33: 501, 125 N. W. 830, 147 Iowa, 29.

In respect to freight.

3. One who contracts with a mine for a certain quantity of coal to fill orders already taken, and takes others in reliance thereon, and is prevented from filling his contract because of the refusal of a railroad company to haul the coal at its published rates, may hold it liable for the difference in cost of filling the orders under the conditions created by the refusal of the railroad to haul the coal, and what it would have cost him to fill them had the railroad company performed its duty, to the amount which the mine would have been able to furnish in compliance with his contract. *Higdon v. Louisville & N. R. Co.* 33: 442, 135 S. W. 768, 143 Ky. 73.
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Malicious prosecution.

4. The risk of conviction is not an element of damages for malicious prosecution resulting in illegal arrest. *Seidler v. Burns*, 33: 291, 79 Atl. 53, — Conn. —.

5. One maliciously prosecuting another which results in his arrest is not answerable in damages for physical suffering caused by cold, want of bed, or deprivation of food, due to acts of persons over whom he had no control, and which he had no reason to anticipate. *Seidler v. Burns*, 33: 291, 79 Atl. 53, — Conn. —. (Annotated: Personal injuries; death.

Prejudicial error as to measure of, see Appeal and Error, 26.

6. In determining the compensation to be awarded for a negligent injury to one conducting a business of his own, the jury may consider the value of his time or services in such business during the time he was compelled to be away from it by the injury, and their diminished value while he could work only part time. *Union Depot & R. Co. v. Londoner*, 33: 433, 114 Pac. 316, — Colo. —.

Injury to water rights; pollution.

Nominal damages, see *supra*, 1.

7. The measure of damages for rendering land unfit or less valuable for pasture or other purposes for which it is adapted by turning chemicals into a stream running through it is the diminution of the market value of the property, if the injury is permanent, or the diminution of the rental value, if the injury is temporary. *Hodges v. Pine Product Co.* 33: 74, 68 S. E. 1107, 135 Ga. 134.

Mental anguish.

8. One who decoys a woman from home in the night on a fictitious errand of mercy, attempts to take undue liberties with her, slanders her and subjects her to humiliating gossip of the neighborhood, may be liable to answer in damages not only for the assault, but to compensate her for the mental suffering, humiliation, and disgrace caused by his act. *Kurpgewelt v. Kirby*, 33: 98, 129 N. W. 177, 88 Neb. 72. (Annotated: 1

9. A carrier is answerable in damages for mental suffering inflicted upon a passenger by insulting language addressed to him by the conductor without provocation, which is of a character calculated to humiliate, mortify, and disgrace him. *Bleecker v. Colorado & S. R. Co.* 33: 386, 114 Pac. 481, — Colo. —. (Annotated: 1

Aggravation.

10. Matter in aggravation is something done by the defendant upon the occasion of the principal trespass, which is of a different legal character from, but not inconsistent with, the trespass. *Kurpgewelt v. Kirby*, 33: 98, 129 N. W. 177, 88 Neb. 72.

DANGEROUS AGENCIES.

Automobile as dangerous agency, see Automobiles.

Electricity, see Electricity.

Negligence as to generally, see Negligence, 1, 2.

DEATH.

- Effect of death of party between submission and decision of cause on appeal, see Appeal and Error, 27.
- Admissibility of evidence as to transaction with person since deceased, see Evidence, 26.
- Effect of, on contract to support person in part payment of rent, see Landlord and Tenant, 1.
- Liability of municipality for negligent death, see Municipal Corporations, 5, 6.

DEBTOR AND CREDITOR.

- Insolvency of debtor, see Bankruptcy.
- Parol evidence to explain writing purporting to fix compensation for collecting debt, see Evidence, 13.

DECEDENT'S ESTATE.

- See Executors and Administrators.

DECLARATIONS.

- Evidence of, see Evidence, 20-27.
- In pleading, see Pleadings, 5.

DEDICATION.

Where, by statute, a dedication conveys the fee, an owner of property abutting on a strip of land which has been dedicated for highway purposes cannot recover from the municipality the value of natural products of the soil, grown upon the surface of the highway, and converted by the municipality to its own use. *Carroll v. Elmwood*, 33: 1053, 129 N. W. 537, 88 Neb. 352. (Annotated)

DEEDS.

- Covenants in, generally, see Covenants and Conditions.
- Creation of easement by, see Easements.

DEFENSE.

- To action in prosecution for assault, see Assault and Battery, 3-5.
- In disbarment proceedings, see Attorneys, 3.
- In action on negotiable instrument, see Bills and Notes, 14, 15.
- Maintenance as, see Champerty and Maintenance.
- Necessity of pleading specially, see Pleading, 6.

DEFINITENESS.

- Of pleading, see Pleading, 2.

DELAY.

- In enforcing note, see Bills and Notes, 14.

DELIVERY.

- Of indemnity bond, see Bonds, 1.

DEMURRER.

- Questioning sufficiency of indictment by, see Criminal Law, 2.
 - In general, see Pleading, 7-11.
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DEPOTS.

- Condition of, see Carriers, 14, 15.

DESCENT AND DISTRIBUTION.

- Tax on right to take property by, see Taxes, 3-18.
- Time of determining persons who may take under will, see Wills, 7-11.
- An adopted child will not inherit from the mother of its deceased foster parent, under a statute which provides that the adopted child shall become the heir at law of the parent adopting it, and be as capable of inheriting as though it was the child of such parent. *Merritt v. Morton*, 33: 139, 136 S. W. 133, 143 Ky. 133. (Annotated)

DESTRUCTION.

- Liability for rent after destruction of property, see Landlord and Tenant, 2, 3.

DISBARMENT.

- Of attorney, see Attorneys, 2, 3.

DISCHARGE.

- Of one joint tortfeasor by release of others, see Joint Creditors and Debtors.
- Of servant, see Master and Servant, 1.

DISCRETION.

- Review of on appeal, see Appeal and Error, 10.

DISCRIMINATION.

- Unconstitutionality of, see Constitutional Law, 1-8.
- In succession tax, see Taxes, 10-15.

DISEASE.

- Liability of municipality for disease caused by polluted water supply, see Municipal Corporations, 6.

DISHONOR.

- Notice of dishonor of note, see Bills and Notes, 6, 7, 9.

DISMISSAL OR DISCONTINUANCE.

- Appeal from order refusing to dismiss, see Appeal and Error, 1.

It is no ground for dismissal of an action brought by the state against parties claiming to be trustees of a sectarian school, to determine who is entitled to administer the school, that the trustees having the right to the property are admitted as parties by amendment, and that the state solicitor still remains a party, since the rights of the parties may be adjudicated without the necessity of bringing a new action. *State ex rel. Kerr v. Hicks*, 33: 529, 70 S. E. 468, 154 N. C. 265.

DIVORCE AND SEPARATION.

Review of alimony on appeal, see Appeal and Error, 15.

Contract to share alimony with attorney, see Appeal and Error, 9; Contracts, 11.

Advertising for divorce business as ground for disbarment, see Attorneys, 2.

A separation agreement by which a man worth from \$15,000 to \$60,000 pays his wife, who has nothing, is in distress, and with no one to look to for advice, \$500 in lieu of all interest in his estate, will be set aside as unfair. *McConnell v. McConnell*, 33: 1074, 136 S. W. 931, — Ark. —.

DOCUMENTARY EVIDENCE.

See Evidence, 11, 12.

DOGS.

See Animals.

DOMICIL.

Residence for purpose of election, see Elections.

DOWER.

Succession tax on provision for wife in lieu of, see Taxes, 16.

DRAFTS.

Attached to bills of lading, see Bills of Lading.

DRAINS AND SEWERS.

Implied reservation of right to drainage, see Easements.

DRUNKENNESS.

Of passenger, see Carriers, 11, 13.
In court room as contempt, see Contempt.

DUE PROCESS OF LAW.

See Constitutional Law, 9-13.

DUPLICITY.

In indictment, see Indictment, etc., 1, 2.

DUTY.

Presumption of performance of, see Evidence, 4.

EASEMENTS.

A grant with full covenant of warranty of the rear of a lot, for the construction of a building, terminates the right of the grantor to drain a building standing on the front of the lot to the sewer in the alley at the rear, where the sewer connection had been underground, and the grantee had no actual knowledge thereof, and the roof drainage had been across a low building on the lot which the grantor knew was to be torn down, while it is not impossible to secure drainage in other directions, although it will be expensive to do so. *Brown v. Fuller*, 33: 459, 130 N. W. 621, — Mich. —.

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EDUCATIONAL INSTITUTIONS.

Exemption of from taxation, see Taxes, 1, 2.

EJECTION.

Of passenger, see Carriers, 11, 12.

EJECTMENT.

Right of one accepting benefits of judgment in ejectment to appeal from unfavorable portion, see Appeal and Error, 3.

ELECTION.

By beneficiary to receive principal of fund which will direct to be used in buying annuity, see Annuities.

Between counts in indictment, see Indictment, etc., 2.

ELECTIONS.

Judicial notice as to, see Evidence, 1.
Compelling unqualified voter to disclose candidate voted for, see Witnesses, 3.

The selection and purchase of a home in a state, with the intention of making it a permanent residence, is not of itself sufficient to make one a citizen of the state for the purpose of fixing his right to vote, if, pending the vacation of the property by the former occupant, he continues to occupy his former residence in another state. *People v. Turpin*, 33: 766, 112 Pac. 531, — Colo. —. (Annotated)

ELECTRICAL USES AND APPLIANCES.

See Electricity.

ELECTRICITY.

Liability for negligence of independent contractor, see Master and Servant, 18.

Power of municipality as to rates for, see Municipal Corporations, 2.

See also Electric Lights.

1. An electric company which maintains upon a public bridge wires carrying a dangerous current, without sufficient insulation, and so placed that persons required to work upon the bridge may come in contact with them, is liable for injury to such a workman by a disruptive discharge of electricity from the wires, without negligence on his part. *Hoppe v. Winona*, 33: 449, 129 N. W. 577, 113 Minn. 252.

2. A municipal corporation which grants to a power company the right to string wires upon a bridge which it maintains as part of its highway system, under proper authority, over a boundary river, acts in its private capacity, and is liable for injury to its employee, whose duties require him to be upon the bridge, by a disruptive discharge from the insufficiently insulated wires, as to the danger from which he was not warned. *Hoppe v. Winona*, 33: 449, 129 N. W. 577, 113 Minn. 252. (Annotated)

ELECTRIC LIGHTS.

Rules of corporation supplying electric light to public, see Public Service Corporations.

EMBEZZLEMENT.

Evidence in prosecution for, see Evidence, 12.

EMINENT DOMAIN.

1. The right of the Federal government to exercise the power of eminent domain to secure land within a state for the irrigation of public land which it owns there is not affected in a particular case by the fact that it intends to supply water from its plant for the irrigation of land which has passed into private ownership, at least where, under the laws of the state, such private owners might have secured property necessary for the irrigation of their lands by right of eminent domain. *Burley v. United States*, 33: 807, 179 Fed. 1, 102 C. C. A. 429. (Annotated)

Necessity of making compensation.

2. A statute requiring the employment of one to secure a purchaser of real estate to be in writing is not in conflict with a constitutional provision that no person's property or particular services shall be taken without just compensation. *Selvage v. Talbott*, 33: 973, 95 N. E. 114, — Ind. —.

EMPLOYEES.

Bonds for fidelity of, see Bonds, 6, 7.

EMPLOYER'S LIABILITY.

Statute as to, see Master and Servant, 11.

ENTIRETIES.

Estate by, see Husband and Wife, 3.

EQUALITY.

Of succession tax, see Taxes, 10-15.

EQUAL PROTECTION AND PRIVILEGES.

See Constitutional Law, 1-8.

EQUITABLE CONVERSION.

See Wills, 14.

EQUITABLE ESTOPPEL.

See Estoppel.

EQUITY.

Jurisdictional limitations of, see Courts, 1.

Jurisdiction and practice in particular cases, see Injunction; Set-off and Counterclaim.

As to trust, see Trusts.

1. Equity has jurisdiction of a suit by the payee of a note against a bank, and its cashier, who had lent the payee's money on the note before a specified indorsement had been secured, contrary to instructions, and the maker and designated surety, who had promised in writing to sign the note, to adjust the rights of the parties and af-

fix the liability for the amount due. *Petty v. Gacking*, 33: 175, 133 S. W. 832, — Ark. —.

To protect remaindermen.

2. Equity has jurisdiction of a proceeding to hold the estate of a life tenant answerable for the sum necessary to make the repairs which he should have made upon the property. *Prescott v. Grimes*, 33: 669, 138 S. W. 206, 143 Ky. 191.

To avoid multiplicity of suits.

3. The receiver of an insolvent hail insurance company whose charter makes its members liable for the losses and expenses of the company, each to the extent of his obligation, cannot maintain a single equity suit against all, to compel them to pay assessments which had been levied against them, either by the directors or the receiver; at least, where the statute provides for an action at law against each member who neglects to pay his obligations. *Burke v. Scheer*, 33: 1057, 130 N. W. 962, — Neb. —.

(Annotated)

Equity principles.

4. Equity will not enforce a lien for purchase money reserved on land in a deed of general warranty, when a part of the land had been before sold by the grantor to other persons whose right is superior to that of the grantee, without abatement from the purchase money of the value of the land so lost to the grantee. *Smith v. Ward*, 33: 1030, 66 S. E. 234, 66 W. Va. 190.

ESTOPPEL.**By contracts or agreements generally; ratification.**

1. One who, in sending an answer to an advertised offer of a prize for a correct solution of a problem, agrees to abide by the decision of the judges, does not thereby estop himself from contesting their rejection of his solution on a ground not made a condition of the contest in the advertisement. *Minton v. F. G. Smith Piano Co.* 33: 305, 36 App. D. C. 137. (Annotated)

2. One who sells a newspaper plant by contract under seal, in his own name, cannot avoid his agreement not to conduct another paper in the same county, upon the ground that the property in fact belonged to his wife, and that he had no pecuniary interest in it. *McAuliffe v. Vaughan*, 33: 255, 70 S. E. 322, 135 Ga. 852.

By conduct, request, or admissions generally.

3. A memorandum made by the holder of a note at the time of receiving a partial payment thereon, "Indorsement on principal," followed by the amount received, does not estop him from afterwards applying enough of the payment to discharge the interest then due, since he has the option to apply the payment as far as necessary in satisfaction of interest due. *Dollar Sav. & T. Co. v. Crawford*, 33: 587, 70 S. E. 1089, — W. Va. —.

By laches, silence, or acquiescence.

4. Where a testator bequeathed prop-

erty to three members of his lodge upon the promise of one, made in the presence of the others, that they would transfer it to the lodge, equity may compel them to effect the transfer. *Winder v. Scholey*, 33: 995, 93 N. E. 1098, 83 Ohio St. 204.

5. Failure of remaindermen to insist that the life tenant make the necessary repairs upon the property does not estop them from holding his estate answerable for the cost of those he should have made. *Prescott v. Grimes*, 33: 669, 136 S. W. 206; 143 Ky. 191.

By negligence or fraud.

6. Failure of the holder of an unrecorded purchase money mortgage on real estate to give notice thereof does not estop him from setting it up to defeat the title of a foreign corporation which purchased the property without complying with the provisions of the local statute necessary to enable it to do business in the state, under which circumstances the statute provides that its contract shall be wholly void. *Hanna v. Kelsey Realty Co.* 33: 355, 129 N. W. 1080, 145 Wis. 276.

EVIDENCE.

Prejudicial error as to, see Appeal and Error, 19-21.

Constitutionality of statute as to, see Constitutional Law, 13.

Absence of testimony to support complaint in injunction proceeding, see Injunction, 7.

Waiver of objection to by eliciting repetition on cross-examination, see Trial, 3.

Judicial notice.

1. The court takes judicial notice of the dates of general elections provided for by general statutes of the state. *Diener v. Star-Chronicle Pub. Co.* 33: 216, 132 S. W. 1143, 230 Mo. 613.

Presumptions and burden of proof.

Presumptions on appeal, see Appeal and Error, 9.

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2. The court cannot assume as matter of law, on a trial of one accused of killing an officer who was attempting to arrest him, that the arrest had the effect of exciting in his mind a sudden heat of passion such as to make the desire to kill irresistible, and thereby reduce the offense to manslaughter. *State v. Meyers*, 33: 143, 110 Pac. 407, — Or. —.

3. The maxim *Res ipsa loquitur* will not apply to establish on the part of a street car company liability for injury to a passer-by by a missile thrown from under a car, where both the act which caused the injury and the negligence of the street car company in relation thereto would have to be inferred from the accident. *De Gloppe v. Nashville R. & Light Co.* 33: 913, 134 S. W. 609, — Tenn. —.

4. The presumption of fact in favor 33 L.R.A.(N.S.)

of the master having performed his duty to furnish servants a reasonably safe working place, instrumentalities, and fellow servants, is overcome by evidence establishing the contrary to a reasonable certainty. *Knudsen v. La Crosse Stone Co.* 33: 223, 130 N. W. 519, 145 Wis. 394.

5. The bursting of a tank in which one has artificially stored water upon his property, and the escape of the water to the injury of neighboring property, raises a presumption of negligence. *Weaver Mercantile Co. v. Thurmond*, 33: 1061, 70 S. E. 126, 68 W. Va. 530.

5a. In an action against a municipality for personal injuries, there is no presumption that either plaintiff or defendant was guilty of negligence. *Oklahoma City v. Reed*, 33: 1083, 87 Pac. 645, 17 Okla. 518.

5b. In an action against a city for injury by an alleged defect in a highway, the burden of proving contributory negligence is on the defendant. *Oklahoma City v. Reed*, 33: 1083, 87 Pac. 645, 17 Okla. 518.

6. A waiver of presentment and notice will not be inferred from doubtful acts or language on the part of the indorser of a promissory note, where he is entitled thereto by statute. *Worley v. Johnson*, 33: 635, 53 So. 543, — Fla. —.

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16. Where an apparently absolute legacy was made in favor of several persons, upon the promise of one that they would hold it in trust for others, the fact that the promise was made on behalf of all may be established by parol evidence, and subsequent declarations of either of the legatees are admissible against all. *Winder v. Scholey*, 33: 995, 93 N. E. 1098, 83 Ohio St. 204.

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22. Statements made by one rendered unconscious by a personal injury, immediately upon his regaining consciousness, eight days later, as to the cause of the injury, are admissible in evidence against one alleged to be responsible therefor, and the fact of the appearance of semiconsciousness before full consciousness returns goes to the weight of the evidence, and not to its admissibility. *Britton v. Washington Water Power Co.* 33: 109, 110 Pac. 20, 59 Wash. 440.

23. A trust in an absolute legacy may be established by parol evidence, and the contemporaneous declarations of the testator, and subsequent declarations of the legatee, that the bequest was made for the benefit of a third person, upon the promise of the legatee to hold it in trust, are admissible for that purpose. *Winder v. Scholey*, 33: 995, 93 N. E. 1098, 83 Ohio St. 204.

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26. The statutory rule that no party shall testify in his own behalf in respect to any transaction had personally with a

person since deceased, where the adverse party is the heir at law, next of kin, or assignee of such deceased person, does not apply where the adverse party claims as the beneficiary of a certificate issued by a mutual benefit association to such decedent, because the beneficiary named in the certificate is not the assignee of the member to whom it was issued, and the circumstance that he is in fact his heir or next of kin is not material where his claim is not founded on that relationship. *Savage v. Modern Woodmen of America*, 33: 773, 113 Pac. 802, — Kan. —.

27. Upon trial of a man for incest who left home after the charge was made, evidence is not admissible of a conversation between his wife and her brother, in his absence, in which, because of an assumed separation, she was advised to return to her father. *Gross v. State*, 33: 477, 135 S. W. 373, — Tex. Crim. Rep. —.

Relevancy and materiality.

Relevancy and materiality under particular pleadings, see *infra*, 40.

First objecting to on appeal, see *Appeal and Error*, 12.

Relevancy of evidence to discredit witness, see *Witnesses*, 4-6.

28. In a prosecution for having in possession intoxicating liquor with intent to sell same, proof that the defendant kept large quantities of liquor concealed on his premises is competent as a circumstance tending to show the intent to sell. *Childs v. State*, 33: 563, 113 Pac. 545, 4 Okla. Crim. Rep. 474.

29. One on trial for perjury alleged to have been committed in a civil action, the parties to which are witnesses against him, may show the status of such action for the purpose of showing that such parties would profit by his conviction, because the action is still pending and his conviction would render him incompetent to testify in it. *State v. Eaid*, 33: 946, 104 Pac. 275, 55 Wash. 302.

30. Evidence of observations as to the washing of decks in respect to leaving them in a slippery condition, which one injured by falling upon a steamer deck had made on other voyages, is not admissible upon the question of negligence in respect to the one on which she fell. *Pratt v. North German Lloyd S. S. Co.* 33: 532, 184 Fed. 303, 106 C. C. A. 445.

31. Upon the question of the liability of a railroad company for an assault upon a colored passenger, because of the conductor's failure to obey the statutory requirement to remove a white man from the colored compartment of a train, evidence is not admissible of his failure to remove other white persons therefrom, of his failure to station a guard to prevent white passengers from entering the compartment, or of the manner in which white passengers were behaving in their own compartment. *Louisville & N. R. Co. v. Renfro*, 33: 133, 135 S. W. 266, 142 Ky. 592.

32. Upon trial of a prosecution for incest in which the state relies upon a single

act, evidence is not admissible of conduct at subsequent times tending to show a criminal intent. *Gross v. State*, 33: 477, 135 S. W. 373, — Tex. Crim. Rep. —.

33. In a prosecution for having in possession intoxicating liquor with intent to sell same, and to convey same from one place within the state to another place therein, evidence that previously a justice of the peace had caused the liquor to be seized under a search warrant, and, on the defendant's motion, has subsequently quashed the warrant and ordered the liquor redelivered to the defendant, is not competent or admissible in the defendant's behalf. *Childs v. State*, 33: 563, 113 Pac. 545, 4 Okla. Crim. Rep. 474.

Weight, effect, and sufficiency.

Review of facts on appeal, see *Appeal and Error*, 14, 15.

34. An architect's certificate for work may be found not to have been withheld in good faith, where the work was accepted and used for several years without objection, until an attempt was made to enforce a mechanics' lien upon the property to secure compensation for it. *Thaler v. Wilhelm Greisser Constr. Co.* 33: 345, 79 Atl. 147, 229 Pa. 512.

35. To establish fraud which will permit the controlling of a written contract by a contemporaneous parol agreement, the evidence must be clear and satisfactory. *Lepley v. Andersen*, 33: 836, 125 N. W. 433, 142 Wis. 668. (Annotated.)

36. The incompetence of a servant which will render a master liable for injury caused to a fellow servant by his negligence may be established by evidence of reputation, although the alleged incompetence did not arise until after his lawful employment. *Rosenstiel v. Pittsburg Railways Co.* 33: 751, 79 Atl. 556, — Pa. —. (Annotated.)

37. Evidence that, at a railroad station where cattle in shipment were frequently detained at night, it was customary for persons accompanying live stock in transit to walk back and forth over the yards between their cars and the depot, is sufficient to justify a finding that the company owed a duty to such persons so engaged to give warning of the approach of a train. *Lacey v. Atchison, T. & S. F. R. Co.* 33: 414, 114 Pac. 198, — Kan. —.

38. The mere fact that the attempt to move a heavily loaded street car stalled on a steep grade caused the wheels to revolve rapidly without imparting motion to the car, but throwing a missile against a passer-by, to his injury, does not establish negligence on the part of the street car company which will render it liable for the injury. *De Gloppe v. Nashville R. & Light Co.* 33: 913, 134 S. W. 609, — Tenn. —.

39. Intention to claim adversely up to a division fence, which will give title by adverse possession, may be found from the fact that the claimant and his grantors had been in possession, claiming title up to the fence for more than fifteen years, and that the owner of the neighboring prop-

erty made no claim beyond the fence for all that time. *Edwards v. Fleming*, 33: 923, 112 Pac. 836, 83 Kan. 653.

Admissibility under particular pleadings.

40. In a suit for breach of promise of marriage, it is erroneous to permit the plaintiff to introduce evidence of her seduction and subsequent delivery of a bastard child, unless there is a special averment of these facts, and that the seduction and sexual intercourse were brought about and accomplished by the defendant under and by virtue of the contract of marriage. *Hendry v. Ellis*, 33: 702, 54 So. 797, — Fla. —.

(Annotated)

Variance.

41. While, in equity, the *allegata* and *probata* must correspond, the rules for the enforcement of this principle in courts of equity are more liberal than those applied in actions at law, and an agreement in matters of substance only is required, it being sufficient that the cause of action made out by the bill and the evidence is substantially the same. *Floyd v. Duffy*, 33: 883, 69 S. E. 993, 68 W. Va. 339.

EXAMINATION.

Of witnesses, see Witnesses, 2.

EXCEPTIONS.

Generally, see Trial, 3.

EXCUSABLE HOMICIDE.

See Homicide, 3.

EXECUTORS AND ADMINISTRATORS.

Equitable jurisdiction of suit to charge estate of life tenant, see Equity, 2.

Liability of estate of life tenant for repairs, see Life Tenants, 2.

Liability of executor for interest, see Interest.

When limitations against life tenant's liability for repairs begin to run, see Limitation of Actions, 2.

Joinder of parties in action to recover for repairs from estate of life tenant, see Parties, 4.

When an application is presented to the probate court for the appointment of an administrator of a surviving partnership, and the court finds the existence of the facts authorizing it to exercise jurisdiction, the action of the court in making the appointment is not subject to collateral attack. *Parnell v. Thompson*, 33: 658, 105 Pac. 502, 81 Kan. 119.

EXEMPTION.

From taxation, see Taxes, 1, 2.

EX MALEFICIO.

Trust *ex malificio*, see Limitation of Actions, 3; Trust, 2.

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EXPERT WITNESSES.

Fees of, see Witnesses, 7.

Statute giving courts power to appoint, see Constitutional Law, 13.

FEEES.

Of witnesses, see Witnesses, 7.

FELLOW SERVANTS.

See Master and Servant, 10-15.

FIDELITY INSURANCE.

See Bonds, 6, 7.

FILING.

Of answer, see Pleading, 1.

FINALITY OF DECISION.

For purpose of appeal, see Appeal and Error, 1, 2.

FIRE DEPARTMENT.

Injury by to person waiting for street car, see Proximate Cause, 2.

FIRE INSURANCE.

See Insurance.

FIRES.

Evidence in action against railroad for setting out, see Evidence, 10.

FISHERIES.

Injury to, by pollution of water, see Waters, 2.

F. O. B.

Passing title on sale f. o. b., see Sale, 1.

FOOD.

Statutory authority to examine into nuisances, sources of filth, and causes of sickness, and remove or prevent the same, and make regulations for the public health relative thereto, and relative to articles which are capable of containing or conveying infection or contagion, or of creating sickness, which are brought into or conveyed from the town, does not empower a board of health to require the selling of milk only in tightly closed bottles or receptacles, to the exclusion of sales in small quantities from a wholesome receptacle kept under hygienic conditions. *Com. v. Drew*, 33: 401, 94 N. E. 682, 208 Mass. 493. (Annotated)

FOREIGN CORPORATIONS.

See Corporations, 4-9.

FOREIGN WILL.

See Wills, 4, 5.

FOREMAN.

As fellow servant, see Master and Servant, 13.

FORGERY.

Of check, see Banks, 5.

FRAUD AND DECEIT.

Sufficiency of evidence to show, see Evidence, 35.

FREEDOM OF SPEECH.

See Constitutional Law, 18.

FREIGHT CARRIERS.

See Carriers, 16-20.

FRIGHT.

Pleading in action for injury by fright of horse, see Pleading, 2, 5.

Of horse by electric railway, see Street Railways.

GAMBLING.

See Gaming.

GAMING.

1. The word "gaming" has no technical meaning, but includes every contrivance or institution which has for its object any sport, recreation, or amusement for the public upon which money or any other article of value can be won or lost by the result of such contrivance or institution, and includes bets or wagers made upon any physical contest, whether of man or beast, when practised for the purpose of deciding such bets or wagers. *James v. State*, 33: 827, 113 Pac. 226, — *Okla. Crim. Rep.* —.

2. One who opens or conducts a house, room, or place where the public are invited to assemble and by means of any plan, device, or scheme bet or lay wagers upon the result of horse racing, is punishable under a statute providing punishment for every person who deals, carries on, opens, and conducts any game or any device for money, checks, credit, or any representative of value. *James v. State*, 33: 827, 113 Pac. 226, — *Okla. Crim. Rep.* —. (Annotated)

3. The keeping of a common gaming house is a misdemeanor at common law and consequently a violation of the law of this state. *State v. Baker* 33: 549, 71 S. E. 186, — *W. Va.* —.

4. That only those who gamble are admitted to the room where the gambling is carried on, and the rest of the public are excluded therefrom, does not affect the crime. *State v. Baker*, 33: 549, 71 S. E. 186, — *W. Va.* —. (Annotated)

5. The keeping of a common gaming house is unlawful, whether the gambling therein be lawful or unlawful. *State v. Baker*, 33: 549, 71 S. E. 186, — *W. Va.* —.

6. It is not material that a common gaming house should be kept for lucre or profit. *State v. Baker*, 33: 549, 71 S. E. 186, — *W. Va.* —.

7. It is not essential, to constitute the offense of keeping a common gaming house, that the gambling therein should be in view of the public, or that the public should be disturbed by noise therein. *State v. Baker*, 33: 549, 71 S. E. 186, — *W. Va.* —.

GARNISHMENT.

Where the seller of goods ships them and makes a draft upon the purchaser, with the bill of lading attached, which he sells to one who receives payment thereon from the drawee, and the drawee, after paying the 33 L.R.A.(N.S.)

draft to a collecting agent, seeks to hold the proceeds by a garnishment as the property of the drawer, because of the defect in quality of the goods, the owner waives no rights by intervening and asserting his title. *Central Mercantile Co. v. Oklahoma State Bank*, 33: 954, 112 Pac. 114, 83 Kan. 504.

GAS.

Power of municipality as to rates, see *Municipal Corporations*, 2.

GATES.

Negligence in lowering gates at railroad crossing, see *Railroads*, 2, 3.

GOOD FAITH.

Sufficiency of evidence to show lack of, see *Evidence*, 34.

GOOD WILL.

Consideration for transfer of, see *Contracts*, 4.

GRAND JURY.

Presence of unauthorized person in grand jury room, see *Indictment*, etc., 6-8.

Special attorney to represent county attorney before, see *Indictment*, etc., 6, 8.

GUARANTY.

Notification of acceptance of the guaranty is not necessary to bind persons who sign an agreement to be responsible for the faithful performance of his contract by one about to be reappointed as salesman for the obligee for another year, since the guaranty is absolute, and not conditional, and it is immaterial that the contract has not been signed by either employer or employee when the sureties put their names to the guaranty which is attached to it. *J. R. Watkins Medical Co. v. Brand*, 33: 960, 136 S. W. 867, 143 Ky. 468. (Annotated)

HABEAS CORPUS.

Habeas corpus will lie to secure the discharge of one who, having been released without bail upon suspension of his sentence for crime, is recommitted to custody, since the sentence containing a proviso for suspension is void. *Re Peterson*, 33: 1067, 113 Pac. 729, — *Idaho*, —.

HACKS.

Ordinance granting special privileges to, see *Constitutional Law*, 7.

HARMLESS ERROR.

See *Appeal and Error*, 16-26.

HEALTH.

Pure food laws, see *Food*.

HEARING.

Necessity of to constitute due process, see *Constitutional Law*, 12.

HEARSAY.

Evidence of, see *Evidence*, 20-27.

HEAT.

Rules of corporation supplying heat to public, see Public Service Corporations.

HEAT OF PASSION.

See Evidence, 2.

HEIRS.

Meaning of word "heirs" in treaties, see Treaties.

Meaning of word "heirs" in will, see Wills, 12.

HIGHWAYS.

As to bridges, see Bridges.

Special privilege to hack drivers in, see Constitutional Law, 7.

Right of person dedicating land for highway to natural products of soil growing therein, see Dedication.

Liability for injury by electric wires in highway, see Electricity, 1, 2.

Sufficiency of petition in action for injury, see Pleading, 5, a.

Fright of horse by electric railway on, see Street Railways.

HOLOGRAPHIC WILLS.

See Wills, 2.

HOMICIDE.

Verdict as curing error on prosecution for, see Appeal and Error, 13.

Evidence of testimony at coroner's inquest, see Evidence, 18.

Evidence as to declarations or acts of accused, see Evidence, 24.

Evidence of threats, see Evidence, 24, 27.

Presumption of heat of passion, see Evidence, 2.

Correctness of instructions in prosecution for, see Trial, 16.

1. Where a person wilfully, recklessly, carelessly, and negligently, and at an unlawful rate of speed, as defined by the statute, drives his automobile upon the public streets and highways, and thereby kills another, negligence of the driver of another car, in which the deceased was riding when he was killed, cannot be invoked, under ordinary circumstances, to relieve such person of criminal liability. *Schultz v. State*, 33: 403, 130 N. W. 972, — Neb. —.

2. One who drives an automobile recklessly, carelessly, and negligently, and at a rate of speed forbidden by the statute, upon the public streets or highways of this state, and thereby causes the death of another, is guilty of criminal homicide. *Schultz v. State*, 30: 403, 130 N. W. 972, — Neb. —. (Annotated)

3. Resistance to the extent of taking life cannot be made to an unlawful arrest where the arrest is attempted by a known officer and nothing is to be reasonably apprehended beyond a mere temporary detention in jail. *State v. Meyers*, 33: 143, 110 Pac. 407, — Or. —. (Annotated) 33 L.R.A. (N.S.)

HORSE RACE.

Gambling on, see Gaming, 2.

HOSPITAL.

As charity, see Charities.

Boycott against by employers, see Conspiracy.

Making acquiescence in hospital regulations condition to continuance in employment, see Master and Servant, 1.

HUSBAND AND WIFE.

Moral obligation as consideration for wife's contract, see Contracts, 5.

As to divorce, see Divorce and Separation.

Estoppel of husband selling property in his own name to allege that title is in his wife, see Estoppel, 2.

Admissibility of statements between, see Evidence, 21.

Evidence, in prosecution of husband, of conversation between his wife and her brother in his absence, see Evidence, 27.

Effect of agreement between husband and wife to prevent change of beneficiary in policy on his life, see Insurance, 6, 7.

Succession tax on sum provided for wife by antenuptial agreement, see Taxes, 16.

Devise to "widow," see Wills, 6.

Husband's Liabilities.

1. Artificial teeth are necessities which a man must furnish to his wife. *Clark v. Tenneson*, 33: 426, 130 N. W. 895, — Wis. —.

Wife's Liabilities.

2. A married woman is not personally liable for artificial teeth purchased by her for her own use, although she has always attended to the dental affairs of herself and her children, and paid the bills, and the dentist who made the teeth has never had any dealings with the husband, if there is nothing to show that she made the payment out of her separate estate. *Clark v. Tenneson*, 33: 426, 130 N. W. 895, — Wis. —. (Annotated)

Estate by entirety.

3. A man cannot convey to his wife a half interest in his estate so as to create a tenancy by entirety in the whole estate, and cause his remaining half to pass to her rather than to his heirs, upon his death. *Pegg v. Pegg*, 33: 166, 130 N. W. 617, — Mich. —. (Annotated)

Actions.

4. A man cannot recover for loss of the society or those personal services of his wife formerly embraced by the term "consortium," through injuries negligently inflicted upon her by another, where the statutes have conferred upon her a legal entity of her own, and relieved her of the obligation to perform services which she formerly owed him. *Marri v. Stamford Street R. Co.* 33: 1042, 78 Atl. 582, — Conn. —. (Annotated)

IDENTITY.

Mistake in, as justification for assault, see Assault and Battery, 4.

IMPEACHMENT.

Of witness generally, see Witnesses, 4-6.

IMPLIED AGREEMENTS.

See Contracts, 1-3.

IMPLIED EASEMENT.

See Easements.

IMPLIED WARRANTY.

See Sale, 3, 4.

IMPROVEMENTS.

Contribution for, see Cotenancy.

INCEST.

Evidence in prosecution for, see Evidence, 27, 32.

Evidence to impeach prosecuting witness, see Witnesses, 4-6.

INCOMPETENT PERSONS.

Compelling contribution from incompetent cotenants, see Cotenancy.

INDEMNITY.

Bonds for, see Bonds.

INDEPENDENT CONTRACTORS.

Liability for acts of, see Master and Servant, 18.

INDICTMENT, INFORMATION, AND COMPLAINT.

What question of sufficiency of, may be raised, see Criminal Law, 2.

Power of special counsel to governor to sign, see Officers, 6.

Duplicity, repugnancy.

How question of duplicity may be raised, see Criminal Law, 2.

1. An information which charges a defendant with having in possession intoxicating liquor with the intent to sell same, and with the intent to convey same from one place within the state to another place therein, does not charge two offenses. Childs v. State, 33: 563, 113 Pac. 545, 4 Okla. Crim. Rep. 474.

2. The state need not be required to elect on which charge it will rely under an indictment for perjury charging false testimony that accused did not know of the execution of a contract, and that a named person claimed to be the owner of a specified piece of machinery. State v. Eaid, 33: 946, 104 Pac. 275, 55 Wash. 302.

Description of offense.

3. An indictment for practising medicine without a license need not state that accused was not within the classes not included in the law, where these classes were merely persons rendering gratuitous services and surgeons in the service of the Federal government, since the exception is not descriptive of the offense. State v. Smith, 33: 179, 135 S. W. 465, — Mo. —. 33 L.R.A. (N.S.)

4. An indictment for perjury is sufficient which sets forth the substance of the controversy in which the crime was committed, in what court the oath alleged to be false was taken, and that such court had authority to administer the oath, with proper allegations of the falsity of the matter on which the perjury is assigned. State v. Eaid, 33: 946, 104 Pac. 275, 55 Wash. 302.

Sufficiency to support conviction.

5. A common-law indictment for perjury is sufficient to support a conviction for the statutory crime, where the common law and statutory crimes are substantially the same. State v. Eaid, 33: 946, 104 Pac. 275, 55 Wash. 302. (Annotated)

Quashing.

How question of sufficiency of indictment may be raised, see Criminal Law, 2.

6. If the county attorney is disqualified from representing the state in the prosecution of a party charged with crime, said county attorney is without authority to appoint a special attorney to represent him before the grand jury in the investigation of said cause, and an indictment found as the result of such investigation upon motion of the defendant should be set aside. Hartgraves v. State, 33: 568, 114 Pac. 343, — Okla. Crim. Rep. —. (Annotated)

7. No person has a right to be in the grand jury room during any of their proceedings while investigating a criminal charge, except the witness then being examined and the attorney authorized by law to represent the state in such examinations; and, if any other person is in the grand jury room during any part of their investigations, an indictment found by them as the result of such investigation should, upon motion of the defendant, be set aside. Hartgraves v. State, 33: 568, 114 Pac. 343, — Okla. Crim. Rep. —.

8. Where a counsel privately employed to prosecute a case appears before a grand jury and assumes to represent the state upon the investigation of a case then pending before said grand jury, an indictment found by said grand jury as the result of such investigation should, upon motion of the defendant, be set aside. Hartgraves v. State, 33: 568, 114 Pac. 343, — Okla. Crim. Rep. —.

INDORSEMENT.

Of bill or note, see Bills and Notes.

INFANTS.

Sale of liquor to, see Intoxicating Liquors.

1. A surviving father cannot be deprived of the custody of a minor child by the mere fact that in giving the child to another it would be surrounded by greater material comforts than if given to the parent, where a statute provides that the surviving parent who is competent to transact his own business, and not otherwise un-

suitable, is entitled to the guardianship of his minor children, and it affirmatively appears that the father is competent to transact his own business and that he is not otherwise unsuitable. *Re Crocheron*, 33: 868, 101 Pac. 741, 16 Idaho, 441.

(Annotated)

2. Proof that a father some four years previous did drink some and at times become a "little hilarious," and has at times failed or is unable to pay his debts, is not sufficient to deprive him of the guardianship of his minor children, under a statute providing that the surviving parent who is competent to transact his own business and not otherwise unsuitable is entitled to the guardianship of his minor children, especially where it appears that the father is neither indigent nor immoral and is capable of properly providing for and educating his children. *Re Crocheron*, 33: 868, 101 Pac. 741, 16 Idaho, 441.

INFORMATION.

See Indictment, etc.

INHERITANCE.

See Descent and Distribution.

INHERITANCE TAX.

See Taxes, 3-18.

INITIATIVE AND REFERENDUM.

Constitutionality of, see Constitutional Law, 19.

INJUNCTION.

Mandatory injunction.

1. Equitable relief by way of mandatory injunction may be granted to compel a water company to furnish water to one entitled to it, if several months must elapse before a hearing could be secured upon an application for a writ of mandamus. *Bourke v. Olcott Water Co.* 33: 1015, 78 Atl. 715, — Vt. —.

Contract rights.

2. Injunction will lie to prevent a public-service corporation from wrongfully ceasing to furnish steam to a consumer for heating purposes, after the proper connections have once been made and the service has begun. *Seaton Mountain El. L. H. & P. Co. v. Idaho Springs Invest. Co.* 33: 1078, 111 Pac. 834, — Colo. —.

Against legal proceedings.

3. Equity has power to restrain a party within its jurisdiction from prosecuting a suit in the courts of another state, and in a proper case will not hesitate to exercise the power. *Mason v. Harlow*, 33: 234, 114 Pac. 218, — Kan. —.

4. Courts will not enjoin a suit in another state merely on the ground of convenience of parties, but will do so when such restraint is necessary to prevent one citizen from doing an inequitable thing, as where the action has been brought maliciously, in order to vex and harass another citizen, or to interfere with or prevent the free administration of justice in a suit pending 33 L.R.A. (N.S.)

in their own state. *Mason v. Harlow*, 33: 234, 114 Pac. 218, — Kan. —.

5. Equity will enjoin the prosecution by a resident of the state, of an action against an attorney, also resident there, in the courts of another state, for an alleged libel in a letter of instructions sent to an attorney in the latter state after the taking of depositions for use in a pending suit, which action is not brought in good faith, but to prevent defendant from properly discharging his duties to his client in the cause in which the depositions were taken. *Mason v. Harlow*, 33: 234, 114 Pac. 218, — Kan. —.

Against officers generally.

6. Attempted enforcement of contractual regulations of public service, by criminal proceedings under an ordinance of a city not authorized by legislative enactment to adopt such means of enforcement, may be enjoined. *Bluefield Waterworks & I. Co. v. Bluefield*, 33: 759, 70 S. E. 772, — W. Va. —.

Procedure; bond.

When right of action on bond accrues, see Action or Suit, 1.

7. An injunction will be granted on a complaint which is not supported by testimony, if it alleges facts stating a cause of action, and defendant fails to establish the affirmative defense, which is necessary to defeat recovery, and which is controverted by plaintiff's reply. *Seaton Mountain El. L. H. & P. Co. v. Idaho Springs Invest. Co.* 33: 1078, 111 Pac. 834, — Colo. —.

8. That a municipal corporation employs regular counsel on salary does not prevent its employing special counsel to assist in the defense of an injunction suit against it so as to relieve the bond conditioned to satisfy all costs and damages wrongfully resulting from the suing out of the injunction from liability for the compensation of such counsel if the injunction suit is dismissed. *Vicksburg Waterworks Co. v. Vicksburg*, 33: 844, 54 So. 852, — Miss. —. (Annotated)

INNKEEPERS.

Liability of one engaging accommodations for third person where they refuse to accept them, see Contracts, 13.

INSOLVENCY.

As to bankruptcy, see Bankruptcy.

Payment of check by bank in ignorance of customer's insolvency, see Banks, 3.

Effect of omission of insolvent defendants, see Corporations, 1.

As affecting set-off, see Set-off and Counterclaim, 5.

INSTALMENTS.

Waiver of breach by failing to pay, see Contracts.

INSTRUCTIONS.

See Trial, 12-16.

INSULT.

To passenger, see Carriers, 2.

INSURABLE INTEREST.

See Insurance, 1.

INSURANCE.

Validity of agreement of third person to pay premiums, see Contracts, 9.

Jurisdiction of action to enforce liability of members of mutual company, see Courts, 1; Equity, 3.

Admissibility of evidence, see Evidence, 26.

Insurable interest.

1. An uncle has not, merely because of his relationship, an insurable interest in the life of his nephew. *McRae v. Warmack*, 33: 949, 135 S. W. 807, — Ark. —
Validity of policy.

Right of trustee in bankruptcy to set aside future annuity contracts, see Bankruptcy, 3.

2. A contract by which an insurance company undertakes for a present cash premium to pay to the insured annuities beginning at a designated future time, and continuing during his life, is not invalid as against public policy. *Mutual L. Ins. Co. v. Smith*, 33: 439, 184 Fed. 1, 106 C. C. A. 593.

Construction of policy generally.

3. A policy written by a state agent upon a brick building "and its additions adjoining and communicating," after notice from the owner that he wanted the policy to cover not only the brick building, but a wooden one which had been moved back to make way for it, and, although separated from it by a few feet, was connected by passageway and used with it, will cover the wooden structure. *Shepard v. Germania F. Ins. Co.* 33: 156, 130 N. W. 626, — Mich. —
(Annotated)

Assignment of policy.

Contract as against public policy, see Contracts, 9.

4. One who has paid the premiums of an insurance policy upon another's life, under an agreement for an assignment of the policy, may, in case the assignment is annulled as contrary to public policy, recover the premiums paid. *McRae v. Warmack*, 33: 949, 135 S. W. 807, — Ark. —
Change of beneficiary.

Contract to maintain policy; right of beneficiary to enforce, see Parties, 2.

5. The rights of a beneficiary named in a certificate of insurance in no wise depend upon the possession thereof by the beneficiary. *Supreme Lodge K. of P. v. Ferrell*, 33: 777, 112 Pac. 155, 83 Kan. 491.

6. Where, in the part performance of an antenuptial contract, a husband procures a change in a certificate of insurance in which his children were the sole beneficiaries, so as to make his wife an equal beneficiary with the children, and where she has fully executed the antenuptial contract on her part, she thereby obtains an equitable interest in the certificate, and he cannot thereafter, without her consent, surrender the certificate and obtain the issuance of a new one in which a third party is named as the sole beneficiary, and thus divest her of her interest in the certificate, which was procured pursuant to such contract. *Supreme Lodge K. of P. v. Ferrell*, 33: 777, 112 Pac. 155, 83 Kan. 491.

7. Where a husband agrees that, if his wife will help to pay the assessments upon a certificate in a mutual benefit association in her favor, he will not change the beneficiary, and in consequence of such agreement she makes a part of the payments thereon, using for the purpose what are in fact the proceeds of her own labor outside of her ordinary household duties, she cannot be displaced as such beneficiary without her consent, notwithstanding she commingles her earnings with those of her husband as soon as received, keeping no separate account thereof, and then takes the money for the assessments from the common fund. *Savage v. Modern Woodmen of America*, 33: 773, 113 Pac. 802, — Kan. —

8. Where the designation of the beneficiary in a certificate issued by a mutual benefit association is made in pursuance of an agreement founded upon a sufficient consideration, the person so designated acquires a vested interest, and unless by reason of countervailing equities cannot be displaced, although the rules of the order permit the member to change the beneficiary at will. *Savage v. Modern Woodmen of America*, 33: 773, 113 Pac. 802, — Kan. —
(Annotated)

INTENT.
As determining question whether possession was adverse, see Adverse Possession, 1.
Of bankrupt to give preference, see Bankruptcy, 2.
Parol evidence as to, see Evidence, 14.
Evidence as to, generally, see Evidence, 28, 32.
Sufficiency of evidence to show, see Evidence, 39.

INTEREST.

Effect on right to, of accepting check not including interest which states that it is in full payment of account, see Accord and Satisfaction.

Estoppel to apply payment to interest instead of to principal, see Estoppel, 3.

As affecting competency of witness, see Evidence, 29; Witnesses, 1.

Usurious interest, see Usury.

INTEREST.

1. Under a contract to pay on the 15th of each month for services and supplies furnished during the previous month, interest runs upon each month's items from the time payments for them become payable, and not merely from the time the last item is entered in the account, although the entire transaction becomes the subject of one

book account. *Bassick Gold Mine Co. v. Beardsley*, 33: 852, 112 Pac. 770, —Colo. —.

2. A bequest of a certain fund to be expended in the purchasing of an annuity for the legatee carries interest from the expiration of the period applicable to bequests generally, and not from the death of the testator. *Parker v. Cobe*, 33: 978, 94 N. E. 476, —Mass. —.

INTERROGATORIES.

Interrogatories on trial, see Trial, 11.

INTERSTATE COMMERCE COMMISSION.

Mistake of carrier in quoting rate less than that filed with, see Carriers, 21.

INTERURBAN RAILWAYS.

Liability for negligence, see Street Railways.

INTERVENTION.

Of parties in actions generally, see Parties, 5.

INTOXICATING LIQUOR.

What law in point of time governs liability for selling, see Criminal Law, 1, 3.

Evidence in prosecution under liquor laws, see Evidence, 28, 33.

Sufficiency of indictment, see Indictment, etc., 1.

Power of special counsel to governor to sign information charging violation of liquor laws, see Officers, 6.

1. Under a statute providing that a sale by one person for another shall be deemed a sale by both, and that both shall be liable, either jointly or severally, a licensed saloon keeper is criminally liable for breach by his servant of a statutory provision that no spirituous liquors shall be sold to a minor, irrespective of whether or not the sale was made without the saloon keeper's knowledge, and against his express instructions. *State v. Nichols*, 33: 419, 69 S. E. 304, 67 W. Va. 659. (Annotated)

2. Delivery of intoxicating liquors to a minor bell boy in a licensed hotel by the bartender, and receipt of payment therefor at the time, constitute a sale of the liquor to the minor, where there was nothing said at the time of delivery as to whether he was buying for himself or for an undisclosed principal, although the bartender was accustomed to let the bell boy take drinks ordered by the guests of the hotel to their rooms, and thought that the liquor in question was for one of them. *State v. Nichols*, 33: 419, 69 S. E. 304, 67 W. Va. 659.

INTOXICATION.

See Drunkenness.

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IRRIGATION.

Exercise of eminent domain for purpose of, see Eminent Domain, 1.

Power of United States to construct irrigation works, see United States.

Use of waters for, see Waters, 4.

JOINDER.

Of causes of action, see Action or Suit, 5-7.

Of parties, see Parties, 4.

JOINT CREDITORS AND DEBTORS.

Parol evidence to show intent of parties to settlement with one tortfeasor, see Evidence, 14.

Effect of affixing private seal to settlement with one of several joint tortfeasors, see Seal.

1. If one of several joint wrongdoers makes full payment of damages caused by injury done, there can be no further recovery for the same injury. *Fitzgerald v. Union Stock Yards Co.* 33: 983, 131 N. W. 612, —Neb. —.

2. If one of several joint wrongdoers makes settlement with the injured party, and pays him damages which he agrees to receive, and does receive, as full compensation for all damages sustained, it will release all of the joint wrongdoers. *Fitzgerald v. Union Stock Yards Co.* 33: 983, 131 N. W. 612, —Neb. —.

3. Settlement with one of several joint wrongdoers, and payment of damages, is not a defense to an action against another, unless it was agreed between the parties to the settlement that such payment was in full of all damages suffered. *Fitzgerald v. Union Stock Yards Co.* 33: 983, 131 N. W. 612, —Neb. —.

JOINT TENANTS.

In general, see Cotenancy.

Estate by entireties, see Husband and Wife, 3.

JOINT TORT FEASORS.

See Joint Creditors and Debtor.

JUDGMENT.

Personal judgment for permitting animal to run at large, see Animals.

Finality of, for purpose of appeal, see Appeal and Error, 1, 2.

On appeal, see Appeal and Error, 27-29.

Collateral attack on appointment of administrator, see Executors and Administrators.

Personal judgment in mechanics' lien case, see Mechanics' Liens, 2.

Judgment on pleading, see Pleading, 3.

JUDICIAL NOTICE.

See Evidence, 1.

JURISDICTION.

Of courts generally, see Courts.

JURY.

Questions for court or jury, see Trial, 4-9.

JUSTIFIABLE HOMICIDE.

See Homicide, 3.

JUSTIFICATION.

For assault, see Assault and Battery, 3-5.

LACHES.

Estoppel by, see Estoppel, 5.

To bar action, see Limitation of Actions, 1.

LANDLORD AND TENANT.

Vesting of title to leasehold in lessee's trustee in bankruptcy as dependent upon acceptance by trustee, see Bankruptcy, 4.

Effect of lease of portion of public park on city's liability for injury, see Municipal Corporations, 7.

Making landlord liable for water supply to tenants, see Waters, 5.

1. A tenant of property for a term of years who is to pay a monthly rental and furnish the lessor with the reasonable comforts of life, including room and board, cannot be required upon death of the lessor to pay more than the specified amount during the remainder of the term, although the rental value of the property amounts to such sum plus the value of the room and board. *Re Shearn*, 33: 347, 114 Pac. 131, — Utah, —. (Annotated)

2. Rent paid in advance cannot be recovered upon accidental destruction of the tenement, although the statute and lease provide that such destruction terminates the lease. *Harvey v. Weisbaum*, 33: 540, 113 Pac. 656. — Cal. —. (Annotated)

3. Under a statute providing that in case of the total destruction of a leased building, the rent shall be paid up to the time of such destruction, and then and from thenceforth the lease shall cease and come to an end, unless the parties have otherwise stipulated in their agreement of lease, the tenant may, in case of the total destruction of the property without his fault, recover such portion of the instalments of rent as have been paid in advance, as would have been earned after such destruction. *Carley v. Liberty Hat Mfg. Co.* (N. J. Err. & App.) 33: 545, 79 Atl. 447, — N. J. —.

LAST CLEAR CHANCE.

See Proximate Cause, 1.

LAW.

As to statutes, see Statutes.

LEASE.

Of portion of public park, see Municipal Corporations, 7.

Vesting of title to leasehold in lessee's trustee in bankruptcy as dependent upon acceptance by trustee, see Bankruptcy, 4.

In general, see Landlord and Tenant.

LEGAL PROCEEDINGS.

Injunction against, see Injunction, 3-5. 33 L.R.A. (N.S.)

LEGATEES.

Estoppel of, see Estoppel 4.

LEGISLATURE.

Right to confer upon municipalities power to enact ordinances by initiative and referendum, see Constitutional Law, 19.

LETTERS.

Admissibility in evidence, see Evidence, 12, 21.

LIBEL AND SLANDER.

Injunction against prosecution of action for, see Injunction, 5.

Putting defamatory matter on outside of package in the mails, see Post-office.

1. An article inquiring into the eligibility for re-election to office of a coroner if he was the one who failed to hold for inquiry a chauffeur who, with his automobile, ran down and killed a child in the street, is not libelous on the chauffeur, although it uses with reference to him such words as "killed a little child" and "mangled little tots," and this is, by innuendo, alleged to have charged him with a crime involving moral turpitude, since the words do not import a felonious intent. *Diener v. Star-Chronicle Pub. Co.* 33: 216, 132 S. W. 1143, 230 Mo. 613.

Privileged communications.

2. A newspaper article animadverting upon the conduct of a coroner in letting go a chauffeur without inquiry, after he had run down and killed a child, which simply states the facts, without any indication of malice, is privileged so far as the chauffeur is concerned, since it is a matter of interest to the public. *Diener v. Star-Chronicle Pub. Co.* 33: 216, 132 S. W. 1143, 230 Mo. 613.

3. The publication of a copy of a public record of conditional sales made by a retail merchant is privileged, and will not subject the publishers to a prosecution for criminal libel, although it was unwarranted, and is alleged to have subjected the seller to the hatred of his customers and injured him in his business. *State v. Darwin*, 33: 1026, 115 Pac. 309, — Wash. —.

4. Although advice by an attorney to a client as to the business integrity of a stranger with whom the client has been dealing is privileged, yet the attorney will be liable for slander if he gives the advice in a public or semipublic place, in a loud voice, and in the hearing of divers persons, and addresses his remarks, not to the client, but to a third person. *Kruse v. Rabe* (N. J. Err. & App.) 33: 469, 79 Atl. 316, — N. J. —.

5. A communication false in fact, addressed to the general public, imputing the commission of a criminal offense or of a moral delinquency to a public officer in the discharge of his official duties, is not privileged, although made in good faith and on probable cause. *Oakes v. State*, 33: 207, 54 So. 79, — Miss. —.

Actions; defenses.

Forbidding counsel to read to jury from law books, see Trial, 2.

Jury as judge of both law and facts, see Trial, 7, 8.

Malice as question for jury, see Trial, 6.

Right of one accused of libel to state motive in making publication, see Witnesses, 1.

6. An osteopath cannot, under a charge of libel in calling him a quack and charlatan, recover damages on the theory that the libel was in fact against osteopathy as a profession, and that he was injured as a member of the profession. *Lathrop v. Sundberg*, 33: 90, 113 Pac. 574, — Wash.

7. An osteopath practising as a doctor without a license cannot recover damages for libel upon him in his common-law right to do business as an osteopath, since that was not the character in which he was attempting to carry on the business. *Lathrop v. Sundberg*, 33: 90, 113 Pac. 574, — Wash.

8. An osteopath doing business as a doctor without a license, contrary to statute, cannot recover damages for libel upon him in his professional capacity, since he will not be permitted to recover for loss of earnings which he received by violation of law. *Lathrop v. Sundberg*, 33: 90, 113 Pac. 574, — Wash. — (Annotated)

LICENSE.

Right of osteopath practising without license to recover for libel upon him in his professional capacity, see Libel and Slander, 8.

Invalid contract of unlicensed foreign corporation, see Corporations, 9.

Requiring license in exercise of police power, see Constitutional Law, 16.

For practice of medicine, see Physicians and Surgeons.

LIENS.

For cost of public improvements, see Public Improvements.

As to vendor's lien, see Vendor and Purchaser.

LIFE ANNUITIES.

See Annuities.

LIFE ESTATE.

Creation of, by will, see Wills, 12.

LIFE TENANTS.

Power of equity to protect remaindermen, see Equity, 2.

Estoppel to hold life tenant's estate liable for repairs, see Estoppel, 5.

Limitation of time for suit to recover for failure to make repairs, see Limitation of Actions, 2.

Joinder of parties in action to recover for repairs from estate of life tenant, see Parties, 4.

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Devise of life estate with power to bequeath property to such of testator's heirs as life tenant may prefer, see Wills, 8.

1. A life tenant is bound to make all ordinary, reasonable, and necessary repairs to preserve the property and prevent its going to decay or waste. *Prescott v. Grimes*, 33: 669, 136 S. W. 206, 143 Ky. 191. (Annotated)

2. The estate of a life tenant is answerable for the cost of repairs, which he should have placed upon the property during his lifetime. *Prescott v. Grimes*, 33: 669, 136 S. W. 206, 143 Ky. 191.

LIMITATION OF ACTIONS.

Adverse possession, see Adverse Possession.

Conflict of laws as to contractual limitation of time for suit, see Conflict of Laws.

Laches.

1. The statute of limitation or laches will not prevent a purchaser of land under general warranty from claiming abatement of purchase money yet unpaid for a part of the land lost to him from superior adverse right. *Smith v. Ward*, 33: 1030, 66 S. E. 234, 66 W. Va. 190.

When statute runs.

2. The amount which remaindermen may recover for failure of a life tenant to make necessary repairs to the property is not limited to the amount of deterioration of the property within the period of the statute of limitations, since the duty to place the property in repair exists at all times up to the expiration of the tenancy, and the statute begins to run against the liability only at such expiration. *Prescott v. Grimes*, 33: 669, 136 S. W. 206, 143 Ky. 191.

When action is barred.

3. An action to have persons who have secured a legacy which is apparently absolute, upon promise to hold it for others, declared trustees *ex maleficio*, is not governed by the statute applicable to the time for beginning actions upon contracts not in writing, either express or implied. *Winder v. Scholey*, 33: 995, 93 N. E. 1098, 83 Ohio St. 204.

Interruption of statute; removal of bar.

4. An amendment after the completion of the limitation period, of a complaint demurrable for failure to state facts sufficient to constitute a cause of action, is permissible, if the facts stated in the original complaint are sufficient when read in the light of the amendment, to disclose that the amendment is but the perfection of the imperfect statement of the cause of action attempted to be pleaded, and not the statement of a new or different cause of action. *Bourdreaux v. Tucson Gas, E. L. & P. Co.* 33: 196, 114 Pac. 547, — Ariz. (Annotated)

5. Where the statute makes payments to the record owner of a mortgage binding upon the real owner, a part payment to a

mortgagee who has made an unrecorded assignment is sufficient to toll the statute of limitations. *Girard Trust Co. v. Owen*, 33: 262, 112 Pac. 619, 83 Kan. 692.

(Annotated)

6. The payee of a note, who has assigned it as collateral security, has still such an interest therein that a written acknowledgment made to him by the debtor may serve to toll the statute of limitations. *Girard Trust Co. v. Owen*, 33: 262, 112 Pac. 619, 83 Kan. 692.

LOAN.

Of depositor's money by bank, see Banks, 1.

MAILS.

See Postoffice.

MAINTENANCE.

See Champerty and Maintenance.

MALICE.

Effect of, on liability for boycott, see Conspiracy.

As question for jury, see Trial, 6.

MALICIOUS PROSECUTION.

Measure of damages for, see Damages, 4, 5.

MANDATORY INJUNCTION.

See Injunction, 1.

MARRIAGE.

As to breach of promise, see Breach of Promise.

Divorce or separation, see Divorce and Separation.

MASTER AND SERVANT.

Error in admission of evidence, see Appeal and Error, 19.

Prejudicial error as to measure of damages, see Appeal and Error, 26.

Exclusion by employers from servants' hospital list of certain institution, see Conspiracy.

Equal protection and privileges as to employees, see Constitutional Law, 8.

Restricting right of contract of servants, see Constitutional Law, 11.

Police power as to, see Constitutional Law, 17.

Applicability of local law as to master's liability to foreign corporation doing business in state, see Corporations, 4.

Injury to municipal employee by electric wire, see Electricity, 2.

Presumption of performance of duty by master, see Evidence, 4.

Proximate cause of injury to servant, see Proximate Cause, 1.

Termination of relation; discharge.

1. It is not illegal for an employer to make continuation in his employment depend upon the employee's acquiescence in provisions established by him for securing hospital service for injured employees 33 L.R.A.(N.S.)

through forced contributions from their wages. *Union Labor Hospital Asso. v. Vance Redwood Lumber Co.* 33: 1034, 112 Pac. 886, 158 Cal. 551.

Duty as to place and appliances generally.

Presumption of performance of duty as to working place, see Evidence, 4.

2. In operations where the servant necessarily make their own working place, the safe-place-to-work rule has little or no application. *Knudsen v. La Crosse Stone Co.* 33: 223, 130 N. W. 519, 145 Wis. 394.

3. A master having furnished a reasonably safe working place to his servant, and the conditions being such that thereafter the servants necessarily are expected to make their own working place, which must change from time to time and at short intervals as the work proceeds, dangers created are not attributable to the master. *Knudsen v. La Crosse Stone Co.* 33: 223, 130 N. W. 519, 145 Wis. 394.

4. Notice to a mine operator of a defect in the original construction of the cage is not necessary to hold him liable for injury thereby caused to an employee. *Poli v. Numa Block Coal Co.* 33: 646, 127 N. W. 1105, — Iowa, —.

Selection and retention of employees.

Presumption of performance of duty as to, see Evidence, 4.

Sufficiency of evidence to show incompetence of servant, see Evidence, 36.

5. The master should furnish his servants with a reasonably safe place to work, reasonably safe instrumentalities with which to do the work, and the fellow servants provided should be reasonably safe as such; the standard of care as to each duty being such as is exercised by the great mass of mankind under the same or similar circumstances. *Knudsen v. La Crosse Stone Co.* 33: 223, 130 N. W. 519, 145 Wis. 394.

6. To hold a master liable for injury to a servant through the negligence of an incompetent fellow servant, it is not necessary to show that the bad general reputation of such servant extended to the precise character of negligence which caused the injury. *Rosenstiel v. Pittsburg Railways Co.* 33: 751, 79 Atl. 556, — Pa. —.

Assumption of risk.

7. An employee in a mine does not assume the risk of injury from the notorious and persistent disregard, by the proprietor, of his statutory duty to maintain a proper cover over the cage in order to protect employees from injury. *Poli v. Numa Block Coal Co.* 33: 646, 127 N. W. 1105, — Iowa, —.

(Annotated)

Contributory negligence.

8. A miner is not *per se* negligent in continuing to work in connection with a cage having a defective covering after receiving the employer's promise to repair it as soon as possible, unless the hazard is so great that no reasonably prudent person would expose himself to it. *Poli v. Numa Block Coal Co.* 33: 646, 127 N. W. 1105, — Iowa, —.

9. A miner is not guilty of contributory negligence by going to work in a room for which the owner has not furnished props in accordance with a statutory duty, which will prevent his holding the latter liable for injuries caused by fall of the roof, unless he could have seen or known by the exercise of ordinary care, that the situation was dangerous and imminently so. *Low v. Clear Creek Coal Co.* 33: 656, 131 S. W. 1007, 140 Ky. 754.

Fellow servants and their negligence.

Negligence in selection and retention of fellow servants, see *supra*, 5, 6.

Title of statute changing fellow servant rule, see *Statutes*, 2.

10. Where the place in which a servant is to work necessarily changes from time to time, negligence of one or more of several servants, not excepting the foreman of the crew, rendering the working place of some other servant or servants unsafe, is negligence of a fellow servant, for which the master is not responsible. *Knudsen v. La Crosse Stone Co.* 33: 223, 130 N. W. 519, 145 Wis. 394.

11. An amendment of a statute making a railroad company liable for injuries to employees through the negligence of fellow servants, and prohibiting any contract which restricts such liability, which provides that no contract for relief or indemnity between the company and its employee shall bar a recovery, does not apply alone to such contracts as restrict the liability of the company. *McGuire v. Chicago, B. & Q. R. Co.* 33: 706, 108 N. W. 902, 131 Iowa, 340.

12. A blaster working with others under a foreman, all constituting a stone-quarry crew, is a fellow servant of such foreman in respect to duties of the latter as to guarding against the working place of those under him being made unsafe by the rolling down from one level to another of earth or rock in the course of quarry work. *Knudsen v. La Crosse Stone Co.* 33: 223, 130 N. W. 519, 145 Wis. 394.

13. The foreman of a crew erecting a water tank, or removing heavy machinery from a car to a factory, or moving a pile driver, or in charge of a train crew, or the crew of a vessel, or a dock crew, in regard to all the details of the general employment, as regards the safe-place rule, is a fellow servant of the men under him. *Knudsen v. La Crosse Stone Co.* 33: 223, 130 N. W. 519, 145 Wis. 394.

14. An employee of a mine may rely on the promise of a pit boss who employs and discharges the operatives and has immediate charge of the actual underground operations of the mine, to repair the cover of the cage, made in response to his complaint of its insufficiency. *Poli v. Numa Block Coal Co.* 33: 646, 127 N. W. 1105, — Iowa, —.

15. Requiring a mine operator to employ only licensed pit bosses does not relieve him from liability for the negligence of his employees so far as it pertains to the performance of the nondelegable duties 33 L.R.A. (N.S.)

of the master. *Poli v. Numa Block Coal Co.* 33: 646, 127 N. W. 1105, — Iowa, —. Master's liability for acts of servant or independent contractor.

Liability of carrier for acts of servant, see *Carriers*.

Liability of charitable institution, see *Charities*, 2.

Liability for illegal sale of liquor by servant, see *Intoxicating Liquors*, 1.

16. The owner of an automobile, who employs a chauffeur to take the car from the garage to a repair shop, is not liable for injury inflicted upon a stranger by his negligent handling of the car while he has gone on an errand of his own, requiring a journey six or seven times as long as was required by his employment, to a crowded part of a city, although, at the time of the injury, he was returning towards his original destination. *Fleischner v. Durgin*, 33: 79, 93 N. E. 801, 207 Mass. 435. (Annotated)

17. A local manager of a telephone company does not act within the scope of his authority in assaulting and beating an employee who is about to leave, to compel her to sign a voucher for the compensation which he alleges to be due to her, and the telephone company is therefore not liable to her for injuries inflicted in that manner. *Crelly v. Missouri & K. Teleph. Co.* 33: 328, 113 Pac. 386, — Kan. —.

18. The fact that the painting of a municipal bridge was in charge of an independent contractor does not relieve the municipality from liability for injury to his servant through a dangerous electric line maintained by its authority on the bridge, where the contractor did not know the dangers incident to the presence of the line. *Hoppe v. Winona*, 33: 449, 129 N. W. 577, 113 Minn. 252.

MAXIMS.

As to equitable principles generally, see *Equity*, 4.

MECHANICS' LIENS.

1. The principal contractor is a necessary party to a suit to enforce a mechanics' lien against the building of the owner for material furnished by plaintiff to such contractor, to be used in the construction of the building. *Augir v. Warder*, 33: 69, 70 S. E. 719, — W. Va. —. (Annotated)

2. A personal judgment cannot be entered against the property owner in a suit to foreclose a mechanics' lien if there is no privity of contract between the owner and the party furnishing the material or performing the labor. *Augir v. Warder*, 33: 69, 70 S. E. 719, — W. Va. —.

MEMORANDUM.

As will, see *Wills*, 2.

MENTAL ANGUISH.

Damages for, see *Damages*, 8, 9.

MILITIA.

Requiring transportation of at special rates, see Constitutional Law, 3.

MILK.

Regulation of sale of, see Food.

MINE BOSS.

As a fellow servant, see Master and Servant, 14, 15.

MINES.

Refusal of carrier to haul product of, see Carriers, 17-19.

Duty to employees in, see Master and Servant, 4, 7-9.

Who are fellow servants in, see Master and Servant, 14, 15.

MINORS.

See Infants.

MISSILE.

Injury to passerby by missile thrown from under street car, see Evidence, 38.

MISTAKE.

In identity as justification for assault, see Assault and Battery, 4.

As ground for recovery of payment by bank, see Banks, 2, 3.

Of carrier in quoting rate, see Carriers, 21, 22.

MITIGATION.

Of damages for assault on passenger, see Carriers, 6.

MONOPOLY AND COMBINATIONS.

Contracts between two persons in restraint of trade, see Contracts, 12.

Voting trust, see Corporations, 3.

MORAL OBLIGATION.

As consideration for contract, see Contracts, 5.

MORTGAGE.

Payment to record owner as tolling limitations as against real owner, see Limitation of Actions, 5.

Estoppel to set up unrecorded mortgage, see Estoppel, 6.

Failure of suit to foreclose mortgage for unpaid purchase money on partition sale, see Partition, 2.

Effect of recording laws on priority, see Records and Recording Laws.

Effect of failure to record, see Records and Recording Laws, 1.

Record as notice to mortgagee, see Records and Recording Laws, 2.

MOTIONS AND ORDERS.

Raising question of sufficiency of information by motion, see Criminal Law, 2.

MOTIVE.

Right of witness to testify to his motive, see Witnesses, 1.

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MULTIPLICITY OF SUITS.

Equitable jurisdiction to avoid, see Equity, 3.

MUNICIPAL CORPORATIONS.**Ordinances.**

Enacting ordinances by initiative and referendum, see Constitutional Law, 19.

Denial of equal protection of laws by, see Constitutional Law, 2, 7.

Constitutionality of smoke ordinance, see Constitutional Law, 2, 14.

Injunction against enforcement of ordinance, see Injunction, 6.

1. The validity of a provision in a city ordinance expressly authorized by the legislature does not depend upon the expediency or public policy of its enactment, but upon its being within the legislative power of the state. *State v. Chicago, M. & St. P. R. Co.* 33: 494, 130 N. W. 545, — Minn. —.

2. In the absence of a delegation thereof by the legislature, express or necessarily implied, a municipal corporation has no power to regulate or control rates for public service, such as the furnishing of water, gas, or electricity, or the terms and conditions of contracts therefor, otherwise than by contract with the corporation or person rendering such service. *Bluefield Waterworks & I. Co. v. Bluefield*, 33: 759, 70 S. E. 772, — W. Va. —. (Annotated)

3. Authority in a municipal charter to pass all ordinances necessary to the execution of the powers vested in the city, and such as may be deemed necessary and proper to conserve the health, comfort, happiness, and convenience of its inhabitants, and enforce the same by reasonable fines and penalties, does not include power to regulate or control public-service rates and conditions otherwise than by contract, nor to enforce regulations so made by fines or criminal penalties. *Bluefield Waterworks & I. Co. v. Bluefield*, 33: 759, 70 S. E. 772, — W. Va. —.

4. In the absence of legislative authority, a municipal corporation cannot enforce rates prescribed by it for a public-service corporation by a criminal penalty. *Bluefield Waterworks & I. Co. v. Bluefield*, 33: 759, 70 S. E. 772, — W. Va. —.

Liability for damages.

For injury by electric wire, see Electricity, 2.

Presumption as to negligence and contributory negligence in action for personal injury, see Evidence, 5a.

Effect of employment of independent contractor on liability, see Master and Servant, 18.

Contributory negligence of injured person, see Negligence, 3.

5. A municipal corporation is within the operation of a statute providing that when a death is caused by the wrongful act of any person or corporation, his personal representative may maintain an action therefor if decedent might have done so had

he lived. *Keever v. Mankato*, 33: 339, 129 N. W. 158, 113 Minn. 55.

6. A municipal corporation which negligently permits the water with which it supplies its inhabitants to become polluted is liable for deaths from disease contracted from its use. *Keever v. Mankato*, 33: 339, 129 N. W. 158, 113 Minn. 55.

7. That a municipal corporation has exercised its authority to rent a portion of a public park does not render it liable for injury to a pedestrian who falls over a water supply pipe in a portion of the park not rented, where the maintenance of the pipe or its condition was in no way connected with the lease. *Bisbing v. Asbury Park* (N. J. Err. & App.) 33: 523, 78 Atl. 196, — N. J. —. (Annotated)

NAME.

Of party in writ, see Writ and Process.

NATURALIZATION.

Power of naturalized citizen to will property, see Wills, 3.

NECESSARIES.

Husband's liability for, see Husband and Wife, 1.

Wife's liability for, see Husband and Wife, 2.

NEGLIGENCE.

Prejudicial error in instructions in action for, see Appeal and Error, 22.

In use of automobiles, see Automobiles.

Of carrier, see Carriers.

Of charitable institution, see Charities, 2.

Measure of damages for negligence causing personal injury or death, see Damages, 6.

Estoppel by, see Estoppel, 6.

Evidence of declarations of injured person, see Evidence, 22.

Negligent homicide, see Homicide, 1, 2.

Husband's right of action for negligent injury to wife, see Husband and Wife, 4.

Joint liability in case of, see Joint Creditors and Debtors.

Of master or servant, see Master and Servant.

Of municipal corporations, see Municipal Corporations, 5-7.

Proximate cause of injury by, see Proximate Cause.

Of railroads, see Railroads.

In operation of street railways, see Street Railways.

As question for jury, see Trial, 9.

Dangerous agencies.

As to electricity, see Electricity.

Presumption of negligence as to, see Evidence, 5.

1. If a landlord has on his premises a water tank which supplies water to several houses occupied by several tenants, bound at his peril to prevent the from escaping and injuring the property, see 33 L.R.A. (N.S.)

of an adjoining proprietor. *Weaver Mercantile Co. v. Thurmond*, 33: 1061, 70 S. E. 126, 68 W. Va. 530.

2. A landowner who brings water upon his premises by artificial means, and stores it in tanks or reservoirs for his use, is liable if the water escapes and injures the property of an adjoining owner. *Weaver Mercantile Co. v. Thurmond*, 33: 1061, 70 S. E. 126, 68 W. Va. 530. (Annotated) Dangerous premises.

2a. A railroad company is not liable for injury to a child by the explosion of a torpedo which it finds upon the track, where it had been left to guard a train standing at a station against other incoming trains, although children were accustomed to play on the track at the place where it was left,—at least where the torpedo was picked up by the child before the necessity for its use had ceased. *St. Louis & S. F. R. Co. v. Williams*, 33: 94, 135 S. W. 804, — Ark. —.

Contributory.

Of passenger, see Carriers, 9, 10.

Burden of proving, see Evidence, 5b.

Effect of, on liability for negligent homicide, see Homicide, 1.

Of servant, see Master and Servant, 8, 9.

Necessity of pleading, see Pleading, 5b.

At railway crossing, see Railroads, 3.

As to surface waters, see Waters, 3.

3. One who, for the purpose of taking a picture, stands on the curb of a public street, and, after satisfying himself that the only vehicle in sight is standing still 100 to 150 feet away, covers his head with the focusing cloth, and keeps it so covered for five minutes, is guilty of such negligence that he cannot hold the owner of the vehicle liable for injury caused by its running against him, although the owner of the vehicle is the municipality, whose duty is to keep the highway safe. *Mastin v. New York*, 33: 784, 94 N. E. 611, 201 N. Y. 81. (Annotated)

NEGOTIABILITY.

Of bills or notes, see Bills and Notes, 2-4.

NEGOTIABLE INSTRUMENTS.

See Bills and Notes.

NEGROES.

Injury to, by permitting other passenger to remain in car in violation of separate coach law, see Carriers, 3-5; Evidence, 31.

NEPHEW.

Insurable interest in life of. see Insurance, 1.

NEWSPAPER.

Right of court to compel proprietor of, who is also an attorney, to justify in open court article in paper suggesting that jury was bribed, see Attorneys, 1.

Contract of seller not to re-engage in business, see Contracts, 4, 12.
Validity of contract to sell made on Sunday, see Sunday.

NEW TRIAL.

On appeal, see Appeal and Error, 28.

NOMINAL DAMAGES.

See Damages, 1.

NONRESIDENTS.

Personal judgment against, for permitting animal to run at large, see Animals.

Jurisdiction over, see Courts, 1-3.

NOTICE.

Error in admission of evidence of notice to servant or agent, see Appeal and Error, 19.

Of nonpayment of note, see Bills and Notes, 6, 7, 9.

Of breach of building contract to surety company, see Bonds, 5.

To grantee under warranty deed of superior claim, see Covenants and Conditions.

Estoppel by failure of mortgagee to give notice to subsequent purchaser, see Estoppel, 6.

Of acceptance of guaranty, see Guaranty.

To mine operator of defect in construction of cage, see Master and Servant, 4.

Question for jury as to whether notice was given within a reasonable time, see Trial, 5.

1. Complaints to the train despatcher of a street railway company, of the incompetence of a motorman, are not sufficient to charge the company with knowledge of that fact, if he had no authority to employ or discharge such employees, and is not shown to have transmitted the complaint to one who had the power. *Rosenstiel v. Pittsburg Railways Co.* 33: 751, 79 Atl. 556, — Pa. —.

2. The admission by the general superintendent of a division of a street railway system, who is the person designated to receive complaints concerning employees and management of cars, that a motorman is reckless and that he would have trouble, will bind the company with knowledge of such incompetence. *Rosenstiel v. Pittsburg Railways Co.* 33: 751, 79 Atl. 556, — Pa. —.

NUISANCES.

Ordinance regulating smoke nuisance, see Constitutional Law, 2, 14.

A court of equity will not enjoin the operation of a theater on Sunday upon the ground that it is a public nuisance in that it is a violation of the Sunday laws, and tends to bring together a lawless and turbulent assemblage of people contrary to the criminal laws of the state, where neither the civil or property rights or privi-

leges of the public, nor the public health is affected. *Carrell v. State ex rel. Little* 33: 325, 136 S. W. 174, — Ark. —.

(Annotated)

NUNC PRO TUNC.

Entry of nunc pro tunc judgment on appeal, see Appeal and Error, 27.

OBJECTIONS.

To raise question on appeal, see Appeal and Error, 7.

In general, see Trial, 3.

OBSTRUCTING JUSTICE.

One who persuades a person having knowledge of the commission of a crime to leave the jurisdiction of the court without disclosing his knowledge to the grand jury is guilty of obstructing justice, although such person had not been subpoenaed and was under no obligation to appear before the grand jury. *Com. v. Berry*, 33: 976, 133 S. W. 212, 141 Ky. 477. (Annotated)

OFFICERS.

Arrest by, see Arrest.

Assault on, see Assault and Battery, 3.

Bonds of, see Bonds, 8, 9.

Presumptions in prosecution for killing, see Evidence, 2.

Homicide in resisting unlawful arrest, see Evidence, 24; Homicide, 3.

Power of county attorney to appoint special attorney to represent him before grand jury, see Indictment, etc., 6.

Injunction against, see Injunction, 6.

Libel of, see Libel and Slander, 5.

1. An "office" is a legal entity, and may exist in fact, although it be without an incumbent. *Childs v. State*, 33: 563, 113 Pac. 545, 4 Okla. Crim. Rep. 474.

2. Compensation is not indispensable to an office; it is merely incident thereto, and is no part of the office. *Childs v. State*, 33: 563, 113 Pac. 545, 4 Okla. Crim. Rep. 474.

3. An act which empowers the governor to appoint a person to an office, and which designates the qualifications which the incumbent of the office must possess, and the duties which he is to perform, is sufficient to create the office. *Childs v. State*, 33: 563, 113 Pac. 545, 4 Okla. Crim. Rep. 474.

Terms.

4. The general rule is that when an office is created to be filled by appointment, if the legislature does not designate the term of the office, the appointee will hold only during the pleasure of the appointing power. *Childs v. State*, 33: 563, 113 Pac. 545, 4 Okla. Crim. Rep. 474.

Abolishing office.

5. Where the office of county attorney is not embedded in the Constitution of a state, it may be abrogated, or the powers and duties pertaining to it enlarged or diminished, or wholly or partially transferred to district or state officers, as the legislature may see fit. *Childs v. State*,

33: 563, 113 Pac. 545, 4 Okla. Crim. Rep. 474.

Powers.

6. Where a special counsel to the governor, charged with the duty of assisting in the enforcement of the prohibitory liquor laws, has been constitutionally appointed, he has the same power to sign and file an information charging a violation of such laws as has the county attorney. *Childs v. State*, 33: 563, 113 Pac. 545, 4 Okla. Crim. Rep. 474.

OFFSETS.

Set-off generally, see Set-Off and Counterclaim.

OPINIONS.

As evidence, see Evidence, 17.

ORAL CONTRACT.

Specific performance of, see Specific Performance, 1.

ORDINANCES.

Injunction against enforcement of, see Injunction, 6.

In general, see Municipal Corporations, 1-4.

OSTEOPATHS.

Libel of, see Libel and Slander, 6-8.

OVERDRAFT.

Payment of, by bank, see Banks, 2.

PARENT AND CHILD.

Matters as to infants generally, see Infants.

Right of adopted child to inherit from mother of its deceased foster parent, see Descent and Distribution.

PARKS AND SQUARES.

Liability of city for injury by condition of, see Municipal Corporations, 7.

PAROL EVIDENCE.

See Evidence, 13-16.

PAROL TRUSTS.

See Trusts, 1.

PARTIES.

Bringing in other stockholders in suit to enforce stockholder's liability, see Corporations, 1.

In proceeding to enforce mechanics' lien, see Mechanics' Liens, 1.

Demurrer to appeal for want of necessary parties, see Pleading, 8.

Effect of failure of trustee in bankruptcy to intervene in action by bankrupt, see Abatement and Revival, 1.

Right of trustee in bankruptcy to intervene on appeal in action by bankrupt, see Appeal and Error, 4.

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Dismissal of suit where parties are brought in by amendment, see Dismissal or Discontinuance.

Intervention in garnishment proceeding, see Garnishment.

Plaintiff.

Husband, see Husband and Wife, 4.

1. A corporation may enforce the promise of an assignee of its stock to his assignor, to pay unpaid subscriptions to the stock, whether liability for such subscriptions is imposed by the laws of the state or not. *Edwards v. Schillinger*, 33: 895, 91 N. E. 1048, 245 Ill. 231.

2. Children cannot enforce a contract between their parents upon mutually insuring their lives for the benefit of each other, that the survivor will continue the insurance for the benefit of the children, so as to prevent the survivor from changing the beneficiary at his pleasure. *Knights of the Modern Maccabees v. Sharp*, 33: 780, 128 N. W. 786, 163 Mich. 449.

Parties defendant.

3. To a proceeding by executors to determine whether or not a legatee is entitled to immediate possession of a sum devised for the purchase of an annuity for him, the residuary legatees are not necessary parties, where the only question in which they are interested is the matter of interest on the bequest, as to which there is no dispute between them and the annuitant. *Parker v. Cobe*, 33: 978, 94 N. E. 476, — Mass. —.

Joinder.

4. Heirs whose interests in a remainder are identical may join in an action to hold the estate of the life tenant answerable for the cost of repairs which the life tenant should have made upon the property. *Prescott v. Grimes*, 33: 669, 136 S. W. 206, 143 Ky. 191.

Intervention.

5. The trustees selected for a sectarian school by a regular meeting of the religious body controlling it may be permitted to become parties to a suit by the state against rival trustees, to determine who was entitled to administer the school. *State ex rel. Kerr v. Hicks*, 33: 529, 70 S. E. 468, 154 N. C. 265.

PARTITION.

1. In case of reliance by the purchaser at a sale for partition, upon an innocent misrepresentation that an improved parcel of land was included in the sale, he may be relieved from his contract where such representation was a principal inducement to the purchase and a *pro tanto* reduction of the purchase money would result inequitably to the other parties. *Peake v. Renwick*, 33: 409, 68 S. E. 531, 86 S. C. 226. (Annotated)

2. Upon failure of a suit to foreclose a mortgage for unpaid purchase money upon a partition sale, because of failure of title to the property, the suit should not be dismissed, but the parties should be re-

stored to their original condition. *Peake v. Renwick*, 33: 409, 68 S. E. 531, 86 S. C. 226.

PARTNERSHIP.

Power of probate court to dissolve, see Courts, 7.

Service of summons by publication and mailing in partnership name, see Writ and Process.

PART PAYMENT.

As affecting limitation of actions, see Limitation of Actions, 5.

PAYMENT.

Estoppel as to application of payments, see Estoppel, 3.

By one of several joint wrongdoers, see Joint Creditors and Debtors.

As affecting limitation of actions, see Limitation of Actions, 5.

PENALTIES.

Enforcing rates prescribed by ordinance by criminal penalty, see Municipal Corporations, 4.

PERFORMANCE.

Part performance of oral contract, see Contracts, 7.

Of contract generally, see Contracts, 13-17.

PERJURY.

Evidence of interest of witnesses in prosecution for, see Evidence, 29.

Sufficiency of indictment, see Indictment, etc., 2, 4, 5.

PERSONAL INJURIES.

Measure of damages for, see Damages, 6.

Evidence of declarations as to, generally, see Evidence, 22.

To married woman, husband's right of action for, see Husband and Wife, 4.

PERSONAL JUDGMENT.

Against nonresident for permitting animal to run at large, see Animals.

In enforcing mechanics' lien, see Mechanics' Liens, 2.

PETITION.

Of plaintiff, see Pleading, 5.

PHYSICAL EXAMINATION.

Compelling physical examination of policemen to ascertain continued fitness for position, see Search and Seizure.

PHYSICIANS AND SURGEONS.

Police power to regulate, see Constitutional Law, 16.

Validity of contract to pay attending physician percentage of damages recovered for personal injury, see Contracts, 10.

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Privileged communications to, see Evidence, 20.

Indictment for practising medicine without license, see Indictment, etc., 3.

Libel on osteopath, see Libel and Slander, 6-8.

Title of statute regulating practice of medicine, see Statutes, 1.

Fee of physician employed as expert witness, see Witnesses, 7.

1. The addition by amendment of the words, "treat the sick," to a statute requiring one desiring to practise medicine and surgery to have a license, does not bring the case within the rule of *ejusdem generis*, when general words follow special ones, so as to make them mean treat the sick by medicine and surgery. *State v. Smith*, 33: 179, 135 S. W. 465, — Mo. —.

2. Removing the cause of disease by adjustment of the spinal column under the system termed "chiropractic" is within a statute requiring those who wish to treat the sick to secure a license. *State v. Smith*, 33: 179, 135 S. W. 465, — Mo. —. (Annotated)

PLEADING.

Appealability of decision as to, see Appeal and Error, 2.

Necessity of incorporating in record on appeal, see Appeal and Error, 6.

Reversal for error as to, see Appeal and Error, 17, 18.

In criminal prosecution, see Criminal Law, 2; Indictment etc.

Evidence admissible under, see Evidence, 40.

Variance between pleading and proof, see Evidence, 41.

Granting injunction on complaint not supported by testimony, see Injunction, 7.

Time for filing.

1. A defendant has a right to file his answer at any time before final hearing, but he cannot delay the hearing, unless by affidavit filed, good cause can be shown therefor. *Augir v. Warder*, 33: 69, 70 S. E. 719, — W. Va. —.

Definiteness; particularity.

2. One injured by the fright of his horse while driving on a roadway running parallel to an electric railway track, through the negligent operation of the car, need not, in order to hold the railway company liable for the injury, allege that he would have controlled the horse and avoided the injury had the speed of the car been slackened, if he alleges that the accident would have been avoided in such event. *Effinger v. Fort Wayne & W. V. Traction Co.* 33: 123, 93 N. E. 855, — Ind. —.

Judgment on pleadings.

3. That an issue of fact is undisposed of will not prevent the entry of judgment on the pleadings, if the same judgment must be entered regardless of what the

findings might have been upon such issue. *Seaton Mountain E. L. H. & P. Co. v. Idaho Springs Invest. Co.* 33: 1078, 111 Pac. 834, — Colo. —.

Amendment.

Review of discretion as to, see Appeal and Error, 10.

Prejudicial error as to, see Appeal and Error, 18.

As affecting limitation of actions, see Limitation of Actions, 4.

4. The trial court may properly allow an amended bill to be filed, after the evidence taken has developed a state of facts variant from those set up in the original bill, but not constituting a departure, as defined by the courts, nor a new cause of action. *Floyd v. Duffy*, 33: 883, 69 S. E. 993, 68 W. Va. 339.

Declaration or complaint.

5. A definite charge that the negligence of a street car company in refusing to stop its car when the one in charge of it saw a horse on a road running parallel to its track frightened at the approaching car, and its driver in peril, was the proximate cause of the resulting accident, is not necessary where the accident is alleged to have been caused by the negligence of the corporation. *Effinger v. Fort Wayne & W. V. Traction Co.* 33: 123, 93 N. E. 855, — Ind. —.

5a. A petition, in an action against a municipality for injury on a highway, which alleges that the city had maintained a hydrant about 22 inches high, extending into the sidewalk about 40 inches from the outer edge thereof, and that plaintiff, while exercising due and proper care, and without any fault on his part, stumbled over said hydrant and fell, sustaining injuries, states facts sufficient to constitute a cause of action against the municipality. *Oklahoma City v. Reed*, 33: 1083, 87 Pac. 645, 17 Okla. 518.

5b. It is not necessary that plaintiff, in an action against a municipality for injury on a defective walk, allege and prove that he was not guilty of contributory negligence. *Oklahoma City v. Reed*, 33: 1083, 87 Pac. 645, 17 Okla. 518.

What must be pleaded.

6. Whenever failure of consideration is a proper defense in an action of assumpsit upon a negotiable note, it need not be specially pleaded, but may be proved under the general issue. *Dollar Sav. & T. Co. v. Crawford*, 33: 587, 70 S. E. 1089, — W. Va. —.

Demurrer.

Appealability of order permitting filing of pleadings after reversal of judgment on demurrer, see Appeal and Error, 2.

Questioning sufficiency of indictment by demurrer, see Criminal Law, 2.

Determining as matter of law on demurrer that publication is libelous, see Trial, 8.

7. The striking out of portions of a complaint claiming improper elements of damage must be accomplished, not by 33 L.R.A. (N.S.)

murrer, but by motion. *Seidler v. Burns*, 33: 291, 79 Atl. 53, — Conn. —.

8. A bill which on its face shows want of necessary parties is demurrable. *Augir v. Warder*, 33: 69, 70 S. E. 719, — W. Va. —.

9. An allegation of fraud is not necessary to enable one accepting an advertised offer of a prize for a correct solution of a problem, to hold the one making the offer responsible therefor in case he refuses to comply therewith, and it may be ignored if made, and will therefore not render demurrable a complaint stating the offer, acceptance, performance of the contract, and refusal of the prize. *Minton v. F. G. Smith Piano Co.* 33: 305, 36 App. D. C. 137.

10. A demurrer admits an allegation concerning the laws of another state, since such allegation is one of fact. *Edwards v. Schillinger*, 33: 895, 91 N. E. 1048, 245 Ill. 231.

11. Where some of several joint defendants demur to the plaintiff's petition, and the demurrer goes to the substance of the whole petition and challenges the plaintiff's right to any relief, such demurrer inures to the benefit of all, though some may be in default. *Tate v. Goode*, 33: 310, 70 S. E. 571, 135 Ga. 738.

(Annotated)

PLEDGE AND COLLATERAL SECURITY.

Effect of acknowledgment to payee of pledged note, see Limitation of Actions, 6.

POLICE.

Arrest by, see Arrest.

Physical examination of, to ascertain continued fitness for position, see Search and Seizure.

POLICE POWER.

See Constitutional Law, 14-17.

POLLUTION.

Of water, damages for, see Damages, 1, 7.

Of water generally, see Waters, 2.

POOL.

Of corporate stock, see Corporations, 3.

POSTOFFICE.

Interference with free speech by forbidding placing of scurrilous matter on mail packages, see Constitutional Law, 18.

The placing by a private citizen of a package in the mail bearing an inscription offering a reward for the return of a certain person to the authorities of a certain state is within the operation of a statute prohibiting the deposit for mailing of all matter upon the outside of which is written or otherwise impressed any language of a scurrilous, defamatory, or threatening character, or calculated to reflect injuriously upon the character or con-

duct of another. *Warren v. United States*, 33: 800, 183 Fed. 718, 106 C. C. A. 156. (Annotated)

POWERS.

Of appointment under will, see Wills, 8.

PREFERENCES.

By bankrupt, see Bankruptcy, 2.

PREJUDICIAL ERROR.

See Appeal and Error, 16-26.

PREMATURITY.

Of action, see Action or Suit, 1.

PRESCRIPTION.

Title by, see Adverse Possession.

PRESENTMENT.

Of note for payment, see Bills and Notes, 7-9; Evidence, 6.

PRESUMPTIONS.

On appeal, see Appeal and Error, 9.
In general, see Evidence, 2-7.

PRINCIPAL AND AGENT.

Evidence of admissions of agent, see Evidence, 19.

Liability for unlawful sale of liquor by agent, see Intoxicating Liquors, 1.

Imputing agent's knowledge to principal, see Notice.

PRINCIPAL AND SURETY.

As to bonds generally, see Bonds.

As to guaranty, see Guaranty.

PRIORITY.

Effect of failure to record on, see Records and Recording Laws.

PRIVILEGED COMMUNICATIONS.

Evidence of, see Evidence, 20.

In libel case, see Libel and Slander, 2-5.

PRIZE.

Estoppel to contest decision of judges in prize contest, see Estoppel, 1.

Sufficiency of pleading in action to recover, see Pleading, 9.

One who advertises an offer to give a prize to whoever rightly counts the dots in the advertisement, and states that in case of a tie a prize of equal value will be given to each one making a correct answer, cannot avoid liability to anyone making a correct answer, on the ground that the answer was not as neatly and legibly written as was the one for which the prize was awarded. *Minton v. F. G. Smith Piano Co.* 33: 305, 36 App. D. C. 137. (Annotated)

PROBATE.

Of will, see Wills, 4, 5.

PROBATE COURT.

Powers of, see Courts, 7.
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PROCESS.

See Writ and Process.

PROMISE.

As affecting limitation of actions, see Limitation of Actions, 6.

Reliance by servant on master's promise to repair, see Master and Servant, 8.

Servant's reliance on promise of pit boss, see Master and Servant, 14.

PROXIMATE CAUSE.

Sufficiency of pleading as to, see Pleading, 5.

1. A railroad company is not liable for the death of an employee killed while walking along its track to his work, even though he bears to it the relation of licensee, if he was in full possession of his faculties and there is no reason why he could not have stepped off the track up to the last moment, although the engineer was negligent in failing to keep a lookout and to see signals which attempted to warn him of the employee's danger, since his negligence is not the proximate cause of the injury. *Exum v. Atlantic C. L. R. Co.* 33: 169, 70 S. E. 845, 154 N. C. 408.

2. A street railway company which fails to stop a car to take up passengers waiting in the street for it, and holding transfers good only on it, after the sounding of a fire alarm, is not liable for injury to them by the fire department, whose apparatus passes the place before they can gain the sidewalk in safety. *Stephens v. Oklahoma City R. Co.* 33: 1007, 114 Pac. 611, — Okla. — (Annotated)

3. Permitting a dog to run at large without a muzzle, contrary to law, is not the approximate cause of injury to a pedestrian who is tripped and injured by its running against him. *Forsythe v. Kluckhohn*, 33: 163, 129 N. W. 739, — Iowa, — (Annotated)

PUBLIC IMPROVEMENTS.

Tender of proper amount as condition of suit to set aside assessment, see Action or Suit, 2, 3.

Due process as to, see Constitutional Law, 12.

The lien upon property for the cost of a public improvement falls with the setting aside of the assessment for invalidity. *Denver v. State Invest. Co.* 33: 395, 112 Pac. 789, — Colo. —

PUBLIC POLICY.

Courts bound by expressions of, in statutes, see Courts, 5.

PUBLIC SERVICE CORPORATIONS.

Involuntary bankruptcy proceedings against, see Bankruptcy, 1.

Fact that expenses of suit against are paid by rival corporation as defeating action, see Champerty and Maintenance.

Injunction against, see Injunction, 2.

Injunction against enforcement of ordinance regulating, see Injunction, 6.

Power of municipality as to rates of, see Municipal Corporations, 2-4.

1. That a corporation undertaking to furnish electricity and steam heat to inhabitants of a municipal corporation, and securing from the municipality a franchise for that purpose, intends to use only the exhaust steam from the plant which manufactures the electricity, to supply the heat, does not, on the ground that such heat is merely a by-product, and that it could not furnish steam alone without loss, entitle it to deny the right to it to others than users of electricity. *Seaton Mountain E. L. H. & P. Co. v. Idaho Springs Invest. Co.* 33: 1078, 111 Pac. 834, — Colo.

2. A rule adopted by a corporation organized to supply electric light and steam heat to the inhabitants of a municipal corporation, and which, under a franchise from the municipality, has placed conduits for that purpose in the public streets, to the effect that steam for heat will be supplied only to persons taking electricity from the company, is unreasonable, and cannot be enforced to deprive persons who do not take electricity, of the right to steam. *Seaton Mountain E. L. H. & P. Co. v. Idaho Springs Invest. Co.* 33: 1078, 111 Pac. 834, — Colo. — (Annotated)

PUNISHMENT.

For crime, see Criminal Law, 3-7.

QUANTUM MERUIT.

Recovery on, see Contracts, 2.

QUASHING.

Of indictment, see Indictment, etc., 6-8.

QUESTION FOR JURY.

See Trial.

QUIETING TITLE.

See Cloud on Title.

RAILROAD RELIEF ASSOCIATION.

Forbidding contracts with employees for establishment of relief or indemnity plan as substitute for master's liability, see Corporations, 4.

RAILROADS.

Foreign railroads doing business in state, see Corporations, 4-8.

Constitutionality of statute abolishing fellow servant rule as to, see Constitutional Law, 8.

Time of statute changing fellow servant rule as to, see Statutes, 2.

Evidence in action for setting out fire, see Evidence, 10.

Liability for restoring stream to old channel, see Waters, 1.

Lease; sale.

1. A domestic railroad company
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not, by conveying its property to a foreign corporation which has no authority to own it, relieve itself of liability to persons injured in the operation of the road, which the state imposes upon it as a condition to its right to construct and operate the road. *Plummer v. Chesapeake & O. R. Co.* 33: 362, 136 S. W. 162, 143 Ky. 102.

(Annotated)

Accidents at crossings.

Sufficiency of evidence to show duty to give warning of approach of train, see Evidence, 37.

Proximate cause of injury, see Proximate Cause, 1.

2. A railroad company which begins to lower a safety gate at a street crossing upon approach of a train, at a time when a traveler in a vehicle is upon the track, is bound to arrest the descent of the gate to give him opportunity to escape, and will be liable for the injury caused by lowering the gate upon his horses. *McLennan v. North Carolina R. Co.* 33: 988, 70 S. E. 1066, — N. C. — (Annotated)

3. It is not negligence *per se* for a traveler in a vehicle who is upon a railroad track at a street crossing when the signal sounds for approach of a train and the safety gates begin to lower, to attempt to escape by driving his horse forward at a trot, rather than take the risk of remaining on the track inside the gates while the train passes, where he has less than 60 feet to go to get beyond the gate. *McLennan v. North Carolina R. Co.* 33: 988, 70 S. E. 1066, — N. C. —

RATES.

Of carriers, see Carriers, 21, 22.

Equal protection and privileges as to, see Constitutional Law, 3.

Power of municipality as to, see Municipal Corporations, 2-4.

REAL PROPERTY.

Who may question power of foreign corporation to take title to, see Corporations, 5.

Covenants and conditions as to, see Covenants and Conditions.

Sufficiency of proof of rights in, see Evidence, 39.

Partition of, see Partition.

Specific performance of contract as to, see Specific Performance, 1.

Rights, duties, and liabilities on transfer of, see Vendor and Purchaser.

RECEIVERS.

Jurisdiction of action by, to enforce liability of members of insolvent mutual insurance company, see Courts, 1; Equity, 3.

RECORDS AND RECORDING LAWS.

Copy of court record as evidence, see Evidence, 8, 9.

Libel by publication of copy of, see Libel and Slander, 3.

On appeal, see Appeal and Error, 6.

Effect of failure to record as against unauthorized foreign corporation, see Corporations, 9.

Estoppel of one failing to record, see Estoppel, 6.

1. The fact that a conditional vendor of a chattel takes a mortgage on the property at the time title vests in the vendee does not give his mortgage priority over that of a prior recorded mortgage given by the vendee on the chattel after he had paid enough on the purchase money to give him an interest to mortgage, if he neglected for a considerable time to place his mortgage on record, since such delay permits the prior mortgage to attach to the whole property. *Thornton v. Findley*, 33: 491, 134 S. W. 627, — Ark. —.

2. A mortgage to secure a pre-existing debt is not within the protection of a statute giving mortgages priority as against bona fide purchasers from the date they are filed for record, so as to entitle it to priority from the time of its record over an existing unrecorded mortgage. *George M. McDonald & Co. v. Johns*, 33: 57, 114 Pac. 175, — Wash. —. (Annotated)

RECOUPMENT.

See Set-off and Counterclaim, 1-4.

RE-ENTRY.

As against lessee's trustee in bankruptcy, see Bankruptcy, 4.

RELATIVE.

Insurable interest, see Insurance, 1.

RELEASE.

Forbidding avoidance of statutory liability to employees by relief or indemnity contract, see Constitutional Law, 8, 17.

Parol evidence to show intent of parties, see Evidence, 14.

Of one joint debtor, see Joint Creditors and Debtors.

RELIGIOUS SOCIETIES.

Appeal in action to determine which of two sets of trustees shall administer sectarian school, see Appeal and Error, 1.

Dismissal of action to determine who is entitled to administer school maintained by, see Dismissal or Discontinuance.

Intervention of parties in action to determine who is entitled to administer sectarian school, see Parties, 5.

1. Trustees of a school maintained by a voluntary religious association, appointed by a minority at a meeting regularly called in accordance with the constitution of the association, are entitled to act as against those appointed by a special meeting of the majority, for which there is no provision in the constitution. *State ex rel. Kerr v. Hicks*, 33: 529, 70 S. E. 468, 154 N. C. 265.

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2. A voluntary religious association consisting of an annual meeting of delegates from constituted churches, whose constitution provides only for a yearly meeting, the place of which shall be designated at the prior meeting, has no authority to call special meetings or change the place of the annual meeting after it has been fixed and the regular annual meeting adjourned, and an attempt to do so by the majority members will be ineffectual as against the acts of the minority assembling at the regular time and place fixed. *State ex rel. Kerr v. Hicks*, 33: 529, 70 S. E. 468, 154 N. C. 265.

REMAINDERMEN.

Jurisdiction of equity to protect, see Equity, 2.

REMEDIES.

Due process as to, see Constitutional Law, 12, 13.

REMITTITUR.

On appeal, see Appeal and Error, 28.

RENEWAL.

Of note, see Bills and Notes, 13.

RENT.

Liability for, generally, see Landlord and Tenant.

REPAIRS.

Duty of life tenants to make, see Life Tenants; Limitation of Actions, 2.

REPETITION.

Of instructions, see Trial, 12.

RESERVATIONS.

Implied reservation of easement, see Easements.

RES GESTÆ.

See Evidence, 20-27.

RESIDENCE.

For purpose of election, see Elections.

RES IPSA LOQUITUR.

See Evidence, 3, 5.

RESPONDEAT SUPERIOR.

See Master and Servant, 16-18.

RESTORATION.

Of stream to original channel, see Waters, 1.

RESTRAINT OF TRADE.

Contracts in, see Contracts, 12.

REVIVAL.

Of suit, see Abatement and Revival.

RULES.

Of clearinghouse, effect on payee of bank's failure to comply with, see Banks, 4.

Of public service corporations, see Public Service Corporations.

RUNNING AT LARGE.

See Animals.

SALE.

Damages for breach of contract of, see Damages, 2.

Drawing draft on purchaser with bill of lading attached, see Garnishment.

Of railroads, see Railroads, 1.

Passing of title; delivery.

1. Title passes upon delivery by the seller of machinery to the carrier f. o. b. at the place of manufacture, if it is not expressly reserved, although the purchase price has not been paid and the seller is to assist in setting it up. *Dentzel v. Island Park Asso.* 33:54, 78 Atl. 935, 229 Pa. 403. (Annotated)

Conditional sale.

Effect of taking renewal note without reserving title, see Bills and Notes, 13.

Libel by publication of copy of record of conditional sales, see Libel and Slander, 3.

Failure of conditional vendor taking mortgage of security to record mortgage, see Records and Recording Laws, 1.

2. A manufacturer who places goods for sale with a retailer, retaining title by a conditional bill of sale, which is not recorded as required by statute to become notice to purchasers, cannot recover the property from a corporation to which the retailer turns over his stock in trade in satisfaction of a subscription to stock of the corporation, where the corporation had no notice of the rights of the manufacturer. *Bass, Heard, & Howle v. International Harvester Co.* 33: 374, 53 So. 1014, — Ala. —. **Warranty.**

Damages for breach, see Damages, 2.

3. A provision in a contract of sale by a jobber of farm implements that all goods are subject to the warranties published in factory catalogues does not supersede the implied warranty on his part that the implement will perform the work for which it is intended. *Loxterkamp v. Lininger Implement Co.* 33: 501, 125 N. W. 830, 147 Iowa, 29. (Annotated)

Rights and remedies of parties.

Liability of one taking bill of lading with draft attached, see Bills of Lading.

Damages for breach, see Damages, 2.

4. A retail merchant who purchases from a jobber with an implied warranty a farm implement for resale does not, by failing to make a test of its efficiency until it is sold and tested by a customer, waive his right to recover on the warranty because of concealed or latent defects which prevent the machine from doing the work for which it is intended. *Loxterkamp v. Lininger Implement Co.* 33: 501, 125 N. W. 830, 147 Iowa, 29. 33 L.R.A. (N.S.)

SALOONS.

Sale of liquor in, generally, see Intoxicating Liquors.

SATISFACTION.

See Accord and Satisfaction.

SCHOOLS.

Action to determine which of two sets of trustees shall administer school, see Appeal and Error, 1; Dismissal or Discontinuance; Parties, 5; Religious Societies, 1.

Exemption of, from taxation, see Taxes, 1, 2.

SEAL.

The affixing of a private seal to an instrument purporting to be a settlement with one of several joint tortfeasors is without effect. *Fitzgerald v. Union Stock Yards Co.* 33: 983, 131 N. W. 612, — Neb. —.

SEARCH AND SEIZURE.

The constitutional provision against unreasonable searches and seizures does not extend to the protection of a policeman against a physical examination to ascertain his continued fitness for his position. *People ex rel. Wayman v. Steward*, 33: 259, 94 N. E. 511, 249 Ill. 311. (Annotated)

SECONDARY EVIDENCE.

See Evidence, 8-10.

SECRECY.

Of ballot, see Witnesses, 3.

SECRET TRUST.

See Trusts, 2.

SEDUCTION.

Evidence of, in suit for breach of promise, see Evidence, 40.

SENTENCE.

For crime, see Criminal Law, 3-7.

SEPARATE COACH LAW.

See Carriers, 3-5.

SEPARATION.

See Divorce and Separation.

SET-OFF AND COUNTERCLAIM.

See also Banks, 3.

Recoupment.

1. Where the state which has contracted to furnish a contractor a certain number of convicts per day sues for the amount due under the contract, and for the value of the services of convicts left after the expiration of the contract period, the two claims are not separable, so as to prevent the contractor from recouping against both a claim for failure to furnish the number

Effect of failure to record as against unauthorized foreign corporation, see Corporations, 9.

Estoppel of one failing to record, see Estoppel, 6.

1. The fact that a conditional vendor of a chattel takes a mortgage on the property at the time title vests in the vendee does not give his mortgage priority over that of a prior recorded mortgage given by the vendee on the chattel after he had paid enough on the purchase money to give him an interest to mortgage, if he neglected for a considerable time to place his mortgage on record, since such delay permits the prior mortgage to attach to the whole property. *Thornton v. Findley*, 33: 491, 134 S. W. 627, — Ark. —.

2. A mortgage to secure a pre-existing debt is not within the protection of a statute giving mortgages priority as against bona fide purchasers from the date they are filed for record, so as to entitle it to priority from the time of its record over an existing unrecorded mortgage. *George M. McDonald & Co. v. Johns*, 33: 57, 114 Pac. 175, — Wash. —. (Annotated)

RECOUPMENT.

See Set-off and Counterclaim, 1-4.

RE-ENTRY.

As against lessee's trustee in bankruptcy, see Bankruptcy, 4.

RELATIVE.

Insurable interest, see Insurance, 1.

RELEASE.

Forbidding avoidance of statutory liability to employees by relief or indemnity contract, see Constitutional Law, 8, 17.

Parol evidence to show intent of parties, see Evidence, 14.

Of one joint debtor, see Joint Creditors and Debtors.

RELIGIOUS SOCIETIES.

Appeal in action to determine which of two sets of trustees shall administer sectarian school, see Appeal and Error, 1.

Dismissal of action to determine who is entitled to administer school maintained by, see Dismissal or Discontinuance.

Intervention of parties in action to determine who is entitled to administer sectarian school, see Parties, 5.

1. Trustees of a school maintained by a voluntary religious association, appointed by a minority at a meeting regularly called in accordance with the constitution of the association, are entitled to act as against those appointed by a special meeting of the majority, for which there is no provision in the constitution. *State ex rel. Kerr v. Hicks*, 33: 529, 70 S. E. 468, 154 N. C. 265.

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2. A voluntary religious association consisting of an annual meeting of delegates from constituted churches, whose constitution provides only for a yearly meeting, the place of which shall be designated at the prior meeting, has no authority to call special meetings or change the place of the annual meeting after it has been fixed and the regular annual meeting adjourned, and an attempt to do so by the majority members will be ineffectual as against the acts of the minority assembling at the regular time and place fixed. *State ex rel. Kerr v. Hicks*, 33: 529, 70 S. E. 468, 154 N. C. 265.

REMAINDERMEN.

Jurisdiction of equity to protect, see Equity, 2.

REMEDIES.

Due process as to, see Constitutional Law, 12, 13.

REMITTITUR.

On appeal, see Appeal and Error, 28.

RENEWAL.

Of note, see Bills and Notes, 13.

RENT.

Liability for, generally, see Landlord and Tenant.

REPAIRS.

Duty of life tenants to make, see Life Tenants; Limitation of Actions, 2.

REPETITION.

Of instructions, see Trial, 12.

RESERVATIONS.

Implied reservation of easement, see Easements.

RES GESTÆ.

See Evidence, 20-27.

RESIDENCE.

For purpose of election, see Elections.

RES IPSA LOQUITUR.

See Evidence, 3, 5.

RESPONDEAT SUPERIOR.

See Master and Servant, 16-18.

RESTORATION.

Of stream to original channel, see Waters, 1.

RESTRAINT OF TRADE.

Contracts in, see Contracts, 12.

REVIVAL.

Of suit, see Abatement and Revival.

RULES.

Of clearinghouse, effect on payee of bank's failure to comply with, see Banks, 4.

Of public service corporations, see Public Service Corporations.

RUNNING AT LARGE.

See Animals.

SALE.

Damages for breach of contract of, see Damages, 2.

Drawing draft on purchaser with bill of lading attached, see Garnishment.

Of railroads, see Railroads, 1.

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1. Title passes upon delivery by the seller of machinery to the carrier f. o. b. at the place of manufacture, if it is not expressly reserved, although the purchase price has not been paid and the seller is to assist in setting it up. *Dentzel v. Island Park Asso.* 33:54, 78 Atl. 935, 229 Pa. 403. (Annotated)

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1. Where the state which has contracted to furnish a contractor a certain number of convicts per day sues for the amount due under the contract, and for the value of the services of convicts left after the expiration of the contract period, the two claims are not separable, so as to prevent the contractor from recouping against both a claim for failure to furnish the number

of hands called for by the contract. *State v. Arkansas Brick & Mfg. Co.* 33: 376, 135 S. W. 843, — Ark. —.

2. When a state auditor has no authority to undertake the liquidation of claims, failure to present to him a claim against the state for damages for failure to furnish convicts according to contract will not prevent its use by way of recoupment, in a suit to recover the contract price for those furnished. *State v. Arkansas Brick & Mfg. Co.* 33: 376, 135 S. W. 843, — Ark. —.

3. In a suit by the state to recover the contract price for the services of convicts which it has leased to a contractor, he may recoup to the amount of the claim a demand for damages for failure to furnish the number of convicts called for by the contract. *State v. Arkansas Brick & Mfg. Co.* 33: 376, 135 S. W. 843, — Ark. —.

(Annotated)

4. Although the statute has substituted a counterclaim in most cases for the former recoupment, yet the right to use the latter is preserved by a grant of the right to plead new matter constituting a defense to the action. *State v. Arkansas Brick & Mfg. Co.* 33: 376, 135 S. W. 843, — Ark. —.

Effect of insolvency.

5. A bank which induces an insolvent to make a payment to it upon indebtedness cannot, in an action by his trustee in bankruptcy to recover the same as a voidable preference, claim the right of set-off, on the theory that the fund was a deposit in due course of business. *Schmidt v. Bank of Commerce*, 33: 558, 110 Pac. 613, 15 N. M. 470.

SHERIFF.

Bond of deputy sheriff, see Bonds, 8, 9.

SHIPPING.

Negligence toward passenger on steamship, see Carriers, 7; Evidence, 30.

SILENCE.

Estoppel by, see Estoppel, 4.

SLANDER.

See Libel and Slander.

SMOKE.

Validity of smoke ordinance, see Constitutional Law, 2, 14.

SPECIAL ATTORNEY.

Liability on injunction bond for compensation of, see Injunction, 8.

SPECIAL INTERROGATORIES.

See Trial, 11.

SPECIFIC PERFORMANCE.

1. Specific performance of an oral contract to convey real estate will be decreed, although possession was not taken, where one remainderman accepts the offer by another to convey his interest in the common property upon the death of the life tenant, 33 L.R.A. (N.S.)

if the former will build a home for the life tenant on the property, builds the home, and has no adequate remedy at law for his reimbursement. *Henrikson v. Henrikson*, 33: 534, 127 N. W. 962, 143 Wis. 314.

(Annotated)

2. Where one of several cotenants places improvements upon the common property at the instance of another, under a parol contract for an interest therein void under the statute of frauds, he cannot compel the other contracting party to reimburse him for the improvements, since such party is liable only for such portion of the cost as his share of the property bears to the whole and therefore his remedy at law is not adequate so as to prevent specific performance on the contract to convey. *Henrikson v. Henrikson*, 33: 534, 127 N. W. 962, 143 Wis. 314.

STATE.

Claim against; failure to present to auditor, see Set-Off and Counterclaim, 2.

Contract by, to furnish convict labor, see Set-Off and Counterclaim, 1-3.

Succession tax on transmission of property to, see Taxes, 18.

STATIONS.

Carrier's duty as to, see Carriers, 14, 15.

STATUTE OF FRAUDS.

In general, see Contracts, 6, 7.

As to parol trusts, see Trusts, 1.

STATUTE OF LIMITATIONS.

See Limitation of Actions.

STATUTES.

Constitutional equality of protection and privileges, see Constitutional Law, 1-8.

Review of, by court, see Courts, 5, 6.

1. The practice of medicine and surgery and the treatment of the sick are so far germain that they may be regulated by one statute, under a Constitution forbidding statutes to contain more than one subject. *State v. Smith*, 33: 179, 135 S. W. 465, — Mo. —.

2. A title, "An Act to Amend" a section of the Code which made a railroad company liable for injuries to employees caused by negligence of fellow servants, is sufficient to recover provisions that this liability shall not be avoided by relief or indemnity contracts between the parties. *McGuire v. Chicago, B. & Q. R. Co.* 33: 706, 108 N. W. 902, 131 Iowa, 340.

3. The courts of a state adopting a statute from another state are not bound by any constitutional construction placed upon the statute by the courts of the latter state, although it was made before such adoption. *Re McKennan*, 33: 606, 126 N. W. 611, — S. D. —.

STREET RAILWAYS.

Error in admission of evidence in action for injury, see Appeal and Error, 20.

Presumption as to negligence, see Evidence, 3.

Sufficiency of evidence to show negligence, see Evidence, 38.

Notice to company of incompetence of motorman, see Notice.

Pleading in action for injury by fright of horse, see Pleading, 2, 5.

An interurban electric railway company may be liable for injury to one driving on a highway running parallel to its tracks, by the fright of his horse and overturning of the carriage, where its motorman in charge of the car, upon approaching the traveler at high speed, sees that the horse is frightened and that the roadway is narrow, with a ditch on either side, and refuses to slacken his speed upon signal, the result of which is that the horse becomes unmanageable and causes the injury. *Effinger v. Fort Wayne & W. V. Traction Co.* 33: 123, 93 N. E. 855, — Ind. —. (Annotated)

STRIKING OUT.

Portion of complaint, see Pleading, 7.

SUCCESSION TAX.

See Taxes, 3-18.

SUMMONS.

See Writ and Process.

SUNDAY.

Injunction against operation of theater on, see Nuisances.

1. Where a person who had been conducting and publishing a newspaper made a contract to sell the property, business, and good will to another person, who was in the employment of the publisher of a different newspaper, such a contract was not freed from the invalidity arising from having been made on Sunday, on the ground that selling and buying newspapers was not the ordinary business of either party. *McAuliffe v. Vaughan*, 33: 255, 70 S. E. 322, 135 Ga. 852.

2. Where a newspaper plant, the contract for the sale of which had been made on Sunday, had been delivered to one of the parties on a prior week day, and he formed a partnership for the conduct of the paper with the one who signed the contract, although he himself did not do so and the parties entered into and retained possession of the plant and paid the purchase money, which the seller received without objection because of the time when the contract was signed, the contract was thereby ratified and enforceable as if it had not been made on Sunday. *McAuliffe v. Vaughan*, 33: 255, 70 S. E. 322, 135 Ga. 852.

SUPPORT.

Contract to furnish, in part of rent, see Landlord and Tenant, 1.

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SURFACE WATER.

See Waters, 3.

SURGEONS.

See Physicians and Surgeons.

SURVEY.

Effect of survey establishing true line on title acquired by adverse possession, see Adverse Possession, 2.

SURVIVORSHIP.

Period of time to which survivorship relates, see Wills, 9, 11.

SUSPENSION OF SENTENCE.

See Criminal Law, 3-7.

TAXES.**Exemptions.**

See also *infra*, 9, 14, 18.

1. Property of an educational corporation, portions of which are occupied by a family, rented for election purposes and held as vacant property for a rise in value, is not within the operation of a statute exempting from taxation property of such corporations occupied solely for the purposes for which they were incorporated. *Parsons Business College v. Kalamazoo*, 33: 921, 131 N. W. 553, — Mich. —.

2. A business college, owned by a private corporation, giving short courses in bookkeeping, penmanship, business law, shorthand, typewriting, correspondence, and grammar, and, incorporated chiefly to avoid taxation, is not within the operation of a statute exempting from taxation real estate owned by educational institutions incorporated under the laws of the state. *Parsons Business College v. Kalamazoo*, 33: 921, 131 N. W. 553, — Mich. —.

Succession tax.

Due process of law as to, see Constitutional Law, 9, 10.

Equal protection and privileges as to, see Constitutional Law, 4.

3. An inheritance or succession tax is a tax upon the exercise of the right to transmit property, and is based upon the right of taxation, and not upon the right to regulate the succession of property. *Re McKennan*, 33: 606, 126 N. W. 611, — S. D. —. (Annotated)

4. A constitutional provision that no tax shall be levied except in pursuance of a law which shall distinctly state the object of the same to which the tax shall be applied has no application to an inheritance or succession tax. *Re McKennan*, 33: 606, 126 N. W. 611, — S. D. —.

5. Special constitutional authority is not necessary to validate a collateral inheritance tax, where general legislative power has been conferred on the legislature. *Rodman v. Com. ex rel. Selligman*. 33: 592, 113 S. W. 61, 130 Ky. 88. (Annotated)

6. Constitutional authority to impose a special or excise tax includes power to levy an inheritance tax. *Rodman v. Com.*

ex rel. Selligman, 33: 592, 113 S. W. 61, 130 Ky. 88.

7. A collateral inheritance tax is not upon property, so as to be subject to constitutional provisions governing such taxes, by reason of the fact that it is made a certain per centum on the value of the estate, so that the property pays it. *Rodman v. Com. ex rel. Selligman*, 33: 592, 113 S. W. 61, 130 Ky. 88.

8. A succession tax is not placed upon decedent's estate by the fact that the executor is required to pay it, where he is also required to deduct it from the estate passing to the legatee or collateral heir. *Rodman v. Com. ex rel. Selligman*, 33: 592, 113 S. W. 61, 130 Ky. 88.

9. A succession tax is not invalid because it applies to inheritances in favor of institutions which are subject to general tax exemption. *Rodman v. Com. ex rel. Selligman*, 33: 592, 113 S. W. 61, 130 Ky. 88.

10. A provision of a treaty that the subjects of the contracting parties in the respective states may freely dispose of their goods and effects by testament, and that the heirs shall receive the succession without having occasion to take out letters of naturalization, will prevent a state from imposing any higher inheritance tax upon property devised or bequeathed by one of its citizens to a citizen of the foreign state, than it imposes in case of devises or bequests to its own citizens of the same degree of relationship to the testator under similar circumstances, and it is immaterial that the treaty also provides that the states shall be at liberty to make respecting this matter such laws as they think proper. *Re Stixrud*, 33: 632, 109 Pac. 343, 58 Wash. 339. (Annotated)

11. A succession tax, not being a tax on property, is not affected by a constitutional provision that all taxes shall be uniform upon all real and personal property according to its value in money. *Re McKennan*, 33: 606, 126 N. W. 611, — S. D. —.

12. A classification of inheritance taxes according to nearness of relationship of the recipient of the property to decedent, and according to amount received with increased tax as relationship becomes remote, or as the property taken increases in amount, does not violate a constitutional provision that all taxation shall be equal and uniform. *Re McKennan*, 33: 606, 126 N. W. 611, — S. D. —.

13. The imposition of increased rates of taxation upon the whole amount taken whenever a portion of a decedent's estate taken by a recipient exceeds certain amounts, and not merely upon the excess above the amount fixed, is not unconstitutional as being unequal taxation, although it may result in giving recipients of sums only slightly above the division line a less net estate than would be received by those whose shares were just under the division line. *Re McKennan*, 33: 606, 126 N. W. 611, — S. D. —.

14. A constitutional provision avoiding 33 L.R.A. (N.S.)

all laws exempting certain classes of property from taxation has no application to an exemption from a succession tax of property transmitted to a widow and certain heirs, since such tax is not one on property. *Re McKennan*, 33: 606, 126 N. W. 611, — S. D. —.

15. A collateral inheritance tax does not violate constitutional requirements of uniformity or equality in taxation, although it is a definite per centum upon the amount of the inheritance; nor is it invalid because it may result in discrimination between relatives and strangers. *Rodman v. Com. ex rel. Selligman*, 33: 592, 113 S. W. 61, 130 Ky. 88.

16. A sum provided by antenuptial agreement to be paid the wife in case of her surviving the husband, in lieu of all claims and rights which she might otherwise have upon her husband's estate as his widow, is subject to succession tax. *People v. Field*, 33: 230, 93 N. E. 721, 248 Ill. 147. (Annotated)

17. A provision in a statute imposing a collateral inheritance tax, that the first \$500 of every estate shall not be subject to the tax, refers to the estate passing to each recipient, and not to the whole estate of the testator. *Rodman v. Com. ex rel. Selligman*, 33: 592, 113 S. W. 61, 130 Ky. 88.

18. A constitutional exemption from taxation of property of the state and that devised to religious or charitable purposes does not apply to an inheritance or succession tax upon the transmission of property to the state or a religious body. *Re McKennan*, 33: 606, 126 N. W. 611, — S. D. —.

TENANCY IN COMMON.

See Cotenancy.

TERM.

Of office, see Officers, 4.

TERRITORIAL LIMITATIONS.

As to jurisdiction, see Courts, 1-3.

TESTAMENTARY CHARACTER.

Of instrument, see Wills, 2.

THEATERS.

Enjoining operation of, on Sunday as nuisance, see Nuisance.

THEFT.

Right of bailee to refuse redelivery of property on ground that it had been stolen by unknown thief from undisclosed owner, see Bailment.

THEORY OF ACTION.

Change of, in libel case, see Libel and Slander, 6.

THREATS.

Evidence of, see Evidence, 24 27.

TIME.

- Time when case made was served, see Appeal and Error, 8.
 Length of time of imprisonment, see Criminal Law, 3.
 For filing pleadings, see Pleading, 1.
 Of determining who may take under will, see Wills, 7-11.

TRADE.

- Validity of agreement in restraint of, see Contracts, 12.

TRANSFER.

- Refusal of passenger on street car to pay fare until transfer is given him, see Carriers, 12.
 Of insurance policy, see Insurance, 4.

TRANSFER TAX.

- See Taxes, 3-18.

TREATIES.

- Effect of, on inheritance tax on property devised to aliens, see Taxes, 10.

- Provision as to right of naturalized citizen to will property, see Wills, 3.

The word "heirs" in a treaty may be construed to mean not only those who take by operation of law, but also those who are called to the succession by act of the property owner, where the civil law prevails within the territory of one of the parties to the transaction. *Re Stixrud*, 33: 632, 109 Pac. 343, 58 Wash. 339.

TRESPASS.

- Joining statutory action to quiet title with common-law action to recover damages for trespass, see Action or Suit, 5.

- Aggravation of damages for, see Damages, 10.

TRIAL.**Statements and arguments of counsel.**

1. It is not error for a trial court to refuse to listen to the reading of authorities upon the argument of a cause. *State v. Meyers*, 33: 143, 110 Pac. 407, — Or. —.

2. Counsel may be forbidden to read to the jury from law books in arguing a libel cause to them, notwithstanding the Constitution provides that in such suits the jury shall determine the law and the facts, under the direction of the court. *Oakes v. State*, 33: 207, 54 So. 79, — Miss. —.

Objections and exceptions.

3. One does not waive his objection to the incompetency of evidence which has been admitted by the court, by eliciting a repetition of it on cross-examination of the witness. *Cathey v. Missouri, K. & T. R. Co.* 33: 103, 133 S. W. 417, — Tex. —.

(Annotated)

Questions of law and fact.

4. If the evidence is substantially conflicting upon a material issue, it presents a question for the jury. *Fitzgerald* 33 L.R.A. (N.S.)

ion Stock Yards Co. 33: 983, 131 N. W. 612, — Neb. —.

5. An owner of property can be said, as a matter of law, not to give notice within a reasonable time within the meaning of a requirement of a bond insuring the performance of a contract to erect a building, that immediate written notice must be given of any breach of the contract by the contractor, or of any act on his part which might involve a loss for which the surety would be liable, where the undisputed evidence shows that the contract, which was to be completed on March first, was not completed within the time limited, that money paid on the contract price at the request of the contractor, after such date, was used to pay bills on other contracts, that on April 6th suit was brought against the contractor, wherein the owner was garnished by a materialman to recover for materials used in building, that the contractor informed the owner on April 13th that he would like to have further payments made as he was cramped for money, and that notice of the defaults and acts referred to was not given the surety company until April 27th, at about which time the contractor went into bankruptcy, although the owner, on being garnished, had consulted a commercial agency and received a favorable report as to the contractor's solvency. *George A. Hormel & Co. v. American Bonding Co.* 33: 513, 128 N. W. 12, 112 Minn. 288.

6. Where an attorney uses slanderous words in advising his client as to the business integrity of a stranger with whom the client is dealing, in a public or semi-public place, in a loud voice, and in the hearing of divers persons, and there is no need of either publicity or loud utterances, the question of express malice is for the jury. *Kruse v. Rabe* (N. J. Err. & App.) 33: 469, 79 Atl. 316, — N. J. —.

7. The court may require the jury to consider only the law given in its charge in a libel suit, notwithstanding the Constitution provides that in such suits the jury shall determine the law and the facts, under the direction of the court. *Oakes v. State*, 33: 207, 54 So. 79, — Miss. —.

(Annotated)

8. The court may determine as matter of law on demurrer that a publication relied on without innuendo to be libelous *per se* is not so, or that an innuendo seeking to give words of hidden meaning a libelous intent is forced and unnatural, or that an attempt to put a libelous edge on ambiguous words is an unnatural and forced construction, and that therefore no libel is alleged, although the Constitution provides that in libel suits the jury shall, under the direction of the court, determine the law and the facts. *Diener v. Star-Chronicle Pub. Co.* 33: 216, 132 S. W. 1143, 230 Mo. 613.

9. The court cannot declare that a railroad company is negligent as matter of law in running a train into a station at an unusual speed, which results in striking

an animal and throwing it against a person waiting to take a train, to his injury, where there is no limitation, by statute or ordinance, on the speed which trains may maintain. *St. Louis, I. M. & S. R. Co. v. Woods*, 33: 855, 131 S. W. 869, — Ark. —
 Taking case from jury.

10. A general affirmative charge cannot be given where the evidence is in dispute. *Seigel v. Long*, 33: 1070, 53 So. 753, — Ala. —.

Special interrogatories.

11. Failure of the jury to answer a special interrogatory as to an immaterial fact will not prevent receiving their verdict. *Union Depot & R. Co. v. Londoner*, 33: 433, 114 Pac. 316, — Colo. —.

Instructions.

Error in admission of evidence cured by, see Appeal and Error, 19, 20.

Prejudicial error as to, see Appeal and Error, 22-25.

12. Where the substance of an instruction requested by the defendant has been given by the court upon his own motion, he is not required to repeat it because of such request. *Schultz v. State*, 33: 403, 130 N. W. 972, — Neb. —.

13. Where the plea of a former acquittal is interposed, but no evidence is introduced to support it, it is not improper for the court to decline to instruct the jury on that issue. *Hartgraves v. State*, 33: 568, 114 Pac. 343, — Okla. Crim. Rep. —.

14. Where there is no evidence upon which to predicate a requested instruction, it is proper for the court to refuse to give it. *Schultz v. State*, 33: 403, 130 N. W. 972, — Neb. —.

15. In an action to hold a railroad company liable for striking an animal with its train and throwing it against a person waiting at its station to take the train, to his injury, an instruction that railroad companies are required to provide all things necessary to the security of passengers reasonably consistent with their business and appropriate to the means of conveyance employed is abstract and prejudicial. *St. Louis, I. M. & S. R. Co. v. Woods*, 33: 855, 131 S. W. 869, — Ark. —.

16. On trial of a person charged with recklessly driving an automobile at a forbidden speed on a public street, and thereby causing the death of another, the court may define an unlawful rate of speed in the language of the statute regulating the use of motor vehicles upon the public streets and highways. *Schultz v. State*, 33: 403, 130 N. W. 972, — Neb. —.

TRUSTEES.

In bankruptcy, see Bankruptcy.

Negotiability of note to trustee, see Bills and Notes, 4.

TRUSTS.

For voting corporate stock, see Corporations, 3.

Evidence of declarations of trustee, see Evidence, 23.

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Parol trusts.

Parol proof of trust, see Evidence, 16, 23.

1. A conveyance secured by one in pursuance of a parol agreement by which the property is to be subdivided and sold, the purchase money paid out of the proceeds, and the profits divided and the portion remaining unsold at a certain date reconveyed, is held in trust for all parties interested, and the grantee cannot refuse to account on the theory that the agreement is void because not in writing. *Floyd v. Duffy*, 33: 883, 69 S. E. 993, 68 W. Va. 339. (Annotated)

Constructive trusts.

When action to have persons declared trustees is barred, see Limitation of Actions, 3.

Estoppel to deny trust, see Estoppel, 4.

2. Where a testator is induced to make an apparently absolute legacy by a promise, express or implied, on the part of the legatee, that he will transfer the legacy to another, although no express trust is created, and although the legatee, at the time of the promise, intended no fraud, a court of equity may interfere to prevent a wrong, and declare the legatee a trustee *ex maleficio* for the protection of the testator's intended beneficiary. *Winder v. Scholey*, 33: 995, 93 N. E. 1088, 83 Ohio St. 204. (Annotated)

UNCLE.

Insurable interest in life of nephew, see Insurance, 1.

UNIFORMITY.

Of succession tax, see Taxes, 10-15.

UNION DEPOT COMPANY.

Liability of, see Carriers, 8, 15.

UNITED STATES.

The Federal government has the constitutional power to make available, for the reclamation of arid land by irrigation, the waste waters of rivers within its borders, through the construction of works to impound and distribute such water. *Burley v. United States*, 33: 807, 179 Fed. 1, 102 C. C. A. 429.

USURY.

Who may set up defense of, see Action or Suit, 4.

A note is not made usurious by a provision that interest, which is the highest rate allowed by law, shall, if not paid at maturity, become principal, and bear interest at the same rate. *Palm v. Fancher*, 33: 295, 48 So. 818, 93 Miss. 785. Annotated.

VARIANCE.

Between pleading and proof, see Evidence, 41.

VENDOR AND PURCHASER.

Contract as within statute of frauds, see Contracts, 6.

Rights of foreign corporation taking title without complying with local statutes as against unrecorded mortgage lien in favor of prior vendor, see Corporations, 9.

Covenants between, see Covenants and Conditions.

Abatement of price because of failure of title to part of land as condition to enforcement of lien, see Equity, 4.

Estoppel of mortgagee to set up title as against purchaser, see Estoppel, 6.

Effect of laches on right to abatement of purchase price, see Limitation of Actions, 1.

Rights of purchaser at sale for partition, see Partition, 1.

Specific performance of contract, see Specific Performance, 1.

The measure of abatement from purchase money for loss by superior adverse title of a specific part of land conveyed by warranty deed is not the average value of the land lost, as compared with the balance of the land, but the relative value; that is, the value of the particular land lost at the date of the deed. *Smith v. Ward*, 33:1030, 66 S. E. 234, 66 W. Va. 190.

VIDELICET.

Effect of videlicet following word "heirs" in devise of real property, see Wills, 12.

VOTERS AND ELECTIONS.

See Elections.

WAIVER.

Of right to claim interest by accepting check, see Accord and Satisfaction.

Of right to appeal, see Appeal and Error, 3.

Of landlord's right to re-enter as against lessee's trustee in bankruptcy, see Bankruptcy, 4.

Of presentment and notice, see Bills and Notes, 8, 9; Evidence, 6.

Of reservation of title on conditional sale, see Bills and Notes, 13.

Of breach of contract, see Contracts, 15, 16.

Of breach of warranty, see Sale, 4.

Of objections, see Trial, 3.

WAREHOUSEMAN.

Liability of carrier as, see Carriers, 20.

WARRANTY.

Damages for breach of covenant of, see Damages, 2.

On sale of personalty, see Sale, 3, 4.

WASTE.

By life tenant, see Life Tenants, 1.

WATERS.

Negligence in storage of, see Evidence, 5; Negligence, 1, 2.

Restoration to old channel.

1. A railroad company into whose bor-

row pits a neighboring stream turned in time of flood may restore the same to its ancient channel without cleaning out such channel, even after the change has existed long enough to permit the old channel to be partially filled up so that restoration of the flow of water washes and injures riparian property, if the limitation period has not run. *Yazoo & M. V. R. Co. v. Brown*, 33:804, 54 So. 804, — Miss. —.

(Annotated)

Pollution.

Damages for, see Damages, 1, 7.

City's liability for pollution of public water supply, see Municipal Corporations, 6.

2. Damages may be recovered for the destruction or injury of fishing privileges of a pecuniary value by the turning of chemicals into the stream upon which they are exercised. *Hodges v. Pine Product Co.* 33:74, 68 S. E. 1107, 135 Ga. 134.

(Annotated)

Surface waters.

3. Where damage is caused by surface water negligently collected in a ditch or trench dug through a public alley, and thence allowed to soak through a sewer connection previously constructed, into a basement of an adjacent building, the fact that the owner or occupant of the building, in making his sewer connection, failed to stamp the earth replaced therein sufficiently to render it impervious to water, does not constitute contributory negligence. *Helphand v. Independent Teleph. Co.* 33:369, 130 N. W. 111, 88 Neb. 542.

(Annotated)

Irrigation.

Exercise of eminent domain in aid of, see Eminent Domain, 1.

Power of United States to construct irrigation works, see United States.

4. The act of Congress of June 17, 1902, to provide for the construction of irrigation works, permits the irrigation of lands held in private ownership, by providing for a charge upon the lands which may be irrigated with waters from an irrigation project, and limiting the size of tract held in private ownership for which water may be sold. *Burley v. United States*, 33:807, 179 Fed. 1, 102 C. C. A. 429, Public water supply.

Mandatory injunction to compel furnishing of water, see Injunction, 1.

Injuries resulting from pollution of, see Municipal Corporations, 6.

Power of municipality as to rates, see Municipal Corporations, 2.

5. A water company whose charter provides that every person within a municipality shall be entitled to water upon paying a reasonable compensation cannot make the payment of its bills by owners of buildings a condition to supplying water to tenants. *Bourke v. Olcott Water Co.* 33:1015, 78 Atl. 715, — Vt. —.

(Annotated)

WATER SUPPLY.

See Waters, 5.

WATERWORKS.

See Waters, 5.

WIDOW.

Who may take under devise to "widow," see Wills, 6.

WILLS.

Creation of annuity by, see Annuities.
When action to have legatees declared trustees is barred, see Limitation of Actions, 3.

Tax on devise or bequest by, see Taxes, 3-18.

Validity.

1. Where a testator executes two separate and distinct wills, one relating solely to property at his domicile, and the other relating solely to property situated in a foreign state or country, both are valid, if executed, attested, and proved in accordance with the laws of the place where the property disposed of is situated. *Parnell v. Thompson*, 33:658, 105 Pac. 502, 81 Kan. 119.

Testamentary character.

2. A dated and signed memorandum in the handwriting of deceased, found among his belongings on the page of a blank book such as he used in his business, stating that "everything is" his wife's, cannot be probated as his will, although there is evidence that he had made a will, if there is nothing to identify this memorandum as the will referred to. *Smith v. Smith*, 33:1018, 70 S. E. 491, — Va. —. (Annotated)

What may be disposed of.

3. Real property is included in a provision of a treaty giving a naturalized citizen a right to give by testament his goods and effects in favor of such parties as he thinks proper. *Re Stixrud*, 33:632, 109 Pac. 343, 58 Wash. 339.

Probate; contest.

Prejudicial error in instructions, see Appeal and Error, 23.

Testimony of attending physician as to mental condition of testator, see Evidence, 20.

Competency of attending physician, see Evidence, 20.

4. The statutes conferring jurisdiction on probate courts to allow and admit to record authenticated copies of foreign wills executed and proved according to the laws of any state or territory of the United States, or of any country other than the United States and territories thereof, and giving to such copies, when so allowed and recorded, the same effect as if the original will had been proved here, were not intended to deny such courts jurisdiction to probate an original will executed in a foreign state or country, which disposes of property situated here. *Parnell v. Thompson*, 33:658, 105 Pac. 502, 81 Kan. 119.

(Annotated)

5. A foreign will executed in accordance with local laws and disposing of local property may be admitted to probate where the property is situated, although testator also executed another will disposing of foreign property, which had been probated where that property was located. *Parnell* 33 L.R.A. (N.S.)

v. Thompson, 33:658, 105 Pac. 502, 81 Kan. 119.

Description of beneficiaries; who may take.

6. A devise to the widow of a man who is married at the time the will is made is not limited to the wife then living, but belongs to the one who eventually becomes his widow as the result of death of the wife and remarriage of the man. *Meeker v. Draffen*, 33:816, 94 N. E. 626, 201 N. Y. 205. (Annotated)

7. Under a bequest in trust to pay the income to testator's children for life, and after the decease of the survivor of them, to distribute the fund to those persons "who may then take the same as my heirs," the persons to take are those who were his heirs at testator's death, and not those who would have been such had he lived until the time of the death of the surviving child; at least, where other clauses of the will creating similar estates indicate that he referred to his real, and not hypothetical, heirs. *Welch v. Blanchard*, 33:1, 94 N. E. 811, — Mass. —.

(Annotated)

8. A devise of a life estate, with power to bequeath the property upon death of the life tenant to such of testator's heirs as the life tenant may prefer, confines the selection to testator's legal or actual heirs, so that the property may not be given to a descendant of testator, whose parent is living, but the heirs among whom the appointment may be made will be determined as of the time of the death of the life tenant. *Wallace v. Diehl*, 33:9, 95 N. E. 646, — N. Y. —.

(Annotated)

9. Under a devise to two minors, share and share alike, provided that in case of the death of either, his share shall revert to the other, with power to the executor to convert the real estate and pay the proceeds to the minor's guardian, to be held in trust until each attained majority, "when he shall have his share," the gift takes effect at the testator's death, with a gift over to the survivor upon contingency terminable at the attainment of majority, and all interest of one in the other's share terminates when the latter attains majority. *Willits v. Conklin*, 33:321, 130 N. W. 757, 88 Neb. 805.

10. The rule that words of limitation shall be applied to the death of the first taker without issue during the life of the testator is extremely technical in its character, and does not apply where there are any indications, however slight, that the testator referred to death subsequent to his own demise. *Willits v. Conkl.* 33:321, 130 N. W. 757, 88 Neb. 805.

11. The general rule is that the period of time to which survivorship relates depends upon the intention of the testator, rather than upon technical language used in a particular clause in a will. *Willits v. Conklin*, 33:321, 130 N. W. 757, 88 Neb. 805.

Nature of estate or interest created.

12. A devise to one, "his heirs, viz., his

children, grandchildren, and assigns," limits the word "heirs" to the class named, and therefore passes only a life estate to the first taker. *Hall v. Hall*, 33: 191, 78 Atl. 971, — Vt. — (Annotated)

13. A provision in a will giving money to a testator's granddaughter "if she survives me" is not relieved of the condition by a succeeding clause, "I hereby give and bequeath such sum to her," and therefore the bequest will lapse in case of her death before that of testator. *Wallace v. Dienl*, 33: 9, 95 N. E. 646, — N. Y. —

Equitable conversion.

14. Where power is given to an executor to convert the real estate into money, and he is directed to pay the proceeds over to the guardians of certain minors during their minority, a court of equity will decree that an equitable conversion of the real estate of the testator took place, and that the estate should be distributed as personal property, in accordance with the terms of the will. *Willits v. Conklin*, 33: 321, 130 N. W. 757, 88 Neb. 805.

WITNESSES.

First raising objection as to, on appeal, see Appeal and Error, 12.

Statute giving courts power to appoint experts, see Constitutional Law, 13.

Privileged communications, see Evidence, 20.

Competency.

Presumption as to competency, see Evidence, 7.

Evidence to show interest of, see Evidence, 29.

1. One on trial for libeling a public officer may state to the jury what his motive was in making the publication, if there is evidence which would justify the jury in finding that the alleged libelous matter was true. *Oakes v. State*, 33: 207, 54 So. 79, — Miss. —

Examination; privilege.

2. The court may, in its discretion, exclude questions which are calculated to ridicule the witness to whom they are propounded. *Pratt v. North German Lloyd S. S. Co.* 33: 532, 184 Fed. 303, 106 C. C. A. 445.

Cross-examination.

Waiver of objection to evidence by eliciting repetition on cross examination, see Trial, 3.

3. An unqualified person who has voted at a school election, the laws governing which provide no method for identifying and rejecting his ballot, may be required in a proceeding to contest the validity of the election, to state how he voted. *People v. Turpin*, 33: 766, 112 Pac. 539, — Colo. —

Impeaching; discrediting.

4. Upon trial of a prosecution for incest which is defended on the theory that it was an attempt by the prosecuting wit-

ness where she had denied admitting such relations, evidence is admissible of such admissions, for the purpose of impeaching her, and showing her relations to such person, and her character generally. *Gross v. State*, 33: 477, 135 S. W. 373, — Tex. Crim. Rep. —

5. Where, upon a trial for incest, the prosecuting witness denies a statement which has been introduced in evidence, to the effect that she had had illicit relations with other-relatives, accused may introduce evidence to contradict her, for the purpose of showing the unreliability of her testimony and that her claim was fabricated. *Gross v. State*, 33: 477, 135 S. W. 373, — Tex. Crim. Rep. —

6. The state, having introduced the testimony of the prosecuting witness on a trial for incest, which was defended on the theory that the charge was made to get even with defendant for accusing her of wrongdoing with a suitor, that she was never allowed to be in the company of men unchaperoned, cannot object to the introduction of evidence that she had been seen alone with such person, on the ground that it was an immaterial matter. *Gross v. State*, 33: 477, 135 S. W. 373, — Tex. Crim. Rep. —

Fees.

7. Physicians employed without an agreement as to compensation, by a plaintiff in an action to recover for personal injuries, to make a personal examination of his condition in order to qualify as experts, and then to attend court to testify as such experts and assist counsel in meeting expert evidence from the other side, may recover from him reasonable compensation for their time, and are not limited to the regular witness fees, where they were not summoned, but appeared voluntarily under the agreement. *Gordon v. Conley*, 33: 336, 78 Atl. 365, — Me. —

(Annotated)

WOMEN.

Mental anguish as element of damages for assault on, see Damages, 8.

WRIT AND PROCESS.

1. Service of summons by publication and mailing upon a foreign partnership in the partnership name as upon a corporation is not sufficient to give jurisdiction over the partners individually or collectively, at least where the firm name does not contain the full name of either partner. *Yarbrough v. Pugh*, 33: 351, 114 Pac. 918, — Wash. —

2. Mailing a summons directed to a partnership in which the full name of neither partner appears is not mailing directed to defendant as required by statute, and will therefore not give jurisdiction over the individual partners. *Yarbrough v. Pugh*, 33: 351, 114 Pac. 918, — Wash. —

WRONGFUL ARREST.

As justification for assault, see Assault and Battery, 3.

